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Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking Its State-Level Tax-Exempt Status

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Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's
Discriminatory Practices by Revoking Its State-Level Tax-Exempt Status

BOB JONESING¹ BADEN-POWELL:²
FIGHTING THE BOY SCOUTS OF
AMERICA'S DISCRIMINATORY PRACTICES
BY REVOKING ITS STATE-LEVEL TAX-
EXEMPT STATUS

RUSSELL J. UPTON*

* Note & Comment Editor, *American University Law Review*, J.D., 2001, *American University, Washington College of Law*, B.A., 1998, *Johns Hopkins University*. I would like to thank Professor Peter M. Cicchino for his insight and unforgettable passion, Professor Janet Spragens for her comments and mothering, my editors Karolyn Ann Hicks and Brian K. Esser for their guidance, and both Kevin S. Willen and Steven P. Ragland for balancing the gift of their time with their unforgiving editorial prowess.

1. Using "Bob Jones" as a verb is a term of art originated by the author and should be understood to mean the method by which discrimination is destabilized through the revocation of tax-exempt status. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that the I.R.S. properly denied Bob Jones University tax-exempt status based on the University's discriminatory practices).

2. *See* Boy Scouts of America, *Founders of Scouting and the B.S.A.* (discussing the advent of scouting and the founders of the scouting movement), at <http://www.scouting.org/nav/about.html> (last visited May 9, 2001).

As a youth, Robert Baden-Powell greatly enjoyed the outdoors, learning about nature and how to live in the wilderness. After returning as a military hero from service in Africa, Baden-Powell discovered that English boys were reading the manual he had written for his military regiment on stalking and survival in the wilderness. Gathering ideas from Ernest Thompson Seton, Daniel Carter Beard and others, he rewrote the manual as a nonmilitary nature skill book and called it "Scouting for Boys." To test his ideas, Baden-Powell brought together twenty-two boys to camp at Brownsea Island, off the coast of England. This historic campout was a success and resulted in the advent of Scouting. Thus, the imagination and inspiration of Baden-Powell, later proclaimed "Chief Scout of the World," brought Scouting to youth the world over.

Id.

Introduction.....	794
A. Preliminary Considerations	801
I. Background	806
A. The Boy Scouts of America	806
B. <i>Dale v. Boy Scouts of America</i>	809
II. Challenging Tax-Exempt Status	814
A. Although Not “State Action,” Tax Exemption Subsidizes the Activities of Tax-Exempt Organizations....	816
III. Dale Should Sue to Have the New Jersey Tax Commissioner Revoke the B.S.A.’s State Level Tax-Exempt Status.....	820
A. Standing	821
B. The New Jersey Tax Commissioner Has the Authority to Revoke the B.S.A.’s State-Level Tax-Exempt Status.....	827
C. Applying the Reasoning of <i>Bob Jones University</i> to the <i>Dale</i> case	830
1. The activities of tax-exempt organizations must both align with established public policy and conform with current legal mandates.....	830
2. “Bob Jonesing” the B.S.A.	835
3. Contemporary standards	837
D. The B.S.A.’s probable affirmative defenses	838
IV. Revoking the B.S.A.’s State-Level Tax-Exempt Status Will Help Eliminate Its Anti-Gay Policy	846
A. Sympathetic Loss of Funding and Support	846
B. Revoking the B.S.A.’s Tax-Exempt Status in New Jersey Will Directly Impact the Organization’s Funding.....	852
C. The Efficacy of Revoking Tax-Exempt Status	855
Conclusions	858

INTRODUCTION

For nearly two decades, gay Boy Scouts across the nation have challenged the Boy Scouts of America’s (“B.S.A.”) unofficial policy³ of

3. Whether the B.S.A.’s policy is official was an issue addressed at both the state and federal levels. The United States Supreme Court accepted the B.S.A.’s bare assertion as to its stance on homosexuality, considering various position statements made as far back as 1978, but noting that they “need not inquire further [than the B.S.A.’s assertion] to determine the nature of the Boy Scouts’ expression with respect to homosexuality.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651 (2000). *But see id.* at 676 (Stevens, J., dissenting) (concluding, after consideration of the B.S.A.’s various position statements as well as other documentation, that the “B.S.A. never took any clear and unequivocal position on homosexuality”). The New Jersey Supreme Court took the same stance as Justice Stevens’ dissent. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1207 (N.J. 1999), *rev’d*, 530 U.S. 640 (2000) (noting that the B.S.A.’s anti-gay policy had not been incorporated into its bylaws, rules, regulations, or handbooks). The New Jersey Superior Court Appellate Division simply focused upon the B.S.A.’s “expressive purpose” which is not to condemn homosexuality, but to “instill values in young people.” *Id.* Furthermore, a search of the B.S.A.’s official web page for the terms “gay” or “homosexual” yields no meaningful results. *See* Boy Scouts of America, *Official Web Site Search Engine* (finding the word “gay” only as part

expelling openly gay members.⁴ Yet, it took the Supreme Court of New Jersey's 1999 decision in *Dale v. Boy Scouts of America*⁵ to thrust the fight against sexual orientation discrimination by the B.S.A. into the headlines.⁶ Although James Dale's⁷ attack on the B.S.A.'s policy was not a first-time battle, he was the first plaintiff to have any real success;⁸ however, that success was short lived.⁹ On June 28, 2000, the

of the last name "Gaylen" and middle name "Gayle," and locating the word "homosexual" in a news article discussing the need for the B.S.A.'s ethical teachings in light of a rise in the level of prejudice by American youth), at <http://www.scouting.org/nav/about.html> (last visited Mar. 31, 2001). The absence of references including the words "gay" or "homosexual" suggests that the B.S.A.'s stance on homosexuality is not established in any of the B.S.A.'s official policy materials. See *id.*

4. See, e.g., Julie Makinen Bowles, *D.C. Panel To Examine Boy Scouts' Ban On Gays*, WASH. POST, Jan. 20, 1998, at B1 (discussing the case of Michael S. Geller and Roland D. Pool, two gay men who were expelled from the B.S.A. after each independently revealed his homosexuality to D.C. Scouting officials); Tom Ragan, *Scout's Policy to Not Hire Gays Stands, For Now*, CHI. TRIB., Sept. 9, 1999, at 4 (discussing the case of Keith Richardson, a man denied employment by the B.S.A. because he is gay). For a wealth of information on the B.S.A. itself, its exclusion of gays and atheists, the full range of court cases challenging the B.S.A.'s policies, a myriad of statements and resolutions from both sectarian and nonsectarian groups, funding and chartering information, related cartoons, and other relevant sources, see generally *Google's Cache of http://sir.home.texas.net* (no longer available), at <http://www.google.com/search?q=cache:sir.home.texas.net/+&hl=en> (last visited Mar. 31, 2001); Advocate.com, *Headlines: Boy Scouts of America coverage and related articles* (listing Advocate.com articles on the B.S.A. controversy), at http://www.advocate.com/html/news/news_subjects/scouts.asp (last visited Mar. 31, 2001); *Scouting for All Homepage*, (detailing the struggle for acceptance by gay Scouts), at <http://www.scoutingforall.org> (last visited Mar. 31, 2001).

5. 734 A.2d 1196 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

6. See, e.g., John J. Goldman, *N.J. High Court Tells Boy Scouts to Admit Gays*, L.A. TIMES, Aug. 5, 1999, at A1 (reporting that the highest court in New Jersey ruled unanimously that the Boy Scouts of America must admit homosexuals); Robert Hanley, *New Jersey Court Overturns Ouster of Gay Boy Scout*, N.Y. TIMES, Aug. 5, 1999, at A1 (reporting the New Jersey Supreme Court's finding that the Boy Scouts violated New Jersey's anti-discrimination law with the 1990 expulsion of James Dale, a gay Eagle Scout); Hanna Rosin, *Boy Scouts' Exclusion of Gays is Illegal, Top N.J. Court Rules*, WASH. POST, Aug. 5, 1999, at A2 (reporting that the New Jersey Supreme Court ruled that the B.S.A.'s policy of excluding homosexuals is illegal under state anti-discrimination law and further noting that "the decision represents the first time a top state court has ruled against the group's ban on gays"). Since the New Jersey Supreme Court's *Dale* decision in August 1999, continued discussion of the larger issues of sexual orientation discrimination and gay rights in general has remained in the public eye. See Joan Biskupic, *For Gays, Tolerance Translates To Rights*, WASH. POST, Nov. 5, 1999, at A1 (discussing how legal gains, including the decision in *Dale*, reflect a shift in attitudes about various gay rights issues).

7. James Dale, a gay man expelled from the BSA expressly because of his homosexuality, was the Respondent in *Boy Scouts of America v. Dale*. See *infra* Part I.B and accompanying notes (providing a summary of James Dale's experiences as a Boy Scout).

8. See Press Release, Lambda Legal Defense & Education Fund, *Unanimous New Jersey Supreme Court Strikes Down Boy Scout Anti-Gay Ban* (Aug. 5, 1999) (stating that "[t]he 7-0 decision Wednesday by the New Jersey Supreme Court is the *first ever* ruling by a state high court to strike down the [B.S.A.'s] ban on gay members, and vindicates Dale's nine-year struggle with the organization that kicked him out solely because he is gay") (emphasis added), available at

U.S. Supreme Court, reversing the New Jersey Supreme Court, held that applying New Jersey's Law Against Discrimination ("L.A.D.")¹⁰ to require the B.S.A. to reinstate Dale violates the B.S.A.'s First Amendment right of expressive association.¹¹

Although Dale's attempt to force the B.S.A. to restore him as a troop leader and a B.S.A. member failed,¹² he still may be able to achieve his grander goal of ending the B.S.A.'s practice of sexual orientation discrimination. To date, Dale and plaintiffs like him have sued the B.S.A. under various civil rights causes of action.¹³ Prior

<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=465>. Since Dale's loss in the Supreme Court, Michael Geller and Rolland Pool are the only plaintiffs to have had any success against the B.S.A. See Sewel Chan, *D.C. Panel Reinstates Two Gay Adult Scouts*, WASH. POST, June 22, 2001, at B1 (reporting that the D.C. Commission on Human Rights ruled the B.S.A. violated the District's anti-discrimination law by expelling the two Eagle Scouts in 1992 for being gay; the Commission ordered the B.S.A. and the National Capital Area Council to reinstate both men as adult members, pay each \$50,000 in compensatory damages, and pay their attorney's fees). For a more detailed discussion of this case, see *infra* n.15.

9. See Linda Greenhouse, *The Supreme Court: The New Jersey Case; Supreme Court Backs Boy Scouts In Ban of Gays From Membership*, N.Y. TIMES, June 29, 2000, at A1 ("The Supreme Court ruled today by a 5-4 vote that the Boy Scouts have a constitutional right to exclude gay members because opposition to homosexuality is part of the organization's 'expressive message.'"); see also Lisa Keen, *Court: Scouts Can Bar Gays*, WASH. BLADE, June 30, 2000, at I (discussing the decision but focusing upon Justice Stevens' dissent).

10. N.J. STAT. ANN. §§ 10:5-1 et seq. (West 1993 & Supp. 2000).

11. See *Dale*, 530 U.S. at 661 (reversing the New Jersey Supreme Court's holding and finding in favor of the B.S.A.). The United States Supreme Court's decision, however, was split 5-4—a far cry from unanimity. See *Dale*, 530 U.S. at 643 (noting that Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined; that Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined; and that Justice Souter filed a second dissenting opinion, in which Justices Ginsburg and Breyer joined).

12. It is important to understand that Dale's ultimate goal is for the B.S.A. to change its anti-gay policy and be reinstated; he does not want to see the B.S.A. disbanded. See Brief for Respondent at 7, 33, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) [hereinafter Brief for Respondent, *Dale* (No. 99-699)] ("On July 29, 1992, Dale brought this suit against BSA . . . [seeking] reinstatement to continue participating in the organization, affirming his continuing belief in Scouting and the Scout Oath and Law;" "[o]nce the unlawful discrimination . . . has been ended and he is reinstated, Dale is prepared to be bound by the same directives and limitations placed on all Scoutmasters."); cf. Scouting for All, *Our Mission Statement* (noting that Scouting for All's mission is to "get the Boy Scouts of America to rescind its policy of discrimination against gay youth and adults"), at <http://www.scoutingforall.org/news/viewnews.cgi?newsid940286177,17541> (last visited Mar. 31, 2001).

13. See *Dale*, 530 U.S. at 645 (noting that Dale's initial complaint alleged that the B.S.A. violated New Jersey's public accommodations statute, a law which, among other things, prohibits discrimination on the basis of sexual orientation in places of public accommodation). For another case currently challenging sexual orientation discrimination by the B.S.A., see, e.g., *Chicago Area Council of Boy Scouts v. Chicago Comm'n on Human Relations*, No. 99-3018 (Ill. App. Ct. filed May 21, 1992) (alleging before the Chicago Commission on Human Relations that the B.S.A., in refusing to hire a gay man as a scout leader, violated section 2-160-010 of the Chicago Human Rights Ordinance ("CHRO"), which declares:

that prejudice, intolerance, bigotry and discrimination occasioned thereby threaten the rights and proper privileges of the city's inhabitants and menace the institutions and foundation of a free and democratic society; and that behavior which denies equal treatment to any individual because of his or her race, color, sex, age, religion, disability, national origin, ancestry, *sexual orientation*, marital status, parental status, military discharge status, or source of income undermines civil order and deprives persons of the benefits of a free and open society.

Id. (emphasis added)). Section 2-160-030 of the CHRO makes it unlawful to "directly or indirectly discriminate against any individual in hiring . . . because of . . . sexual orientation." *Id.* For discussion of a case recently decided by the District of Columbia Human Rights Commission, see Sewell Chan, *D.C. Panel Reinstates Two Gay Adult Scouts*, *supra* note 8 (discussing the victory by Michael Geller and Roland Pool over the National Capital Area Council of the B.S.A.). This suit alleged sexual orientation discrimination against two former Eagle Scouts applying to be scout leaders, in violation of the District of Columbia Human Rights Act, the intent of which is to:

secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, *sexual orientation*, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business

D.C. CODE ANN. §§ 1-2501 to 1-2505 (1981 & Supp. 1999) (emphasis added). For cases previously challenging sexual orientation discrimination by the B.S.A. that have been decided or dismissed, see, e.g., *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 222 (Cal. 1998) (alleging that the B.S.A.'s rejection of Curran's application to become an assistant scoutmaster, because of both his sexual orientation and his desire to teach children to accept the homosexual lifestyle, violated the Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1999)). The Unruh Civil Rights Act states that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever;" the act does not, however, explicitly list "sexual orientation." *Id.*; see also Carol Ness, *Fired Gay Man Sues Boy Scouts*, SAN FRANCISCO EXAMINER, Mar. 24, 1999, at A5 (discussing the case of Chris Keener, filed from his position with the B.S.A. for being gay, and how the "suit opens a new strategic front—employment—in gay rights advocates' struggle to push the B.S.A. to drop its adamant anti-gay stance," presumably pursuant to CAL. GOV'T CODE § 12921 (West 1992 & Supp. 2000), which holds that "[t]he opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation is hereby recognized as and declared to be a civil right"); Tony Perry, *State Court Upholds Firing of Gay Scout Leader*, L.A. TIMES, May 23, 1997, at A3, A26 (stating that "[a] state appellate court ruled Thursday that the Boy Scouts of America had the right to fire [Chuck Merino,] a police officer[,] as a Boy Scout leader because he is gay," and implying through discussion of the court's finding that the B.S.A. did not qualify as a "business organization.").

For cases challenging the B.S.A.'s discrimination against atheists, see, e.g., *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 261 (Cal. 1998) (holding, in a case where two boys were expelled from the Cub Scout program for refusing to participate in the religion-related elements of the program, that the B.S.A. was not a "business establishment" for purposes of the Unruh Civil Rights Act); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385, 385 (Kan. 1995) (holding, in a case where the B.S.A. excluded a man from a scout leadership position because he was unwilling to profess "belief in and duty to a supreme being," that the B.S.A. was not a "public accommodation" within the meaning of the Kansas Act Against Discrimination, KAN. STAT. ANN. § 44-1001 (1998), which forbids "discrimination against individuals in employment relations, in relation to free and public

plaintiffs met with even less success than Dale.¹⁴ Since Dale, Michael Geller and Rolland Pool won their case for reinstatement before the D.C. Commission on Human Rights; however, some legal scholars expect the decision to be overturned when it reaches the D.C. Court of Appeals.¹⁵ Even if the U.S. Supreme Court's decision in *Dale* had a chilling effect upon civil-rights-based lawsuits against the B.S.A.,¹⁶ other means of fighting discrimination and hastening change should not lay dormant.

The B.S.A. does not receive direct grants from either the federal or state governments.¹⁷ Rather, the organization's largest sources of

accommodations . . . by reason of race, religion, color, sex, disability, national origin or ancestry"); *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1278 (7th Cir. 1993) (holding, in a case challenging the B.S.A.'s refusal to admit a member who would not affirm his belief in God, that the B.S.A. is not a place of "public accommodation" for purposes of Title II prohibition on discrimination on religious grounds, Civil Rights Act of 1964, § 201(b), 42 U.S.C. § 2000a(b) (1994)).

14. See, e.g., *Curran*, 952 P.2d at 239 (holding that the language of the Unruh Civil Rights Act "cannot reasonably be interpreted to bring the membership decisions of the Boy Scouts within the reach of the act"); Perry, *supra* note 13, at A3 ("A state appellate court ruled Thursday that the Boy Scouts of America had the right to fire [Chuck Merino,] a police officer[,] as a Boy Scout leader because he is gay"); *Randall*, 952 P.2d at 266 (holding that the Unruh Civil Rights Act does not apply to the B.S.A.'s membership decisions); *Seabourn*, 891 P.2d at 406 (holding that broad coverage of the Kansas Civil Rights Act "suggested by the plaintiff, divorcing 'public accommodations' from business establishment or business purpose . . . is not the law in Kansas"); *Welsh*, 993 F.2d at 1278 (holding that the B.S.A. is not a place of "public accommodation" for purposes of Title II prohibition on discrimination on religious grounds, Civil Rights Act of 1964).

15. See Sewell Chan, *D.C. Panel Reinstates Two Gay Adult Scouts*, *supra* note 8 (noting that the "two sides in the dispute disagreed yesterday on whether the seventy-three page D.C. ruling was a potential precedent for future cases or an instance of legal chutzpah that will soon be overturned;" quoting a lawyer for the B.S.A. as saying the decision will "almost certainly appeal to the D.C. Court of Appeals"). The Commission distinguished *Dale* by stating that Dale was a public gay activist, unlike Geller and Pool, "who would not send messages about homosexuality or its lifestyle," and thus the District's interest in eradicating discrimination outweighed the B.S.A.'s right of expressive association. See *id.* at B4. George Davidson, the attorney who argued the *Dale* case before the Supreme Court for the B.S.A., commented that the Commission's decision "blatantly depart[s] from controlling Supreme Court precedent." *Id.*

16. But see *Court Says Boy Scouts Can Bar Gays*, AP, June 28, 2000, available at 2000 WL 23360735 (noting that the Supreme Court's ruling "did not specifically give the Scouts permission to bar homosexual boys from *membership*" where it was clear on the issue of gay Scout *leaders*) (emphasis added). Such an interpretation arguably leaves room for a civil rights-based suit by a B.S.A. member not in a leadership position. Nevertheless, Dale's civil rights-based fight is over.

17. Although the practical reality is that tax exemption is a form of government subsidy, as will be argued below, see *infra* Part II.A and accompanying notes, this Comment will not argue whether the federal or state governments directly aid the B.S.A. Officially, "there are no direct federal or other tax funds going into the budgets of either the [local] councils or the Boy Scouts of America, Inc." Boyd R. Critz, III, *B.S.A. Council Funding and Control* (Critz is a former Local Council Commissioner), at http://www.infidels.org/~nap/bsa_funding_BCritz.html (last visited Mar. 31, 2001); see also BOY SCOUTS OF AMERICA, PHILANTHROPIC ADVISORY SERVICE REPORT (1997) [hereinafter PHILANTHROPIC ADVISORY SERVICE REPORT]

funding are its fees and investment income.¹⁸ Therefore, the finding of “state action” employed in other civil rights discrimination cases cannot be used in this instance to force change.¹⁹ The B.S.A. does,

(expired Aug. 1998) (noting that no more than possibly one percent of funding comes directly from federal or other tax funds), at <http://gaylesissues.about.com/newsissues/gaylesissues/library/content/blscouts007.htm>; Boy Scouts of America, *Who Pays for Scouting?* (noting the various sources of funding, none of which include the federal or state governments), at <http://www.scouting.org/nav/about.html> (last visited Mar. 31, 2001). Unofficially, however, federal tax dollars do end up paying for some B.S.A. activities. See Critz, *supra* (discussing the various indirect ways that tax dollars support the B.S.A., including the fact that over one-third of all Explorers belong to groups chartered by tax-supported police and/or fire departments who use tax-purchased equipment and “comp” personnel time in their operations); see also Act of May 31, 1962, Pub. L. No. 87-459, 76 Stat. 82 (“An Act [t]o authorize the Secretary of Defense to lend certain Army, Navy, and Air Force equipment and to provide transportation and other services to the [B.S.A.] in connection with the World Jamboree of Boy Scouts to be held in Greece in 1963, and for other purposes”); Jim Garamone, *Service Members Build, Run Scout City*, AM. FORCES PRESS SERV., Aug. 1, 1997 (discussing how in July 1997 “thousands of service members helped the Boy Scouts of America build Virginia’s sixth largest city [35,000+] for the 10-day National Boy Scout Jamboree,” held every four years since 1981), available at http://www.defenselink.mil/news/Aug1997/n08011997_9708015.html. For a complete discussion on tax-dollar support of the B.S.A., see generally Larry A. Taylor, *How Your Tax Dollars Support the Boy Scouts of America*, THE HUMANIST, Sept.-Oct. 1995, at 6-13 (discussing all aspects of B.S.A. funding).

18. See PHILANTHROPIC ADVISORY SERVICE REPORT, *supra* note 17 (listing the B.S.A.’s sources of funds as derived from the B.S.A.’s audited consolidated financial statements for the year ending December 31, 1996: 44% from fees, 26% from investment income, 19% from supply operations [selling uniforms and equipment], 7% from retirement benefits trusts and local council contributions, 2% from other, 1% from contributions and bequests, and 1% from magazine publication sales). But see Critz, *supra* note 17, who notes that:

[m]ost Councils are funded from several sources. United Ways contribute a major piece, varying from about 35% down. Councils also raise funds directly through solicited gifts from individual supporters. This can also raise about 30-50% of total funding Finally, fees, literature and badge sales, sales of things such as “Scout popcorn,” etc. make up the difference. “Membership” fees for the youth and adult leaders are NOT a part of these budgets, though. These plus all subscription fees to Boy’s Life Magazine go to the National Council, B.S.A., Inc..

Id.

19. Many plaintiffs challenging discrimination have been successful when the court finds the policy is a result of “state action.” See, e.g., *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 193 (1970) (“[W]here a state policy enforces privately chosen racial discrimination in places of public accommodation, it renders such private discrimination unconstitutional state action, regardless of whether the private discriminator was motivated or influenced by it.”); *Reitman v. Mulkey*, 387 U.S. 369, 374-75 (1967) (holding that although a state may take a neutral position with respect to private racial discrimination, any significant state involvement in private discrimination could amount to unconstitutional state action); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (“State action . . . refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.”); *Green v. Connally*, 330 F. Supp. 1150, 1164 (D.D.C. 1971) (noting the 1964 Civil Rights Act’s “rule of thumb” for detecting unconstitutional state action: when a private school is “operated . . . predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source”) (quoting § 401(c), 42 U.S.C. § 2000c (1964)).

however, receive indirect aid from the federal government through its § 501(c)(3)²⁰ tax-exempt status.²¹ The B.S.A. also receives indirect aid from the states through similar state-level tax exemptions.²²

In *Bob Jones University v. United States*,²³ the Supreme Court upheld the Internal Revenue Service's ("I.R.S.") decision to revoke the § 501(c)(3) tax-exempt status of a university employing racially discriminatory admissions standards, and to ban the § 170²⁴ deductibility of charitable donations made to the University.²⁵ In so doing, the Court did not compel the University to stop discriminating, but decided that the government should not subsidize such discrimination.²⁶

Even if the B.S.A. could similarly be "Bob Jonesed," the loss of tax-exempt status would not require the B.S.A. to end its discriminatory practices.²⁷ Tax dollars, however would no longer subsidize the B.S.A.'s discrimination,²⁸ a worthy goal in and of itself. Furthermore, revoking the B.S.A.'s tax exemption would directly undermine its funding.²⁹ When combined with sympathetic cuts in funding and support, this situation could pressure the B.S.A. to change its policy

20. See I.R.C. § 501(c)(3) (1994 & Supp. V 1999) (providing an illustrative partial list of tax-exempt organizations).

21. Although this conclusion will be argued below, see *infra* Part II.A, this Comment is more concerned with the B.S.A.'s reliance on state-level tax exemptions.

22. This conclusion will also be argued below. See *infra* Part IV.B.

23. 461 U.S. 574 (1983).

24. See I.R.C. § 170 (1994 & Supp. V 1999) (allowing taxpayers to take deductions for certain charitable contributions, i.e., contributions to § 501(c)(3) groups).

25. See *Bob Jones Univ.*, 461 U.S. at 605 (affirming the judgment of the Court of Appeals that nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine do not qualify as tax-exempt organizations under the Internal Revenue Code ("I.R.C."), nor are contributions to such schools deductible as charitable contributions).

