Constitutional Rights of the Boy Scouts

*By Scott H. Christensen**

For the past quarter century, Boy Scouts of America has been defending itself against legal attacks for educating boys to do their "duty to God" and keep "morally straight." Until 2000, most litigation was brought by adults or youth seeking membership. The decision of the Supreme Court of the United States in *Boy Scouts of America v. Dale*[1] extinguished the membership cases but sparked a new round of litigation. Following *Dale*, the cases have challenged Boy Scouts' relationship with government entities. In a few instances, Boy Scouts has sued the government to protect its constitutional rights.

This article summarizes the legal landscape that Boy Scouts have been hiking since the success before the Supreme Court.[2] From San Diego to Connecticut, Boy Scouts has been defending its right to equal treatment in government forums. A disturbing trend has emerged, however, in which the Ku Klux Klan appears to be given greater constitutional protections than some lower courts have been affording Boy Scouts. This trend is part of the ever-expanding application of state and local antidiscrimination laws to encroach on the federal constitutional rights of organizations with traditional values.

Before surveying the recent Boy Scouts litigation, I will begin with some background to put those cases in context.

As the U.S. Supreme Court recognized, Boy Scouts is "a private, not-for-profit organization engaged in instilling its system of values in young people."[3] More than three million youth members and one million adult leaders are active in the traditional programs of Cub Scouts, Boy Scouts, and Venturing.

The national Boy Scouts organization charters approximately 300 Councils nationwide to administer the Scouting program at the local level. The national organization also charters local community organizations to operate Cub Scout Packs, Boy Scout Troops, and Venturing Crews by identifying leaders and providing a meeting space. The center of gravity in the Scouting organization is at the local Pack and Troop level, where boys meet weekly with volunteer adult leaders in private homes, community centers, public schools, and church basements.

The mission of Boy Scouts is "to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Law."[4] The Scout Oath includes the obligations to do one's "duty to God" and to be "morally straight"[5] and the Scout Law requires being "reverent" and "clean."[6] In addition to agreeing to live according to the Oath and Law, adult volunteer leaders also subscribe to the Declaration of Religious Principle, which states that "no member can grow into the best kind of citizen without recognizing an obligation to God."[7] Boy Scouts is "absolutely nonsectarian,"[8] however, and virtually every religion in America is represented in Scouting—from the Armenian Church of America to Zoroastrians. In adhering to the values of the Oath and Law, Boy Scouts does not accept as members atheists or agnostics,[9] or avowed homosexuals.[10]

For many years, Boy Scouts defended lawsuits challenging its membership standards. The typical plaintiffs were homosexual adults,[11] atheist or agnostic youth or their parents,[12] and girls seeking youth membership.[13] The basic claim common to these cases was that a Cub Scout Pack or Boy Scout Troop is a place of public accommodation, like a gas station or movie theater, and must admit anyone who applies. Most cases were brought under state law, although one relied on the federal public accommodations statute.[14]

Boy Scouts defended itself by appealing to its constitutionally protected freedoms of speech and association. The values of the Scout Oath and Law form the core of Boy Scouts' speech protected by the First Amendment.[15] Scouting is an expressive association because all members agree to adhere to the Oath and Law.[16] Scouting also is an intimate association because the traditional programs are administered in small groups, at the Pack or Troop level.[17] Finally, Boy Scouts used statutory defenses available in the public accommodations laws, such as exemptions for private clubs or religious organizations.[18]

Boy Scouts successfully defended itself in eight states and the District of Columbia—including five of their highest courts[19]—and one federal court of appeals.[20] The only state supreme court to rule against Scouts was New Jersey,[21] and that decision was overturned by the Supreme Court.[22] The Supreme Court victory in *Boy Scouts of America v. Dale* confirmed that Boy Scouts has the right under the First Amendment to select leaders who agree to live according to the Scout Oath and Law.[23] That decision brought membership challenges to a close.[24]

Following Boy Scouts' widely-publicized success before the Supreme Court, the attacks turned to the relationships between Boy Scouts and government. For example, in Madison, Wisconsin, the City Council voted to exclude Boy Scouts from any charitable proceeds raised during the annual Fourth of July fireworks charity, although Boy Scouts continued to volunteer to collect charitable donations for other organizations.[25] In Norwalk, Connecticut, Scouts had to fight for permission to hold a meeting in a public park after members of the City's Parks Committee told a Scoutmaster it would not grant a permit because of Boy Scouts' stance before the Supreme Court.[26] In Philadelphia, Pennsylvania, the City threatened to terminate Boy Scouts' use of City-owned property.[27]

