

2001

Boy Scouts of America v. Dale: The Gay Rights Activist as Constitutional Pariah Symposium

Arthur S. Leonard
New York Law School

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***Boy Scouts of America v. Dale:* The “Gay Rights Activist” as Constitutional Pariah**

by
Arthur S. Leonard

An openly gay man so constantly and inescapably broadcasts a message about the moral and social acceptability of homosexuality that an organization that does not want to broadcast such a message is entitled to deny him membership, even if applicable state law forbids discrimination on the basis of sexual orientation.¹

By so seemingly² holding, the Supreme Court has added fuel to the long-running debate about whether it is meaningful to speak of a distinction between status and conduct when analyzing legal issues raised by human sexuality.

The debate arises most centrally in the context of military service, where statute and regulations impute to those with a homosexual orientation the propensity to engage in conduct prohibited by the Uniform Code of Military Justice.³ The Court, however, has studiously avoided taking any cases challenging the military regulations, thus delaying its entry into the debate.⁴ With its June 28, 2000 ruling in *Boy Scouts of America v. Dale*, a majority of the Court apparently lines up with those who argue that such a distinction is artificial

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Arthur S. Leonard is a professor at New York Law School. The writer acknowledges support of this work through a New York Law School faculty research grant.

and makes no sense in the real world outside the courtroom – at least in the case of a man who is characterized as an “avowed homosexual and gay rights activist.”⁵

The Court’s holding on this point in *Dale*, while potentially momentous in its theoretical impact, is barely articulated, much less discussed and analyzed in any depth by Chief Justice William H. Rehnquist’s opinion, which is mainly concerned with refuting the New Jersey Supreme Court’s conclusion that expressing disapproval of homosexuality is not an essential expressive function of the Boy Scouts of America.⁶ The opinion particularizes the holding to plaintiff

James Dale, an “avowed homosexual and gay rights activist,”⁷ and disavows adopting a general rule “that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”⁸ Nonetheless, the opinion does not provide a theoretical basis for determining those gay people who are now to be considered second-class citizens where antidiscrimination laws are concerned. This lack of definition raises the possibility of any openly homosexual person being treated as a public accommodations pariah so long as the organization can assert a credible expressive association interest that regards homosexuality as morally unacceptable.

I. BACKGROUND: THE DALE CASE

James Dale joined the Cub Scouts as an eight-year-old and advanced through the ranks of scouting to become an Eagle Scout, the highest rank, before graduating from the program at age eighteen. His record in the Scouts was exemplary. He then applied to become an adult member and was appointed assistant scoutmaster for Troop 73. Meanwhile, as a student at Rutgers University, Dale acknowledged his gay identity and joined the Rutgers University Lesbian/Gay Alliance, becoming its co-president and campus spokesperson. After a local newspaper reported remarks Dale made at a seminar on the psychological and health needs of gay youth in July 1990, he received a letter from Monmouth Council Scout Executive James Kay revoking his membership. When Dale pressed for an explanation, he was told that the Boy Scouts "specifically forbid membership to homosexuals."⁹

But Dale could have looked high and low in all the Scout literature available to him at the time without discovering any such prohibition. Homosexuality was not mentioned in the Scout Oath or Law, nor in the Boy Scouts Handbook or any other official publication of the organization. Scout leaders were instructed by the organization to avoid discussing issues of sexuality and to refer questions from the boys about sex to their parents, teachers, religious counselors, or others with relevant expertise. Although an internal memorandum from 1978 reflected an understanding at the highest national level of Scouting that it was undesirable to have openly gay members, this view was never formalized in an "official" policy statement.¹⁰