26. Much like the B.S.A., Bob Jones University is a private organization and does not receive any direct federal aid. If it did, the university's pre-1975 exclusion of all African-Americans would be subject to the Supreme Court's ruling in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), not only stopping the government's § 501(c)(3) subsidy, but forcing the university to integrate. As a private institution, however, Bob Jones University was not initially subject to *Brown*. It is important to note that, although it originally admitted no African-Americans, in 1975 Bob Jones University revised its policy. See *Bob Jones Univ.*, 461 U.S. at 580 (following the U.S. Court of Appeals for the Fourth Circuit's decision in *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976), which prohibited racial exclusion in private schools). As of May 29, 1975, Bob Jones University "permitted unmarried [African-Americans] to enroll; but a disciplinary rule prohibits interracial dating and marriage." *Bob Jones Univ.*, 461 U.S. at 580. This racially discriminatory admissions practice was in place at Bob Jones University until 2000. See *infra* note 44.

27. See *supra* note 26 and accompanying text.

28. See *supra* note 17 and accompanying text (discussing the ways tax dollars are currently used to support the B.S.A.).

29. The B.S.A. would undoubtedly be adversely affected financially by revocation of its tax-exempt status. See *supra* note 17 and accompanying text (discussing the B.S.A.'s reliance on tax dollars for support).

in an effort to cease the resulting loss of revenue.³⁰

A. *Preliminary Considerations*

Before the potential for this approach is overestimated, one severe limitation must be acknowledged. The Supreme Court in *Bob Jones University* revoked the University's tax-exempt status under § 501(c)(3) and its donor deductibility under § 170 based upon an overriding compelling federal interest in eradicating racial discrimination.³¹ The Supreme Court has yet to recognize a similar compelling interest in eradicating sexual orientation discrimination.³²

Despite the lack of a compelling federal interest, *Romer v. Evans*³³ provides some hope for federal recognition of gays.³⁴ In *Romer*, the Supreme Court found no rational basis for state-sponsored anti-gay measures.³⁵ Nevertheless, the fact remains that the Supreme Court has not protected sexual orientation to the same degree as race.³⁶

30. This point is a conclusion to be argued below. *See infra* Conclusion.

31. *See Bob Jones Univ.*, 461 U.S. at 604 (noting that the "governmental interest at stake here is compelling").

[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest . . . and no "less restrictive means" . . . are available to achieve the governmental interest.

Id. (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981)).

32. *See infra* Introduction, Subpart A (discussing the limitations placed upon this Comment by the Supreme Court's refusal to recognize a federal compelling interest in eradicating discrimination on the basis of sexual orientation).

33. 517 U.S. 620 (1996).

34. In *Romer*, various parties brought suit challenging the validity of an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination. *See Romer*, 517 U.S. at 620 (discussing the broad scope of "Amendment 2" to the Colorado Constitution). The U.S. Supreme Court subsequently held that Amendment 2 violated the Equal Protection Clause of the U.S. Constitution. *See id.* (stating its holding after discussing the Colorado Supreme Court's holding that Amendment 2 failed to satisfy strict scrutiny).

35. *See Romer*, 517 U.S. at 634 (stating that the Colorado amendment was born of nothing more than "animosity toward the class of persons affected").

36. As the Supreme Court noted in *Romer*, the "Fourteenth Amendment [does] not give Congress a general power to prohibit discrimination in public accommodations." *Id.* at 628. Therefore, the Court relied on the test that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* at 631. The infamous case *Bowers v. Hardwick*, 478 U.S. 186 (1986), held that the federal Constitution does not confer "a fundamental right [upon] homosexuals to engage in acts of consensual sodomy." *Id.* at 192. The *Bowers* Court also declared that it was not "inclined to take a more expansive view of [its] authority to discover new fundamental rights embedded in the Due Process Clause." *Id.* at 194. Finally,

Such is not the case, however, in the District of Columbia and in twelve of the fifty states where gay, lesbian, and bisexual people receive greater protection.³⁷

the Court in *Bowers* accepted as a rational basis for criminalizing homosexual sodomy “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.” *Id.* at 196. In other words, unlike race, which is a suspect class receiving strict scrutiny, sexual orientation is not a suspect class; therefore, it only receives rational basis review, the lowest level of constitutional scrutiny. If a rational basis for the discrimination can be put forth, the discrimination will be allowed to stand.

37. See Walter J. Walsh, *The Fearful Symmetry of Gay Rights, Religious Freedom, and Racial Equality*, 40 HOW. L.J. 513, 528 (1997) (listing what was at the time the eleven state-level statutes including sexual orientation together with other protected categories, along with over 150 municipalities nationwide that have adopted ordinances outlawing sexual orientation discrimination). The first state-level sexual orientation antidiscrimination statute was adopted by the District of Columbia in 1977. See D.C. CODE ANN. §§ 1-2501 to 1-2557 (1981 & Supp. 1999) (prohibiting sexual orientation discrimination comprehensively). Wisconsin adopted the second in 1982. See WIS. STAT. §§ 66.432, 66.433, 106.04, 111.31, 230.18, 234.29 (1997 & Supp. 2000) (prohibiting such discrimination in employment, housing, and public accommodations). Massachusetts passed the third such statute in 1989. See MASS. GEN. LAWS ch. 71, § 89, ch. 76, § 5, ch. 151B, § 4(1), ch. 161A, § 5(a), ch. 272, § 98 (1996 & Supp. 2000) (prohibiting such discrimination in education, employment, public accommodations, and transportation). Since then, other states have followed: Connecticut (1991), CONN. GEN. STAT. §§ 4a-60a, 10-15c, 31-57e, 46a-81a to 46a-81r (1998 & Supp. 2000) (prohibiting such discrimination in contracts with the state, credit practices, education, employment, housing, membership in associations of licensed persons, public accommodations, state practices, religious organizations, ROTC programs, and construction of statutes in general); Hawaii (1991), HAW. REV. STAT. §§ 42F-103, 368-1 (Michie 1999) (prohibiting such discrimination in employment, housing, public accommodations, and access to services receiving state financial assistance); Vermont (1991), VT. STAT. ANN. tit. 3, §§ 961, 963, tit. 8, §§ 1211, 1302, 4724, tit. 9, §§ 2362, 2410, 2488, 4502, 4503, tit. 16, § 11, tit. 21, §§ 495, 1726 (1999 & Supp. 2000) (prohibiting such discrimination in credit services, employment, insurance trade practices, retail installment contracts and sales, agricultural finance leases, public accommodations, education, rental and sale of real estate, education); California (1992), CAL. CIV. CODE §§ 51.7 (West 1992 & Supp. 2000), CAL. GOV'T CODE §§ 12920-12955 (West 1992 & Supp. 2000) (prohibiting such discrimination in employment and housing); New Jersey (1992), N.J. STAT. ANN. §§ 10:2-1, 10:5-3 to 10:5-12, 11A:7-1 (West 1993 & Supp. 2000) (prohibiting such discrimination comprehensively); Minnesota (1993), MINN. STAT. §§ 60A.970, 363.01-363.20 (1991 & Supp. 1999) (prohibiting such discrimination in employment, disclosure of medical information, real property, public service, education, aiding and abetting and obstruction of this statute, reprisals for defending the person discriminated against, trade or business practice, credit practice, pension rights, and by viatical settlement providers or brokers); Rhode Island (1995), R.I. GEN. LAWS §§ 11-24-5, 28-5-1 to 28-5-42, §§ 34-37-1 to 34-37-11 (1995 & Supp. 1999) (prohibiting such discrimination in employment, housing, hotels and public places, and state services and facilities); and New Hampshire (1998), N.H. REV. STAT. ANN. §§ 21-I:52, 151:21-b, 354-A:1, 354-A:6, 354-A:7, 354-A:8, 354-A:10, 354-A:16, 354-A:17 (1999) (prohibiting such discrimination in employment, public accommodations, housing, home health care, and classified service employment). Since Walsh's article, Nevada amended its laws to include sexual orientation in 1999. See NEV. REV. STAT. ANN. §§ 613.10-613.420 (Michie 1999) (prohibiting such discrimination in employment only). Maine too amended its anti-discrimination statute to include sexual orientation; however, that amendment was repealed by referendum in February 1998. See ME. REV. STAT. ANN. tit. 5, § 4553(10)(G) (West 1989 & Supp. 1997) (repealed 1998). Maryland is the most recent state to extend civil rights protections

Although the goal of revoking the B.S.A.'s federal § 501(c)(3) tax-exempt status and related § 170 donor deductibility is not without merit, arguing for the removal of federal tax-exempt status will remain unrealistic³⁸ until either the Supreme Court or Congress moves to protect sexual orientation on a federal level.³⁹ In the

to gays and lesbians. See Matthew Mosk, *Md. House Passes Gay Rights Bill in 'Big Step Forward'*, WASH. POST, Mar. 31, 2001, at B1 (reporting that the Maryland House of Delegates passed a bill "identical to one that squeaked through the a Senate committee and last week survived a 10-hour filibuster on the Senate floor;" leaving only the "formality" of a House vote on the Senate bill before enactment); see also H.B. 307, 415th Leg. (Md. 2001); S.B. 205, 415th Leg. (Md. 2001) (prohibiting sexual orientation discrimination in public accommodations, housing, and employment). For a continually updated list of the municipalities that protect sexual orientation see Lambda Legal Defense and Education Fund, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=217> (last visited Mar. 31, 2001).

38. Arguing that the Supreme Court should protect sexual orientation is beyond the scope of this Comment. However, for arguments concerning this issue, see, e.g., Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 192-93 (1998). Professor Cicchino argues that:

[I]n order to determine whether a government interest is legitimate, the courts must look to empirical effects on the public welfare. Where the interest in question is unrelated to such effects . . . the law is rationally unrelated to a legitimate government purpose. . . . [L]aws that discriminate against people on the basis of sexual orientation cannot pass that test. Defenders of such laws, lacking any other argument, must resort to bare assertions that homosexuality is wrong. Depriving that bare moral argument of its constitutional legitimacy brings the controversy over homosexuality closer to concluding that laws that burden lesbian and gay people violate the guarantee of equal protection because they have no rational relationship to a legitimate government interest. Such laws are no more than an expression of private bias.

Id.; see also Marie Elena Peluso, Note, *Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 VAND. L. REV. 1533, 1535 (1993) (arguing that "in order to fulfill the ultimate goals of Title VII, Congress must amend the statute to protect homosexuals from employment discrimination"); see also *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 39 (D.C. 1987) (finding that the "District of Columbia's compelling interest in eradicating sexual orientation discrimination outweighs any burden that equal provision of the tangible benefits would impose on Georgetown's religious exercise") (holding incorporated by D.C. CODE ANN. § 1-2520(3) (1981 & Supp. 1999)); see generally Walsh, *supra* note 37 (discussing the *Georgetown Gays* decision).

39. Such recognition may not be too far off. Two bills relating to protection of sexual orientation were introduced in Congress in 1999; however, it appears that both died in committee. See Walsh, *supra* note 37, at 528 (noting that "Congress is now considering federal protection in employment on [sexual orientation] ground[s]"); see also Employment Non-Discrimination Act of 1999, S.1276, H.R.2355, 106th Cong. §§ 1-19 (prohibiting employment discrimination on the basis of sexual orientation); Civil Rights Amendments Act of 1999, H.R.311 ("To amend the Civil Rights Act of 1964 and the Fair Housing Act to prohibit discrimination on the basis of affectional or sexual orientation, and for other purposes."). But see Edward P. Jones, *Press Watch*, 9 EXEMPT ORG. TAX REV. 711, 711 (1994). Jones notes that:

Interior Department officials decided not to include the term "sexual orientation" in its antidiscrimination directive in December because they

alternative, revoking state-level tax-exempt status in the states that protect sexual orientation is *today* an entirely realizable goal.⁴⁰

The method this Comment suggests, however, for revoking the B.S.A.'s state-level tax-exempt status derives from a case involving only federal taxation issues.⁴¹ And because few New Jersey or other state cases have litigated these issues, this Comment must rely primarily upon federal case law. Nevertheless, scattered sections of the New Jersey Statutes define charitable nonprofit organizations in terms of the federal Internal Revenue Code ("I.R.C.") § 501(c)(3).⁴² By not only using language from § 501(c)(3), but also by citing it specifically, the New Jersey Legislature implies that its state-level tax exemption scheme parallels the federal one,⁴³ thus adding credence to the federal tax jurisprudence upon which this Comment relies.

Finally, this Comment must concede that the financial burden of revoking only state-level tax-exempt status will not *alone* force the B.S.A. to change its anti-gay policy.⁴⁴ Therefore, a detailed economic

feared the category could force the department to expel Boy Scouts of America from federal parks programs [T]hose familiar with the policy said that Thomas C. Collier Jr., the department chief of staff, persuaded Babbitt that an explicit ban against sexual orientation discrimination in the directive could trigger an explosive controversy involving the Boy Scouts, which bans gays from its ranks.

Id. (citing Lou Chibbaro, *Babbitt Aides Fear Policy Change Would Upset Boy Scouts*, WASH. BLADE, Jan. 14, 1994, at 1).

40. See *supra* notes 23-26 and accompanying text (discussing the revocation of Bob Jones University's tax-exempt status).

41. See *Bob Jones Univ.*, 461 U.S. at 577-79 (discussing only §§ 501(c)(3) and 170 of the Internal Revenue Code).

42. See, e.g., N.J. STAT. ANN. § 54:4-3.64 (West 1993 & Supp. 2000)

All lands and the improvements thereon actually and exclusively used for conservation or recreation purposes, owned and maintained or operated . . . by a nonprofit corporation or organization organized under the laws of this or any State of the United States authorized to carry out the purposes on account of which the exemption is claimed and which is *qualified for exemption from Federal Income Tax under Section 501(c)(3) of the [I.R.C.] shall be exempt from [state] taxation*

Id. (emphasis added); *id.* § 54:4-3.65 (stating that "[e]ach owner of real property claiming the tax exemption provided by this act" must file an application "accompanied by documentation to establish the organization and purposes of the property owner and its entitlement to exemption from Federal income tax under Section 501(c)(3) of the Internal Revenue Code") (emphasis added); *id.* § 45:17A-20 (defining "[c]haritable purpose" to mean "any purpose described in section 501(c)(3) of the Internal Revenue Code"); *id.* § 55:14K-56 (defining "[q]ualified nonprofit organization" as "any corporation or association of persons organized under Title 15A of the New Jersey Statutes . . . being within the description of section 501(c)(3) of the United States Internal Revenue Code").

43. Compare *id.* § 40:48C-41 ("Tax exemption; *religious, charitable or educational institutions or organizations.*") (emphasis added), with I.R.C. § 501(c)(3) (1994 & Supp. V 1999) ("Corporations, and any community chest, fund, or foundation, organized and operated exclusively for *religious, charitable, scientific, testing for public safety, literary, or educational purposes.*") (emphasis added).

44. Even though Bob Jones University lost its tax exemption in 1983, it was not

analysis of the dollar amount that state tax exemption saves the B.S.A. is unnecessary.⁴⁵ The stigma of a state-level tax-exempt status revocation, and its compounding effect upon the existing backlash from organizations that fund and support the B.S.A., however, may prove more valuable than the loss of the status itself.⁴⁶ These factors combined may well provide the B.S.A. with the incentive it needs to change its policy.

Part I of this Comment will summarize the B.S.A.'s background and detail the origins of James Dale's situation. Part II will discuss the history and theory behind fighting discrimination through the revocation of tax-exempt status. Part III will explain how Dale⁴⁷ could sue to revoke the B.S.A.'s state-level tax exemptions in New Jersey. This section will also discuss how to overcome the B.S.A.'s probable affirmative defenses. Part IV will discuss the financial and political pressures the B.S.A. currently faces nationwide, note the various ways the B.S.A. currently benefits from its state-level tax exemptions in New Jersey, and address the efficacy of revoking tax-exempt status. This Comment concludes that, in the best-case scenario, the compounding effect of a state-level tax-exempt status revocation upon existing sympathetic cuts in funding and support will force the B.S.A. to change its policy.

until recently that it finally repealed its policy on interracial dating. *See* Mike Allen, *Bob Jones University Lifts Ban On Campus Interracial Dating*, WASH. POST, Mar. 4, 2000, at A8 (reporting that Bob Jones III, president of the Fundamentalist Christian University, announced his decision to lift the ban in response to the national media scrutiny that followed a campaign visit by Texas Governor George W. Bush, and further noting that Jones said even without the ban "his university would not keep a gay student in school, just as it would not keep an adulterer or thief"). The University's reluctance to change its policy even after losing § 501(c)(3) status suggests that more pressure than revocation of tax-exempt status alone is necessary to encourage policy change.

45. To prove revoking the B.S.A.'s tax-exempt status would economically force a policy change, a detailed, dollar-for-dollar analysis would be required. Because this Comment suggests ancillary means to bring about change, such analysis falls beyond the scope of this Comment.

46. *See infra* Part IV.C (discussing the value of stigmatization).

47. This Comment will use James Dale's situation as a test case, focusing upon the B.S.A. in New Jersey, and when necessary upon the Monmouth County Local Council. Thus, in making the argument to revoke the B.S.A.'s state-level tax-exempt status, this Comment will analogize the federal jurisprudence used in *Bob Jones University* only with New Jersey statutes and case law. Performing this analysis with the District of Columbia and the other eleven states that protect sexual orientation would be both daunting and unnecessarily repetitive.

I. BACKGROUND

A. *The Boy Scouts of America*

Baden-Powell founded the Boy Scouts in England in 1907,⁴⁸ but the group was not incorporated in the United States until February 8, 1910.⁴⁹ Congress conferred a federal charter⁵⁰ upon the B.S.A. on

48. See Boy Scouts of America, *Scouting Around the World* (discussing how Baden-Powell founded the scouting movement in England on return from his military service in Africa), at <http://www.scouting.org/nav/about.html> (last visited Mar. 31, 2001). Ironically, several recent biographers have suggested that Baden-Powell was gay. See, e.g., PIERS BRENDON, *EMINENT EDWARDIANS* (1979); TIM JEAL, *BOY-MAN: THE LIFE OF LORD BADEN-POWELL* (1990); MICHAEL ROSENTHAL, *THE CHARACTER FACTORY: BADEN-POWELL AND THE ORIGINS OF THE BOY SCOUT MOVEMENT* (1984). Biographer Tim Jeal acknowledged Baden-Powell's decades-long friendship with Kenneth McLaren, claiming he found nothing upon which to conclude the two men had a physical relationship; however, the friendship ended abruptly when McLaren got married. See JEAL, *supra* (noting that Baden-Powell destroyed the majority of his personal correspondence, including that with McLaren, before his death); see also Elizabeth Abbott, *Experts on Baden-Powell, Founder of Scouting, Suggest He Was Homosexual*, PROVIDENCE J., Aug. 22, 1999, at B1 (noting how several biographers including Jeal, although not able to say definitively that Baden-Powell was gay, "clearly make that suggestion"). For example, Abbott quotes author Michael Rosenthal's assertion that Baden-Powell was "clearly in love with [Kenneth] McLaren." *Id.* (quoting a 1999 interview with Michael Rosenthal, author of *THE CHARACTER FACTORY: BADEN POWELL AND THE ORIGINS OF THE BOYSCOUT MOVEMENT* (1984)). But see GIP PLASTER, *The Ultimate Irony: Evidence Suggests Founder and "Chief Scout of the World" May Have Been Gay*, TEXAS TRIANGLE, Feb. 26, 1998, at 18 ("All the evidence about Baden-Powell's sexual orientation—although voluminous and convincing—is still only circumstantial. The truth, whatever it may have been, died with Baden-Powell in Kenya in 1941.").

49. See *Dale*, 734 A.2d at 1200-01 (discussing the B.S.A.'s membership since its foundation); see also Boy Scouts of America, *About the BSA* (providing information about the B.S.A. on the official web site, including information about the founder of the B.S.A., William Dickerson Boyce), at <http://www.scouting.org/nav/about.html> (last visited Mar. 31, 2001). In another twist of irony, William Boyce Mueller, grandson of William Dickerson Boyce, recently publicly revealed his own homosexuality. See Jim Merrett, *Doing His Best to Do His Duty, the Grandson of the Boy Scouts of America Founder Comes Out*, THE ADVOCATE, Dec. 31, 1991, available at <http://sir.home.texas.net/WASPBGAY.htm> (last visited Jan. 23, 2000) (copy on file with author) (stating that "[m]y grandfather would not have tolerated discrimination . . . [h]e founded the Boy Scouts [of America] for all boys, not just for some").

50. It is important to note that the B.S.A.'s federal charter does not provide a useful window through which to attack the B.S.A.'s discriminatory practices as a form of "state action." See *Stearns v. Veterans of Foreign Wars*, 353 F. Supp. 473, 476 (D.D.C. 1972) (holding that the grant of a Congressional charter, absent discriminatory language in the charter itself, is insufficient to constitute impermissible government approval of private discrimination). As Ronald C. Moe noted in his feature, *Congressionally Chartered Corporate Organizations (Title 36 Corporations): What They Are and How Congress Treats Them*, 46 FED. LAW. 35, 37 (1999) (citing 36 U.S.C. § 2301 (1994)):

Congress, in chartering patriotic, charitable, and professional organizations, . . . does not make these organizations "agencies of the United States" or confer any powers of a governmental character or assign any benefits. These organizations do not receive direct appropriations, they exercise no federal powers, their debts are not covered by the full faith and

June 15, 1916.⁵¹ In the charter, Congress stated the B.S.A.'s official

credit of the United States, and they do not enjoy original jurisdiction in the federal courts. . . . In effect, the federal chartering process is honorific in character.

Id. Although the federal charter originally provided an “official imprimatur” to these organizations along with some level of prestige that in turn could lead to indirect financial benefit, the result is that granting the charter “misleads the public into believing that somehow the U.S. government approves and supervises the [organizations].” *Id.* at 36. In 1992, the House Judiciary Committee responded to concern about this incorrect assumption by declaring a moratorium on granting new charters, which the 104th Congress later made permanent. *See id.* at 36 (discussing Congress’ move to dismantle the federal charter process). Regardless, the “status of a private nonprofit organization receiving a federal charter does not appear to be substantially different from that of a similar organization incorporated under state law.” *Id.* at 37. The legal distinctions are negligible, dealing only with citizenship for jurisdictional purposes and the fact that only Congress can amend these charters. *See id.* at 38 (discussing the minimal legal distinctions between state and federal incorporation). These organizations are required to submit to an annual independent audit, the report from which is submitted to Congress along with an annual report discussing the organization’s activities for that year. *See id.* (noting the minimal government oversight of federally chartered organizations). Even so, these reports are only subjected to “desk review” unless serious questions arise, at which point the independent accountant or organization is contacted for clarification. *See id.* The fact is, no federal charter has ever been revoked or even threatened through non-compliance with these reporting requirements. *See id.* As the House Judiciary Committee concluded in 1992, federal charters serve no valid purpose and therefore were discontinued. *See id.* at 39 (discussing the theory behind Congress’ ending the practice of granting federal charters).

51. 36 U.S.C. §§ 21-29 (1994). Title 36 is the code section dedicated to “Patriotic Societies and Observances.” *Id.* A few weeks after the United States Supreme Court’s decision in *Dale*, Rep. Lynn Woolsey, D-Cal., launched a short-lived campaign to revoke the B.S.A.’s federal charter. *See* Oliver Yates Libaw, *Boy Scout Backlash? Youth Group Faces Pressure to Admit Gays*, ABC NEWS.COM, July 20, 2000 (noting that on July 19, 2000, Rep. Woolsey “introduced legislation to revoke the Boy Scouts’ symbolic Congressional charter” and publicly stated “I think the charter implies that we then agree with this discrimination and intolerance, and I don’t want the federal government to support intolerance”), at <http://more.abcnews.go.com/sections/us/dailynews/boyscouts000719.html>; *see also* Scouting for All Act, H.R. 4892, 106th Cong. (2000). The Scouting for All Act read:

A BILL [t]o repeal the Federal charter of the Boy Scouts of America. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE. This Act may be cited as the ‘Scouting for All Act’.

SEC. 2. FINDINGS. The Congress finds the following: (1) Federal charters are prestigious distinctions awarded to organizations with a patriotic, charitable, or educational purpose. (2) Although intended as an honorific title, a Federal charter implies Government support for such organizations. (3) In 1916, the Federal Government granted a Federal charter to the Boy Scouts of America. (4) Although the Boy Scouts of America promotes the social and civic development of young boys through mentoring, it also sets an example of intolerance through its discriminatory policy regarding sexual orientation. (5) Federal support for the Boy Scouts of America indirectly supports the organization’s policy to exclude homosexuals. (6) A policy of excluding homosexuals is contradictory to the Federal Government’s support for diversity and tolerance and should not be condoned as patriotic, charitable, or educational.

purpose was “to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using methods which were in common use by Boy Scouts on June 15, 1916.”⁵² Within the charter, Congress reserved the right to “repeal, alter, or amend” it at any time.⁵³

The B.S.A.’s bylaws provide that “both membership in Scouting and advancement and achievement of leadership in Scouting units are open to all boys without regard to race or ethnic background, and advancement and achievement of leadership in Scouting is based entirely upon individual achievement.”⁵⁴ The B.S.A. claims publicly that neither its federal charter nor its bylaws permit the exclusion of any boy: “[S]couting should be made available for all boys who meet entrance age requirements.”⁵⁵ As the New Jersey Supreme Court noted in *Dale*:

BSA membership is an American tradition. Since the program’s inception in 1910 through the beginning of [the 1990s], over eighty-seven million youths and adults have joined BSA. As of

SEC. 3. REPEAL OF FEDERAL CHARTER OF BOY SCOUTS OF AMERICA. (a) REPEAL—Chapter 309 of title 36, United States Code, which grants a Federal charter to the Boy Scouts of America, is repealed. (b) CLERICAL AMENDMENT—The analysis at the beginning of subtitle II of title 36, United States Code, is amended by striking the item relating to chapter 309.