Several other cases, discussed below, have resulted in litigation. These cases fall into two basic categories: (1) taxpayers suing the government because of the relationship the government has with Boy Scouts and (2) the government

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itself terminating or changing the terms of a relationship with Boy Scouts. The first kind of suit largely has been pursued under the Establishment Clause and may or may not include Boy Scouts as a defendant. The second kind of case largely falls under the Supreme Court's viewpoint discrimination and unconstitutional conditions jurisprudence.

In the past six years, the American Civil Liberties Union has funded lawsuits seeking to sever Boy Scouts' relationships with government. Two months after the Supreme Court decided *Dale*, a lesbian couple, an agnostic couple, and their respective minor sons represented by the ACLU sued the City of San Diego and Boy Scouts to terminate two leases between the City and Boy Scouts.[28] Under one lease, the local Boy Scouts council operates a $2.5 million aquatic center built with Boy Scout funds for the use and benefit of all youth groups in San Diego; under the other lease, Boy Scouts constructed and operates a campground open for use by the public. The leases require Boy Scouts to make the properties available to the community on a first-come-first-served basis at no expense to the City.[29] The leases are part of a City program in which the City leases property to over 100 secular and religious nonprofits in return for community service.[30] In *Barnes-Wallace v. Boy Scouts of America*, the district court described Boy Scouts' lawful and constitutionally protected values as an "anti-agnostic and anti-atheist stance,"[31] repeatedly referred to Boy Scouts as "discriminatory,"[32] and declared that "lawsuits like this are the predictable fallout from the Boy Scouts' victory before the Supreme Court."[33] The district court acknowledged that the City leased "publicly-owned land to 'well over 100 nonprofit groups to advance the educational, cultural and recreational interests of the City' without regard to whether the lessees are religious."[34] Even though the leasing processes followed were public and typical, the district court concluded that exclusive negotiations with Boy Scouts violated the Establishment Clause because they were not equally open to "the religious, areligious and irreligious."[35] The district court ultimately declared that both leases were unconstitutional, but Boy Scouts may remain on the properties while appeals are pending. The Ninth Circuit heard oral argument earlier this year.[36]

Another district court immediately applied *Barnes-Wallace* to declare military support for the National Scout Jamboree unconstitutional.[37] The Jamboree is a national, civic, patriotic event held every four years for a ten day period. Since 1981, the Jamboree has been held at Fort A.P. Hill in Fredericksburg, Virginia. The military lends logistical support because it views the Jamboree as a unique and valuable opportunity to practice skills in constructing, supporting, and dismantling a temporary "tent city" that will sustain 40,000 people. In *Winkler v. Rumsfeld*, a group of taxpayers represented by the ACLU sued the Departments of Defense and Housing and Urban Development over federal support for Scouting programs, asserting that the support violates the Establishment Clause.[38] The district court granted summary judgment in the government's favor on the claims against HUD and all but the Jamboree claim against DOD. The court relied primarily on the decision in *Barnes-Wallace* that Boy Scouts' nonsectarian "duty to God" requirement rendered Boy Scouts a religious organization and the Jamboree could not be supported under the Establishment Clause as a result.[39] Boy Scouts was not a party to the case but provided evidence used before the district court and participated as an amicus curiae at the Seventh Circuit, including at oral argument earlier this year.[40]

In spite of success before the Seventh Circuit thirteen years ago,[41] Boy Scouts remains the subject of litigation over recruiting in public schools. An atheist parent of a child in Mt. Pleasant Public Schools in Michigan brought suit against Boy Scouts and the school district challenging the district's policy of allowing Boy Scouts equal access to school meeting space and literature distribution systems, alleging that this policy constitutes religious discrimination against atheist students under the Michigan Constitution and the Elliott-Larsen Civil Rights Act.[42] The trial court's dismissal was affirmed by the Michigan courts, and the Supreme Court denied a petition for a writ of *certiorari* earlier this year.[43] In another pair of cases, an atheist mother represented by the ACLU asserted that allowing Boy Scouts to recruit at her son's school on the same basis as other groups violated state law prohibiting establishment of religion. The Oregon circuit court dismissed the case, the Oregon Court of Appeals affirmed, and the Oregon Supreme Court denied review.[44] Undeterred, the mother challenged the same Boy Scout activities in a second suit alleging that the recruiting discriminated against her son on the basis of religion. The superintendent found no probable cause for the claim, but the state circuit court concluded that the plaintiff presented sufficient evidence to warrant remand to the superintendent for further proceedings. The school and state appealed that decision, and the Oregon Supreme Court heard oral argument earlier this year.[45]