Dale tried to appeal the revocation of his membership internally without success. After New Jersey enacted a law forbidding discrimination in places of public accommodation,¹¹ Dale filed suit against the Boy Scouts in state court in 1992, seeking reinstatement as an adult member and leader. A trial judge granted summary judgment to the defendant, finding that the Boy Scouts of America is not a "place of public accommodation" and, alternatively, that the Boy Scouts would have the privilege to exclude Dale from membership under the First Amendment's protection for expressive association.¹² The Appellate Division reversed on both counts, finding the Scouts analogous to Little League Baseball, which had previously been held to be covered by the law, and finding as well that reinstating Dale would place no burden on the Scouts' right to expressive association. The court found that the Scouts had failed to show that disapproval of homosexuality was part of its expressive function.¹³ In unanimously affirming this ruling, the New Jersey Supreme Court reviewed an extensive summary judgment record, finding little support for the Boy Scouts' assertion that opposition to homosexuality was an intrinsic feature

of its expressive association that would be significantly burdened if they were required to accept Dale as an assistant scoutmaster.¹⁴

The Supreme Court reversed, five votes to four.¹⁵ Chief Justice Rehnquist's opinion for the Court proclaimed deference towards the Boy Scouts' contention that its expressive association included disapproval of homosexuality, and it deferred as well to the Scouts' contention that its ability to communicate such disapproval would be significantly burdened by having Dale as an adult member.¹⁶ Rehnquist treated the issue as whether the leadership of the Boy Scouts of America sincerely disapproved of homosexuality and wished to *avoid* communicating any approval of homosexuality to its members, rather than whether the organization had ever formally adopted a program of explicitly sending its members a message of disapproval of homosexuality or whether it had been formed, in the first place, to propagate such a message. Thus, the Court implicitly conceptualized the case as being about a non-governmental organization's right not to be required to appear to endorse a particular viewpoint about homosexuality.

Rehnquist treated as obvious the proposition that having Dale as an adult member would "surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs"¹⁷ and opined that the Boy Scouts is entitled to judicial deference on that point. Rehnquist then asserted that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association,"¹⁸ without sparing even a sentence to discuss what New Jersey's interests might be or how the weights should be calculated in this balancing test.¹⁹ Rehnquist concluded with a disclaimer that the Court was not expressing any view about whether the Boy Scouts' "teachings with respect to homosexual conduct are right or wrong."²⁰ Since the Boy Scouts has never adopted a formal, published policy instructing its members about homosexuality, one presumes that Rehnquist's reference to the organization's "teachings with respect to homosexual conduct" (a phrase apparently lifted from the Boy Scouts' briefs) refers solely to its internal memoranda and statements made during litigation, as well as whatever conclusion about homosexuality its members might draw from the organization's studied silence on the topic combined with the more generalized conventional morality taught in its publications.

Dissenting, Justice John Paul Stevens turned to the Court's precedents concerning the clash between associational freedom and state antidiscrimination laws,²¹ observing that prior to *Dale*, the Court had never accepted

a First Amendment defense by a discriminatory membership organization, because the Court had always found that the defendant organizations were not organized for the purpose of discriminating or advocating discrimination.²² Applying similar analysis of the record in this case, Stevens found no support for the contention that the Boy Scouts was organized for the purpose of discriminating against homosexuals or the purpose of "teaching" any particular view about homosexuality to its members. Describing as "astounding" the Court's expressed willingness to defer to the Boy Scouts in deciding both the organization's expressive associational function and the degree of burden the antidiscrimination law would impose on that function,²³ Stevens asserted that the only way to avoid sham claims of associational freedom masquerading for pure discrimination would be to conduct an independent scrutiny of the evidence of what the Scouts had actually said and done prior to the litigation. Extracting a general teaching from the Court's prior expressive association cases about membership organizations, Stevens summarized the holdings as follows:

The relevant question is whether the mere inclusion of the person at issue would "impose any serious burden," "affect in any significant way," or be "a substantial restraint upon" the organization's "shared goals," "basic goals," or "collective effort to foster beliefs."²⁴