Id. On September 13, 2000, Rep. Woolsey’s bill failed to pass in the House of Representatives by a vote of 362 to 12. *See* 146 CONG. REC. H7448, H7446-445 (daily ed. Sept. 12, 2000) (recording floor debate about Rep. Woolsey’s bill). Rep. Woolsey credited Steven Cozza, founder of Scouting for All, for lobbying for the legislation. *See* Libaw, *supra* (discussing the force behind Rep. Woolsey’s bill). Rep. Woolsey also composed a letter, signed by ten other members of Congress, which she sent to President Clinton asking him to resign his position as the honorary head of the B.S.A.. *See* Marc Sandalow, *Clinton Asked to Step Down As Honorary Head of Scouts*, S.F. CHRON., July 15, 2000, at A1 (excerpting the letter, which read in part: “In order to disavow this policy of intolerance, as well as to clarify any misperception of implicit presidential approval, we urge you, the leader of our nation, to resign as the honorary head of the [B.S.A.]”). Shortly after the United States Supreme Court decision in *Dale* and before receiving Rep. Woolsey’s letter, President Clinton responded to an inquiry about the Court’s decision saying “[t]he Boy Scout still are—they’re a great group, they do a lot of good.” *See id.* at A1. President Clinton had no public reaction to Rep. Woolsey’s letter and apparently made no attempt to distance himself from the B.S.A. either while in office or since.

52. 36 U.S.C. § 23 (1994).

53. 36 U.S.C. § 29 (1994). Revocation is unlikely given that Congress has never revoked a federal charter for any reason. *See* Moe, *supra* note 51, at 38 (noting further that no charter has ever been placed at serious risk through non-compliance with reporting requirements).

54. BYLAWS OF THE BOY SCOUTS OF AMERICA art. VII, § 2, cl. 1.

55. Brief for Respondent, *supra* note 12, at 2, *Dale* (No. 99-699) (quoting the B.S.A. Bylaws).

December 1992, over four million youths and over one million adults were active BSA members. BSA's success in attracting members is at least partly attributable to its *long-standing commitment to a diverse and "representative" membership . . .*⁵⁶

The B.S.A.'s stated commitment to a diverse and representative membership suggests it would accept gay members.⁵⁷ In fact, as to issues of sexuality, the B.S.A. has stated, "boys should learn about sex and family life from their parents, consistent with their spiritual beliefs,"⁵⁸ thereby reinforcing the expectation that the B.S.A. would not be concerned about the issue of sexual orientation.

B. *Dale v. Boy Scouts of America*

James Dale joined the B.S.A. as a Cub Scout in 1978, at the age of eight.⁵⁹ Over the next decade, he progressed through the ranks as a youth member.⁶⁰ An "exemplary" scout⁶¹ who earned more than twenty-five merit badges,⁶² Dale received admission to the Order of the Arrow in 1983,⁶³ achieved the status of Vigil Honor,⁶⁴ and earned

56. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1200-01 (N.J. 1999) (emphasis added); *see also* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 666 (2000) (Stevens, J., dissenting) (quoting the B.S.A. describing its responsibilities as "a commitment that our membership shall be representative of *all* the population in every community, district, and council") (emphasis in original).

57. To be representative of the community, the B.S.A. arguably should have the same percentage of gay members as the rest of society. The standard view regarding the degree of homosexuality present in American society is that approximately ten percent of the general population is gay. *See* Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 776 (1995) ("Since 1948, when Alfred C. Kinsey and his associates released their path-breaking study, *Sexual Behavior in the Human Male*, the oft-cited statistic is that ten percent of the population is gay."); *cf.* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 378 (2000) ("The famous ten percent figure for homosexuals . . . arises from the Kinsey studies."). Thus, it should follow from the B.S.A.'s claim of having a membership representative of society, that ten percent of B.S.A. members and leaders should be gay. When a Scout is openly gay, however, as in Dale's case, the B.S.A. revokes his membership.

58. Brief for Respondent, *supra* note 12, at 4, *Dale* (No. 99-699) (quoting B.S.A. Bylaws 9(a)); *accord* *Dale*, 530 U.S. at 669 (Stevens, J., dissenting) ("Scouts . . . are directed to receive their sex education at home or in school, but not from the organization: 'Your parents or guardian or a sex education teacher should give you the facts about sex that you must know.'") (quoting BOY SCOUTS OF AMERICA, BOY SCOUT HANDBOOK (1992)).

59. *See Dale*, 530 U.S. at 644 (discussing the history of James Dale's B.S.A. membership); *see also Dale*, 734 A.2d at 1204 (same).

60. *See Dale*, 530 U.S. at 644 (noting that Dale became a Cub Scout three years after he joined the B.S.A.); *see also Dale*, 734 A.2d at 1204 (detailing Dale's progression from Cub Scout to Boy Scout in 1981 and listing his various Boy Scout Troops thereafter). Dale was a Cub Scout with Pack 142, *see Dale*, 530 U.S. at 644, and then a Boy Scout with Troop 73 until his eighteenth birthday in 1988. *See Dale*, 734 A.2d at 1204.

61. *See Dale*, 530 U.S. at 644 ("By all accounts, Dale was an exemplary Scout.").

62. *See Dale*, 530 U.S. at 665 (Stevens, J., dissenting).

63. *See id.* (noting the prestige of this distinction). To become a member of The

the Eagle Scout Badge in 1988.⁶⁵ In 1989, Dale sought and obtained approval for adult membership in the B.S.A., becoming the Assistant Scoutmaster of Troop 73 of the Monmouth County Local Council⁶⁶ of the B.S.A.⁶⁷

That same year, Dale began his undergraduate education at Rutgers University, where he openly acknowledged his homosexuality for the first time.⁶⁸ While at Rutgers, Dale joined and eventually

Order of the Arrow,

a youth must be a registered member of a Boy Scout troop or Varsity Scout team and hold First Class rank. The youth must have experienced 15 days and nights of camping during the two years before his election. The 15 days and nights must include six consecutive days (including five nights) of resident camping, approved under the auspices and standards of the Boy Scouts of America. The balance of the camping must be overnight, weekend, or other short-term camps. Scouts are elected to the Order by their fellow unit members, following approval by the Scoutmaster or Varsity team Coach.

Boy Scouts of America, *Order of the Arrow*, at <http://www.bsa.scouting.org/factsheets/02-512.html> (last visited Mar. 31, 2001).

64. See *Dale*, 734 A.2d at 1204.

After two years of service as a Brotherhood member, and with the approval of the national Order of the Arrow Committee, a Scout may be recognized with the *Vigil Honor* for outstanding service to Scouting, his lodge, and the community. This honor is bestowed by special selection and is limited to one person for every 50 members registered with the lodge each year.

Boy Scouts of America, *Order of the Arrow* (emphasis added), at <http://www.bsa.scouting.org/factsheets/02-512.html> (last visited Mar. 31, 2001).

65. See *Dale*, 530 U.S. at 644, 665 (Stevens, J., dissenting) (discussing Dale's achievements, including his rank of Eagle Scout, an honor achieved by only three percent of all scouts); see also *Dale*, 734 A.2d at 1204 (same). Being awarded the rank of Eagle Scout "is a performance-based achievement whose standards have been well-maintained over the years. Not every boy who joins a Boy Scout troop earns the Eagle Scout rank; only about 2.5 percent of all Boy Scouts do so. This represents more than 1 million Boy Scouts who have earned the rank since 1911." Boy Scouts of America, *Eagle Scout*, at <http://www.scouting.org/nav/scouts.html> (last visited Mar. 31, 2001).

66. The Monmouth County Local Council of the B.S.A. has jurisdiction over the geographical area in which James Dale served. See *Dale*, 734 A.2d at 1201 (discussing how the "vast network of members is managed through a complex of national, regional, and local organizations"). The Monmouth Council, incorporated in 1924, is one of approximately 400 local councils nationwide, see *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 274 (N.J. Super. Ct. App. Div. 1998), and one of fourteen in New Jersey. See Brief for Respondent, *supra* note 12, at 3 n.4, *Dale* (No. 99-699). In 1991, the Monmouth County Local Council had 9,446 youth members and 2,781 adults registered in 215 units. See *Dale*, 706 A.2d at 274.

67. See *Dale*, 530 U.S. at 644 (discussing Dale's application and acceptance as a Scout Troop leader); see also *Dale*, 734 A.2d at 1204 (discussing Dale's participation in B.S.A. leadership, including his positions as assistant patrol leader, patrol leader, bugler, and Junior Assistant Scoutmaster for Troop 73 from 1985 to 1988). The New Jersey Supreme Court noted that "Dale was also invited to speak at organized Boy Scout functions, such as the Joshua Huddy Distinguished Citizenship Award Dinner, and attended national events, including the National Boy Scout Jamboree." *Id.*

68. See *Dale*, 530 U.S. at 644-45 (noting that this was the first time Dale "acknowledged to himself and others that he is gay"); see also *Dale*, 734 A.2d at 1204 (noting that before attending Rutgers University, Dale had not acknowledged his sexual orientation to himself, his family, or his friends).

became co-president of the Rutgers University Lesbian/Gay Alliance.⁶⁹ While he was attending a seminar to discuss gay and lesbian issues, a New Jersey newspaper interviewed Dale about the seminar and subsequently published an article based on the interview that included his picture.⁷⁰

Within the month, Dale received a letter from Monmouth Council Executive James W. Kay revoking his B.S.A. membership.⁷¹ When Dale asked why his membership had been revoked, Kay replied “the standards for leadership established by the Boy Scouts of America . . . specifically forbid membership to homosexuals.”⁷² After the Northeast Regional Council supported the Monmouth County Local Council’s decision and the National Council affirmed the same,⁷³ Dale brought suit⁷⁴ under the New Jersey L.A.D.⁷⁵

In his initial complaint, Dale sought declaratory and injunctive relief, compensatory and punitive damages, as well as costs and attorney fees.⁷⁶ The Superior Court of New Jersey dismissed his suit⁷⁷

69. See *Dale*, 530 U.S. at 645 (describing Dale’s involvement in gay and lesbian student programs at Rutgers); see also *Dale*, 734 A.2d at 1204 (same). What is known today as the Bisexual-Gay-Lesbian Alliance of Rutgers University (“BiGLARU”) was originally founded as the Rutgers Homophile League shortly after the 1969 Stonewall Riots, by then-Rutgers University student Lionel Cuffie in an effort “to create a safe and friendly environment for Lesbian, Gay, Bisexual and Transgendered Rutgers students” as well as to enable this community “to take action in the political sphere and work towards attaining respect as well as the right to freely enjoy being part of this community, without facing harassment or discrimination.” Bisexual-Gay-Lesbian Alliance of Rutgers University, *The BiGLARU: History, Aims and Goals*, at <http://mariner.rutgers.edu/biglaru/what.htm> (last visited Mar. 31, 2001).

70. See *Dale*, 530 U.S. at 645 (explaining how the B.S.A. learned about Dale’s sexuality); see also *Dale*, 734 A.2d at 1204-05 (same); Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (Newark, N.J.), July 8, 1990, at 11 (reporting on the seminar and including a picture captioned “Mary Leddy . . . chats with Rutgers Students Sharice Richardson and James Dale, co-presidents of the Lesbian/Gay Alliance”).

71. See *Dale*, 530 U.S. at 645 (discussing how Dale’s membership was revoked); see also *Dale*, 734 A.2d at 1205 (noting that the letter requested Dale “sever any relations [he] may have with the Boy Scouts of America”). The dismissal letter granted Dale sixty days to request a review of his termination from the Monmouth Council Regional Review Committee. See *id.*

72. *Dale*, 530 U.S. at 645 (stating the reason for Dale’s dismissal); see also *Dale*, 734 A.2d at 1205 (discussing Dale’s expulsion by letter dated August 10, 1990).

73. See *Dale*, 734 A.2d at 1205 (noting that Dale was denied the right to attend his review by the National Council members who believed his presence would serve “no useful purpose” given that the BSA “does not admit avowed homosexuals to membership in the organization”).

74. See *Dale*, 530 U.S. at 645 (noting that Dale’s initial complaint was filed in 1992).

75. N.J. STAT. ANN. § 10:5-1 to 10:5-12 (West 1993 & Supp. 2000).

76. See *Dale*, 734 A.2d at 1205-07 (discussing the procedural history of Dale’s lawsuit).

77. See *Dale v. Boy Scouts of Am.*, No. Mon-C-330-02 (Ch. Div. Nov. 3, 1995) (dismissing Dale’s claims and holding with respect to the applicability of New Jersey L.A.D. that the B.S.A. was not a place of public accommodation or alternatively that

and Dale appealed. The Appellate Division of the Superior Court of New Jersey reversed the trial court, holding that under L.A.D. the B.S.A. had illegally discriminated against Dale.⁷⁸ In an effort to bolster its First Amendment defenses, the B.S.A. continued to argue on appeal that the Scout Oath⁷⁹ and Law,⁸⁰ the codes that embody the organization's general moral stance,⁸¹ either explicitly or implicitly

the B.S.A. was exempt under the "distinctly private" exception, N.J. STAT. ANN. § 10:5-5 (West 1993 & Supp. 2000), as well as accepting the B.S.A.'s First Amendment, freedom of expressive association defense).

78. See *Dale*, 706 A.2d at 274 (holding that: "(1) the B.S.A. is a place of public accommodation under [L.A.D.]; (2) the B.S.A.'s expulsion of [Dale] . . . violated L.A.D.[:] and (3) L.A.D.'s prohibition of the B.S.A.'s policy of excluding gay members does not infringe [upon the B.S.A.'s] freedom of expressive association").

79. The Scout Oath requires that each scout promise: "I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and *morally straight*." BOY SCOUTS OF AM., BOY SCOUT HANDBOOK 9 (11th ed. 1998) [hereinafter BOY SCOUT HANDBOOK] (emphasis added). The handbook also defines "morally straight":

To be a person of strong character, your relationship with others should be honest and open. You should respect and defend the rights of all people. Be clean in your speech and actions, and remain faithful in your religious beliefs. The values you practice as a Scout will help you shape a life of virtue and self-reliance.

Id. at 46.

80. The Scout Law requires that B.S.A. members be "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, *clean*, and reverent." *Id.* at 9 (emphasis added). The B.S.A. relies upon the word "clean" to argue its stance against homosexuality. The B.S.A. handbook states:

A Scout is CLEAN. A Scout keeps his body and mind fit. He chooses the company of those who live by high standards. He helps keep his home and community clean. You can't avoid getting dirty when you work. There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts and actions. Swear words and dirty stories are often used to ridicule other people and hurt their feelings. The same is true of racial slurs and jokes that make fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such tasteless behavior. He avoids it in his own words and deeds.

Id. at 53. "The words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral. We doubt that young boys would ascribe any meaning to these terms other than a commitment to be good." *Dale*, 734 A.2d at 1224.

81. Ironically, the Boy Scout Scoutmaster Handbook teaches that "moral fitness" is an individual's choice, deferring the ultimate definition to its members:

Morality . . . concerns the "principles of right and wrong" in our behavior, and "what is sanctioned by our conscience or ethical judgment." . . . In any consideration of moral fitness, a key word has to be "courage." A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong.

BOY SCOUTS OF AMERICA, SCOUTMASTER HANDBOOK 71 [hereinafter SCOUTMASTER HANDBOOK]. It is clear, however, from reading the Boy Scout Handbook that B.S.A. members' concept of morality necessarily engages a Scout's "religious beliefs." See BOY SCOUT HANDBOOK, *supra* note 79, at 54 (discussing religious faithfulness and duties). Regardless, as the New Jersey court noted, "it appears that no single view on [the subject of sexual orientation] functions as a unifying associational goal of the [B.S.A.]." *Dale*, 734 A.2d at 1225. Moreover, because the B.S.A. does not affiliate

state its members' views regarding homosexuality.⁸² Nevertheless, the New Jersey Supreme Court affirmed the Appellate Division's application of L.A.D.⁸³

itself with any one religious denomination, *see Dale*, 734 A.2d at 1216 ("There is a close association between the Boy Scouts of America and virtually all religious bodies and denominations in the United States." (quoting SCOUTMASTER HANDBOOK, *supra*, at 227)), the B.S.A. cannot claim by association that its "morality" implies being in favor of discrimination on the basis of sexual orientation. This fact is made even more clear by the fact that the various denominations differ on their stances about sexual orientation. *See Dale*, 734 A.2d at 1224 (comparing the Brief of Amici Curiae National Catholic Committee on Scouting, which argues that Boy Scouts' admission of practicing homosexuals would impede some church sponsors' ability to promote religious values and beliefs, with the Brief of Amici Curiae of The Diocesan Council of the Episcopal Diocese of Newark, which supports the rights of gays and lesbians to live "free from discrimination based upon . . . sexual orientation"); *see also* Carol Ness, *Gay Scouts Gain Support, Methodist General Board Urges Group to Change Member-Leader Policy*, SAN FRANCISCO EXAMINER, Oct. 15, 1999, available at 1999 WL 2387269. This article reports that:

[a]n important board of the United Methodist Church has taken a stand against the Boy Scouts' ban on gays, intensifying the rift over homosexuality in one of the nation's biggest denominations. . . . Some two-thirds of the more than 75,000 scout troops are sponsored by churches of 31 denominations, many of which are under pressure to treat gays equally. . . . More than 400,000 Scouts in more than 11,000 packs and troops meet in Methodist churches. . . . [T]he vote adds a powerful voice within the church in its debate of its own policies toward gays and lesbians. Another church group, the Commission on United Methodist Men, already has taken the opposite stance, supporting the Boy Scouts in their appeal of the ruling.

Id.; Press Release, Religious Action Center of Reform Judaism, Nation's Largest Jewish Organization Lauds New Jersey Court Decision Banning Discrimination By Boy Scouts of America (Aug. 5, 1999) ("The Religious Action Center, in keeping with long-standing policy against discrimination on the basis of sexual orientation, joined an amicus brief supporting James Dale . . . in his suit against the Boy Scouts of America."), available at <http://uahc.org/reform/rac/news/080599.html>; Press Release, United Church of Christ, Church Leaders Reject Claims that Bible Condemns Homosexuality (Aug. 12, 1998) ("The Office for Church in Society of the United Church of Christ today . . . joined other social justice and religious groups at a press conference refuting claims that the Bible condemns homosexuality."), available at <http://beta.wfn.org/1998/08/msg00146.html>.

82. *See Dale*, 530 U.S. at 650 ("The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms 'morally straight' and 'clean.'"); *see also Dale*, 734 A.2d at 1224 n.12 (acknowledging that the B.S.A. also pointed to a "1978 position paper in support of its argument that it associates for the express purpose of advocating the immorality of homosexuality"). The Court declined, however, to view the 1978 position paper as representative of members' shared views because it was never distributed to the B.S.A.'s members. *See id.* at 1205 n.4, 1224 n.12 (observing further that, although statements expressing similar positions were composed in 1991 and 1993, the Court declined to consider them because they "were written after the onset of litigation in other states charging the organization with discrimination against members on the basis of sexual orientation," thus their "self-serving nature . . . [was] apparent").

83. *See Dale*, 734 A.2d at 1230 (holding that (1) the B.S.A. was a place of "public accommodation" within the meaning of L.A.D., (2) the B.S.A. was not exempt from L.A.D., (3) the B.S.A. violated L.A.D., (4) the B.S.A. was not sufficiently personal or private to warrant constitutional protection under freedom of intimate association, (5) the enforcement of L.A.D. did not violate the B.S.A.'s freedom of expressive association, and (6) enforcement of L.A.D. did not violate the B.S.A.'s freedom of

The United States Supreme Court granted the B.S.A.'s petition for writ of certiorari on January 14, 2000.⁸⁴ Less than six months later, the Court reversed the New Jersey Supreme Court's decision, finding in favor of the B.S.A. and ending Dale's eight-year civil rights-based fight to be reinstated as an adult member.⁸⁵ Although for many people this decision appeared to be the death knell for gay Scouts challenging the B.S.A.'s policy,⁸⁶ Dale and other similarly situated plaintiffs may have another option.

II. CHALLENGING TAX-EXEMPT STATUS⁸⁷

Section 501(c)(3) of the 1986 I.R.C. grants tax-exempt status for corporations "organized and operated exclusively for religious, charitable . . . or educational purposes"⁸⁸ that meet certain statutory requirements.⁸⁹ The I.R.C. permits tax-exempt status because these organizations perform quasi-public functions.⁹⁰ Tax exemption for

speech).

84. *Boy Scouts of Am. v. Dale*, 528 U.S. 1109 (2000) (granting petition for writ of certiorari).

85. *See Dale*, 530 U.S. at 661 (holding that the New Jersey Supreme Court's application of L.A.D. to require the B.S.A. to admit Dale violated the B.S.A.'s First Amendment right of expressive association). A detailed analysis of the United States Supreme Court's reasoning in reversing the New Jersey Supreme Court is beyond the scope of this Comment; nevertheless, many of the issues discussed will be addressed when considering the B.S.A.'s affirmative defenses to the tax exempt status revocation suit proposed by this Comment. *See infra* Part III.D. Furthermore, Justice Stevens' dissent thoroughly addresses all of the internal inconsistencies of the majority's decision, carefully delineating how the majority appears to have ignored the Court's own clear precedent. *See generally Dale*, 530 U.S. at 663-700 (Stevens, J., dissenting).

86. *See supra* note 16 and accompanying text (noting the potential of a member-led civil rights-based suit against the B.S.A.).

87. Again, it is important to note that when analyzing the revocation of tax-exempt status, one must begin at the federal level given the minimal jurisprudence at the state level; only then can it be applied to the applicable states by analogy and supported by the few cases that do exist.

88. I.R.C. § 501(c)(3) (1994 & Supp. V 1999). In full, this section provides tax exemption for:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.

89. *See id.*

90. *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970) (noting that, in the

these organizations began over a century ago with the enactment of the income tax law of 1894.⁹¹ Reliance upon tax-exempt status is now so deeply ingrained in corporate culture that it has become essential to the existence of many organizations.⁹² As this reliance grew, the I.R.S.' classification of such organizations became increasingly routine.⁹³ Controversy did not arise until the 1970s.⁹⁴

In a 1970 decision, *Green v. Kennedy*,⁹⁵ the United States District Court for the District of Columbia struck the first blow against discriminatory tax-exempt organizations.⁹⁶ The court granted a preliminary injunction against the Secretary of the Treasury to enjoin the I.R.S. from granting tax-exempt status to private schools with racially discriminatory admissions policies.⁹⁷ In July of that year, the I.R.S. acquiesced, issuing a news release declaring it could "no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination."⁹⁸ Shortly thereafter, the I.R.S. notified private schools, including Bob Jones University, of this policy change.⁹⁹

The I.R.S. formalized this policy in a 1971 Revenue Ruling requiring that "[a]ll charitable trusts, educational or otherwise, [be] subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy."¹⁰⁰ The ruling further noted that

area of property tax exemption, the State of New York has "an affirmative policy that considers [quasi-public corporations] as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest").

91. See An Act to Reduce Taxation, To Provide Revenue for the Government, and For Other Purposes, Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 509, 556 (noting that "nothing herein contained shall apply . . . to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes").

92. See Michael Yaffa, Comment, *The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds*, 30 UCLA L. REV. 156 (1982) (discussing the history of tax exemptions and deductions to charitable organizations); see also Randolph W. Thrower, *I.R.S. is Considering Far Reaching Changes in Ruling on Exempt Organizations*, 34 J. TAX'N 168, 168-69 (1971) (acknowledging that "[the I.R.S.'] denial or exemption, or even our refusal to rule on the organization's qualifications, may doom the organization").

93. See Yaffa, *supra* note 92, at 156-57 (discussing the routine and uncontroversial nature of I.R.S. tax-exempt organization classification).

94. See *id.* at 157 (discussing cases of the 1970s that worked to impose public policy limitations on granting § 501(c)(3) tax-exempt status).

95. 309 F. Supp. 1127 (D.D.C.), *app. dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970).

96. See *id.* at 1140.

97. See *id.* at 1140 (granting the preliminary injunction); see also *Bob Jones Univ.*, 461 U.S. at 578 (citing *Green* as the first time a court relied upon an organization's discriminatory policies to revoke tax-exempt status).

98. *Bob Jones Univ.*, 461 U.S. at 578 (quoting an IRS news release issued on July 10, 1970).

99. See *id.* (quoting the I.R.S. letter dated November 30, 1970).

100. Rev. Rul. 71-447, 1971-2 C.B. 230.

the “promotion of social welfare includes activities to eliminate prejudice and discrimination.”¹⁰¹ That same year, Bob Jones University sued the I.R.S. to enjoin it from revoking the University’s tax-exempt status.¹⁰² The case was ultimately appealed to the Supreme Court which held that the I.R.S.’ policy was both legal and within its regulatory power.¹⁰³ While Bob Jones University did subsequently lose its tax-exempt status, it was not forced to stop employing the racially discriminatory admissions standards that brought about the loss of that status.¹⁰⁴

A. *Although Not “State Action,” Tax Exemption Subsidizes the Activities of Tax-Exempt Organizations*

No significant difference in economic impact exists between a “legislative decision that a particular entity should receive a direct government grant of a certain amount, and one that it should be relieved of its otherwise payable tax burden by that amount.”¹⁰⁵ This argument has been made repeatedly in various forums to suggest that tax exemption becomes a form of government subsidy constituting “state action.”¹⁰⁶ Although supported by scholars,¹⁰⁷ state legislatures,¹⁰⁸ the I.R.S.,¹⁰⁹ congressional committees,¹¹⁰ and

101. *Bob Jones Univ.*, 461 U.S. at 578 (citing I.R.C. Reg. 1.501(c)(3)-1(d)(2)).