In all of these cases, there is no dispute that the government had a secular and neutral purposes behind its relationship with Boy Scouts, so the only question is whether, under *Lemon v. Kurtzman*[46] and its progeny, the government relationship had the primary effect of advancing religion.[47] In each case, a "reasonable observer" taking into account the history and context of the relationship, would conclude there is no advancement of religion because there is no evidence of government endorsement of Boy Scouts' values.[48] A reasonable observer would not consider Boy Scouts "religion" for purposes of the Establishment Clause in light of the totality of the Scouting program because to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation."[49] Boy Scouts' private speech encouraging members to fulfill their "duty to God" cannot be attributed to the government in any event because "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[50]

In order to protect its constitutional rights, Boy Scouts has had to sue government entities. Boy Scouts in Broward County, Florida, like numerous other local groups, had been permitted for many years to use public school facilities after

hours.[51] Other groups that used the facilities included churches, a youth orchestra, a service agency for senior citizens, and an African-American sorority. But after the decision in *Dale*, the school board revoked Scouts' permission to use school facilities "because the Scouts' membership policies discriminate on the basis of sexual orientation, and therefore violate the School Board's anti-discrimination policy."[52] Boy Scouts sued, and the district court concluded that Boy Scouts was excluded from school facilities because it exercised its "First Amendment right to freedom of expressive association."[53] The district court preliminarily enjoined the school board's actions as discrimination based on Scouting's viewpoint.[54] The school board agreed to settle by turning the preliminary injunction into a permanent injunction and paying Boy Scouts' attorneys fees.

Meanwhile, the State of Connecticut excluded Boy Scouts from a state employee charitable campaign, in which 900 different groups participate, solely because of the values Boy Scouts defended in *Dale*.[55] Connecticut concluded that state antidiscrimination law precluded Boy Scouts' participation in the charitable campaign. Nevertheless, the campaign continued to include a wide variety of other groups that discriminate in membership and services on the basis of sex, ethnicity, age, or sexual orientation. The district court upheld the State's actions, and the Second Circuit affirmed, in a decision that squarely conflicts with the Supreme Court precedent in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc*.[56] The Second Circuit upheld removal of the Scouts from the charity list on the ground that Connecticut did not "require" the Boy Scouts to change its "constitutionally protected" views, but merely required the Boy Scouts to "pay[] a price" for "exercising its First Amendment rights."[57]

On the other side of the country, the City of Berkeley revoked free berthing space used by Sea Scouts in the City marina in retaliation for the position Boy Scouts defended in *Curran v. Mount Diablo Council of the Boy Scouts of America*,[58] a case factually similar to *Dale* decided under state law. City Council members "made clear" that they wanted to take "'punitive actions' against the Sea Scouts in an 'attempt to overturn [Boy Scouts'] national policies.'"[59] City officials stated that they were excluding the Sea Scouts "to discourage BSA from maintaining its disfavored policies and to retaliate for BSA's expulsion of Timothy Curran . . . pursuant to those policies."[60] The City relied on a City law that use of the marina "will not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition."[61] But the City also granted free berthing to the Cal Sailing Club, which runs a "women teaching women" program that limits access based on "sex,"[62] and the Nautilus Institute, which operates a program for "teenage public school students" that predicates access on "age."[63] The individual Sea Scouts represented by a sole practitioner sued (Boy Scouts was not a party), and the California Supreme Court ultimately rejected their First Amendment challenge on the ground that the Sea Scouts remained free to exercise their constitutional rights at the full price of berthing in the marina.[64] A petition for a writ of certiorari is pending presently.