Stevens concluded that there was no evidence in the record to show that the Boy Scouts had any sort of shared goal, basic goal, or collective effort to foster beliefs with respect to homosexuality. Indeed, the organization had shied away from making any public statements on the subject, articulating a public position only in response to litigation and instructing its members to avoid discussion of the issue. Stevens also noted that the documentation of internal discussion on the issue was scarce and self-contradictory. The 1978 internal memorandum upon which the organization heavily relied actually stated that (at that time) no state had outlawed discrimination against homosexuals, but that if such legislation was adopted the organization would have to reconsider its membership policies.²⁵ The organization first publicly proposed that the Scout Oath and Scout Law mandates that members be "morally straight" and pursue a "clean" life could be interpreted as condemning homosexuality only after litigants attacked the exclusionary membership policy.²⁶ In a more recent statement, the organization appeared to back away from the contention that homosexuals are not "morally straight" or "clean" by instead contending that allowing openly gay adults to serve as troop leaders would

conflict with the expectations of the parents of youthful Scout members.²⁷

Stevens' arguments, however, seem to respond more to Rehnquist's carelessly worded opinion than to the actual concept of the case that the majority appears to have adopted: not that the Scouts wish to send a particular message about homosexuality to its members, but rather that the Scouts wish to *avoid* sending a particular message to its members. As Rehnquist wrote, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."²⁸ Thus, for the majority, the issue was not so much that Dale's presence would *conflict* with a message that the Scouts were already sending, but rather that it would "force" the organization to send a message with which its leadership disagreed. That is why Rehnquist was more concerned with the "sincerity" of the organization's "beliefs" about homosexuality than with whether the organization had, in fact, been sending a clear message of those beliefs to its members and the general public.

II. SENDING A MESSAGE: THE OPENLY GAY MAN AS A POLITICAL BANNER

The Court's ruling depends on the proposition that James Dale, by being both openly gay and, in Rehnquist's description, a "gay rights activist," automatically radiates a message, such that every organization with which he is associated is thereby adopting and sending a message of approval of homosexuality both to its members and to the public at large. Justice Stevens suggests that this proposition, when expanded to the entire adult membership of Scouting, is "mind boggling,"²⁹ not least because the Boy Scouts is a diverse organization with millions of members who undoubtedly hold a wide variety of views on many controversial issues on which the Boy Scouts' leaders would rather not take a public position. Many of these members undoubtedly express those views publicly outside of their Scouting activities, as Dale had done. Surely, an organization that seeks members from all religious faiths would rather avoid being identified as a "Zionist" organization, but would that justify the Boy Scouts in refusing to allow an adult who is an active, outspoken Zionist to be a Scoutmaster?

In support of his conclusion that reinstatement of Dale would force an unwanted message on the Boy Scouts, Rehnquist relied on the Court's unanimous 1995 decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*³⁰ The Court held there that the First Amendment right of freedom of speech protected the organizers of a Boston parade from being forced to include in the line of march a gay organization

carrying a banner proclaiming its identity. According to the *Hurley* opinion, the organizers of the parade did not seek to exclude gay people from marching—not even openly gay people—but rather did not want to include an organization carrying a banner proclaiming gay identity, because that would interpolate an unwanted gay rights message into the overall message of the parade. The Court characterized a parade as an inherently expressive activity and held that the parade organizers had the right to determine what the parade expressed through the signs, banners, and slogans exhibited by the marchers.³¹

But by relying on *Hurley* to justify the exclusion of Dale from the Scouts, the Court conflates the banner with the person who holds it. Unless Dale wears a sign proclaiming his sexual orientation or constantly speaks about it while undertaking his duties as an assistant scoutmaster, he is not engaged in the kind of conduct for which the Gay Irish group was fighting in *Hurley*: to actively project their message to the public using the vehicle of a parade organized by somebody else.³² As Justice Stevens observed in dissent:

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB [the Gay Irish group in Boston], Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.³³

Dale's battle is not to convert the Boy Scouts into a gay rights organization. It is merely to participate as an individual in the Boy Scouts, on the same basis on which any other adult with his background of successful youth participation would normally be entitled to participate, especially at a time when the supply of qualified adult leaders for Scout troops is so tight that troops have disbanded for lack of leadership.³⁴ As Justice Stevens observed, there was no indication that Dale had ever tried to use his assistant scoutmaster position to convey a gay rights message. Indeed, until an anonymous person sent the newspaper clipping to the Monmouth Council Scout Executive, describing Dale's participation in the seminar on gay youth, nobody in the Scouts organization even knew that Dale was gay.³⁵