102. *See id.* at 581 (discussing the procedural history of *Bob Jones University*). That suit became *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974), in which the Supreme Court denied the University judicial review prior to the payment of any tax under the Tax Injunction Act. *See* I.R.C. § 7421(a) (1994 & Supp. V 1999) (“Except as provided . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.”). In response, the University filed returns paying a total of \$21.00 in taxes for the period of December 1, 1970 to December 31, 1975. *See Bob Jones Univ.*, 461 U.S. at 581-82. When denied its request for a refund, the University sued for recovery. *Id.* at 582. The government counterclaimed for the amount of unpaid taxes from 1971 to 1975: \$489,675.59 plus interest. *Id.* On January 19, 1976, the I.R.S. officially revoked Bob Jones University’s tax-exempt status, effective as of December 1, 1970, the day after the University was first notified of this policy change. *Id.* at 581.

103. *See Bob Jones Univ.*, 461 U.S. at 605-06 n.32 (noting that the “I.R.S. policy properly extends to private schools, including religious schools”).

104. *See supra* note 44 (noting that Bob Jones University maintained its racially discriminatory admissions standards until 2000).

105. Comment, *Tax Incentives as State Action*, 122 U. PA. L. REV. 414, 420 (1973) [hereinafter *Tax Incentives*].

106. *See infra* notes 107-112 (citing several authors who have promoted such an argument).

107. *See Tax Incentives, supra* note 105, at 421 n.28 (listing J. MAXWELL, FINANCING STATE AND LOCAL GOVERNMENT 152 (1965); Note, *Internal Revenue Code and Racial Discrimination*, 72 COLUM. L. REV. 1215, 1219 (1972)).

108. A report of a joint committee of the New York legislature states that tax exemption gives a blind subsidy, controlled by accident, and completely unreviewed as is the case with government grants. *See id.* at 421 n.29 (citing ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF THE STATE IN

prominent figures including a Secretary of the Treasury¹¹¹ and a former President,¹¹² the courts have yet to accept the argument that tax exemption rises to the threshold level of “state action.”¹¹³ As a result, tax exemption has not been used to force change.¹¹⁴

Although the court did not accept the argument,¹¹⁵ the Fourth Circuit Court of Appeals in the 1963 private school desegregation case, *Griffin v. County School Board of Prince Edward County*,¹¹⁶ was the first to acknowledge the theory that tax benefits could be viewed as government aid.¹¹⁷ The court held:

The allowance of such tax credits appears to be an indirect method of channeling public funds to the Foundation The allowance of such tax credits makes uncertain the completeness of the County’s withdrawal from the school business. It might lead to a contention that exclusion of Negroes by schools of the Foundation is county action. Their allowance, however, during the second of the four years that the Foundation has operated its schools does not require a present finding on this record that the County is still in the school business, and that the acts of the Foundation are its acts.¹¹⁸

One year later, however, the Supreme Court reversed the Fourth Circuit, treating both tax credits and direct grants as equivalent forms

STRENGTHENING THE PROPERTY TAX 85 (1963)).

109. A former assistant chief counsel of the I.R.S. stated tax exemptions “save the beneficiaries of the exemption from tax at the expense of individuals who are taxed” and that “[i]t differs only in method from a disbursement of government funds.” *See id.* at 422 n.30.

110. *See id.* at 422 n.33 (recounting the words of Walter W. Heller from his testimony before the House Committee on Ways and Means). Heller noted that:

[t]he back door to government subsidies marked ‘tax relief’ is easier to push open than the front door marked ‘expenditures’ or the side door marked ‘loans, guarantees, and insurance.’ . . . [H]ere is a whole catacombs of Government benefits which are largely hidden from public view, let alone, periodic review.

Id.

111. *See id.* at 422 n.32 (quoting a study presented to the Joint Economic Committee in 1969 by Secretary Joseph Barr, where he said, “[t]hrough special provision in the tax system, similar in effect to appropriations, we are now making available huge sums of money to various functional sectors of the budget”).

112. *See id.* at 422 n.36 (citing LYNDON B. JOHNSON, ECONOMIC REPORT OF THE PRESIDENT 18 (1966)).

113. *See Walz v. Tax Comm’n*, 397 U.S. 664, 675 (1970) (holding that tax exemption is not government sponsorship).

114. *See* discussion *supra* note 19 (noting how findings of “state action” have been used to force organizations to change their activities).

115. *See Griffin v. Bd. of Supervisors*, 322 F.2d 332, 339 (4th Cir. 1963), *rev’d*, 377 U.S. 218 (1964) (acknowledging but not accepting the theory that tax benefits are economic support from the government).

116. *Id.*

117. *See id.* at 338-39 (discussing the benefits of tax-exempt status).

118. *Id.* at 339.

of government assistance.¹¹⁹ This finding, however, involved tax credits, not tax exemptions.¹²⁰

In 1970, the Supreme Court appeared to establish a clear rule relating to tax exemptions in *Walz v. Tax Commissioner of the City of New York*,¹²¹ only to retreat from this position in subsequent cases.¹²² In *Walz*, a realty owner sought an injunction against the New York City Tax Commission from granting tax-exempt status to religious organizations for properties used solely for religious worship.¹²³ The Court denied the injunction and held that although “[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit[,]”¹²⁴ granting a “tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.”¹²⁵ Scholars cite this point to argue that tax exemptions do not rise to the level of “state action.”¹²⁶

In the same year as *Walz*, the United States District Court for the District of Columbia, in *Green v. Kennedy*,¹²⁷ acknowledged that tax benefits do not rise to the level of direct grants, but found “only a difference of degree that does not negative our essential finding . . . that the tax benefits under the [I.R.C.] mean a substantial and significant support by the Government to the segregated private school pattern.”¹²⁸ Two years later, in *McGlotten v. Connally*,¹²⁹ the same court distinguished *Walz*’s stance on tax-exemptions, noting:

119. See *Griffin v. County Sch. Bd.*, 377 U.S. 218, 233-34 (1964) (reversing the judgment of the Court of Appeals to reinstate the District Court’s decision).

120. A tax credit is a dollar-for-dollar reduction of the amount already calculated to be paid in taxes, unlike a deduction, which reduces the amount of taxable income before the amount to be paid in taxes is calculated. See BLACK’S LAW DICTIONARY 367 (7th ed. 1999). Tax exemption, as in § 501(c)(3) tax exemption, relieves the qualifying organization of the duty to pay taxes altogether. See I.R.C. § 501(c)(3) (1994 & Supp. V 1999) (making exemption like a deduction or credit for the entire amount owed).

121. 397 U.S. 664 (1970).

122. See, e.g., *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (abandoning the Court’s analysis in *Walz*).

123. See *Walz v. Tax Comm’n*, 397 U.S. 664, 666 (1970) (outlining the grounds for the suit).

124. *Id.* at 674.

125. *Id.* at 675.

126. See, e.g., Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: “Constitutionalizing” the Internal Revenue Code*, 82 YALE L.J. 51, 70 n.48 (1972) [hereinafter *Taxes and Civil Rights*] (noting that although “state action” was clearly present, the *Walz* Court was correct in finding it insufficient to suggest an establishment of religion).

127. 309 F. Supp. 1127 (D.D.C. 1970).

128. *Id.* at 1134.

129. 338 F. Supp. 448 (D.D.C. 1972).

The holding in *Walz* was that exemption of church property from state property tax did not violate the First Amendment Establishment Clause. As such, it was premised on historical considerations peculiar to the First Amendment: Few concepts are more deeply imbedded in the fabric of our national life . . . than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally.¹³⁰

In 1973, the Supreme Court finally appeared to reverse its *Walz* stance by acknowledging, in *Committee for Public Education and Religious Liberty v. Nyquist*,¹³¹ a “practical similarity” between providing a tax exemption to parents of children in private schools and a New York statute providing both a tuition grant and a tax benefit.¹³²

At the state level, the New Jersey Superior Court held, in the 1974 case *Brunson v. Rutherford Lodge Number 547 of the Benevolent & Protective Order of Elks*,¹³³ that:

The State grants tax exemption to encourage private support of activities in which the State has a vital interest, and to support a service that would otherwise in all likelihood be performed by the State. The public receives services that would require the expenditure of state funds. These mutual benefits constitute a degree of state involvement.¹³⁴

More recently, the New Jersey Tax Court again acknowledged the “similarity between exemptions and subsidies.”¹³⁵

Extending this rationale to its logical conclusion, some authors claim “[i]t now seems beyond contention that tax benefits will continue to be recognized as functional economic equivalents of direct government expenditures.”¹³⁶ Even if that assertion goes too

130. *Id.* at 459 n.58.

131. 413 U.S. 756 (1973).

132. *See id.* at 794 (finding the “*Walz* analogy unpersuasive” and holding the tax exemption to not be “sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools”).

133. 319 A.2d 80 (N.J. Super. Ct. Law. Div. 1974).

134. *Id.* at 92-93 (internal quotations and citations omitted). “In [New Jersey] it has long been recognized that there is a symbiotic relationship between the State and the exempt organization and that the latter is relieved from the burden of taxation because it is practically performing a public work which the State would otherwise have to perform.” *Id.* at 91.

135. *Chester Borough v. World Challenge, Inc.*, 14 N.J. Tax 20, 30 n.3 (Tax Ct. 1994); *accord PIA N.J., Inc. v. Director*, 13 N.J. Tax 94, 97 (Tax Ct. 1993) (comparing New Jersey’s tax exemption for Bibles, N.J. STAT. ANN. § 54:32B-8.25 (West 1993 & Supp. 2000), to Texas’s similar exemption, but noting “the [Texas] exemption lacked a secular objective which justified conferring a government subsidy on such publications”) (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17-18 (1989)).

136. *Tax Incentives*, *supra* note 105, at 425. Some state courts have taken this extra step, calling the grant of tax-exempt status outright “state action.” *See Pitts v. Dep’t of*

far, the less extreme *Green* rationale, reflected in *Brunson* at the state level in New Jersey, still stands: Tax exemption is a substantial and significant form of government financial support.¹³⁷

III. DALE SHOULD SUE TO HAVE THE NEW JERSEY TAX COMMISSIONER REVOKE THE B.S.A.'S STATE LEVEL TAX-EXEMPT STATUS¹³⁸

By affording the B.S.A. tax-exempt status in New Jersey, the state is not only condoning, but also, effectively funding the organization's anti-gay policy.¹³⁹ Dale should, therefore, seek an injunction to prevent the New Jersey Tax Commissioner from maintaining the B.S.A.'s state-level tax-exempt status. To do so, Dale must first establish that he has standing to make such a challenge.¹⁴⁰ Second, he must demonstrate that the New Jersey Tax Commissioner has the authority to revoke the B.S.A.'s state-level tax-exempt status.¹⁴¹ Third, Dale has to explain how the B.S.A.'s anti-gay policy contradicts New Jersey's public policy and frustrates current New Jersey law.¹⁴² Finally, Dale must defeat the B.S.A.'s probable First Amendment-based

Revenue, 333 F. Supp. 662, 669, 670 (E.D. Wis. 1971) (finding, in a case with similar facts to *Brunson*, that "the grant of a tax exemption to . . . organizations [which discriminate in their membership on the basis of race] is significant state action encouraging discrimination in violation of the plaintiffs' rights under the equal protection clause [of the Fourteenth Amendment];" however, providing only an injunction against the grant of tax exemptions, while explicitly not "interfer[ing] with any right of any organization to discriminate in membership on the basis of race"); *Falkenstein v. Dep't of Revenue*, 350 F. Supp. 887, 888-89 (D. Or. 1973). *Falkenstein*, another case with facts similar to *Brunson*, held that:

[t]he State grants tax exemptions to encourage private support of activities in which the State has a vital interest . . . and to support "a service that would otherwise be performed by the State." The public receives services that would require the expenditure of state funds. These mutual benefits constitute a degree of state involvement in discriminatory activity that the Fourteenth Amendment prohibits.

Id. (internal citations omitted).

137. See *Green v. Kennedy*, 309 F. Supp. 1127, 1134 (D.D.C. 1970) (finding tax exemptions amount to some level of state action); *Brunson*, 319 A.2d at 92 (finding tax exemptions to be a "symbiotic relationship" between the state and the exempted group).

138. It is important to note again that *Bob Jones University* only provides the basic method by which Dale could sue to revoke the B.S.A.'s state-level tax-exempt status in New Jersey. This Comment does not suggest Dale should argue from *Bob Jones University* at the state level, but rather, he should apply the method of *Bob Jones University*, significantly interpreted by analogy, to the B.S.A. at the state level.

139. See *supra* text accompanying notes 105-137 (developing this argument further).

140. See *infra* Part III.A (arguing that Dale has standing to challenge the B.S.A.'s tax-exempt status in New Jersey).

141. See *infra* Part III.B (arguing that the New Jersey Tax Commissioner has the authority to revoke the B.S.A.'s state-level tax-exempt status in New Jersey).

142. See *infra* Part III.C (applying the reasoning of *Bob Jones University* to Dale's situation).

affirmative defenses.¹⁴³

A. *Standing*

Standing is the initial hurdle for anyone seeking to challenge an organization's tax-exempt status.¹⁴⁴ Of course, Dale had standing to sue the B.S.A. in his own discrimination case.¹⁴⁵ Establishing standing to challenge the B.S.A.'s tax-exempt status, however, is more difficult because any debate over the B.S.A.'s tax status should arguably be between the B.S.A. and the I.R.S., not between the I.R.S. and a third party.¹⁴⁶ Because this Comment argues for the revocation of the B.S.A.'s state-level tax-exempt status in New Jersey, this section will begin by discussing Dale's strongest argument for achieving standing—the New Jersey statutes upon which various plaintiffs have relied to challenge the property tax-exemptions of third parties. However, since no similar statutory rights exist in New Jersey for a non-property tax oriented suit (and because the theory of revoking the B.S.A.'s tax-exempt status may some day be applied at the federal level), this Comment also considers Dale's chances of achieving

143. See *infra* Part III.D (arguing that the B.S.A.'s probable affirmative defenses should fail).

144. See *Allen v. Wright*, 468 U.S. 737, 750-51 (1984) (noting that the Art. III analysis as to “whether the litigant is entitled to have the court decide the merits of the dispute,” is perhaps the most important part of standing doctrine (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975))).

145. Both the United States Supreme Court and the New Jersey Supreme Court heard *Dale* without ever addressing the issue of Dale's standing to sue. It can therefore reasonably be presumed that both courts believed Dale had standing to bring his claims against the B.S.A. Furthermore, L.A.D.:

[D]eclares that practices of discrimination against any of its inhabitants, because of . . . sexual orientation . . . are a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm . . . giv[ing] rise to legal remedies, including compensatory and punitive damages . . . available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 2000). Under L.A.D., “[a]ny individual who has been discriminated against in violation of the provisions of this act . . . shall have standing in courts of law to institute actions to enforce the provisions of this act.” N.J. STAT. ANN. § 10:5-38 (West 1993 & Supp. 2000).

146. For detailed discussion on the issue of standing in cases challenging tax-exempt status, see Harvey P. Dale, *Standing to Challenge Tax-Exempt Status*, 307 PLI/TAX 491, 526-29 (1990) (discussing the “inconsistent and much criticized” case-law of the standing doctrine). See generally Thomas McCoy & Neal E. Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441 (1984) (arguing that if the courts heeded the fundamental doctrines defining and limiting their role, they would have produced a clear and workable body of law concerning the issue of tax exemptions for racially discriminatory private schools).

standing under the stricter standards applied at the federal level.¹⁴⁷

Dale possesses statutory rights to sue local chapters of the B.S.A. over the tax-exempt status of the property they hold in Monmouth County.¹⁴⁸ The New Jersey Superior Court relied upon these rights in *Brunson*, a case where a “non-white” man sued to revoke the property tax-exemption of a local Elks lodge that employed racially discriminatory membership standards.¹⁴⁹ Citing the relevant code sections, the *Brunson* court noted, “it is necessary that one challenging an exemption be a taxpayer of the county where the property involved is located.”¹⁵⁰ The court continued, “only a taxpayer of the taxing district involved has standing to assert a right to have back taxes assessed and collected.”¹⁵¹ The court found the plaintiff in *Brunson* had standing to sue¹⁵² and subsequently ruled in

147. The theory behind this approach is that if standing is achievable under the stricter federal standard, it should be so at the state level. *See infra* note 156 (explaining how New Jersey’s standing approach is similar to, yet less strict than, the federal approach).

148. *See* N.J. STAT. ANN. 54:3-21 (West 1993 & Supp. 2000) (“A taxpayer . . . feeling discriminated against by the assessed valuation of other property in the county . . . may . . . appeal to the county board of taxation by filing with it a petition of appeal; provided, however, that any such taxpayer . . . file a complaint directly with the Tax Court, if the assessed valuation of the property subject to the appeal exceeds \$750,000.00.”); N.J. STAT. ANN. 54:4-63.13 (West 1993 & Supp. 2000) (“On the written complaint of . . . any taxpayer, of the taxing district . . . the county board of taxation shall hear the matter. Any such complaint or motion shall specify the property alleged to have been omitted and the particular year of the assessment.”).

149. *See* *Brunson v. Rutheford Lodge No. 547 of the Benevolent & Protective Order of Elks*, 319 A.2d 80, 89 (N.J. Sup. Ct. Law Div. 1974) (describing the basis for the suit). *Brunson* was originally filed as a class action attacking all tax exemptions and liquor licenses granted to all Elks lodges in New Jersey. *See id.* at 82. The class “as contemplated by plaintiffs could not be maintained” against all of the Elks Lodges without adding plaintiffs who had been injured by each. *See id.* at 83. The suit was thus amended leaving only the tax matters with respect to the Rutherford and Nutley Lodges before the Court. *See id.* at 84; *see also id.* at 82 (noting that *Brunson* is the first instance of this issue arising in New Jersey).

150. *Id.* at 83 n.2 (citing N.J. STAT. ANN. 54:3-21 (West 1993 & Supp. 2000); *Pleasantville Taxpayers v. Pleasantville*, 278 A.2d 229 (N.J. Super. Ct. App. Div. 1971)).

151. *Id.* (citing N.J. STAT. ANN. 54:4-63.13 (West 1993 & Supp. 2000); *Jabert Operating Corp. v. Newark*, 85 A.2d 216 (N.J. Super. Ct. App. Div. 1951)).

152. *See id.* at 83 (limiting the attempted class action attack on all Elks lodges in New Jersey to one plaintiff’s attack on two local lodges); *see also* *Atrium Dev. Corp. v. Cont’l Plaza Corp.*, 520 A.2d 827, 828-29 (N.J. Super. Ct. App. Div. 1987) (finding standing in a similar case, and noting that to not find standing would “unjustifiably impair[] a taxpayer’s opportunity to ensure the integrity of the local tax scheme which demands equality of treatment for all,” and that the state’s “well-settled policy [on taxpayer standing] is based on the perception that the potential for abuse is outweighed by the necessity of providing a broad range of techniques for ensuring the ultimate fairness of the local property tax system”); *Hackensack v. Hackensack Med. Ctr.*, 549 A.2d 869, 871 (N.J. Super. Ct. App. Div. 1988) (“The argument that someone else may have received improper tax treatment does not entitle the taxpayer to an exemption not authorized by statute. Rather, it may give rise to ground for any taxpayer in the taxing district to challenge such exemption.”).

his favor, revoking the tax-exempt status of the local Elks lodges.¹⁵³ Although a few states have deviated from finding standing in similar situations,¹⁵⁴ no New Jersey decision has challenged the clear grant of standing intended by the New Jersey legislature.¹⁵⁵

Beyond suits challenging property tax-exemption, New Jersey standing doctrine largely mirrors the federal regime; if anything, the standard applied at the state level is less strict than that applied at the federal level.¹⁵⁶ Therefore, if Dale can achieve standing under the federal regime with regard to all forms of B.S.A. tax-exemptions, he should be able to do the same in New Jersey.

In the Supreme Court case *Simon v. Eastern Kentucky Welfare Rights Organization*,¹⁵⁷ several indigents and indigent organizations sued the I.R.S. for issuing a Revenue Ruling granting favorable tax treatment to nonprofit hospitals that refused indigents non-emergency room service.¹⁵⁸ The Court noted “the ‘case or controversy’ limitation of Article III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”¹⁵⁹ In *Simon*, the Court denied standing

153. See *Brunson*, 319 A.2d at 93 (finding the exemptions for the tax years in questions invalid under both the federal and state Constitutions).

154. See generally Daniel F. Sullivan, Annotation, *Standing of One Taxpayer to Complain of Underassessment or Nonassessment of Property of Another for State or Local Taxation*, 9 A.L.R. 4th 428 (1981 & Supp. 2000) (detailing the split of authority on the issue of taxpayer standing to challenge the property tax assessment of another taxpayer).

155. See *id.* at 446-47, 475-76 (showing a clear trend in New Jersey to grant standing to taxpayers challenging third-party tax burdens).

156. See *Crescent Park Tenants Ass'n v. Realty Eq. Corp. of N.Y.*, 275 A.2d 433, 437-38 (N.J. 1971) (quoted in *Chamber of Commerce v. New Jersey*, 445 A.2d 353, 357-58 (N.J. 1982), as the “now well-established policy enunciated by Justice Jacobs”).

Unlike the Federal Constitution, there is no express language in New Jersey's Constitution which confines the exercise of our judicial power to actual cases and controversies. Nevertheless we will not render advisory opinions or function in the abstract nor will we entertain proceedings by plaintiffs who are “mere intermeddlers” or are merely interlopers or strangers to the dispute. Without ever becoming enmeshed in the federal complexities and technicalities, we have appropriately confined litigation to those situations where the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness. In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of “just and expeditious determinations of the ultimate merits.”

Id.

157. 426 U.S. 26 (1976).

158. See *id.* at 28 (discussing the basis for this suit).

159. *Id.* at 41-42. See also U.S. CONST. art. III, § 2.

The judicial power shall extend to all Cases, in Law and Equity, arising under the Constitution [or] the Laws of the United States . . . [and] to *Controversies*

because the plaintiffs could neither show they were personally injured nor carry the burden of demonstrating that their alleged injury resulted from the I.R.S.' Revenue Ruling.¹⁶⁰

Eight years later, the Supreme Court continued to hone its test for standing. In *Allen v. Wright*,¹⁶¹ parents of African-American children attending public schools in districts undergoing desegregation challenged the I.R.S.' failure to deny tax-exempt status to racially discriminatory private schools across the country.¹⁶² The parents alleged injury to their children due to their diminished ability to receive a desegregated public education.¹⁶³ The parents argued that the I.R.S.' grant of tax-exempt status to discriminatory private schools undermined desegregation efforts in public schools.¹⁶⁴

The *Allen* Court held that to secure standing a "plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."¹⁶⁵ The plaintiffs in *Allen* failed to satisfy this two-part test because they could not show how the I.R.S.' grant of tax-exempt status to racially discriminatory private schools across the country resulted in their children's direct personal injury.¹⁶⁶ Moreover, the Court noted that if they found the attenuated injury in *Allen* cognizable, "standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school regardless of the location of that school."¹⁶⁷ Because the Court failed to find an

to which the United States shall be a party; to *Controversies* between two or more States . . . between Citizens of Different States . . . and between a State, or Citizens thereof, and foreign States, Citizens or Subjects.

Id. (emphasis added).

160. See *Simon*, 426 U.S. at 40 (discussing the reasons for denying standing).

161. 468 U.S. 737, 739 (1984).

162. See *id.* at 739 (discussing the basis of the *Allen* plaintiffs' claims).

163. See *id.* at 746 (detailing the alleged injuries).

164. See *id.* ("[B]ecause contributions to such schools are deductible . . . and the 'deductions facilitate the raising of funds to organize new schools and expand existing schools in order to accommodate white students avoiding attendance in desegregating public school districts.'").

165. *Id.* at 751. The Court further explained the "fairly traceable" component of the standing inquiry "examines the causal connection between the assertedly unlawful conduct and the alleged injury;" whereas the "redressability" component "examines the causal connection between the alleged injury and the judicial relief requested." *Id.* at 753 n.19.

166. See *id.* at 754 (holding that plaintiffs' claim was not judicially cognizable under either a government avoidance of violation of the law interpretation nor a stigmatic injury interpretation). As noted, lacking personal injury, non-economic stigmatic injury "accords a basis for standing only to those who are personally denied equal treatment by the challenged discriminatory conduct." *Id.* at 755 (internal quotations omitted).

167. *Id.* at 755-56. *But see id.* at 758.

injury fairly traceable to the alleged illegal conduct of the I.R.S., it never reached the second part of its standing test: redressability.¹⁶⁸

Other cases, however, have found standing when a third party challenges the tax-exempt status of an organization. For example, in *McGlotten* an African-American man successfully sought to enjoin the Secretary of Treasury from granting income tax exemption, as well as the related deductibility of contributions, to fraternal nonprofit organizations that excluded non-whites.¹⁶⁹ *McGlotten's* suit was based on the Local Elks Lodge's refusal to grant him membership because of his race.¹⁷⁰ This case and *Allen* differ in that *McGlotten* himself could allege a clear injury.¹⁷¹ The injuries alleged were: "1) that the funds generated by such tax benefits enable[d] segregated fraternal orders to maintain their racist membership policies; and 2) that such benefits constitute[d] an endorsement of blatantly discriminatory organizations by the Federal Government."¹⁷² The *McGlotten* court held that these injuries were sufficient to find standing.¹⁷³

In a suit to enjoin the New Jersey Tax Commissioner from maintaining the B.S.A.'s state-level tax-exemptions, Dale should be able to overcome any standing barriers. Because Dale personally had his B.S.A. membership revoked based solely on his sexual

The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration.

Id.

168. See *infra* notes 176-179 (discussing the issue of redressability in terms of Dale's potential suit).

169. See *McGlotten v. Connally*, 338 F. Supp. 448, 450 (D.D.C. 1972) (discussing the facts of the case).

170. See *id.* (providing information regarding background of *McGlotten's* suit).

171. See *infra* note 172 and accompanying text (detailing *McGlotten's* alleged injury).

172. *McGlotten*, 338 F. Supp. at 452.