The Second Circuit and California Supreme Court decisions upholding actions by Connecticut and Berkeley, respectively, are inconsistent with Supreme Court decisions prohibiting viewpoint discrimination and unconstitutional conditions in government programs. The government cannot exclude an otherwise eligible organization from participation in a government program because of membership policies that form the organization's expression.[65] Nor may government condition access to government benefits on the relinquishment of constitutional rights.[66]

In response to the repeated discrimination against Boy Scouts by state and local government, Congress crafted two legislative solutions. The Boy Scouts of America Equal Access Act, part of the No Child Left Behind Act of 2001, requires public schools to provide Boy Scouts with equal access to benefits and services provided other outside youth and community groups, including meeting space, recruiting opportunities, and literature distribution.[67] The regulations make clear that this access must be "on terms that are no less favorable than the most favorable terms provided to one or more outside youth or community groups."[68] If a school fails to comply, the Department of Education may terminate the federal funds that the school receives.[69] The Boy Scouts of America Equal Access Act has effectively ended the need for litigation against schools.

In response to challenges to Boy Scouts' participation in government programs beyond access to public schools,[70] Congress enacted the Support Our Scouts Act of 2005.[71] This legislation accomplishes two basic goals. First, the Support Our Scouts Act protects federal government relationships with Scouting, including the ability to host the Jamboree on federal property.[72] Second, the Act prohibits state or local governments that receive federal Community Development Block Grant ("CDBG") funds from discriminating against Boy Scouts in government forums or denying Boy Scouts access to facilities equal to that provided other groups.[73] If a state or local government fails to comply, HUD may terminate the CDBG funds it receives. The Support Our Scouts Act, like the Boy Scouts of America Equal Access Act on which it was based, requires state or local governments to treat Boy Scouts at least as well as other community organizations participating in government programs on pain of losing CDBG funds.

The irony of the recent assaults on Boy Scouts is that many of the cases have been funded by the American Civil Liberties Union. Throughout the history of the litigation discussed above, the ACLU has either directly filed the claims against Boy Scouts or filed an amicus curiae brief in support of the attack on Scouts.[74] In the last twenty-five years, the ACLU has contributed to no fewer than fourteen lawsuits against Boy Scouts, for a total of over 100 years worth of litigation—longer than Boy Scouts of America has existed.

The ACLU has been so fervent in suing Boy Scouts that it is litigating positions directly contrary to pro-civil liberties positions it has taken in other cases. For example,

the ACLU persuaded a district court and then the Eighth Circuit that Missouri may not exclude the Ku Klux Klan from the State's "Adopt-A-Highway" program based on the Klan's viewpoint.[75] The Eighth Circuit concluded that whether analyzed under the First or Fourteenth Amendments, "viewpoint-based exclusion of any individual or organization from a government program is not a constitutionally permitted means of expressing disapproval of ideas . . . that the government disfavors."[76] The State violated the Klan's constitutional rights because it "simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association."[77]

But while the ACLU was litigating in Missouri to include the Klan in government programs, the ACLU was suing in California and Illinois to exclude Boy Scouts from government programs.

CONCLUSION

The constitutionally dubious treatment of Boy Scouts by some lower courts following *Dale* is part of a growing pattern of state agency actions and judicial opinions that have excluded groups from government programs because of their traditional religious commitments or have sought directly to regulate their internal practices.

Several religious groups have been denied recognition, and commensurate benefits, at public law schools, universities, and high schools. The Christian Legal Society is litigating exclusion from law schools at public universities in California and Illinois.[78] Other on-campus Christian student groups were denied recognition by the California State University system because their internal membership policies require members to adhere to a Christian statement of faith and code of conduct.[79] In Washington State, a public high school denied recognition to an on-campus Christian club whose membership was limited to Christians.[80]

A variety of religious organizations are suffering from the application of state anti-discrimination laws to their employment and other internal decisions. California and New York have deemed Catholic Charities insufficiently religious to avail itself of religious exemptions from state laws requiring that employee health insurance include coverage for prescription contraceptives,[81] and Catholic Charities of Boston was pressured to cease adoptions rather than change policies to permit same-sex couples to adopt in violation of Catholic doctrine.[82] The Salvation Army in New York[83] and a Baptist children's home in Kentucky[84] are litigating over their religious employment criteria, and a United Methodist children's home in Georgia[85] settled a case by abandoning its religious requirements for employment.