Whereas the policy on military service conflates status and conduct by adopting the presumption that "homosexuals" have a "propensity" to "engage in homosexual conduct," the Boy Scouts' argument in *Dale*

advances the proposition that people who are openly homosexual are, whether consciously or not, constantly propagandizing for approval of homosexuality by their mere presence. Once again, status and conduct are conflated to justify treating people differently on account of their sexual orientation. Another strong resemblance between the Scouts and the military policies is the apparent acceptance that there will be many "homosexuals" who are fully acceptable members of both organizations without being open about their sexual orientation. In this sense, then, the conflation is not between status and conduct, but rather between "known status" and conduct.

One wonders why the women who sought membership in all-male business clubs were not found to have projected any sort of message by their "forced" inclusion pursuant to state public accommodations laws. After all, the presence of a woman in a formerly all-male sanctum communicates its own message about the rights of women to participate in the economic and social life of the community. It also says that it is acceptable for women to participate in that sphere—hardly a non-controversial position at the time these cases were litigated, and still controversial, to judge by the continuing under-representation of women in positions of business leadership. Why would it have been no less valid for the U.S. Jaycees to argue that their core purpose of advancing the business interests of young men was diluted and contradicted, and that the organization was forced to convey an additional message about the validity of business careers for women? The Court's response was to say that, after it had examined the articulated goals and policies of the Jaycees, it could not find that the organization had a shared purpose that would be contradicted by including women as members, while the state had a compelling interest in ensuring the inclusion of women in important private institutions in the business community.³⁶

In *Dale*, the Court abandoned its requirement that the discriminatory organization prove that it has a shared goal that would be burdened by including a person such as Dale, precisely because the Court saw Dale, unlike a (presumably heterosexual) woman, as a banner proclaiming Gay Pride wherever he is.³⁷ But a person is not a banner and does not speak until he speaks. Of course, such conflation by the Court may be understandable in a decision that finds that the Boy Scouts are speaking a negative message about homosexuality when they are not speaking at all!

III. EXCLUSION FROM THE PUBLIC SPHERE

The party that files the petition for *certiorari* frames the questions to be presented to the Court. And the Court,

of course, is limited to deciding questions of federal law. These two factors worked together to practically exclude from the case one of its most important issues: the very public nature of the Boy Scouts of America.

The New Jersey Supreme Court, which had to confront the issue of whether the organization is a "place of public accommodation" under state law before it had any need to deal with the expressive association claim, necessarily gave extensive consideration to the nature of the organization and how it related to the surrounding community. After reviewing the detailed record on the question, that court had no problem reaching the conclusion that the Boy Scouts was an active, non-exclusionary participant in the life of the communities where its troops functioned. Indeed, the Scouts organization actively involved religious, civic, educational, and governmental units in activities as sponsors for individual troops.³⁸ As the New Jersey Supreme Court stated:

In New Jersey, for example, public schools and school-affiliated groups sponsor close to 500 scouting units, comprising approximately one-fifth of the chartering organizations in the State. Other governmental entities, such as law enforcement agencies, fire departments, city governments, and the military, sponsor approximately 250 scouting units in New Jersey.³⁹

Sponsorship includes the duty to secure facilities and find adult leadership, thus implicating the sponsoring organization in whatever policies the Scouts adopt regarding qualifications for leadership. These facts persuaded the New Jersey Supreme Court that the Scouts were a place of public accommodation under state law.

