4-2011

# Boy Scouts of America v. Dale: A Sociopolitical and Historical Examination of The Contentious Supreme Court Decision

Stephen Bergonzi
*The College at Brockport*, bergonzi@wustl.edu

# Boy Scouts of America v. Dale: A Sociopolitical and Historical Examination of The Contentious Supreme Court Decision

A Senior Honors Thesis

Presented in Partial Fulfillment of the Requirements
for graduation in the College Honors Program

By
Stephen Bergonzi
Education and History Major

The College at Brockport
May 2011

Thesis Director: Dr. James Spiller, Associate Dean Graduate Education & Scholarship and Associate Professor, History

# Boy Scouts of America v. Dale: A Sociopolitical and Historical Examination of The Contentious Supreme Court Decision

***Dedicated to my loving grandmother, Elvira E. Bergonzi.***

## Introduction…

James Dale was an avid boy scout in his younger years. From the age of eight, he enjoyed the "community" spirit of the Scouts, and felt the organization was the one place where he felt he "belonged." His youth was spent fishing, hiking, climbing and generally enjoying life in the outdoors with his friends. When Dale turned 18, having reached Eagle Scout rank, the highest rank in the Scouts, his membership expired. He then took on a leadership position as an assistant Scoutmaster.

A New Jersey native, Dale enrolled at Rutgers University, where he came to terms with his homosexuality. Coming out as gay, he joined and ultimately became copresident of the Rutgers University Lesbian/Gay Alliance. After his club hosted a formal lecture and discussion on psychological health and wellness issues surrounding gay teenagers, Dale was featured in a newspaper article as the "copresident of the Lesbian/Gay Alliance" on the need for more gay role models.

Shortly thereafter Dale received a letter from (New Jersey) Monmouth Council Executive James Kay that terminated his role as an adult member in the organization. Exclaiming he "felt betrayed… like [I had been hit with] a kidney punch," Dale filed a complaint in the New Jersey Supreme Court, and requested the reason behind the decision. Mr. Kay informed Dale that the Scouts "specifically forbid membership to homosexuals." [1]

Dale noted in his complaint the New Jersey public accommodations anti-discrimination statute, which specifically forbade "places of public accommodation" from discriminating on the basis of sexual orientation. The New Jersey Supreme Court lower division granted summary judgment in favor of the Boy Scouts. The Court held that New Jersey's public accommodations law was inapplicable due to the fact that the Boy Scouts of America was not a place of public

[1] Andrew Koppelman, and Tobias Barrington Wolff, *A Right To Discriminate? : How the Case of Boy Scouts of America v. James Dale Warped the Law of Free Association* (New Haven: Yale University Press, 2009), x.

accommodation and that the Boy Scouts is a "private group" exempted from the public accommodations laws.

Dale appealed to the New Jersey Supreme Court Appellate Division, which reversed and "remanded," or sent the case back to the lower courts. The Appellate Court held that the public accommodations law applied to the Boy Scouts. The case went back to The New Jersey Supreme Court. The state court affirmed the judgment of the Appellate Division, when it held that the Boy Scouts of America organization was a place of public accommodation subject to public accommodations law. The New Jersey Supreme Court also found that the organization was not exempt from public accommodations law and that the Boy Scouts violated the law when they revoked *Dale*'s membership based on his open homosexuality.

The case then went before the United States Supreme Court, who disagreed. With five justices in agreement, the highest judiciary in the United States ruled in the case known as *Boy Scouts of America v. Dale* (2000) that the Boy Scouts of American was a private organization, and as such was protected by the first amendment to the constitution's freedom of association clause, which protects organizations' right to assemble including a private organizations' ability to exclude unwanted members who would significantly harm the message of the group if allowed to join. The U.S. Supreme Court concluded that forced inclusion of homosexual scout leaders under New Jersey's public accommodations anti-discrimination laws was unconstitutional under the freedom of association clause of the United States Constitution.[2]

*Dale* represented a significant setback for the gay rights movement. This decision not only prevented an openly gay man from being a scout leader, it signaled to gay and lesbian rights advocates that after fifty years of gay rights history, since the founding of the movement in the 1940s and 50s, when a small collection of gay men and women joined together to form social

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

clubs, newspapers and magazines focused on the issue of homosexuality in America, the Supreme Court at the start of the new millennium remained hostile to gay rights.