This pattern will likely intensify as legalization of same-sex marriage is debated in legislatures and courts across the country.[86] The Supreme Court ultimately will need to take another case—perhaps from among the percolating suits discussed above—to resolve the limitations on state and local anti-discrimination laws when they interfere with federal constitutional rights of organizations with traditional values.

FOOTNOTES

[1] 530 U.S. 640 (2000).

[2] For a useful analysis of contemporary litigation against Boy Scouts, see Erez Reuveni, Note, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. REV. 109, 114-20 (2006) (*available at* http://www.bu.edu/law/lawreview/v86n1/Reuveni.pdf).

[3] *Dale*, 530 U.S. at 644.

[4] http://www.scouting.org.

[5] The Scout Oath states that "On my honor 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." *Dale*, 530 U.S. at 649.

[6] The Scout Law states that a Scout is "Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent." *Dale*, 530 U.S. at 649.

[7] Boy Scouts of America Bylaws art. IX, § 1, cl. 1.

[8] *Id.*

[9] *See* Welsh v. Boy Scouts of America, 993 F.2d 1267, 1268 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); Randall v. Orange County Council, Boy Scouts of America, 952 P.2d 261, 264-65 (Cal. 1998).

[10] *See Dale*, 530 U.S. at 653-54; Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218, 224-25 (Cal. 1998).

[11] *See* Boy Scouts of America v. District of Columbia Commission on Human Rights, 809 A.2d 1192 (D.C. 2002).

[12] *See* Randall v. Orange County Council, Boy Scouts of America, 952 P.2d 261 (Cal. 1998).

[13] *See* Yeaw v. Boy Scouts of America, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997) (depublished), *review dismissed*, 960 P.2d 509 (Cal. 1998).

[14] *See Welsh*, 993 F.2d 1267.

[15] *See Dale*, 530 U.S. at 655-56.

[16] *See id.*

[17] *See generally* Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984). *See* Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 476 n.14 (3d Cir. 1986) ("as our focus must necessarily be on Kiwanis Ridgewood, a club with but twenty-eight members, it is apparent that evidence dealing with the whole of the Kiwanis International complex is irrelevant"), *cert. dismissed*, 483 U.S. 1050 (1987).

[18] *See Welsh*, 993 F.2d at 1276-77.

[19] Randall v. Orange County Council, Boy Scouts of America, 952 P.2d 261 (Cal. 1998); Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218 (Cal. 1998); Quinnipiac Council, Boy Scouts of America, Inc. v. Comm'n on Human Rights & Opportunities, 528 A.2d 352 (Conn. 1987); Boy Scouts of America v. District of Columbia Commission on Human Rights, 809 A.2d 1192 (D.C. 2002); Chicago Area Council of Boy Scouts of America v. City of Chicago Commission on Human Relations, 748 N.E.2d 759 (Ill. App. Ct.), *appeal denied*, 763 N.E.2d 316 (Ill. 2001); Seabourn v. Coronado Area Council, Boy Scouts of America, 891 P.2d 385, 387 (Kan. 1995); Department of Human Rights v. Boy Scouts of America, No. MX 92-07717 (Minn. Dist. Ct. Aug. 6, 1992); Downey-Schottmiller v. Commonwealth of Pennsylvania, Human Relations

Commission, No. 2291 CD 1999 (Pa. Commw. Ct.); Schwenk v. Boy Scouts of America, 551 P.2d 465 (Or. 1976); Powell v. Bunn, 59 P.3d 559 (Or. Ct. App. 2002), *review denied*, 77 P.3d 635 (Or. 2003).

[20] *See Welsh*, 993 F.2d 1267.

[21] Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999).

[22] Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

[23] *Id*. at 655-56.

[24] *See, e.g.*, *District of Columbia Commission*, 809 A.2d at 1203.

[25] Lesley Rogers Barrett, *"Booms" Fund Can't Give to Scouts; Groups Can't Discriminate, Council Says*, Wis. St. J., June 2, 2004, at B1.

[26] *See Council Approves Use of Park by Boy Scouts*, Associated Press, Sept. 29, 2004; *Norwalk Weighs Whether to Deny Permit for Boy Scouts*, Associated Press, Sept. 20, 2004.

[27] *See* Tina Moore, *City Poised to Evict Boy Scouts Council*, Philadelphia Inquirer, July 23, 2006.