That question, having been settled definitively by the state's highest court, could not be re-examined by the United States Supreme Court. This meant, unfortunately, that the Supreme Court apparently discounted how relevant the facts underlying the public accommodations determination could be to the question of expressive association. For the right of a "private organization" to dictate the terms of its expressive association must necessarily accommodate the constitutional and statutory non-discrimination requirements of the public entities with which its activities become intertwined. The public schools of New Jersey are prohibited from discrimination on the basis of sexual orientation in the activities they conduct for students and other participants, as a matter of equal protection of the laws as well as in compliance with the state's law against sexual orientation discrimination. Similarly, police and fire departments are bound by such

nondiscrimination requirements, producing the anomaly under the Supreme Court's decision that an openly gay police officer who wishes to volunteer as an adult leader for the Boy Scout troop sponsored by the police department, which may actually be holding its meetings at the police station, needs be told that he is to be excluded from an activity otherwise made available to all other members of the department. This would be in clear violation of constitutional and statutory policies governing the operation of the police department.

Apart from a passing mention (in Justice Stevens' dissent⁴⁰) of how the non-discrimination prohibitions imposed on sponsoring organizations would thus undermine the "role model" theory espoused by the Boy Scouts, there is no other mention in the majority or dissenting opinions of the more fundamental question: How can an organization that recruits its members through public schools, frequently meets in public facilities on a privileged basis, and uses public entities as "sponsors" of its activities, maintain the status of a purely private expressive association? Does the Ku Klux Klan have a right to exclude African-Americans from membership? Of course. Would it continue to have that right if its local units were officially sponsored by local police and fire departments, and its meetings were held in police and fire stations? Would a public school be implicated in the establishment of religion if it rented its auditorium for the holding of a religious service? Undoubtedly so. Then is it not equally implicated in discrimination on the basis of sexual orientation if it sponsors a Boy Scout troop, which holds meetings in the school auditorium, and if it enforces the Boy Scout policy by acquiescing in the exclusion of openly gay students or adult volunteers?

In short, there is a strong basis for arguing that the Boy Scouts should not be considered a purely "private organization," but rather an organization whose very existence and function are so intertwined with the government as to take on many of the attributes of state action, thus imposing on it the obligations of equal protection and non-discrimination that restrict the policies of governmental entities. Because of the way this controversy came to the Court, unfortunately, the question of the organization's public nature seems to have been skirted, when it should instead have been central.⁴¹

By the same token, however, the Court's failure to note or address this issue leaves open what may turn into Round Two of the litigation struggle over the Boy Scouts' policy. It is one thing for an individual such as James Dale to ask the government to force a "private" organization to take him as a member. It is quite another for Dale to ask the state of New Jersey, its public schools, and police and fire departments to disengage themselves from discriminatory policies that they are themselves

forbidden to adopt. The state may not be able to order a purely private organization to take as a member one whose public advocacy is anathema to that organization's views, but the state must refuse sponsorship of an organization whose views are anathema to the state's articulated public policies.⁴² As Chief Justice Warren Burger wrote in a different context, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."⁴³

IV. CONCLUSION

Boy Scouts of America v. Dale presented the Supreme Court with an opportunity to explore the limits of associational freedom as a defense raised by the nation's largest youth organization, which is heavily engaged in the public sphere and plays a central role in the lives of millions of American boys. While the Court issued a ruling on the merits of the claim, it failed to undertake the kind of open, conscious exploration of many important issues embedded in the case that could have made an important contribution to the struggle by sexual minorities for equal status in American society.⁴⁴ The resulting decision, "astounding" as it may be to dissenting Justice Stevens, may provide those who study sexual orientation law yet another example of the "gay exception" to the U.S. Constitution.⁴⁵ One hopes that the peculiar methodology the majority employed in reaching key factual findings is confined to such an exception and is not enlarged by lower courts to undermine the salutary workings of public accommodation laws in other contexts. But that such a "gay exception" exists is itself astounding, in light of the Court's ruling in *Romer v. Evans*,⁴⁶ which seemingly held that the Equal Protection Clause forbids treating gay people as constitutional pariahs.

NOTES

¹ This is, of course, a vastly oversimplified statement of the holding in *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), but vastly oversimplifying holdings of Supreme Court cases is a common practice in the world of constitutional adjudication.

² I use the word "seemingly" deliberately, as it is possible to read the majority decision as being much narrower than the foregoing formulation.