173. See *id.* (ruling that these kinds of injuries have historically been settled by the courts, i.e., these injuries are sufficient to find standing); see also *Pitts v. Dep't of Revenue*, 333 F. Supp. 662, 669-70 (E.D. Wis. 1971) ("Under the teachings of *Flast v. Cohen*, 392 U.S. 83 (1968), we believe that the standing of the plaintiffs . . . cannot be questioned. In addition in an amended complaint the plaintiff Pitts, who is black, has alleged additional standing in that he asserts that his application for membership in one organization which qualifies for exemption was denied because that organization's national charter and by-laws deny membership to non-caucasians."); *Falkenstein v. Dep't of Revenue*, 350 F. Supp. 887, 888 (D. Or. 1972) (finding standing in a case identical to *McGlotten*). It is interesting to note that Mr. Clifford *McGlotten* appears to be the plaintiff upon which standing hinged in both the *McGlotten* and *Falkenstein* cases. Compare *McGlotten*, 338 F. Supp. at 448 (naming "Clifford V. *McGlotten*" in case name), with *Falkenstein*, 350 F. Supp. at 887, 888 (naming "Clifford V. *McGlotten*" as secondary plaintiff in case name and finding standing based upon *McGlotten* and not *Falkenstein's* injury).

orientation,¹⁷⁴ he sustained a personal injury from the B.S.A.'s policy, which the state Tax Commissioner supports through tax-exemption.¹⁷⁵ In his complaint, Dale could assert similar injuries to those alleged in *McGlotten*: (1) that the funds generated by such tax benefits enable the B.S.A. to maintain their discriminatory practices; and (2) that such benefits constitute an endorsement of a blatantly discriminatory organization by both the federal and state governments. As in *McGlotten*, these claims alone should be sufficient to find standing for Dale, or at least to satisfy the "fairly traceable" part of the *Allen* test for standing.

Dale also can overcome *Allen*'s redressability requirement.¹⁷⁶ As the *Allen* Court noted, when the relief requested is "simply the cessation of the allegedly illegal conduct . . . the 'redressability' analysis is identical to the 'fairly traceable' analysis."¹⁷⁷ In that Dale seeks to have the New Jersey Tax Commissioner deny the B.S.A. its state-level tax-exempt status and thus cease the allegedly illegal conduct of granting that status, the "redressability" and "fairly traceable" analyses should be identical. Since Dale's injury is sufficient under the "fairly traceable" analysis,¹⁷⁸ it should also satisfy the "redressability" requirement. Nevertheless, revoking the B.S.A.'s state-level tax-exempt status should—as this Comment strives to prove—help encourage the B.S.A. to abandon its discriminatory policy, thereby redressing Dale's greater injury.¹⁷⁹

At a minimum, Dale can achieve standing to challenge local B.S.A.

174. See *supra* note 72 and accompanying text (noting that Dale was expelled by the B.S.A. because the B.S.A. "specifically forbids membership to homosexuals").

175. See *supra* Part II.A (discussing how tax exemption effectively subsidizes organizations' policies).

176. See *supra* note 165 and accompanying text (noting the *Allen* two-part test for standing and further explaining each part of the test).

177. *Allen v. Wright*, 468 U.S. 737, 759 n.24 (1984) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40-46, 39 n.19 (1976)) (addressing the redressability part of *Allen*'s standing test). The majority in *Allen* chose not to undergo a redressability analysis, having denied standing because the plaintiff's injury was not believed to be fairly traceable to the illegal conduct alleged. Justice Stevens did, however, consider the redressability issue in his dissent, arguing that:

[T]he laws of economics, not to mention the laws of Congress embodied in §§ 170 and 501(c)(3), compel the conclusion that the injury respondents have alleged—the increased segregation of their children's schools because of the ready availability of private schools that admit whites only—will be redressed if these schools' operations are inhibited through the denial of preferential tax treatment.

Id. at 788 (Stevens, J., dissenting).

178. See *supra* Part III.A (finding that Dale's injury should be found "fairly traceable" to the B.S.A.'s illegal conduct).

179. See *Allen*, 468 U.S. at 751 (noting that to achieve standing, the alleged injuries must be likely to be redressed by the requested relief).

chapters' property tax exemptions,¹⁸⁰ as was the case *Brunson*.¹⁸¹ He should also be able to satisfy both parts of the *Allen* standing test, thereby meeting a standard strict enough to ensure standing at the state level.¹⁸²

B. The New Jersey Tax Commissioner Has the Authority to Revoke the B.S.A.'s State-Level Tax-Exempt Status

In *Bob Jones University*, the petitioners claimed the I.R.S. overstepped its lawful bounds by revoking Bob Jones University's § 501(c)(3) status, arguing that only Congress can alter the code section's scope.¹⁸³ The B.S.A. would likely make a similar argument if faced with a revocation of its state-level tax-exempt status. The Supreme Court in *Bob Jones University* addressed this argument and ultimately ruled in favor of the I.R.S.¹⁸⁴

The Court noted that Congress, considering its authority extends well beyond matters of taxation, must rely upon an agency to oversee the day-to-day implementation of tax laws and to anticipate likely problems.¹⁸⁵ Given the complexity of the I.R.C. and the associated problems that arise from a society with an ever-changing system of values and beliefs, denying an agency the authority to interpret these laws would hobble the tax system and hinder the progress of tax jurisprudence.¹⁸⁶ Accordingly, Congress explicitly granted the

180. *See supra* notes 148-155 and accompanying text (explaining Dale's statutory right to challenge another's property tax exemption in New Jersey).

181. The *Brunson* court found the plaintiff had standing to sue even though the only evidence of personal injury resulted from his application not being "fully pressed" because Lodge members persuaded him that the Lodge's policy would result in his rejection on racial grounds. *See Brunson v. Rutheford Lodge No. 547 of the Benevolent & Protective Order of Elks*, 319 A.2d 80, 89 (N.J. Super. Ct. Law. Div. 1974) (stating the nature of the injury to Brunson); *accord Schwartz v. Essex County Bd. of Taxation*, 32 A.2d 354 (N.J. 1943) (holding that a taxpayer who filed a complaint with the local board of taxation claiming certain property had been omitted from the tax tables and had had his complaint dismissed because the property was tax-exempt by statute, had standing to challenge the statutory exemption scheme; however, the court dismissed the case on the ground that the exemption scheme was valid), *aff'g* 28 A.2d 482 (N.J. Sup. 1942).

182. *See supra* note 156 (acknowledging how New Jersey's standing scheme mirrors, yet is less strict than, the federal regime).

183. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1982) (detailing petitioners' argument that the I.R.S.' conclusion was irrelevant because the I.R.S. did not have the power to change § 501(c)(3) tax-exempt status).

184. *See id.* at 596-99 (ruling upon the I.R.S.' authority to change the applicability of the I.R.C.).

185. *See id.* at 597 (noting that, although Congress enacted the tax code, "the need for continuing interpretations of those statutes is unavoidable").

186. *See id.* (discussing Congress' delegation of authority to the I.R.S.). Regardless, scholars debating the revocation of tax exemption have argued that the separation of powers requires that only Congress make the laws. *See, e.g., Yaffa, supra* note 92, at 188 ("[T]he point of this Comment is to suggest that it is within the

Commissioner of Internal Revenue the authority to make “‘all needful rules and regulations for the enforcement’ of the tax laws.”¹⁸⁷ This grant of authority subsequently appeared in the tax code itself.¹⁸⁸ Moreover, since the inception of the tax code, “Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws.”¹⁸⁹ Of course, just as Congress can modify the I.R.S. rulings it deems improper, the courts can exercise judicial review over both I.R.S. interpretations and Congressional changes to the I.R.C.¹⁹⁰ Nevertheless, the initial authority to interpret the I.R.C. rests solely with the I.R.S.¹⁹¹

For the purposes of Dale’s suit, the same holds true at the state level. The New Jersey statute that deals with “particular taxes on corporations and others” necessarily includes exempt nonprofit corporations.¹⁹² As is true at the federal level, the “[state tax]

purview of Congress, rather than of an administrative agency, to resolve issues of such significance and sensitivity . . . Congress alone should define the public policy boundaries to be imposed upon this section [501(c)(3)] of the tax code.”). In answer to such arguments, it is important to note the potential for bias in a situation where Congress, and not the I.R.S., is interpreting the I.R.C. and its effect on the B.S.A. See Boy Scouts of America, *The Congress and Scouting* (noting that over 50% of the 106th Congress participated in Scouting; sixty-six senators and 209 representatives participated in Scouting; seven senators and sixteen representatives achieved the rank of Eagle Scout), at <http://www.scouting.org/factsheets/02-571.html> (last visited Mar. 31, 2001).

187. *Bob Jones Univ.*, 461 U.S. at 596 (quoting Revenue Act of 1918, ch. 18, § 1309, 40 Stat. 1057, 1143 (1919)).

188. See I.R.C. § 7805(a) (1994 & Supp. V 1999) (granting the I.R.S. the authority to interpret the I.R.C.).

189. *Bob Jones Univ.*, 461 U.S. at 596.

190. See *id.* at 596 (noting the constraints on I.R.S. decision making); see also Jennifer C. Root, *The Commissioner’s Clear Reflection of Income Power Under § 446(B) And The Abuse of Discretion Standard of Review: Where Has The Rule of Law Gone, And Can We Get It Back?*, 15 AKRON TAX J. 69, 74-76 (2000) (discussing roles of administrative agencies and oversight of the I.R.S.). Root maintains that control of the modern tax code today rests largely in the Executive Branch, through the Department of the Treasury, rather than the courts. *Id.* at 75. But see *South Carolina v. Regan*, 465 U.S. 367, 388 (1984) (discussing the “dangers” inherent in allowing the courts to exercise their injunctive power in the administration of taxation; “[i]f there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary.”) (quoting *Cheatham v. United States*, 92 U.S. 85, 89 (1875)).

191. See *supra* note 188 and accompanying text (citing the I.R.S.’ statutory authority to interpret the I.R.C.); accord *Bob Jones Univ.*, 461 U.S. at 597-98 (“[T]he IRS has the responsibility, in the first instance, to determine whether a particular entity is ‘charitable’ for purposes of § 170 and § 501(c)(3).”).

192. See N.J. STAT. ANN. § 54:10A-3 (West 1986 & Supp. 2000); see also *In re Dejesus*, 243 B.R. 241, 247 (Bankr. D.N.J. 1999).

The tax collection law applies to any “state tax,” defined as “any tax which is payable to or collectible by the state tax commissioner.” Under the Uniform Procedures Act, the *Director of the Division of Taxation has the authority to make assessments, by estimating or direct review of returns, and to provide notice and a demand for payment.*

commissioner shall prescribe and issue such rules and regulations . . . for the interpretation and application of the provisions of this act, as he may deem necessary.”¹⁹³

As for interpreting tax-exempt status at the federal level, “Congress has identified categories of traditionally exempt institutions and has specified certain additional requirements for tax exemption,”¹⁹⁴ but has relied upon the I.R.S. to interpret these code sections for more than sixty years.¹⁹⁵ When the I.R.S. determines which organizations will receive tax-exempt status, it generally considers whether the organization’s activities violate fundamental public policy.¹⁹⁶

In *Bob Jones University*, the Supreme Court held that the I.R.S. did not exceed its authority when it announced its interpretation of § 501(c)(3) in 1970 and 1971.¹⁹⁷ The Court reasoned that established

Id. (emphasis added) (internal citations omitted).

193. N.J. STAT. ANN. § 54:10A-27 (West 1986 & Supp. 2000); *see also Dejesus*, 243 B.R. at 247.

194. *Bob Jones Univ.*, 461 U.S. at 597.

195. *See id.* (describing instances where the I.R.S. was called upon to interpret these and comparable provisions). This is not to say that Congress has remained silent on the issue of tax-exempt organizations, leaving it solely in the hands of the I.R.S. to promulgate all applicable rules and regulations. On October 20, 1976, Congress enacted I.R.C. § 501(i). *See* Pub. L. No. 94-568, 90 Stat. 2697 (1976). Section 501(i) “denies tax-exempt status to social clubs whose charters or policy statements provide for ‘discrimination against any person on the basis of race, color, or religion.’” *Bob Jones Univ.*, 461 U.S. at 601. Section 501(i) reads in part:

Notwithstanding subsection (a), an organization which is described in subsection (c)(7) shall not be exempt from taxation under subsection (a) for any taxable year if, at any time during such taxable year, the charter, bylaws, or other governing instrument, of such organization or any written policy statement of such organization contains a provision which provides for discrimination against any person on the basis of race, color, or religion.

I.R.C. § 501(i) (1994 & Supp. V 1999). In enacting this subsection, Congress “indicated their approval of the standards applied to racially discriminatory private schools by the I.R.S. subsequent to 1970, and specifically of Revenue Ruling 71-447.” *Bob Jones Univ.*, 461 U.S. at 602; *see also* John Evan Edwards, Casenote, *Democracy and Delegation of Legislative Authority: Bob Jones University v. United States*, 26 B.C. L. REV. 745, 764 (1985) (reasoning that the enactment of § 501(i) showed that “Congress was in agreement with the I.R.S.’ conclusion that discrimination is impermissible in tax-exempt educational institutions”); Thomas McCoy & Neal Devins, *Standing and Adverseness In Challenges of Tax Exemptions For Discriminatory Private Schools*, 52 FORDHAM L. REV. 441, 455 n.71 (1984) (noting that “Congress’ amendment of the Internal Revenue Code to prohibit the granting of tax exemptions to racially discriminatory private clubs . . . [I.R.C.] § 501(i) (1976 & Supp. V 1981), strongly suggests that Congress regards the social welfare function of groups receiving tax exemptions to be very important”).

196. *See Bob Jones Univ.*, 461 U.S. at 597-98 (noting the I.R.S.’ reliance upon charitable trust law in making such determinations as well as discussing the standard against which a charitable organization is measured). This standard will be discussed in detail below. *See infra* Part III.C.1 (explaining that the activities of tax-exempt organizations must align with established public policy).

197. *See Bob Jones Univ.*, 461 U.S. at 599 (ruling the I.R.S. was correct in interpreting § 501(c)(3) to exclude institutions engaging in practices contrary to the declared position of the government).

public policy prohibited racial discrimination and, therefore, the I.R.S. could not ignore the decisions of all three branches of the federal government.¹⁹⁸ As noted earlier, no similar federal policy exists prohibiting sexual orientation discrimination.¹⁹⁹ If Dale, however, can show that New Jersey espouses a similar public policy against sexual orientation discrimination,²⁰⁰ the New Jersey Tax Commissioner would not exceed his authority by revoking the B.S.A.'s state-level tax-exempt status.

C. *Applying the Reasoning of Bob Jones University to the Dale Case*

1. *The activities of tax-exempt organizations must both align with established public policy and conform with current legal mandates*

In the *Bob Jones University* decision, the Supreme Court first focused upon the I.R.S.' Revenue Ruling 71-447.²⁰¹ Within that Ruling, the I.R.S. stated "[u]nder common law, the term 'charity' encompasses all three of the major categories identified separately under [§] 501(c)(3) of the Code as religious, educational, and charitable."²⁰² Therefore, to receive § 501(c)(3) tax exemption, an organization must show first that it falls within one of these categories; and second, that its activities are not contrary to public policy.²⁰³

Although the University argued that the statute did not expressly require all organizations be "charitable,"²⁰⁴ the Court noted, "it is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."²⁰⁵ Because

198. *See id.* at 598 (noting the federal government's consensus against racial discrimination); *see also infra* notes 237-239 (detailing this consensus).

199. *See Walsh, supra* note 37, at 528 (discussing the debate surrounding inclusion of "sexual orientation" in federal anti-discrimination laws).

200. This is a conclusion that will be argued below. *See infra* Part III.C.2 (discussing the basis of New Jersey's policy against discrimination, specifically on the basis of sexual orientation); *see also* N.J. STAT. ANN. § 10:5-1 to 10:5-12 (West 1993 & Supp. 2000).

201. *See Bob Jones Univ.*, 461 U.S. at 579 (noting that Revenue Ruling 71-447 formalized the I.R.S.' revised policy on discrimination).

202. Rev. Rul. 71-447, 1971-2 C.B. 230.

203. *See Bob Jones Univ.*, 461 U.S. at 586 (analyzing § 501(c)(3) "within the framework of the [I.R.C.] and against the background of the Congressional purposes").

204. *See id.* at 585-86 (recounting the University's argument that "if an institution falls within one or more of the specified categories it is automatically entitled to exemption, without regard to whether it also qualifies as 'charitable'").

205. *Id.* at 586. The Court also stated that the literal language "mode of expounding a statute has never been adopted by any enlightened tribunal because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish." *Id.* (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183,

“an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy”²⁰⁶ and Bob Jones University’s discriminatory admissions standards ran counter to established public policy,²⁰⁷ the Supreme Court correctly upheld the I.R.S.’ revocation of Bob Jones University’s tax-exempt status.²⁰⁸

In the *Bob Jones University* opinion, the Supreme Court explained that the history of tax exemption turns upon an understanding of charity and its relation to public welfare.²⁰⁹ Section 501’s complement, § 170 of the I.R.C., making contributions to tax-exempt organizations deductible, is entitled “[c]haritable, etc., contributions and gifts.”²¹⁰ Section 170 even lists organizations that mirror those covered by § 501(c)(3).²¹¹ In *Bob Jones University*, the Supreme Court determined that “Congress intended that list to have the same meaning in both sections [of the I.R.C.].”²¹² The Court concluded, “Congress’ intention was to provide tax benefits to organizations serving charitable purposes . . . to encourage the development of private institutions that serve a useful public purpose.”²¹³ Organizations that are tax exempt under § 501(c)(3) are the very same organizations that can receive deductible donations under § 170; thus, the charitable nature of § 170 is intertwined with § 501(c)(3)’s grant of tax-exempt status.

This public benefit doctrine, relied upon in *Bob Jones University*, was not, however, a novel theory. Nearly sixty years earlier, the Court in

194 (1857)).

206. *Id.*

207. *See supra* notes 101-103 and accompanying text (discussing the *Bob Jones University* decision).

208. *See* *Bob Jones Univ.*, 461 U.S. at 605 (holding that Bob Jones University’s ban on intermarriage and interracial dating violated public policy because it was a form of racial discrimination).

209. *See id.* at 589 (noting that Congress created the first tax exemption because charities “provide a benefit to society”).

210. I.R.C. § 170 (1994 & Supp. V 1999) (emphasis added).

211. *Compare id.* § 170(c)(2)(B) (defining a deductible “charitable contribution” as “(c) . . . a contribution or gift to or for the use of . . . (2) a corporation, trust, or community chest, fund, or foundation . . . (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes”), *with id.* § 501(c)(3) (“Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.”); *accord* *Bob Jones Univ.*, 461 U.S. at 586 (“This ‘charitable’ concept appears explicitly in § 170 of the Code. That section contains a list of organizations virtually identical to that contained in § 501(c)(3).”).

212. *Bob Jones Univ.*, 461 U.S. at 586-87.

213. *Id.* at 587-88. The Court in *Bob Jones University* noted further that “to the extent that § 170 ‘aids in ascertaining the meaning’ of § 501(c)(3), therefore, it is ‘entitled to great weight.’” *Bob Jones Univ.*, 461 U.S. at 588 n.10 (quoting *United States v. Stewart*, 311 U.S. 60, 64-65 (1940)).

*Trinidad v. Sagrada Orden*²¹⁴ noted, “the [§ 501(c)(3)] exemption is made in recognition of the benefit which the public derives from corporate activities . . . and is intended to aid them when not conducted for private gain.”²¹⁵ In 1938, Congress expressly reconfirmed the theory underlying charitable tax exemptions:

The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare.²¹⁶

The Court further explained that, to be deemed “charitable,” a court must find “some real advantages to the public which more than offset the disadvantages arising out of special privileges accorded charitable trusts.”²¹⁷

As the Court in *Bob Jones University* continued, “when the Government grants exemptions . . . all taxpayers are affected; the very fact of the exemption . . . means that other taxpayers can be said to be indirect and vicarious ‘donors.’”²¹⁸ Through tax exemption, the state subsidizes the actions of the exempt organization²¹⁹ and requires taxpayers to fund groups they may not wish to support. Therefore,

[T]o warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.²²⁰

Under the Court’s interpretation in *Bob Jones University*, unless an organization aligns with public policy, a government cannot justify granting it tax-exempt status.

New Jersey also adheres to this doctrine. In *Pompton Lakes Senior Citizens Housing Corp. v. Borough of Pompton Lakes*,²²¹ the New Jersey Tax Court noted, “public policy considerations underl[ie] the

214. 263 U.S. 578 (1924).

215. *Id.* at 581.

216. *Bob Jones Univ.*, 461 U.S. at 590 (quoting the Revenue Act of 1938, ch. 289, 52 Stat. 447 (1938)).

217. *Id.* (citing GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 361, at 3 (rev. 2d ed. 1977)).

218. *Id.* at 591.

219. *See supra* notes 105-136 and accompanying text (discussing how tax exemption, although not “state action,” is a form of government subsidy).

220. *Bob Jones Univ.*, 461 U.S. at 592.

221. 16 N.J. Tax 331 (Tax Ct. 1997).

charitable purposes tax exemption.”²²² For example, the New Jersey charitable land tax exemption for land “owned and maintained . . . for the benefit of the public,”²²³ requires that such land be “open to all on an equal basis and that a tax exemption for such property would be in the public interest.”²²⁴ The New Jersey Superior Court explained in *Brunson*, “[e]xemptions . . . are only favored in legislation, upon the theory that the concession is due as quid pro quo for the performance of a service essentially public, and which the state thereby is relieved pro tanto from the necessity of performing.”²²⁵ New Jersey courts place great weight on the public interest standard, as they strictly construe legislative requirements for tax exemption and resolve any doubts against the organization claiming exemption.²²⁶

A corollary to the public benefit principle requires that “the purpose of a charitable trust may not be illegal . . . [and] must be consistent with local laws,”²²⁷ a doctrine established by *Tank Truck Rentals, Inc. v. Commissioner*.²²⁸ In *Tank Truck Rentals, Inc.*, the Tax Court of Pennsylvania upheld the Commissioner’s disallowance of

222. *Id.* at 344.

223. N.J. STAT. ANN. § 54:4-3.64 (West 1983 & Supp. 2000) (cited in *Black United Fund of N.J., Inc. v. City of E. Orange*, 17 N.J. Tax 446, 453 (Tax Ct. 1998)).

224. *Id.* § 54:4-3.66 (cited in *Black United Fund*, 17 N.J. Tax at 453).

225. *Brunson v. Rutheford Lodge No. 547 of the Benevolent & Protective Order of Elks*, 319 A.2d 80, 91 (N.J. Super. Ct. Law. Div. 1974) (emphasis added); *accord Falkenstein v. Dep’t of Revenue*, 350 F. Supp. 887, 888 (D. Or. 1972) (“[T]ax exemptions . . . benefit both the State and the organizations. [The State] relieves . . . the burden of property and corporate excise taxes and, in return, the public benefits from the charitable and benevolent activities of these organizations.”).

226. *See Morris Township v. LF Assoc.*, 10 N.J. Tax 240, 248-49 (Tax Ct. 1988).

All matters of tax exemption involve the application of broad public policy concepts, yet it is well recognized in testing entitlement to tax exemption that legislative requirements must be strictly construed. The general rule in interpreting tax exemptions is that such exemptions are to be strictly construed because an exemption from taxation is a departure from the equitable principle that everyone should bear his just and equal share of the public tax burden. Taxation is the rule, and exemption is the exception to the rule. The legislative design to release one from his just proportion of the public burden should be expressed in clear and unequivocal terms. The burden is upon the claimant to clearly bring himself within an exemption provision. Tax exemptions are not favored, and doubts are to be resolved against one claiming the exemption.

Id. (internal citations omitted); *see also City of Hackensack v. Hackensack Med. Ctr.*, 549 A.2d 869, 870 (N.J. Super. Ct. App. Div. 1988) (“[T]ax exemptions are not favored and exemption provisions are strictly construed against those claiming the exemption.”) (citing *Amerada Hess Corp. v. Div. of Tax*, 526 A.2d 1029 (N.J. 1987); *Bloomfield v. Acad. of Med.*, 221 A.2d 15 (N.J. 1966); *Princeton Univ. Press v. Princeton*, 172 A.2d 420 (N.J. 1961)).

227. *See Bob Jones Univ.*, 461 U.S. at 591 (recognizing the “long-established rule” in the law of trusts that a trust may not violate public policy).

228. 356 U.S. 30 (1958).

“ordinary and necessary” business expense deductions a trucking company claimed for fines paid for violating Pennsylvania’s maximum weight laws for highways.²²⁹ The Supreme Court affirmed, reasoning that Congress’ intent in defining tax policy was not to encourage violation of declared state policy.²³⁰ Allowing the deduction, the Court held, would “frustrate sharply defined national or state policies proscribing particular types of conduct evidenced by some governmental declaration thereof.”²³¹ The Court, noting that the test for non-deductibility is the “severity and immediacy of the frustration resulting from allowance of the deduction,”²³² disallowed the deductions based in part upon established state policy of prescribed weight laws.²³³

In *Green v. Connally*,²³⁴ the United States District Court of the District of Columbia relied upon *Tank Truck Rentals, Inc.*’s “frustration theory,” holding that § 501(c)(3) did not provide tax exemption for organizations that employed racially discriminatory admissions policies.²³⁵ In doing so, the court noted the strong federal public policy against supporting racially segregated schools,²³⁶ based upon the Thirteenth Amendment,²³⁷ *Brown v. Board of Education*,²³⁸

229. *See id.* at 31 (providing the factual background of the case).