## The Significance and Purpose of *Dale*

This failure can be traced to the relative presence and absence and degree thereof of various factors, which influence the Supreme Court in civil rights cases. The breadth of legal precedent, extent of legislative and public support, judicial political ideology, relative level of activity within the civil rights movement and events external to the movement all figure into the eventual ruling.

In *Dale*, the relative dearth of pro-gay rights case law and legislation, resultant from the relatively brief period of time which gay rights activism existed in the American political arena, undermined the gay rights activists' efforts. While the divided public support of gay rights in the 1990s, a powerful tool for predicting Supreme Court decisions as evidenced by the role of mass media in Court policy, while not hampering Dale's efforts did not assist the former Scoutmaster either. In terms of the potent influence of political ideology on judicial decision making, as proven by the impact of Supreme Court law clerks as well as by admissions from the Justices themselves, shows that the overwhelmingly conservative Supreme Court at the time of *Dale* helped ensure a decision along ideological lines. Finally the relative lull in gay rights activism in the 1990s combined with pressure from an anti-gay conservative Christian coalition, whose strength grew when Republicans swept congressional elections in 1994, ultimately led to the upset for gay civil rights advocates in *Dale*.

Analysis of the powerful impact that these sociopolitical and historical forces had on the Supreme Court in *Boy Scouts of America v. Dale* for the gay rights movement, is enhanced by looking at the extent to which various factors influenced the Supreme Court in the 1954 case,

*Brown v. Board of Education of Topeka Kansas*, in which the Court unanimously declared racially segregated schools unconstitutional, for activists fighting for African American civil liberties in the 1930s and 40s.

Seeing as this decision handed a victory to African American civil rights activists, by looking at which social and political energies came together in *Brown* one can clearly recognize which forces were absent in the *Dale* decision. For *Brown* the over 200 year historical legacy of African American civil rights case law and legislation aided civil rights activists' efforts in *Brown*. In addition, while polls showed low levels of public support for desegregation, the federal government, as well as state and local governances, major league teams and other sociopolitical institutions' efforts to integrate ultimately reinforced the Supreme Court's ruling in *Brown*. Finally, the dominance of liberal ideological leanings among members of the Supreme Court that decided *Brown* confirmed a pro-civil rights verdict in *Brown*

## *Dale* and the Gay Rights Movement

### The Beginnings of the Gay Rights Movement

World War II set the modern gay civil rights movement on a path to fruition towards the end of the 1960s.[3] The uprooting of tens of millions of young men and women during the war and the establishment of sex segregated factories and battlefields in which these young people worked, brought together a significant concentration of members of the same sex. Many individuals who otherwise would have resisted their homosexual urges discovered others had sexual feelings towards members of the same sex. Famed gay rights historian John D'Emilio argued that the "temporary freedom from the constraints of family" helped fuel the recognition of a common homosexual identity among men and women, who were formerly unaware that

[3] Eric Marcus, *Making Gay History: The Half-Century Fight for Lesbian and Gay Equal Rights* (New York: Perennial, 2002), 21.

such a distinction between homosexuality and heterosexuality could exist.[4] D'Emilio also points out that the requirement of Americans to be "geographically mobile" enabled increased sexual segregation due to the reliance of factories on women to fill the roles previously occupied by men.[5] In order to find employment, families relocated from more rural areas in the South and smaller cities in the North and West to large urban manufacturing centers in northeastern metropolises during the early to mid 1940s. D'Emilio explains that the extensive breakdown of social roles in a "concentrated" period of time, coupled with sexual segregation from 1941 to 1944 enabled men and women to explore homosexual desires and challenge traditional heterosexual mores.[6]