³ The Uniform Code of Military Justice 10 U.S.C. § 925 art. 125 (1956) prohibits members of the military from engaging in anal or oral sex under any circumstances and is not specifically targeted at same-sex conduct. The statute on military service by "homosexuals," 10 U.S.C. § 654, passed by Congress in 1993 in response to President Clinton's proposal to end the ban on

military service by gay people, adopted as a Congressional factual finding that "homosexuals" have a propensity to engage in certain sexual conduct and that such conduct will have the effect of disrupting "unit cohesion" to the detriment of the national defense. Thus, "homosexuals" must be excluded from the military forces in order to prevent this disruption to unit cohesion. A military member can avoid discharge by proving that she does not have a propensity to engage in "homosexual conduct" – i.e., is not a "homosexual" within the meaning of the statute. See generally, JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999).

⁴ See *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1998), cert. denied, 119 S. Ct. 794 (1999); *Thorne v. United States Dep't of Def.*, dismissed, 139 F.3d 893 (4th Cir. 1998), cert. denied, 119 S. Ct. 371 (1998); *Selland v. Perry*, 100 F.3d 950 (4th Cir. 1996), cert. denied, 117 S. Ct. 1691 (1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), cert. denied, 117 S. Ct. 358 (1996); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992). In all these cases, the circuit courts of appeals rejected constitutional challenges to the military policy of discharging gay personnel and the Supreme Court denied certiorari.

⁵ 120 S. Ct. 2446, 2449 (2000). Chief Justice William H. Rehnquist so characterizes Dale in his opinion for the Court, commenting that "Dale, by his own admission, is one of a group of gay Scouts who have 'become leaders in their community and are open and honest about their sexual orientation.'" *Id.* at 2454.

⁶ See *Dale v. Boy Scouts of Am.* 734 A.2d 1196 (N.J. 1999).

⁷ 120 S. Ct. at 2454. See also *supra* note 5.

⁸ *Id.* at 2453.

⁹ The facts are taken from the reported appellate decisions in the case. See *id.* at 2449; *Dale v. Boy Scouts of Am.*, 734 A.2d at 1204-05; *Dale v. Boy Scouts of America*, 706 A.2d 270, 275-76 (N.J. App. Div. 1998). Ironically, Monmouth Council's Boy Scout Troop 73 no longer exists. Among the reasons given for its dissolution several years ago was a shortage of adult leaders. Jeffrey Gold, *Troop Is Gone, But Scouts Cheer Court Ruling*, MILWAUKEE JOURNAL-SENTINEL, July 2, 2000, at 8A.

¹⁰ See *Dale v. Boy Scouts of Am.*, 734 A.2d at 1200-04.

¹¹ New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49 (amended in 1991 to add "sexual orientation" to the categories of prohibited discrimination).

¹² The Superior Court's decision is not published, but is described in varying degrees of detail in the subsequent opinions

in the case. *See* *Boy Scouts of America v. Dale*, 120 S. Ct. at 2450; *Dale v. Boy Scouts of America*, 734 A.2d at 1205-06; and *Dale v. Boy Scouts of America*, 706 A.2d at 277.

¹³ *See* *Dale v. Boy Scouts of Am.* 706 A.2d at 288.

¹⁴ *See* *Dale v. Boy Scouts of Am.*, 734 A.2d at 1221-22.

¹⁵ Joining Rehnquist in the majority were Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas. Justice John Paul Stevens dissented in an opinion joined by Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer. Justice Souter wrote a separate dissenting opinion joined by Justices Ginsburg and Breyer.

¹⁶ "The Boy Scouts asserts that it 'teaches that homosexual conduct is not morally straight,' Brief for Petitioners 39, and that it does 'not want to promote homosexual conduct as a legitimate form of behavior,' Reply Brief for Petitioners 5. We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality." Rehnquist went on to say that the Court would only look at the written evidence on this point as "instructive, if only on the question of the sincerity of the professed beliefs." 120 S. Ct. at 2453. As to the question of whether reinstating Dale would "significantly burden" the Scouts' expressive association rights, Rehnquist said, "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression." *Id.*

¹⁷ *Id.* at 2454.