230. *See id.* at 35 (noting that the fines were “clearly punitive” and, therefore, to allow deductions for them would “thwart” state policy and encourage continued violation).

231. *Id.* at 33-34.

232. *Id.* at 35.

233. *See id.* at 36-37 (noting that “since the maximum weight statutes make no distinction between innocent and willful violators, state policy is as much thwarted in the one instance as in the other”).

234. 330 F. Supp. 1150 (D.D.C. 1971), *aff’d mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971). *Green v. Connally*, decided on June 30, 1971, was the ruling that followed the January 12, 1970 *Green v. Kennedy* injunction discussed above. *See supra* notes 95-97.

235. *See* 330 F. Supp. at 1179 (making the *Green v. Kennedy* injunction permanent). As the Court noted:

[t]his public policy limitation on tax benefits applies *a fortiori* to the case before us, involving the charitable deduction whose very purpose is rooted in helping institutions because they serve the public good. The [I.R.C.] does not contemplate the granting of special Federal tax benefits to trusts or organizations . . . whose organization or operation contravene[s] Federal public policy.

Id. at 1162; *see also* Yaffa, *supra* note 92, at 163 (discussing the *Connally* court’s reliance on *Tank Truck Rentals, Inc.*).

236. *See Connally*, 330 F. Supp. at 1163-64 (discussing the basis in precedent of the public policy against supporting segregated schools).

237. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

238. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (finding that “segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive[s] the children of the

and the Civil Rights Act of 1964.²³⁹ The Supreme Court affirmed *Connally* and the use of the frustration theory within six months of the lower court's ruling.²⁴⁰ Although no New Jersey Court has yet cited *Tank Truck Rentals, Inc.*, several New Jersey tax cases have applied the frustration doctrine.²⁴¹

2. "Bob Jonesing" the B.S.A.

The B.S.A. has maintained its § 501(c)(3) status for decades.²⁴² Therefore, arguing that the B.S.A. should not receive tax-exemption because it does not fall under any one of the charitable categories²⁴³ would be futile.²⁴⁴ The important questions thus become first,

minority group of equal educational opportunities").

239. 42 U.S.C. §§ 2000c-2000d-4 (1976) (dealing with the implementation of desegregation of public schools).

240. See *Coit v. Green*, 404 U.S. 997 (1971), *aff'g mem. sub nom. Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971) (affirming the *Green* decision without opinion).

241. See *Dep't of Envtl. Prot. v. Franklin Township*, 437 A.2d 353, 368 n.7 (N.J. Tax Ct. 1981) ("The purposes of the Farmland Assessment Act [which exempts land used for farming purposes from taxation] would clearly be frustrated if a change from agricultural use to nonuse did not constitute a change in use, and the Legislature could not have intended such a result."); see also *S. Brunswick Township v. Bellemead Dev. Corp.*, 8 N.J. Tax 616, 621 (Tax Ct. 1987) (same) (citing *Franklin Township*, 437 A.2d at 368 n.7).

242. The B.S.A. is the classic § 501(c)(3) group. See Internal Revenue Service, *Exempt Organization Search* (listing the Boy Scouts of America of Irving, Texas, as a central organization holding a group tax exemption letter), at <http://www.irs.gov/cgi/eosearch> (last visited Mar. 31, 2001). In fact, the B.S.A. is the only specific organization named as an example organization in the I.R.S.' explanation of a group exemption letter. See Internal Revenue Service, *Group Exemption Letter*, at http://www.irs.gov/plain/forms_pubs/pubs/p5570104.htm (last visited Mar. 31, 2001).

A group exemption letter is a ruling or determination letter issued to a central organization recognizing on a group basis the exemption under section 501(c) of subordinate organizations on whose behalf the central organization has applied for recognition of exemption. . . . If your organization is a subordinate one controlled by a central organization (for example a church, *the Boy Scouts*, or a fraternal organization), you should check with the central organization to see if it has been issued a group exemption letter that covers your organization.

Id. (emphasis added). "B.S.A." is also listed as the official abbreviation for the Boy Scouts of America in the I.R.S.' table of exempt organization abbreviations. See Internal Revenue Service, *Table of Exempt Organization Abbreviations* (listing exempt organization abbreviations including the B.S.A.), at http://www.irs.gov/plain/bus_info/tax_pro/irm-part-old/section/33760r.html (last visited Mar. 31, 2001); see also Internal Revenue Service, *Handbook 7.3.4 EO Business Master File and Support Processing Handbook* (listing transaction codes and abbreviations for exempt organizations including the B.S.A.), at http://www.irs.gov/plain/bus_info/tax_pro/irm-part-old/section/27768.html (last visited Mar. 31, 2001); *Taxation With Representation v. Regan*, 676 F.2d 715, 723 n.15 (D.C. Cir. 1982) (listing the B.S.A. as a § 501(c)(3) organization with a federal charter).

243. The twenty-seven categories of § 501(c) are listed in the code itself. See I.R.C. § 501(c)(1-27) (1994 & Supp. V 1999).

244. See *Weingarden v. Comm'r*, 86 T.C. 669, 675 (1986) (citing Rev. Rul. 66-179, 1966-1 C.B. 139) ("[A] unit of the Boy Scouts of America probably could qualify as

whether the B.S.A.'s activities run contrary to public policy, and second, whether the B.S.A.'s tax-exempt status encourages the violation of declared New Jersey law.

Although public policy against sexual orientation discrimination lacks the legal soundness²⁴⁵ and history²⁴⁶ of that against racial discrimination, the District of Columbia and twelve states currently prohibit discrimination on the basis of sexual orientation.²⁴⁷ In New Jersey, the policy is manifested in L.A.D.,²⁴⁸ which prohibits discrimination against any New Jersey inhabitant on the basis of, among other things, sexual orientation.²⁴⁹ The New Jersey legislature noted therein that "such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State. . . . [B]ecause of discrimination, people suffer personal hardships, and the State suffers a grievous harm."²⁵⁰ Just as Congress declared that public policy forbids racial discrimination by enacting the Civil Rights Act of 1964, the New Jersey legislature declared through L.A.D. that public policy in New Jersey prohibits discrimination on the basis of sexual orientation.²⁵¹ Various cases, including *Dale*, illustrate New Jersey's

an educational or charitable organization under § 501(c)(3), as a social welfare organization under § 501(c)(4), or as a social club under § 501(c)(7)."). The goal of this Comment is to argue that the B.S.A. should lose their tax-exempt status because of its policy of sexual orientation discrimination, not because it otherwise fails to qualify as a § 501(c)(3) organization.

245. See *supra* note 36 (explaining that unlike the strict scrutiny applied to race, sexual orientation is not a suspect class, and thus only receives rational basis review).

246. See *supra* notes 237-239 (detailing the historical underpinnings of the public policy against racial discrimination).

247. See *supra* note 37 (listing the states and territories that protect sexual orientation).

248. N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 2000); see also *infra* note 261 and accompanying text (noting the legislative history of L.A.D., specifically including the addition of sexual orientation to the list of classifications against which discrimination is forbidden in New Jersey).

249. See *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 284 (N.J. Super. Ct. App. Div. 1998) (stating that L.A.D. codifies "New Jersey's public policy against discrimination based on affectional or sexual orientation"); accord *Hernandez v. Region Nine Housing Corp.*, 684 A.2d 1385, 1388 (N.J. 1996).

The LAD embodies [New Jersey's] strong public policy to fight discrimination against any of its inhabitants, because of . . . sexual orientation This Court has described the goal of the LAD as being nothing less than the eradication of the cancer of discrimination. In order to further this goal and afford the greatest protection to the victims of discrimination, the legislature has directed that the LAD be interpreted liberally.

Id. (internal citations and quotations omitted).

250. N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 2000).

251. The same is true in each of the other eleven states and the District of Columbia where sexual orientation is protected. See *supra* note 37 and accompanying text.

clear policy stance on sexual orientation discrimination.²⁵²

Beyond public policy concerns is the second question of whether the B.S.A.'s tax-exempt status encourages the violation of declared New Jersey law. Because New Jersey law forbids discrimination on the basis of sexual orientation, it is "axiomatic" that New Jersey may not "induce, encourage, or promote private persons" to achieve what the state itself is legally forbidden to accomplish.²⁵³ By maintaining the B.S.A.'s state-level tax-exempt status, however, New Jersey subsidizes the B.S.A. and its discriminatory policy,²⁵⁴ which in turn frustrates the legislative intent of New Jersey's L.A.D.²⁵⁵ The same holds true for the District of Columbia and the eleven other states that prohibit discrimination on the basis of sexual orientation.²⁵⁶

3. *Contemporary standards*

The B.S.A. could argue that its anti-gay policy is not contrary to public policy because protecting sexual orientation is *not* in the public interest. As the Court noted in *Bob Jones University*, however, "contemporary standards must be considered in determining whether given activities provide a public benefit and are entitled to the charitable tax exemption."²⁵⁷ The Court continued, "[i]n 1894, when the first charitable exemption provision was enacted, racially segregated educational institutions would not have been regarded as against public policy."²⁵⁸ As noted in *Walz*, "[q]ualification for tax exemption is not perpetual or immutable; some tax-exempt groups

252. See *Boy Scouts of Am. v. Dale*, 734 A.2d 1196, 1228 (N.J. 1999) (stating that "New Jersey's compelling interest in eliminating discrimination based on sexual orientation" justifies minor "infringement" upon the expressive association rights of B.S.A. members), *rev'd*, 530 U.S. 640, 661 (2000) (reversing the New Jersey Supreme Court's holding on first amendment grounds); see also *In re Adoption of Child by J.M.G.*, 632 A.2d 550, 554 n.8 (N.J. Super. Ct. Ch. Div. 1993) ("[T]he public policy of New Jersey . . . seems to indicate that any discrimination based solely on sexual orientation is antithetical to the protection of civil rights."). In other words, despite the United States Supreme Court's *Dale* ruling, New Jersey still has a compelling interest in eliminating discrimination based on sexual orientation.

253. This sentence applies the *Tank Truck* frustration theory as used in the school desegregation case *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (noting that "[r]acial discrimination in state-operated schools is barred by the Constitution," thus it is "axiomatic that a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish") (internal quotations omitted).

254. See *supra* Part II.A (arguing that, although not state action, tax exemption subsidizes the activities of tax-exempt organizations).

255. See *supra* notes 249-252 and accompanying text (discussing L.A.D. and New Jersey's policy against discrimination on the basis of sexual orientation).

256. See *supra* note 37 (listing the eleven other states and the District of Columbia that protect sexual orientation).

257. *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 n.20 (1983).

258. *Id.*

lose that status when their activities take them outside the classification.”²⁵⁹

L.A.D. sets forth the contemporary standard for sexual orientation discrimination in New Jersey.²⁶⁰ The New Jersey legislature enacted that standard in 1991 and it has not been repealed.²⁶¹ Therefore, the current version of L.A.D., as amended in 1991, presumably represents the contemporary view of the majority of New Jersey voters. Likewise, a majority of voters in the District of Columbia and the other eleven states that prohibit discrimination on the basis of sexual orientation presumably agree with their states’ anti-discrimination policies.²⁶²

D. *The B.S.A.’s Probable Affirmative Defenses*

In *Dale*, at the New Jersey Supreme Court level, the B.S.A. argued that the appellate court’s application of New Jersey’s L.A.D. violated its First Amendment rights to freedom of intimate and expressive²⁶³ association as well as freedom of speech.²⁶⁴ The New Jersey Supreme

259. *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970).

260. N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 2000).

261. *See id.* § 10:5-3, amended by L. 1991, c. 519, § 2 (adding “affectional or sexual orientation” to the list of protected classes and expanding New Jersey’s historical commitment to eradicating discrimination). “New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society.” *Peper v. Princeton Univ. Bd. of Trustees*, 389 A.2d 465, 478 (N.J. 1978). New Jersey enacted the L.A.D. in 1945, nearly twenty years before the Civil Rights Act of 1964, noting that “because of discrimination, people suffer personal hardships, and the State suffers a grievous harm.” N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 2000). From this history it is clear, as the New Jersey Supreme Court stated, that “[i]t is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society.” *Boy Scouts of Am. v. Dale*, 734 A.2d 1196, 1227 (N.J. 1999).

262. *See supra* note 37 (listing the other states and districts that protect sexual orientation). Justice Stevens’ dissent in *Dale* concludes by focusing upon the modern shift away from anciently rooted unfavorable opinions about homosexuality. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 699-700 (2000) (Stevens, J., dissenting) (citing “[t]he American Psychiatric Association’s and the American Psychological Association’s removal of ‘homosexuality’ from their lists of mental disorders; . . . Georgia’s invalidation of the statute upheld in *Bowers*; and New Jersey’s enactment of the provision at issue in this case”) (internal citations omitted).

263. As the Supreme Court held in *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), “[a]n individual’s freedom to speak, to worship, and to petition government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.” From this realization, the Court stated “the First Amendment [carries with it] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Id.* Without this right, minority viewpoints and related political and cultural diversity would not be protected. *See id.* Thus, any government interference with an organization’s internal affairs has the potential to curtail this right. *See id.* at 623 (discussing the significance of the right to freedom of association).

264. The B.S.A. in fact asserted the rights of its members “to enter into and maintain . . . intimate or private relationships . . . [and] to associate for the purpose

Court addressed and rejected each of these constitutional defenses in turn,²⁶⁵ upholding the Appellate Division's application of L.A.D.²⁶⁶

of engaging in protected speech." *Dale*, 734 A.2d at 1219 (quoting Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 544 (1987)). The Supreme Court and the New Jersey Supreme Court, however, have both addressed First Amendment's protection of freedom of association in two contexts. *See Dale*, 734 A.2d at 1219 (outlining the historical treatment of the freedom of association). The first context is that of the freedom of intimate association, the idea that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* (quoting *Roberts*, 489 U.S. at 617-18). The second context is that of the freedom of expressive association, the idea that there is "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* (quoting *Roberts*, 489 U.S. at 618).

265. *See Dale*, 734 A.2d at 1219-30 (rejecting the B.S.A.'s constitutional defenses as not outweighing the compelling state interest in eradicating sexual orientation discrimination as expressed by L.A.D.). The New Jersey Supreme Court began its discussion of intimate association by noting that although the freedom "to engage in intimate association is . . . protected by the Bill of Rights," that freedom is limited to "protect[ing] those relationships . . . that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life." *Dale*, 734 A.2d at 1219-20 (internal quotation omitted) (clarifying intimate association by noting that the intimate relationships to which the Court has "accorded intimate constitutional protection include marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives." (citing *Rotary Club*, 481 U.S. at 545)). The court continued by analyzing *Roberts*, 468 U.S. at 609, and *Rotary Club*, 481 U.S. at 537, to derive the key considerations for examining "membership organizations to determine whether a protectable intimate association right is present." *Dale*, 734 A.2d at 1221. Those factors include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Roberts*, 468 U.S. at 620. The court then applied these factors to the B.S.A., focusing on the local chapter rather than the national organization because of its stronger intimate association argument. *See Dale*, 734 A.2d at 1221-22. The court noted that individual Boy Scout troops typically consist of fifteen to thirty boys with several adult leaders, *see id.* at 1221, before finding that precedent dictated individual scout troops too large to qualify for protection under intimate association. *See, e.g., Rotary Club*, 481 U.S. at 546 (noting that even *Rotary Club*'s smallest chapters of about twenty members failed to qualify for intimate associational protection). Moreover, like the Jaycees, the B.S.A.'s membership policy is not restrictive, extending membership to "any boy" between the ages of eleven and seventeen. *See Dale*, 734 A.2d at 1221 (noting the lack of selectiveness employed by the B.S.A.). Again, like the Jaycees, the B.S.A. sets no upper limit to its national or local counsel membership. *See id.* "Such an inclusive fellowship . . . based upon diversity of interest, however beneficial to the members' is also not indicative of a protectable form of intimate association." *Id.* at 1222 (citing *Rotary Club*, 481 U.S. at 546-47). Finally, the court noted another similarity to *Rotary Club* that undermined the B.S.A.'s intimate association claim, namely the B.S.A.'s practice of inviting or allowing non-members to attend certain troop meetings and activities. *See id.* The court ultimately concluded that the B.S.A. failed to demonstrate a protectable intimate association right. *See id.*

The New Jersey Supreme Court next considered the B.S.A.'s freedom of expressive association claim, noting that although "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire," the right to choose members is not absolute. *Roberts*, 468 U.S. at 623. "Infringements on that right may be

justified by regulation adopted to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.* The court also stated that “[s]tate laws against discrimination may take precedence over the right of expressive association” *Dale*, 734 A.2d at 1223 (citing *Roberts*, 468 U.S. at 628, to justify the power of state anti-discrimination laws). The court concluded that “a group member infringes upon an organization’s freedom of expressive association only if he or she ‘affect[s] in any significant way the other members’ ability . . . to . . . advocate public or private viewpoints.” *Id.* at 1222 (quoting *N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 13 (1988)); *see also Rotary Club*, 481 U.S. at 548; (holding that the “evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members’ ability to carry out their various purposes”); *Roberts*, 468 U.S. at 626-27 (“Jaycees has failed to demonstrate . . . any serious burdens on the male members’ freedom of expressive association [because] [t]here is . . . no basis in the record for concluding that admission of women . . . will impede the organization’s ability to engage in these protected activities . . .”). Although the B.S.A. argued that the Scout Oath and Law state its members’ views regarding homosexuality, *see supra* notes 79-80 (discussing the Scout Oath and Law), the court held that its “members do not associate for the purpose of disseminating the belief that homosexuality is immoral,” *Dale*, 734 A.2d at 1223, bolstered by the fact that the B.S.A. “discourages its leaders from disseminating any views on sexual issues.” *Id.* Thus, because Dale’s membership could not, and therefore does not, have a significant impact on B.S.A. members’ ability to associate with one another on shared views or upon the organization’s ability to disseminate its message, the court held that L.A.D. does not violate the B.S.A.’s freedom of expressive association. *See id.* (noting further that the B.S.A.’s sponsors and members have different views on homosexuality so the B.S.A. could not have a unified anti-homosexual message to express).

Finally, the New Jersey Supreme Court considered the B.S.A.’s free speech argument, which relied entirely upon *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Hurley*, the Supreme Court held that applying the state public accommodations statute to require the South Boston Allied War Veterans Council (“AWVC”) to allow the Irish-American Gay, Lesbian, and Bisexual Group of Boston (“GLIB”) to march in New York’s Saint Patrick’s Day parade would violate the First Amendment’s protection that “a speaker has the autonomy to choose the content of his own message.” *Hurley*, 515 U.S. at 573. Such a decision would have “essentially require[d] [AWVC] to alter the expressive content of the parade” *id.* at 572-73, because “in the context of an expressive parade, as with a protest march, the parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole.” *Id.* at 577. Thus, the U.S. Supreme Court held that the state courts’ application of the public accommodations law violated the First Amendment. *See id.* at 581 (noting that its ruling “rests not on any particular view about [AWVC’s] message but on the Nation’s commitment to protect freedom of speech”). The New Jersey Supreme Court found the facts of *Hurley* distinguishable from those of *Dale* in two specific contexts. First, the court argued “Dale . . . never used his leadership position or membership to promote homosexuality, or any message inconsistent with [the B.S.A.’s] policies.” *Dale*, 734 A.2d at 1229 (noting that if Dale had used his B.S.A. membership to promote his personal views on homosexuality, the B.S.A. would have a valid First Amendment defense) (citing *Curran v. Mount Diablo Council*, 952 P.2d 218, 253 (Cal. 1998) (Kennard, J., concurring) (noting that the B.S.A. would have a valid First Amendment defense if California’s anti discrimination law applied because Curran sought “membership in order to promote . . . [his] views”)). In short, unlike GLIB, “Dale does not [attend] Boy Scout meetings ‘carrying a banner.’” *Dale*, 734 A.2d at 1229. Second, the court noted that unlike the parade in *Hurley*, being a scout leader is not a form of “pure speech.” *Id.* at 1229 (arguing that parading itself imports the notion that the marchers are parading to make a point; “Dale does not participate in the Boy Scouts ‘to make a point’ about sexuality, but rather because of his respect for and belief in the organization”). The court rejected “the notion that Dale’s presence in the organization is symbolic of

On appeal, the United States Supreme Court—in a sharply divided opinion²⁶⁷—reversed the New Jersey Supreme Court’s decision, finding that Dale’s forced inclusion into the B.S.A. would violate the organization’s First Amendment right of expressive association.²⁶⁸

[the B.S.A.’s] endorsement of homosexuality.” *Id.* Reinstating Dale as a leader “in no way prevents [the B.S.A.] from ‘invoking its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.’” *Id.* (quoting *Hurley*, 515 U.S. at 574). The New Jersey Supreme Court thus rejected the B.S.A.’s free speech defense, concluding that application of L.A.D. did not amount to compelled speech. *See id.* (“To recognize the [B.S.A.’s] First Amendment claim would be tantamount to tolerating the expulsion of an individual solely because of his status as a homosexual—an act of discrimination unprotected by the First Amendment freedom of speech.”).

266. The New Jersey Supreme Court also observed that the “Supreme Court has not hesitated to uphold the enforcement of a state’s anti discrimination statute against an expressive association claim based on assumptions in respect of status that are not a part of the group members’ shared expressive purpose.” *Dale*, 734 A.2d at 1225 (citing *Roberts*, 468 U.S. at 628 and *New York State Club Ass’n*, 487 U.S. at 13). Although the B.S.A. is purportedly “committed to a diverse and representative membership,” *id.* at 1226, the organization freely admitted that it revoked Dale’s membership because he is gay, *id.* at 1225, and then attempted to mount a constitutional defense. Observing that this “litigation stance . . . appear[ed] antithetical to the organization’s goals and philosophy,” *id.* at 1226, the court held that Dale’s expulsion was “based on little more than prejudice and not on a unified Boy Scout position; in other words, Dale’s expulsion [was] not justified by the need to preserve the organization’s expressive rights.” *Id.* at 1226. It was precisely to combat such discrimination that the New Jersey Legislature amended L.A.D. in 1991 to include sexual orientation. “Like other similar statutes, the L.A.D. serves a compelling state interest and ‘abridges no more speech or associational freedom than is necessary to accomplish that purpose.’” *Id.* at 1228 (quoting *Roberts*, 468 U.S. at 629). Thus, even if prohibiting the B.S.A. from excluding homosexuals does infringe upon the B.S.A.’s expressive rights, that infringement would be justified by New Jersey’s compelling interest in eliminating discrimination based on sexual orientation. *See id.* at 1228-29 (finding that any infringement on B.S.A.’s rights was at best, slight); *see also Rotary Club*, 481 U.S. at 549 (declaring that any infringement on Rotary Club’s rights by the Unruh Act was insignificant).

267. *See supra* note 11 (detailing the 5-4 decision in *Dale*).

268. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (ruling in favor of the B.S.A.). The key differences between the U.S. Supreme Court and the New Jersey Supreme Court opinions, and thus the linchpin for the Court’s reversal, are two unprecedented instances of granting deference to the assertions of an organization seeking to defend a discriminatory policy with a claim of expressive association. The New Jersey Supreme Court held that forcing Dale’s inclusion does not violate the B.S.A.’s freedom of expressive association, in part because the organization failed to prove its members associated “for the purpose of disseminating the belief that homosexuality is immoral,” a point bolstered by the fact that the B.S.A. discourages its leaders to discuss sexual issues and the B.S.A. “includes sponsors and members who subscribe to different views in respect of homosexuality.” *Dale*, 734 A.2d at 1223. The United States Supreme Court, however, accepted the B.S.A.’s mere assertion that it teaches “homosexual conduct is not morally straight” without finding a need for further inquiry into the nature of the organization’s expression. *See Dale*, 530 U.S. at 652. Having waived the need for proof of an asserted position, the Court stated “[a]s 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.* at 653 (citing *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 123-24 (1981)). Although the Court cites *LaFollette* for the proposition that “a court, may not constitutionally substitute its own

The Court, however, neglected to discuss the B.S.A.'s claim of intimate association,²⁶⁹ leaving Justice Stevens' dissenting dismissal of that argument unanswered.²⁷⁰ As to the B.S.A.'s free speech claim,²⁷¹ the Court blended its discussion of the free speech and expressive association claims, effectively treating the latter as part of the former.²⁷²

In *Bob Jones University*, the University put forth two constitutional arguments to defend against the loss of its tax-exempt status.²⁷³ The University asserted that the I.R.S.' interpretation of I.R.C. §§ 170 and 501(c)(3) violated both the Free Exercise and Establishment Clauses of the First Amendment.²⁷⁴ The Supreme Court rejected the

judgment for that of the [organization],” *id.* at 123-24, a distinct and crucial difference exists between questioning the wisdom, logic, and consistency of an organization's policies and requiring some level of proof that an organization actually espouses the policies it claims to espouse. *See Dale*, 530 U.S. at 685-86 (Stevens, J., dissenting) (“I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further.”). As Justice Stevens' dissent made abundantly clear, this deference effectively “[s]hield[s] a litigant's claim from judicial scrutiny, render[s] civil rights legislation a nullity, and turn[s] this important constitutional right into a farce.” *Id.* at 686.

269. Brief for Petitioners at 39-42, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) [hereinafter Brief for Petitioners, *Dale* (No. 99-699)] (detailing the B.S.A.'s intimate association argument).

270. *See Dale*, 530 U.S. at 698 n.26 (Stevens, J., dissenting) (discussing the B.S.A.'s intimate association claim, despite the majority's failure to address it). Justice Stevens explained:

BSA also argues that New Jersey's law violates its right to “intimate association.” Our cases recognize a substantive due process right “to enter into and carry on certain intimate or private relationships.” As with the First Amendment right to associate, the State may not interfere with the selection of individuals in such relationships. Though the precise scope of the right to intimate association is unclear, “we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship” to determine whether a group is sufficiently personal to warrant protection [sic] this type of constitutional protection. Considering BSA's size, its broad purposes and its nonselectivity, it is impossible to conclude that being a member of the Boy Scouts ranks among those intimate relationships falling within this right, such as marriage, bearing children, rearing children, and cohabitation with relatives.