[28] Barnes-Wallace v. Boy Scouts of America, 275 F. Supp. 2d 1259, 1287 (S.D. Cal. 2003), *argued*, Nos. 04-55732, 04-56167 (9th Cir. Feb. 14, 2006).

[29] 275 F. Supp. 2d at 1284.

[30] *See id*. at 1274.

[31] *Id*. at 1263.

[32] *Id.* at 1263, 1264, 1274, 1278, 1281, 1282, 1283, 1285, 1286, 1287, 1288.

[33] *Id*. at 1263.

[34] *Id.* at 1274.

[35] *Id.* at 1275; *see id*. at 1274-75.

[36] The oral argument is available on the Ninth Circuit's website, http://www.ca9.uscourts.gov, under "Audio Files." Boy Scouts was supported before the Ninth Circuit by amici curiae including the U.S. Department of Justice Civil Rights Division, which shared oral argument time with Boy Scouts, and the States of Texas, Alabama, Kansas, Oklahoma, South Dakota, and Virginia, among many others. The briefs filed by Boy Scouts and its amici curiae may be found at http://www.bsalegal.org.

[37] Winkler v. Chicago School Reform Board of Trustees, No. 99C2424, 2005 WL 627966, at *14-15, *20, *22 (N.D. Ill. Mar. 16, 2005) ("*Winkler II*"). The same plaintiff, also represented by the ACLU, had litigated an earlier case against the City of Chicago over the City's sponsorship of Scouting groups, which settled when the City agreed to end its sponsorship. Winkler v. City of Chicago, No. 97C2475 (N.D. Ill. dismissed Feb. 4, 1998) ("*Winkler I*").

[38] Winkler v. Chicago School Reform Board of Trustees, No. 99C2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005), 382 F. Supp. 2d 1040 (N.D. Ill. 2005), *argued sub nom.* Winkler v. Rumsfeld, No. 05-3451 (7th Cir. Apr. 6, 2006). The briefs filed by Boy Scouts and its *amici curiae* may be found at http://www.bsalegal.org.

[39] 2005 WL 627966, at *22.

[40] The oral argument is available on the Seventh Circuit's website, http://www.ca7.uscourts.gov, under "Oral Arguments."

[41] Sherman v. Community Consolidated School District *21*, 8 F.3d 1160 (7th Cir. 1993), *cert. denied*, 511 U.S. 1110 (1994).

[42] Scalise v. Boy Scouts of America, 692 N.W.2d 858 (Mich. Ct. App.), *aff'd*, 700 N.W.2d 360 (Mich. 2005), *cert. denied*, 126 S. Ct. 2330 (2006).

[43] 126 S. Ct. 2330 (2006).

[44] Powell v. Bunn, 59 P.3d 559 (Or. Ct. App. 2002), *review denied*, 77 P.3d 635 (Or. 2003) ("*Powell I*").

[45] Powell v. Bunn, 108 P.3d 37 (Or. Ct. App. 2005), *argued*, Nos. S52657, S52659 (Or. May 3, 2006) ("*Powell II*").

[46] 403 U.S. 602 (1971).

[47] *See*, *e.g.*, Agostini v. Felton, 521 U.S. 203, 222-23 (1997).

[48] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002); Good News Club v. Milford Central School, 533 U.S. 98, 119 (2001). The plaintiffs in *Barnes-Wallace* and *Winkler* instead advocate what has been called a "heckler's veto," a "ignoramus's veto," or an "obtuse observer" standard. *See* Elk Grove Unified School District v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring); Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc); Doe v. Small, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring).

[49] Lynch v. Donnelly, 465 U.S. 668, 680 (1984).

[50] Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1990).

[51] Boy Scouts of America v. Till, 136 F. Supp. 2d 1295 (S.D. Fla. 2001).

[52] *Id.* at 1297.

[53] *Id.* at 1308.

[54] *Id.* at 1310-11.

[55] Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004).

[56] 473 U.S. 788 (1985).

[57] 335 F.3d at 95 n.8.

[58] 952 P.2d 218 (Cal. 1998).

[59] Evans v. City of Berkeley, 129 P.3d 394, 407 n.10 (Cal. 2006).

[60] *Id*.

[61] Resolution No. 58,859 N.S.