¹⁸ *Id.* at 2457.

¹⁹ Rehnquist conceded that in prior cases the Court had acknowledged a compelling interest of states to prevent discrimination against women in places of public accommodation. *Id.* at 2456. He failed, however, to say how significant New Jersey's interest might be in prohibiting sexual orientation discrimination by the Boy Scouts of America.

²⁰ *Id.* at 2458.

²¹ *See* *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

²² 120 S. Ct. at 2466-67 (Stevens, J., dissenting).

²³ *Id.* at 2471.

²⁴ *Id.* at 2469. The quoted passages were drawn by Justice Stevens from statements by the Court in *Jaycees*, *Rotary Club*, *Club Ass'n*, and *NAACP*. *See supra* note 21.

²⁵ *See id.* at 2463 (Stevens, J., dissenting). The internal letter is framed in question and answer format. Responding to the question of whether an openly gay person should be terminated from membership, it states: "Yes, in the absence of any law to the contrary. At the present time we are unaware of any statute or ordinance in the United States which prohibits discrimination against individual's employment upon the basis of homosexuality. In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it. . . . It is our position, however, that homosexuality and professional or non-professional employment in Scouting are not appropriate." By the time Dale's membership was terminated, several states and numerous municipalities had adopted such laws.

²⁶ *Id.* at 2463-64 (Stevens, J. dissenting).

²⁷ *Id.* at 2464-65 (Stevens, J. dissenting).

²⁸ *Id.* at 2454.

²⁹ *Id.* at 2476 (Stevens, J. dissenting).

³⁰ 515 U.S. 557 (1995).

³¹ 120 S. Ct. at 2474-76 (Stevens, J. dissenting) (discussing the *Hurley* decision).

³² This writer felt part of a definite minority in the gay community in supporting the Court's decision in *Hurley*. This support stemmed from his own feelings of disquiet while attending Gay Pride marches in New York City during the 1980s and observing the contingent of the "Workers World Party," with their sound truck blasting socialist slogans of little relevance to Gay Pride. The organizers of the Gay Pride march, in pursuing a philosophy of inclusion of all assertedly gay-supportive organizations, allowed the Workers World Party contingent to march, but this writer was taken aback at the inclusion of a group communicating a message almost totally dissociated from the message that the parade organizers were presumably striving to project. In the same light, this writer advised the Rabbi of New York's gay synagogue not to file a discrimination complaint when the organizers of the annual Salute to Israel parade refused to allow the gay synagogue to march under its own banner in the parade. This advice was followed, and several years after the initial controversy, a new generation of parade organizers invited the gay synagogue to participate – under its own banner.

³³ 120 S. Ct. at 2475 (Stevens, J., dissenting).

³⁴ Gold, *supra* note 9. This article reports that Dale's own troop was dissolved after his expulsion for, among other things, lack of adult leadership.

³⁵ 120 S. Ct. at 2472-73, 2475 n.21 (Stevens, J., dissenting).

³⁶ Roberts v. United States Jaycees, 468 U.S. 609, 626-28 (1984).

³⁷ Justice Stevens makes this point when he observes:

The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone – unlike any other individual's – should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicated a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.

120 S. Ct. at 2476 (Stevens, J., dissenting). Stevens noted that counsel for the Boy Scouts actually contended during oral argument that Dale "put a banner around his neck when he . . . got himself into the newspaper. . . . He created a reputation. . . . He can't take that banner off." *Id.* (quoting Tr. of Oral Arg. 25).

³⁸ 734 A.2d at 1200-04.

³⁹ *Id.* at 1201.

⁴⁰ 120 S. Ct. at 2477 (Stevens, J., dissenting).