Id. (internal citations omitted).

271. *See* Brief for Petitioners, *supra* note 269, at 20-28, *Dale* (No. 99-699) (detailing the B.S.A.'s free speech argument).

272. *See Dale*, 530 U.S. at 647-54 (analyzing the First Amendment claim and determining that “the B.S.A. is an expressive association and that the forced inclusion of Dale would significantly affect its expression . . .”).

273. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 602-05 (1983) (outlining and rejecting the University's First Amendment defenses).

274. *See id.*; *see also* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”). Regarding the free exercise argument, the University argued “even if the Commissioner's policy is valid as to nonreligious private schools, that policy cannot constitutionally be

University's Free Exercise argument, noting that "not all burdens on religion are unconstitutional The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding government interest."²⁷⁵ The government interest at stake in *Bob Jones University* was a compelling one,²⁷⁶ and one that outweighed the burden removal of § 501(c)(3) tax-exempt status placed upon the free exercise of discriminatory²⁷⁷ religious beliefs.²⁷⁸ Furthermore, the Court held that other than removing the University's § 501(c)(3) tax-exempt status, "no 'less restrictive means' [was] available to achieve the governmental interest."²⁷⁹ The Supreme Court also rejected the University's Establishment Clause argument;²⁸⁰ however, that analysis is not relevant to the present

applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs." *Bob Jones Univ.*, 461 U.S. at 602. As the Supreme Court noted, the *Bob Jones University* trial court "found, on the basis of a full evidentiary record, that the challenged practices . . . were based on a genuine belief that the Bible forbids interracial dating and marriage." *Bob Jones Univ.*, 461 U.S. at 602-03 n.28 (citing *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 894 (D.C.S.C. 1978)).

275. *Bob Jones Univ.*, 461 U.S. at 603 (citing *United States v. Lee*, 455 U.S. 252, 257-58 (1982)); accord *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (commenting that state "interests of the highest order . . . not otherwise served" can justify limiting religious free exercise).

276. See *Bob Jones Univ.*, 461 U.S. at 604 ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education.").

277. *Bob Jones University* also tried to argue that its policy was not racially discriminatory. See *id.* at 605 (noting the university's assertion that it "now allows all races to enroll, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage"). The Supreme Court responded to that assertion by stating that "[a]lthough a ban on intermarriage or interracial dating applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination." *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973)). The Court subsequently found that the "I.R.S. properly applied Revenue Ruling 71-447 to *Bob Jones University*." *Id.* at 605.

278. See *id.* ("That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.").

279. *Id.* (quoting *Thomas v. Review Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)).

280. *Bob Jones University's* Establishment Clause argument hinged upon the long-settled notion that "neither a State nor the Federal Government may pass laws which 'prefer one religion over another.'" *Id.* at 604 n.30 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). The Court noted, however, "it is equally true that a regulation does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions." *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (internal quotation omitted)). The I.R.S.' reading of I.R.C. § 170 and § 501(c)(3) was "founded on a neutral, secular basis," and did not violate the Establishment Clause. See *id.* (citing generally U.S. COMM'N ON CIVIL RIGHTS, DISCRIMINATORY RELIGIOUS SCHOOLS AND TAX EXEMPT STATUS 10-17 (1982)). Thus, by applying this interpretation of the I.R.C. to all schools regardless of their religious beliefs, the Court did not need to consider whether *Bob Jones University's* policies were actually founded upon "sincere religious beliefs." *Id.* (citing *United States v. Bob Jones Univ.*, 639 F.2d 147, 155 (4th Cir. 1980)).

discussion.

In Dale's potential suit to have the B.S.A.'s state-level tax-exempt status revoked in New Jersey, the B.S.A.'s only possible constitutional defenses would be the same defenses put forth in Dale's suit to force his reinstatement: freedom of expressive and intimate association, as well as freedom of speech.²⁸¹ Yet in this case, the B.S.A.'s defenses would be argued to prevent the revocation of state-level tax-exempt status, an undeniably lesser intrusion upon an organization's First Amendment rights than what the B.S.A. was trying to prevent in *Dale*²⁸²—namely the forced inclusion of an unwanted member.

Recall in *Bob Jones University* that the University was not forced to change its racially discriminatory admissions standards and accept students it wished to exclude; it merely lost the benefit of tax-exempt status. At the state level, in *Brunson*, although the New Jersey Superior Court acknowledged “[f]orcible arguments [were] advanced that constitutional rights to freedom of association [were being] ignored,”²⁸³ the court still revoked the Elks lodges' property tax exemptions. The court noted that the “central purpose of the enactment of the Fourteenth Amendment[,] . . . to eliminate all official state sources of invidious racial discrimination[,] . . . is given strong weight and favor in the balancing of constitutional rights.”²⁸⁴

As highlighted in *Dale* by the New Jersey Supreme Court and evidenced by New Jersey's L.A.D., eradicating discrimination on the basis of sexual orientation is a compelling state interest in New Jersey.²⁸⁵ Furthermore, considering that among the central purposes of L.A.D. is to eliminate from New Jersey all sources of discrimination on the basis of sexual orientation,²⁸⁶ that compelling interest will be

281. See generally Brief for Petitioners, *supra* note 269, *Dale* (No. 99-699) (detailing the First Amendment arguments presented to the U.S. Supreme Court in *Dale*).

282. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”) (emphasis added). The revocation of state-level tax-exempt status is a lesser intrusion than forced inclusion of an unwanted member not only because revoking tax-exempt status fails to directly interfere with the organization's internal affairs, but also because the revocation will only be sought at the state level and at that, initially only in New Jersey.

283. *Brunson v. Rutheford Lodge No. 547 of the Benevolent & Protective Order of Elks*, 319 A.2d 80, 92 (N.J. Super. Ct. Law. Div. 1974).

284. *Id.*

285. See *Boy Scouts of Am. v. Dale*, 734 A.2d 1196, 1227-28 (N.J. 1999) (“It is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society;” “[i]n 1991, the Legislature amended the LAD . . . to add ‘affectional or sexual orientation’ to the list of protected classes;” “LAD serves a compelling state interest. . . .”); *cf.* N.J. STAT. ANN. 10:5-1 et seq. (West 1993 & Supp. 2000).

286. See *supra* notes 248-252, 261 (detailing the history and policy behind New

given “strong weight and favor” when balanced against the B.S.A.’s First Amendment rights.

The B.S.A. might argue that New Jersey’s interest in eradicating sexual orientation discrimination is not compelling, citing the U.S. Supreme Court’s *Dale* opinion as overruling the New Jersey Supreme Court’s assertion. However, only five of nine United States Supreme Court justices agreed that Dale’s forced inclusion violated the B.S.A.’s right of expressive association; four justices found no violation.²⁸⁷ If Dale’s tax-exemption revocation suit were appealed to the United States Supreme Court on constitutional grounds, it is probable that—given the lesser intrusion of revoking state-level tax-exempt status in only one state—at least one of these five justices would side with the four dissenters from *Dale*. Of the five Justices in the *Dale* majority, Justices O’Connor and Kennedy are the most likely to make this switch.²⁸⁸

As to the incongruity between the racial discrimination present in both *Bob Jones University* and *Brunson* and the sexual orientation discrimination present here, eradicating either is a compelling state interest in New Jersey.²⁸⁹ Therefore, much like in *Bob Jones University*, but on the state level, New Jersey’s compelling state interest in eradicating sexual orientation discrimination substantially outweighs whatever burden denial of state-level tax-exempt status places upon the B.S.A.’s exercise of its First Amendment rights. Furthermore, other than the denial of the B.S.A.’s state-level tax-exempt status, no less restrictive means is available to achieve the compelling state interest.

Jersey’s L.A.D.).

287. See *supra* note 11 and accompanying text (detailing the 5-4 opinion in *Dale*).

288. See Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O’Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219, 222 (1996) (“The standards that Justices O’Connor and Kennedy set for their visions of character help to explain why they have been swing Justices.”); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 576 (1983) (listing O’Connor as joining with the majority to revoke Bob Jones University’s tax-exempt status); *Romer v. Evans*, 517 U.S. 620, 622 (1996) (noting that Justice Kennedy wrote the majority opinion, in which Justice O’Connor joined, in a case finding unconstitutional an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination).

289. See *supra* notes 236-239, 285 and accompanying text (detailing the compelling interests of eradicating both racial and sexual orientation discrimination in New Jersey). The fact that eradicating sexual orientation discrimination is not a federal compelling interest is irrelevant when considering the revocation of state-level tax-exempt status, whereas the fact that eradicating racial discrimination is a federal compelling interest sets a floor for New Jersey’s assertion of the same interest.

IV. REVOKING THE B.S.A.'S STATE-LEVEL TAX-EXEMPT STATUS WILL
HELP ELIMINATE ITS ANTI-GAY POLICY²⁹⁰

The United States Supreme Court put an end to Dale's civil rights-based attack on the B.S.A.'s anti-gay policy when it held that Dale's forced inclusion would violate the B.S.A.'s right of expressive association.²⁹¹ The tax exemption revocation suit proposed by this Comment may, therefore, be the most effective method remaining to encourage the B.S.A. to change its policy. The B.S.A. has already lost the funding and support of various corporations, municipalities, and schools who disagree with the anti-gay policy, and this backlash has only intensified since the Supreme Court's July, 2000 decision.²⁹² Removal of the B.S.A.'s state-level tax-exempt status in New Jersey will force the B.S.A. to pay state corporate, property, and other taxes, further undermining the group's funding.²⁹³ Moreover, the removal of tax-exempt status will send an official message of disapproval, compounding the sympathetic loss of support already occurring.²⁹⁴ This Comment suggests that the combination of the existing loss of support, the revocation of state-level tax-exempt status, and the compounding effect of revocation upon the existing loss of support could force the B.S.A. to change its anti-gay policy in an effort to maintain its very existence.

A. *Sympathetic Loss of Funding and Support*

As early as 1992, long-time corporate sponsors, including Levi Strauss & Co., Wells Fargo & Co., and BankAmerica Corporation, began revoking their contributions in protest of the B.S.A.'s anti-gay policy.²⁹⁵ More recently, Chase Manhattan Bank and Textron Inc.

290. Recall that because of the admittedly low dollar amount the B.S.A. saves through state-level tax-exempt status, a detailed economic analysis of the B.S.A.'s tax liability in New Jersey is unnecessary and thus beyond the scope of this Comment. See *supra* note 45.

291. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) (holding that Dale's inclusion would violate the B.S.A.'s right of expressive association).

292. See *infra* Part IV.A (discussing sympathetic loss of support for the B.S.A.).

293. See *infra* Part IV.B (explaining how New Jersey's current tax scheme benefits the B.S.A.).

294. See *infra* Part IV.C (discussing the efficacy of revoking tax-exempt status).

295. See Edward P. Jones, *Press Watch*, 6 EXEMPT ORG. TAX REV. 1027 (1992) (discussing how the Levi Straus, Wells Fargo and BankAmerica corporations all dropped their funding of the BSA, only to become the "target of protests and boycotts by the Christian Coalition of San Francisco" and the "American Family Association, a conservative group in Tupelo, Miss.;" and noting further that BankAmerica reversed its position in mid-August of 1992, becoming the center of protests by the San Francisco Bay Area's gay community and local newspapers) (citing Paul Farhi, *Boy Scouts at Center of Controversy Over Corporate Donations*, WASH. POST, Sept. 7, 1992, at A1); see also *Anti-Porn Group Calls for Boycott of Levis*,

withdrew hundreds of thousands of dollars that used to support the B.S.A. on both the local and national levels.²⁹⁶ The Rhode Island-based CVS pharmacy chain decided to stop donating to an annual B.S.A. dinner because of the conflict between its company-wide non-discrimination policy and the B.S.A.'s anti-gay stance.²⁹⁷ Merrill Lynch is also questioning its support of the B.S.A.²⁹⁸

Local United Way chapters across the country, the B.S.A.'s largest contributor,²⁹⁹ are also questioning their support.³⁰⁰ As of fall 2000, ten United Way chapters have adopted anti-discrimination policies, requiring local B.S.A. chapters not to discriminate on the basis of sexual orientation in return for continued funding.³⁰¹ Several United

INDIANAPOLIS STAR, May 20, 1992, at E03 (noting that "Levi Straus confirmed it will no longer donate to the Scouts because of it's [sic] refusal to admit gay Scouts or leaders;" also reporting that the Levi donation had ranged from \$40,000 to \$80,000 annually).

296. See Kate Zernike, *Scouts' Successful Ban on Gays Is Followed by Loss in Support*, N.Y. TIMES, Aug. 29, 2000, at A1 (discussing Chase Manhattan Bank, "which had contributed about \$200,000 annually to the Boy Scouts until stopping last month," and Textron Inc., which also withdrew hundreds of thousands of dollars in support for the B.S.A., both because of the organization's anti-gay policy).

297. See Peter Freiberg, *Battle Decided; War Looms: BSA Ruling Opponents Demand End to Sponsorship*, WASH. BLADE, July 21, 2000, at 1 (discussing the CVS decision to stop supporting the B.S.A.).

298. See *id.* (noting that Merrill Lynch is wrestling with deciding between "hurting children who are benefiting from scouting, or supporting a position they find ethically untenable").

299. See Pat Doyle, *United Way to Allow Exclusions by Donors*, STAR TRIB. (Minneapolis), Sept. 6, 2000, at 1A (noting that "more than \$83 million of United Way donations goes to local scouting councils"); see also Chuck Sudetic, *Special Report: The Struggle for the Soul of the Boy Scouts*, ROLLING STONE, July 6-20, 2000, at 102 (noting that the United Way contributed \$83.7 million to the B.S.A. in 1996, the last year for which statistics are available).

300. See, e.g., Carol Ann Alaimo, *Gay Backlash Threatens Scout Funding*, ARIZ. DAILY STAR, July 10, 2000, at A1 (noting that the City Council and United Way of Greater Tucson are likely to be questioned about support of the B.S.A. because the City Council gives \$1.7 million in taxpayer monies to the United Way, \$29,000 of which goes to the Catalina Council of the B.S.A., along with another \$25,000 that the United Way gives the B.S.A. gleaned from other non-charity-specific donations); Kathryn Sinicrope, *Scout Issue Going to Committee*, PALM BEACH DAILY NEWS, Jan. 10, 2001, at 1 (noting that the Palm Beach Community Chest/United Way, which gave the local troops \$62,000 in 2000, is forming a special committee to consider whether the organization should keep funding local B.S.A. troops and further noting that the United Way of Palm Beach County decided in September, 2000, that it will give the Scouts two years to permit gay scouts and leaders as members, after which failure to comply will result in the loss to local troops of \$100,000 a year).

301. See Gwyneth K. Shaw, *United Way Flap Creates Hard Choices*, ORLANDO SENTINEL, Sept. 3, 2000, at A1 (listing United Way chapters that have adopted anti-discrimination policies: Branford, CT; Fall River, MA; New Haven, CT; Portland, ME; Providence, RI; San Francisco, CA; Santa Clara, CA; Santa Cruz, CA; Santa Fe, NM; and Somerset County, NJ). It is just a matter of time before the local chapters of the B.S.A. in these locals find themselves in impossible situations, for now they are agreeing with the United Way not to discriminate, but have yet to have an openly gay member within their ranks, requiring them to comply with the B.S.A. national organization's policy. See David Talbot, *United Way Will Keep Funding Scouts Despite*

Way chapters have withdrawn funding altogether because of the anti-gay policy,³⁰² while still other chapters have amended their procedures to allow individual donors to prevent any of their donations to the United Way from going to the B.S.A.³⁰³ Yet, the majority of United Way chapters continue to support the B.S.A.,³⁰⁴

Ban on Gays, BOSTON HERALD, July 22, 2000, at 13 (noting that the five local B.S.A. councils signed anti-discrimination pledges, but that no case of a gay member or leader had yet arisen). When that day comes, these local chapters will either have to lose their United Way funding or lose their B.S.A. charter.

302. See, e.g., *Anti-Scout Wildfires Ignite Nationwide*, ADVOCATE.COM, Sept. 23, 2000 (noting that the United Way of Evanston, IL, decided to stop giving an annual \$5,000 stipend to local troops; the United Way of King County, WA., also decided to cut all funding to local Scouts, holding back \$400,000 already allocated for the next contract period), at http://www.advocate.com/html/stories/821/821_scout_roundup.tml (on file with author); *The Boy Scouts, Not the United Way, Has Changed its Mission*, KEENE SENTINEL, Sept. 26, 2000 (editorial on file with author) (noting that the Monadnock, NH, chapter of the United Way decided to exclude the B.S.A. from its funding list); Robert Franklin, *Boy Scouts Excluded From Medtronic Gift*, STAR TRIB. (Minneapolis), Sept. 28, 2000, at 1A (noting that the United Way of Greater Duluth, MN, will cut off all support to the local B.S.A., costing the organization approximately \$30,000 annually); Jordana Hart, *Local United Ways Still Funding Scouts; Only Two Groups Balk At Ruling Against Gays*, BOSTON GLOBE, Aug. 4, 2000, at B1 (reporting that the United Way of Massachusetts Bay decided to cut funding of the B.S.A. and redirected \$240,000 of the \$288,000 annually given to five local B.S.A. chapters to the Learning for Life program, a non-discriminatory spin-off of the B.S.A.); Jennifer Levitz, *Scouts Dragging Feet on Gay Policy Review*, PROVIDENCE J., Mar. 24, 2000, at A1 (noting that because of the B.S.A.'s anti-gay policy, the "United Way has pulled its funding in San Francisco, New Haven, Conn., and Portland, Maine"); David Rising, *New Policy Could Jeopardize Funding for Boy Scouts*, AP, July 18, 2000 (noting that the United Way of Southeastern New England announced that it will cut funding to groups that discriminate against gays, including the B.S.A., threatening the \$200,000 annual donation to the B.S.A. Narragansett Council), available at <http://www.scoutingforall.org/unitedway.shtml>; *United Way Funding for Scouts Jeopardized By Ruling on Gays*, BERGEN REC., June 30, 2000, at A8 (reporting that the United Way of Somerset County decided to cut off all funding to the B.S.A. more than a month before the Supreme Court's ruling), available at 2000 WL 15821026 [hereinafter *Scouts Funding Jeopardized*]; *United Way Says It Won't Help Scouts*, BOSTON GLOBE, July 29, 1994, at 29 (reporting that the local United Way has decided to stop funding the Hamden-based Quinnipiac B.S.A. Local Council, a decision that will cost the local council about \$60,000 annually). But see Doyle, *supra* note 299, at 1A (noting that the United Way chapters that stopped their funding of the B.S.A. "barely dented" overall United Way funding of the organization).

303. See, e.g., Doyle, *supra* note 302, at 1A (reporting that donors may choose which recipients can receive their donations); Robert Franklin, *Scout Ban of Gay Leaders Becomes a Religious Issue*, STAR TRIB., Sept. 30, 2000, at 1B [hereinafter Franklin, *Religious Issue*] (noting that the Minneapolis and Saint Paul United Way chapters "have offered donors an option to exclude contributions from or target them to the Scouts"). But see Robert Franklin, *United Way Donors Rally for Scouts*, STAR TRIB. (Minneapolis), Mar. 31, 2001, at 1A (reporting that several United Way donors chose to target their United Way donation to the B.S.A.). In Florida, the Heart of Florida United Way proposed a compromise to continue funding of the B.S.A., letting the organization choose its leader if it would agree to accept all boys as members, but the B.S.A. refused to accept the compromise. See Gwyneth K. Shaw, *United Way Stands Pat Against Boy Scouts' Discrimination*, ORLANDO SENTINEL, Jan. 13, 2001, at A1 (reporting that the B.S.A.'s refusal to compromise will jeopardize \$310,000 annually in funding to local troops).

304. See *Scouts Funding Jeopardized*, *supra* note 302, at A8 (noting that the United

even though a letter condemning the B.S.A.'s anti-gay policy accompanies many of their contributions.³⁰⁵

In Connecticut, the state's Commission on Human Rights and Opportunities removed the B.S.A. from the list of charities to which state employees may contribute directly from their paychecks because of the group's anti-gay policy.³⁰⁶ Removing the B.S.A. from this list will cost the organization an estimated \$25,000 annually.³⁰⁷ In response, the B.S.A. filed suit against Connecticut's comptroller and the Connecticut State Employee Campaign Committee, ironically claiming that their removal from the charity list is discriminatory, violating not only Connecticut's laws on discrimination but also the United States Constitution.³⁰⁸

In 1998, Chicago became the first municipality to "formally end[] all support for scouting programs as long as the [B.S.A.] continue[s] to discriminate on the basis of religious belief and sexual orientation."³⁰⁹ Since then, several municipalities, most notably the

Way of Monmouth County, home of Dale's own B.S.A. chapter, "has already approved a \$39,000 allocation to the Scouts for the fiscal year"); see also United Way of Monmouth County, *Community Investments: Funded Programs* (2000) (listing the Monmouth Council of the Boy Scouts as a funded program), at <http://www.uwmonmouth.org> (last visited Mar. 31, 2001).

305. See *United Way: Boy Scouts Should Reconsider Ban on Homosexuals*, NEWS-TIMES (Danbury, Conn.), Jan. 7, 2000 (reporting a letter sent from the United Way of Northern Fairfield County to the Connecticut Yankee Council of the B.S.A., which without threatening to cut off funding of \$250,000 annually, went on record to say that they did not support discrimination in any form), available at <http://www.newstimes.com/archive2000/jan07/rge.htm> (last visited Mar. 31, 2001).

306. See Donna Tommelleo, *Scouts to be Dropped from List of State-Supported Charities*, NEWS-TIMES (Danbury, Conn.), May 12, 2000 (reporting that the commission unanimously voted to remove the B.S.A. from the list of charities to which state employees can contribute directly from their paychecks, because allowing the Boy Scouts to participate in a paycheck deduction program violates Connecticut's anti-discrimination laws), available at <http://www.newstimes.com/archive2000/may12/rgm.htm>. The Director of Connecticut's Commission on Human Rights and Opportunities wrote "[a]llowing the Boy Scouts of America to benefit from a fundraiser that uses state resources . . . including the solicitation in employees' paychecks . . . potentially makes the state a party to . . . discrimination." *Boy Scouts' Refusal to Admit Gays May Cost Charity Contributions*, NEWS-TIMES (Danbury, Conn.), Nov. 21, 1999, available at <http://www.newstimes.com/archive99/nov2199/rgb.htm> (last visited Mar. 31, 2001). Since the Supreme Court's *Dale* decision, the Connecticut Commission on Human Rights and Opportunities reviewed its exclusion of the B.S.A. from the list of state-supported charities, concluding that *Dale* had "no substantive impact" on its decision. See *Declaratory Ruling on the Petition Filed by the State Employees' Campaign Committee* (Feb. 8, 2001), available at <http://www.state.ct.us/chro/metapages/HearingOffice/HODDecisions/declaratoryrulings/boyscout2.htm>.

307. See *id.* (noting the amount such a decision may cost the B.S.A. in Connecticut).

308. See Susanne Youmans, *Scouts Appeal Exclusion from State Charity Deduction Program*, NEWS-TIMES (Danbury, Conn.), June 13, 2000, available at <http://www.newstimes.com/archive2000/jun14/rgg.htm> (discussing the B.S.A.'s suit, filed in U.S. District Court in Bridgeport, CT).

309. Press Release, American Civil Liberties Union, Chicago Ends Boy Scout

city of Los Angeles, have followed Chicago's lead.³¹⁰ Along similar lines, the American Civil Liberties Union ("A.C.L.U.") filed suit in San Diego "to oust the local Boy Scouts from public property."³¹¹

The B.S.A. is also losing support from public schools across the country because of its anti-gay policy. Although approximately twenty-percent of youth B.S.A. members belong to units chartered by educational organizations,³¹² that number is shrinking as many of the nation's school districts are either limiting B.S.A. access to their schools or preventing access altogether.³¹³ The A.C.L.U. is currently

Sponsorship (Feb. 4, 1998) (describing the settlement between the B.S.A. and A.C.L.U., wherein the city of Chicago would drop its support of the B.S.A. and the B.S.A. could continue to discriminate), available at <http://gaylesissues.about.com/newsissues/gaylesissues/library/content/blpr020598bsa.htm> (last visited Mar. 31, 2001).

310. See *Bye Scouts: LA Cuts Ties With Boy Scouts Over Sex, Religious Discrimination*, ABCNEWS.COM, Nov. 29, 2000 (noting that the Los Angeles city council unanimously voted to cut the city's ties with the B.S.A., citing the organization's exclusion of gays and atheists), at <http://www.abcnews.go.com/sections/us/DailyNews/scouts001129.html>. As a result, the Los Angeles Police Department will have to disband its Explorers units, a police cadet B.S.A. spin-off. See *id.* Other municipalities that have ended B.S.A. support include San Francisco and San Jose, California, and Cape St. Claire, Maryland. See Sean Mussenden, *Cape Set to End its Boy Scout Support*, CAP. GAZETTE, July 31, 2000, available at <http://sir.home.texas.net/MD01.htm> (on file with author); Kate Zernike, *Scouts' Successful Ban on Gays Is Followed by Loss in Support*, N.Y. TIMES, Aug. 29, 2000, at A1 (noting various municipalities have "told local Scout troops they can no longer use parks, schools, and other municipal cites"). Still other municipalities are questioning their support. See, e.g., Marilyn Anderson, *Gay and Lesbian Group Asks Board to Shun Boy Scouts*, NEWSDAY (New York), July 19, 2000, at A16 (noting that "Councilwoman Christine Quinn (D-Manhattan) put in a legislative request to draft a law prohibiting the Boy Scouts from having a relationship with the New York Police Department through an Explorer's Club camp"); Daniel de Vise & Lisa Arthur, *Boy Scouts' Ban on Gays Rare for Youth Groups*, MIAMI HERALD, Sept. 17, 2000, at A1 (noting that in Florida, Broward County, Wilton Manors, Fort Lauderdale, and Miami Beach are all considering severing their ties to the B.S.A.).