[62] *See* Cal Sailing Club, The Floating Bottle, http://cal-sailing.org/bottle/2002/Aug.html (last visited Sept. 6, 2006).

[63] *See* Nautilus Institute, Youth/Pegasus Program, http://nautilus.org/archives/pegasus/ (last visited Sept. 6, 2006).

[64] 129 P.3d at 403-04.

[65] *See* Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 829 (1995); Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 806 (1985).

[66] *See*, *e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542, 548 (2001); Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 716 (1981); Speiser v. Randall, 357 U.S. 513, 518 (1958).

[67] 20 U.S.C. § 7905 (2006).

[68] *See* Equal Access to Public School Facilities for the Boy Scouts of America and Other Designated Youth Groups, 71 Fed. Reg. 14994, 15003 (Mar. 24, 2006) (to be codified at 34 C.F.R. § 108.6(b)(4)).

[69] *See* 20 U.S.C. § 7905(c).

[70] *See* 151 Cong. Rec. S8603 (daily ed. July 21, 2005) (In response to Boy Scouts' "relationships with government at all levels" being targeted, the Act "makes clear that the Congress regards the Boy Scouts to be a youth organization that should be treated the same as other national youth organizations.") (statement of Sen. Frist); *see also* 151 Cong. Rec. S2853 (daily ed. Mar. 16, 2005) (statement of Sen. Frist).

[71] Pub. L. No. 109-148, § 8126, 119 Stat. 2728, 2730 (2005).

[72] *See*, *e.g.*, 5 U.S.C. app. § 301 (2006).

[73] *See* 42 U.S.C. §§ 5309(e)(2) (2006).

[74] The ACLU filed amicus curiae briefs against Boy Scouts in *Dale*, *Evans*, and *Wyman*, and represented plaintiffs in *Barnes-Wallace*, *Chicago Area Council*, *Curran*, *District of Columbia Commission*, *Downey-Schottmiller*, *Powell I*, *Powell II*, *Randall*, *Winkler I*, *Winkler II*, and *United States ex rel. Goodwin v. Old Baldy Council, Boy Scouts of America*, No. 02-CV-696 (RT) (C.D. Cal. dismissed Mar. 31, 2005), *appeal docketed*, Nos. 05-55684, 05-55708 (9th Cir. May 12, 2005). In *Old Baldy Council*, an ACLU board member filed a complaint alleging that Boy Scouts violated the federal False Claims Act by accepting a $15,000 grant of HUD funds to provide disadvantaged youth with the opportunity to participate in Scouting. Boy Scouts' motion to dismiss the complaint was granted by the district court, and the case is now awaiting argument before the Ninth Circuit.

[75] Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001); *see also* Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005); Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd., 578 F.2d 1122 (5th Cir. 1978) (a school board could not exclude the Klan from after-hours use of school facilities).

[76] 208 F.3d at 712; *see id*. at 706 n.3.

[77] *Id*. at 709.

[78] Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006); Christian Legal Soc'y Chapter of University of California, Hastings College of the Law v. Kane, No. C 04-4484 JSW, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006), *appeal docketed*, No. 06-15956 (9th Cir. May 23, 2006).

[79] Every Nation Campus Ministries at San Diego State University v. Reed, No. 05-CV-2186 LAB (S.D. Cal. filed Nov. 28, 2005).

[80] Truth v. Kent School District, No. 03-cv-00785 MJP (W.D. Wa. Sept. 22, 2004), *argued*, No. 04-35876 (9th Cir. July 27, 2006).

[81] Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004); Catholic Charities of the Diocese of Albany v. Serio, 808 N.Y.S.2d 447, 28 A.D.3d 115 (N.Y. App. Div. 2006).

[82] *See* Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WEEKLY STANDARD (May 15, 2006).

[83] Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223 (S.D.N.Y. 2005).

[84] Pedreira v. Kentucky Baptist Homes for Children, Inc., No. 00-cv-0210-CRS-JDM (W.D. Ky. filed Apr. 17, 2000).

[85] Bellmore v. United Methodist Children's Home, Civ. No. 2002CV56474 (Ga. Super. Ct. Fulton County).

[86] For a thoughtful analysis of the effect of same sex marriage on religious liberties, see the collection of papers assembled by The Becket Fund for Religious Liberty for a conference on the issue at http://www.becketfund.org/index.php/article/494.html.