⁴¹ The issue was raised at oral argument, but was never addressed in the Court's opinion. See Official Transcript, 2000 WL 489419, *13-15. For an example of this argument in a different context, see *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*, 595 P.2d 592 (Cal. 1979), in which the court concluded that the equal protection requirements of the California constitution could be imposed on the defendant, a private, for-profit company, because it is a heavily-regulated public utility whose employment policies are a matter of public concern. Consequently, the employer had a constitutional obligation not to engage in categorical discrimination on the basis of sexual orientation. For a more recent example, see *Dunayer v. Adults & Children with Learning & Developmental*

Disabilities, Inc., QDS:03762476 (E.D.N.Y., Wexler, J.), published in the N.Y. L.J., May 26, 2000 at 36, col.1. District Judge Wexler approved a magistrate's report recommending that a sexual orientation discrimination plaintiff be allowed to amend her complaint to add an equal protection claim against her private sector employer, a social-welfare agency largely funded by the state and operating under close state regulation.

⁴² This process is already starting. U.S. Representative Lynn Woolsey filed legislation to repeal the federal charter of the Boy Scouts of America, stating, "We're not saying [the Boy Scouts is] bad. . . . We're saying intolerance is bad, and I don't see any reason why the federal government should be supporting it." *Scouts' Charter May Be Pulled*, ASSOCIATED PRESS, DAYTON DAILY NEWS, July 19, 2000, at 3A. In New York City, the Queens Lesbian and Gay Pride Committee sent a letter to Schools Chancellor Harold Levy, asking that the public school system live up to its non-discrimination policy by ending its relationship with the Boy Scouts. Marilyn Anderson, *Gay and Lesbian Group Asks Board to Shun Boy Scouts*, NEWSDAY, July 19, 2000, at A16. In Tucson, Arizona, a city with an ordinance banning sexual orientation discrimination, a local newspaper reported that the city's Advisory Commission on Gay, Lesbian, Bisexual and Transgender Issues was meeting to consider recommending that the local government discontinue its funding of local Boy Scouts activities and the newspaper editorialized in support of such a recommendation. Editorial, *Our Opinion: No Tax Dollars for Groups that Discriminate*, THE TUCSON CITIZEN, July 17, 2000. The United Way of Southeastern New England, a major financial supporter of Boy Scouts activities, informed the Rhode Island chapter of the Boy Scouts that if it did not formally rescind the anti-gay policy by December 2000, United Way's financial support would not be renewed for the next fiscal year. (Such support during the current fiscal year amounted to \$200,000.) The United Way sent letters to 65 organizations on its grant recipient list informing them that the United Way board had adopted a resolution not to provide funding to any organization that has a policy of discriminating in its membership or activities. Jonathan Saltzman, *United Way to Cut Off Groups that Discriminate*, PROVIDENCE JOURNAL-BULLETIN, July 19, 2000, at 1A.

⁴³ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that state court may not take account of societal biases against racially-mixed marriages in deciding on award of child custody).

⁴⁴ For example, the Court, while disclaiming any necessary agreement with the Boy Scouts of America's concerns about the impact of allowing an openly gay man to serve as a scoutmaster, held that it must defer to those concerns if it found them to be sincerely held. 120 S. Ct. at 2453-54. However, the Court never articulated in its opinion what those concerns might be and whether they had any general validity as a matter of fact. At oral

argument, counsel for the Boy Scouts denied that the organization's policy was motivated by fears that gay scoutmasters would molest their adolescent charges, *see* Official Transcript, 2000 WL 489419, *9-10. Thus, the policy seems to be motivated by a "role model" theory, suggesting that the Scouts' leaders believe that having openly gay members and leaders will cause some undetermined number of otherwise heterosexual youths to take up homosexual practices and identities. This brief comment is not the place for an extended treatment of the relevant social science evidence discrediting the role model theory of human sexuality, but the Court could have paid some attention to the question whether the unsubstantiated fears sincerely held by the leaders of an organization should be allowed to trump a validly-enacted state law banning categorical discrimination.

⁴⁵ Perhaps the most blatant example of the "gay exception" to the Constitution is *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was doctrinally discordant with the Court's sexual privacy caselaw at the time of the decision.

⁴⁶ 517 U.S. 620, 635 (1996) (holding that a state may not treat a specific class of citizens, gay people, as a "stranger" to its laws).