311. Tony Perry, *Suit Challenges Scouts' Use of San Diego Land*, L.A. TIMES, Aug. 29, 2000, at A3 (challenging the B.S.A.'s lease of eighteen acres of park land for \$1 a year as well as its rent-free use of a city-owned "aquatic facility" on Mission Bay).

312. See Posting of Mike Montalvo, [mike_montalvo@yahoo.com](http://www.scouter.com/forums), to <http://www.scouter.com/forums> (May 19, 2000) (listing membership statistics that indicate public schools comprise ten percent of the total scout membership or fifty percent of the educational organization scout membership) (citing B.S.A. External Communications Division), available at <http://www.scouter.com/archives/Scouts-L/200005/0617.asp> (last visited Mar. 31, 2001).

313. See, e.g., Rose Archer, *New York School Cuts Ties with Boy Scouts*, CNN.COM, Dec. 1, 2000 (reporting that the New York City Schools Chancellor Harold Levy announced that city schools and educators can no longer sponsor B.S.A. troops or allow the B.S.A. to recruit scouts during school hours on school property), at <http://www.cnn.com/2000/US/12/01/ny.schools.boyscouts> (last visited Mar. 31, 2001); Denise Dube, *Scout Leader at Odds with Policy on Gays*, BOSTON GLOBE, Sept. 10, 2000, at W. Wkly. 1 (reporting that schools in Framingham, Mass., will no longer allow the B.S.A. to recruit or distribute materials inside their schools); Susan Ferrechia, *Boy Scouts Can Meet in Schools, Judge Says*, MIAMI HERALD, Mar. 21, 2001 (stating that it took a court order to force the Broward County School District to allow the B.S.A. to use schools, but the school district can charge rent), available at <http://www.miami.com/herald/content/news/brknews/digdocs/023338.htm> (last

pursuing the goal of ejecting the B.S.A. from Chicago public schools altogether with a class-action suit filed in April 1999.³¹⁴ Several churches and synagogues have similarly severed ties with the B.S.A. troops they sponsor.³¹⁵

Moreover, the B.S.A. is suffering from internal dissent. In recent years, numerous troops have voiced their disagreement with the B.S.A.'s policy on gays to the National Organization.³¹⁶ Since the

visited Mar. 31, 2001); Franklin, *Medtronic Gift*, *supra* note 302, at 1A (noting that the Burnsville-Eagan-Savage School District will no longer allow its schools to charter B.S.A. troops or distribute B.S.A. literature, although the troops may still hold meetings in school facilities); Gay, Lesbian & Straight Education Network (GLSEN), *School District Votes to Cut Ties with Scouts Over Anti-Gay Policy* (Jan. 12, 2001) (noting that North Carolina's Chapel Hill-Carrboro School Board unanimously voted to "sever its relationship" with the B.S.A., giving several troops until the end of the school year to find a new sponsor and alternative meeting places), at <http://www.glsen.org/templates/news/record.html?section=12&record=504>; Press Release, Portland Public Schools, *Recruiting in Portland Public Schools* (Oct. 6, 1999) (commenting that school board will revisit and probably revise its policy to allow the B.S.A. to recruit during school hours), available at <http://www.pps.k12.or.us/update/recruiting.shtml>; see also Mark Walsh, *Ruling on Boy Scouts Could Pose Dilemma for Schools*, EDUC. WK., July 12, 2000, at 38 (discussing the decision that schools will have to make regarding the incongruity between allowing the B.S.A. to use school facilities for meetings and recruiting and individual school districts' anti-discrimination policies). *But see* S. 52, 146th Gen. Assem., Reg. Sess. (Ga. 2001) (requiring that public schools not ban the B.S.A. from school facilities) (not enacted), available at <http://www.legis.state.ga.us> (last visited Mar. 31, 2001).

314. See Teresa Puente, *Tax Funding for Scouts Under Attack in Lawsuit*, CHI. TRIB., Apr. 15, 1999, at 1 (reporting that the A.C.L.U. has sued the Chicago Public Schools and the U.S. Transportation Command at Scott Air Force Base because they are hosts to Scouting Programs and the B.S.A. excludes individuals who will not affirm a belief in God; "[t]his lawsuit isn't about what the Boy Scouts do, it's about what government agencies do with tax dollars"); cf. Freedom Forum, *A.C.L.U. Challenges Public Schools, Military Over Sponsorship of Boy Scouts* (Apr. 16, 1999) (discussing the A.C.L.U. lawsuit which argues that public funding of B.S.A. activities "violates the constitutional requirement of separation of church and state"), at <http://www.freedomforum.org> (last visited Mar. 31, 2001).

315. See, e.g., Sara Olkon, *Temple Severs Ties with Scouts*, MIAMI HERALD, Jan. 11, 2001, at B1 (noting that a reform synagogue in Coral Gables, FL, decided to "sever ties with its 49-year-old Boy Scout troop unless its leaders formally reject the national organization's stance on gay membership," making it one of the "first synagogues in the nation to take action against the Boy Scouts"); Dave Wedge, *Taunton Church Drops Scout Program Over Ban on Gays*, BOSTON HERALD, Nov. 24, 2000, at 12 ("The church, which is affiliated with the United Church of Christ, will end its two-year relationship with the Scouts in January in light of [the] recent U.S. Supreme Court decision allowing the Scouts to discriminate against gays.").

316. See, e.g., Mike Cassidy, *S.J. Boy Scout Troop Pledges Not to Honor National Ban on Gays*, SAN JOSE MERC. NEWS, Feb. 4, 1992, at 1A (reporting that San Jose Scout Troop 260 was "the first troop in the country to openly proclaim that it will not honor a Boy Scouts of America policy of barring gay scouts or gay adult leaders."); *Local Den Objects to Boy Scouts' Policy on Gays, Withdraws*, AP, Nov. 10, 1999 (noting that Ashland Cub Scout Den 2 of Pack 320 will not renew its membership with the B.S.A. because of the organization's ban on homosexuals), available at <http://www.uua.org/news/scouts/portland.html> (last visited Mar. 31, 2001); Suzanne Solis, *Sea Scouts Hoping To Berth in Richmond Berkeley Ousted Group Over Anti-gay Policy*, S.F. CHRON., July 14, 1998, at A13 (noting how the Northland troop distanced itself from the national B.S.A.).

Supreme Court's *Dale* decision, dissention has increased.³¹⁷ The National B.S.A. Office reacted to non-conformity in January, 2001 by expelling seven Boy Scout and Cub Scout troops in the Oak Park, Illinois area whose sponsoring organizations refused to abide by the B.S.A.'s anti-gay policy.³¹⁸ The B.S.A. has also continued to expel openly gay leaders. Most recently, the National B.S.A. Office dismissed the highest-ranking B.S.A. leader in Santa Barbara County, California, after he publicly admitted that he is gay.³¹⁹

Nevertheless, it appears that the initial backlash has not effected dramatically membership or support.³²⁰ Even considering the vast number of disapproving reactions both prior to and since the Supreme Court's *Dale* opinion, the B.S.A. has made no suggestion it intends to change its anti-gay policy. It is for this reason that this Comment suggests using the revocation of state-level tax-exempt status not only to impact directly B.S.A. funding, but, indirectly to compound the existing sympathetic loss of support.

B. Revoking the B.S.A.'s Tax-Exempt Status in New Jersey Will Directly Impact the Organization's Funding

As a nonprofit, charitable corporation, the B.S.A. currently sustains no tax liability.³²¹ If the B.S.A.'s state-level tax-exempt status were revoked, however, all B.S.A. income would be subject to New Jersey's

317. See Glenn Chapman, *Piedmont Scouts Not Accepting Gay Ban; Council Sends Letter Opposing Gay Ban Policy*, OAKLAND TRIB., Oct. 7, 2000 (noting that the Piedmont Council's was the first open defiance of the B.S.A. National Organization's policy since it was solidified by the Supreme Court *Dale* decision), available at <http://www.oaklandtribune.com> (search archives).

318. See William Claiborne, *Scouts Expel Troops Whose Leaders Oppose Gay Ban*, WASH. POST, Jan. 27, 2001, at A2 (noting that the seven troops were "among the first to be expelled since the U.S. Supreme Court's ruling in June").

319. See *Scout Exec Fired For Coming Out*, PLANETOUT NEWS, Oct. 30, 2000 (reporting on the "decommissioning" of Leonard Lanzi, executive director of the Los Padres Council of the B.S.A.), at <http://www.planetout.com/pno>.

320. See Laura Parket & Guillermo X. Garcia, *Boy Scout Troops Lose Funds, Meeting Places*, USA TODAY, Oct. 9, 2000, at 1A (noting that the "loss of support so far has not had much effect on the [B.S.A.'s] network of local troops . . . [m]embership remains robust at 6.2 million . . ."). Although by no means proportional, the backlash to the Supreme Court's decision has had a backlash of its own. See, e.g., Elenor Chute, *Cub Pack Face Loss of Sponsor Over Anti-Gay Policy*, POST-GAZETTE, Jan. 12, 2001, at C4 (reporting that "an anonymous donor, noting reports of a backlash against the Boy Scouts for its anti-gay policies, gave \$1.5 million to Boy Scout operations in the Greater Pittsburgh and Westmoreland-Fayette councils"); Franklin, *Religious Issue*, *supra* note 303, at 1B ("The Viking Council got about \$4000 from new contributors, compared with \$1000 that was withdrawn from existing pledges . . . [and the] St. Paul-area Indianhead Council received an unsolicited \$1500 from a foundation expecting that there might be a shortfall in contributions").

321. See *supra* notes 20 and 49 and accompanying text (noting that the B.S.A. is an incorporated, tax-exempt organization).

Corporation Business Tax Act³²² (“C.B.T.A.”), as is the income of all other corporations doing business, employing or owning capital or property, or maintaining an office in New Jersey.³²³ Although the B.S.A.’s headquarters are in Irving, Texas,³²⁴ the C.B.T.A. requires that even a foreign corporation pay its “just share of the cost of state government upon which it necessarily relies and by which it is furnished protection and benefit.”³²⁵ The amount paid under the C.B.T.A. is based on the net worth of the corporation.³²⁶ The B.S.A.’s net worth is determined based on the value of property³²⁷ it owns in New Jersey as well as its New Jersey sales and investment income,³²⁸ including all endowments and funds currently exempted from taxation because they are “held and administered exclusively for charitable, benevolent, religious or hospital purposes.”³²⁹ Given that the B.S.A.’s total nationwide income for the year ending December

322. N.J. STAT. ANN. §§ 54:10A-1 through 54:10A-5.5 (West 1986 & Supp. 2000).

323. See N.J. STAT. ANN. § 54:10A-2 (West 1986 & Supp. 2000) (detailing which corporations are subject to tax). The Corporation Business Tax Act (“C.B.T.A.”) reads:

Every domestic or foreign corporation which is not hereinafter exempted shall pay an annual franchise tax for the year 1946 and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State.

Because the B.S.A. would be subject to the C.B.T.A., it would not be subject to New Jersey’s Gross Income Tax Act. See N.J. STAT. ANN. § 54:1-1 (West 1986 & Supp. 2000) (imposing a tax on the New Jersey gross income of every individual, estate, or trust).

324. See Boy Scouts of America, *Homepage* (showing P.O. Box 152079, Irving, Texas 75015-2079 as the address of the B.S.A. National Council), at <http://bsa.scouting.org> (last visited Mar. 31, 2001).

325. *Roadway Exp., Inc. v. Dir.*, 236 A.2d 577, 588 (N.J. 1967) (stating that the benefits all businesses receive from the existence of an orderly state government justify state taxes on foreign corporations).

326.

[The CBTA tax] is not a tax upon any of the underlying property of a corporation. Rather, it is a tax for the privilege of the franchise, and the value of that privilege is ascertained on the basis of net worth, it evidencing the potential of the corporation for doing business under the franchise with the sanction and protection of the laws of this State.

U.S. Steel Corp. v. Dir., 186 A.2d 266, 269 (N.J. 1962).

327. See *Werner Mach. Co. v. Dir.*, 110 A.2d 89, 91 (N.J. 1954) (noting that the C.B.T.A. is not a property tax, but rather accounts for the value of property owned by a corporation in assessing the appropriate C.B.T.A. tax for the privilege of doing business in New Jersey).

328. See *Silent Hoist & Crane, Co. v. Dir.*, 494 A.2d 775, 788 (N.J. 1985) (including a New York corporation’s sales and investment portfolio income in its apportioned income base for purposes of calculating its tax liability under C.B.T.A.).

329. N.J. STAT. ANN. § 54:4-3.7 (West 1993 & Supp. 2000); see also *Philanthropic Advisory Service Report*, *supra* note 17 (noting that less than ten percent of the B.S.A.’s funding nationally comes from “retirement benefits trusts and other contributions and bequests”).

31, 1996, exceeded \$144 million,³³⁰ C.B.T.A. tax liability on New Jersey's portion of that income would be significant.

Removal of the B.S.A.'s state-level tax-exempt status would also subject the organization to New Jersey property tax,³³¹ another potentially significant cost to the B.S.A. Currently, all property owned by charitable, nonprofit organizations, expressly including the B.S.A., is exempted from taxation by New Jersey property taxation statutes.³³² Coincidentally, the town of Benson, Vermont, has begun the process of reinstating the collection of property taxes on land the B.S.A. owns in Rutland County, Vermont.³³³ The town's actions are in response to the B.S.A.'s assertion that it is a "private club," a claim proffered to defend its anti-gay policy.³³⁴

Charitable nonprofit organizations, including the B.S.A., also are exempt from sales and use taxes in New Jersey.³³⁵ New Jersey has a sales tax of six percent.³³⁶ The state, thus, loses six cents on every dollar the B.S.A. receives in exchange for certain goods, including membership dues, uniforms and other scouting paraphernalia.³³⁷

330. See Philanthropic Advisory Service Report, *supra* note 17 (noting that the vast majority of the B.S.A.'s budget is derived from fees, investment income, and sales of uniforms, badges, etc.).

331. See N.J. STAT. ANN. § 54:4-1 (West 1993 & Supp. 2000) ("All property real and personal within the jurisdiction of this State not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter.")

332. See *id.* § 54:4-3.24 (West 1993 & Supp. 2000) ("All real property used for the purposes and in the work of . . . the Boy Scouts of America . . . shall be exempt for taxation" up to five acres or any amount of acreage "upon which construction of a building or other improvement has begun"); see generally *id.* § 54:4-3.6 (exempting, in a section entitled "Exemption of property of nonprofit organizations," buildings owned by nonprofit corporations); *id.* § 15A:2-1 (listing the permitted purposes for a nonprofit corporation, including "charitable . . . educational . . . religious . . . literary . . . [and] scientific"); *id.* § 54:4-3.64 (exempting from state taxation land for conservation or recreation purposes owned by nonprofit corporations or organizations).

333. See Barb Dozetos, *Strange Bedfellows Stand Up to Boy Scouts: Liberals and Conservatives Say "Private Club" Should Pay Fair Share*, OUT IN THE MOUNTAINS (1999) (noting that a recent estimate values the B.S.A.'s property on Lake Sunrise at almost \$1 million, meaning the B.S.A. would owe over \$13,000 in property taxes), at <http://www.mountainpridemedia.org/jan99/benson.htm>.

334. See *id.* (indicating that Benson town officials consider the B.S.A.'s shift in identity from a non-profit organization to a private club the end of the organization's eligibility for non-profit tax exemption); accord *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) ("The Boy Scouts is a *private*, not-for-profit organization engaged in instilling its system of values in young people.") (emphasis added).

335. See N.J. STAT. ANN. § 54:32B-9(b)(1) (West 1993 & Supp. 2000) (exempting from sales and use taxes "a corporation, association, trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes").

336. See *id.* § 54:32B-4(a) (noting that for every dollar received from the sale of goods, the purchaser is to reimburse the vendor by six cents).

337. See Philanthropic Advisory Service Report, *supra* note 17 (noting that

The B.S.A. is specifically exempt from paying tax for the use of fuel for “motor boats or motor vessels used exclusively for Sea Scouts training by a duly chartered unit of the Boy Scouts of America.”³³⁸ The New Jersey Statutes also contain multiple non-tax-related provisions that benefit the B.S.A.³³⁹

C. The Efficacy of Revoking Tax-Exempt Status

Revocation of the tax exemption subsidy³⁴⁰ carries with it an interesting and powerful side effect. As Justice O’Connor observed in her concurrence to *Lynch v. Donnelly*,³⁴¹ “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”³⁴² Although O’Connor is discussing an Establishment Clause case, her words are equally powerful when considered in a tax-exemption context. In fact, within her *Lynch* concurrence, O’Connor noted that tax exemption also raises issues of endorsement.³⁴³ Kenneth Karst arrived at a similar

nineteen percent of the B.S.A.’s funding nationally comes from “supply operations,” including the sale of uniforms, badges, and other B.S.A. paraphernalia).

338. N.J. STAT. ANN. § 54:39-66(1)(r) (West 1993 & Supp. 2000).

339. See, e.g., *id.* § 39:3-27 (“No fee shall be charged for the registration of motor vehicles not used for pleasure or hire, owned by . . . the Boy Scouts of America . . .”); *id.* § 23:2-3 (allowing the Division of Fish, Game and Wildlife to stock with fish any body of water “under the control of and for the use of . . . the Boy Scouts”); *id.* § 13:8C-27(c)(1) (allowing state grants for “lands to be acquired or developed by a qualifying tax-exempt nonprofit organization for recreation and conservation purposes [to] include up to fifty percent of the cost of acquisition or development of the lands”); *id.* § 2A:53A-7(a).

No non-profit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association

Id. § 40:55D-8(c) (allowing municipalities to exempt organizations holding federal § 501(c)(3) tax-exempt status from the payment of any fee charged for the administration of its functions).

340. This conclusion was argued above. See *supra* Part II.A (explaining how tax exemption subsidizes tax-exempt organizations even if it does not rise to the level of state action).

341. 465 U.S. 668 (1984).

342. *Id.* at 688 (O’Connor, J., concurring). It is important to note that O’Connor does not favor such endorsement or disapproval, and believes that any government activity that achieves either end in relation at least to religion should be subject to the highest level of judicial scrutiny. See *id.* at 689.

343. See *id.* at 692 (“The laws upheld in *Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (tax exemption for religious, educational, and charitable organizations) . . . had such [endorsement] effects, but they did not violate the Establishment Clause.”) (O’Connor, J., concurring).

conclusion when discussing the Department of Defense's policy of excluding gay men and lesbians from the armed forces.³⁴⁴ Karst noted that this policy has been "the single most important governmental action in maintaining public attitudes that stigmatize homosexual orientation."³⁴⁵ Both O'Connor's and Karst's analyses support the conclusion that government actions demonstrating endorsement or disapproval significantly affect public opinion.

Consider the history of Daughters of the American Revolution ("D.A.R."), a non-profit organization founded around the turn of the twentieth century, and federally chartered much like the B.S.A.³⁴⁶ In 1939, D.A.R. refused to let world-renowned opera singer Marian Anderson, an African-American woman, perform at Washington D.C.'s then premier concert venue, D.A.R.'s Constitution Hall.³⁴⁷ Outraged by this display of racism, First Lady Eleanor Roosevelt resigned from D.A.R. and persuaded Secretary of the Interior Harold L. Ickes to invite the singer to perform a free public concert from the steps of the Lincoln Memorial.³⁴⁸ On Easter Sunday, 1939, 75,000 people—the largest audience ever assembled at the Memorial—arrived not only to hear Anderson, but also to speak out against racism.³⁴⁹ Following this event, D.A.R. "lost stature and public support . . . as it became identified with racial bias . . ."³⁵⁰ Eventually,

344. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991) (explaining that the exclusion regulations of the Department of Defense and the various services is an authoritative statement cosigning "a homosexual" to the status of outsider and reassuring other service-members that they belong).

345. *Id.* at 558-59; accord Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677, 700 (1991) (citing the Department of Defense's policy as "the single most important government expression stigmatizing gay Americans").

346. See National Society of Daughters of the American Revolution, *All About DAR* (detailing the history of Daughters of the American Revolution), at <http://www.dar.org/natsociety/allabout.html> (last visited Mar. 31, 2001).

347. See Penn Library Special Collections, *Marian Anderson: A Life in Song; Singing to the Nation* [hereinafter Penn Collection, *Marian Anderson*] (detailing the events preceding Anderson's historic concert from the steps of the Lincoln Memorial, with downloadable video and audio excerpts), at <http://www.library.upenn.edu/special/gallery/anderson/lincoln.html> (last visited Mar. 9, 2001).

348. See National Archives and Records Administration, *Exhibit: Eleanor Roosevelt Letter* (calling the position taken by D.A.R. an "unfortunate attitude"), at <http://www.nara.gov/exhall/originals/eleanor.html> (last modified Mar. 1996); see also Penn Collection, *Marian Anderson*, *supra* note 347 (recounting Anderson's historic concert).

349. See Afrocentric Voices, *Biography: Marian Anderson* (recounting how Anderson's historic concert focused attention on subsequent cases of racial discrimination), at <http://www.afrovoices.com/anderson.html> (last visited on Mar. 31, 2001).

350. See David Crary, *Boy Scouts May Lose Support After Winning Battle Over Gays*, CNN.COM, June 30, 2000 (noting that the Scouts "risk suffering a fate similar to that of [D.A.R.]"), at <http://www.cnn.com/2000/LAW/06/30/scoutsfuture.ap> (last

D.A.R. abandoned its racist policy.³⁵¹

By revoking the B.S.A.'s state-level tax exemption, New Jersey can send a powerful message that the state government officially disapproves of the B.S.A.'s anti-gay policy.³⁵² Government representatives from various cities and states already sent similar messages of disapproval in the form of amicus curiae briefs submitted to the Supreme Court in support of Dale.³⁵³ Although removal of the B.S.A.'s state-level tax-exempt status does not affect the § 170 federal deductibility of corporate contributions to the organization, such action by New Jersey would place a shadow of inferiority over the B.S.A.³⁵⁴ In turn, this shadow makes contribution less attractive to corporate sponsors who do not wish to align themselves with a group disfavored by the state government and who could just as easily align themselves with more favored groups. Therefore, promulgation of this message of disapproval will likely lead to a further decline in corporate sponsorship for the B.S.A. Similarly, if tax-exemption revocation officially stigmatizes the B.S.A., more municipalities and public school systems will seek to distance themselves from the organization, further undermining B.S.A. support.

The effect of revoking state-level tax-exempt status is potentially exponential. As the other states that prohibit sexual orientation discrimination follow Dale's lead in New Jersey, sending a similar message of disapproval, corporate donation to the B.S.A. will grow even less attractive. In the best case scenario, the I.R.S. could use a multi-state revocation of state-level tax-exempt status as the basis for a Revenue Ruling denying federal § 501(c)(3) tax-exempt status and § 170 donor deductibility to groups that discriminate on the basis of

visited Mar. 31, 2001).

351. See Deb Price, *Pressure Mounts on Boy Scouts to Change*, DET. NEWS, Sept. 11, 2000, at 9 (commenting that "[e]ventually, America was so changed that D.A.R. changed as well").

352. See Posting of Bill Bekkenhuis, bekkenhuis@fast.net, to Rec.Scouting.Issues (Aug. 28, 1999) (copy on file with author) (explaining that ultimately the B.S.A. must decide whether it will embrace society's more tolerant values and continue to enjoy the good will of the general public, access to public school children, and government sponsorship of Scout units).

353. See Lambda Legal Defense & Education Fund, *B.S.A. v. Dale: Online Presskit* (providing Internet links to the various briefs of amicus curiae submitted in Dale's support, including those from the Attorneys General of California, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Oklahoma, Oregon, Vermont, and Washington, as well as from the city governments of Atlanta, Chicago, Los Angeles, New York, San Francisco, Portland, and Tucson), at <http://www.lambdalegal.org/cgi-bin/pages/sections/dalepresskit/amici.html> (last visited Mar. 31, 2001).

354. See *supra* Part II.A (discussing the notion that certain governmental actions, such as affording an organization tax exempt status, may present issues of government endorsement of questionable activity).

sexual orientation.³⁵⁵ If corporations were unable to take deductions for their contributions, corporate sponsorship would all but disappear. At that point, the B.S.A. could still theoretically maintain its anti-gay policy; however, such a stance would be fiscal suicide.

CONCLUSION

The Supreme Court established the method for a suit to revoke tax-exempt status when it decided *Bob Jones University* in 1983. James Dale is now perfectly situated to apply this method to the B.S.A. in New Jersey. If successful, similarly-situated plaintiffs could bring similar suits in the District of Columbia and the other eleven states that protect sexual orientation.³⁵⁶

Although not necessarily a panacea, revoking state-level tax-exempt status remains a worthy goal. First, state governments should not subsidize discrimination that violates the state's own laws. Second, the compounding effect of the stigma associated with removing state-level tax exemptions upon current sympathetic cuts in funding and support may compel the B.S.A. to reconsider its discriminatory policy. Finally, and perhaps most importantly, when more states begin to prohibit sexual orientation discrimination in their laws or when it is condemned at the federal level, the path to ending the B.S.A.'s anti-gay policy once and for all will already be laid.

355. See *supra* Part III.B (noting the I.R.S.' authority to interpret § 501(c)(3) and grant tax-exempt status accordingly).

356. See *supra* note 37 (listing the twelve states and the District of Columbia that protect sexual orientation).