Zoologist and sexual behavior researcher Alfred Kinsey's publication of *Sexual Behavior in the Human Male* in 1948 and *Sexual Behavior in the Human Female* in 1953, further broke-down traditional "heteronormativity," or the belief that heterosexuality is the "normal" and only acceptable form of sexual orientation,. Kinsey wrote in both texts that his teams' personal interviews with American men and women, discovered "significant numbers" of men and women in the United States had engaged at some point in "homosexual behavior."
The "Kinsey reports" on human sexuality, coupled with the experiential influences of World War II led many gay men and women to come "out of the closet," to reveal their sexual orientation to others. The years between 1941 and 1942 paved the way for gay men and women to openly debate issues central to sexual orientation in the 1940s, such as their frustration with concealing their sexuality. A vocabulary soon developed with which homosexual men and women could easily share ideas and connect.

---

[4] Craig A. Rimmerman, Kenneth D. Wald and Clyde Wilcox, *The Politics of Gay Rights*, ed. Craig A. Rimmerman, Kenneth D. Wald and Clyde Wilcox (Chicago, IL: The University of Chicago Press, 2000), 32.
[5] Rimmerman, *The Politics of Gay Rights*, 32.
[6] Rimmerman, *The Politics of Gay Rights*, 32.

A "gay consciousness" arose amongst homosexuals living in "the closet," in the United States towards the late 1940s, which questioned the underlying belief throughout much of 20th century that homosexuality was a "choice."

## Case Law and History

### The "One" Decision

Homosexual communalism in the late 1940 paved the way for the creation of several gay and lesbian organizations and magazines at the start of the 1950s. In an effort to extend the reach of these groups several gay rights social clubs established subscription-based newspapers and magazines. For instance, editors of the weekly *One Inc.*, maintained a small gay subscribership, and were supported by early homosexual organizations such as the Mattachine Society and the Daughter of Bilitis.[7]

Many of these magazines devoted a majority of articles to educating "closeted" or individuals hiding their homosexuality, about contemporary gay issues. The goal of these papers was to educate future generations of gay Americans so as to eventually open up a broader dialogue with the general public.[8]

However, for *One* magazine, disseminating messages became difficult after the U.S. Postmaster of Los Angeles, California, where *One* was based, held up the October 1954 issue, refusing its circulation due to his belief that it contained several "obscene" articles. The U.S. Postmaster claimed that any image depicting a "homosexual act," which could range from hand holding to images of shirtless men, was inherently "obscene" and that he had a "duty" to prevent it from being delivered.[9] The magazine took the post office to court. Both the local presiding judge and the three-judge panel of the Ninth Circuit Court of Appeals ruled against the

[7] Marcus, *Making Gay History*, 21.
[8] Joyce Murdoch and Deb Price, *Courting Justice: Gay Men and Lesbians v. The Supreme Court* (New York: Basic Books, 2001), 30.
[9] Rimmerman, *The Politics of Gay Rights*, 33.

magazine. The Ninth Circuit viewed the October 1954 edition of the paper as "morally depraving and debasing," and thus "unmailable" because it was "obscene."[10]

The justification of discrimination against gay Americans on the basis that homosexuality was "immoral" or "obscene" came about, in part due to Cold War tensions.[11] Public antipathy towards a new "open" form of homosexuality, characterized by the establishment of legalized homophile (early 1950s and 60s gay friendly) organizations such as, was incited by government officials who linked the threat of communism with the threat of homosexuality. Federal Bureau of Investigations (FBI) Director J. Edgar Hoover and Senator Joseph McCarthy (R, WI) known for their fervent investigations of the "loyalty" of federal government employees thought to be communists, sought to fire suspected homosexuals working for the federal government. Federal investigators worried that gay men and lesbian women would likely divulge important governmental information due to the stereotype of homosexuals as "weak willed" and "sissy" type people. Government investigators feared that homosexuals would not be able to stand up physically and emotionally to Soviet interrogation and thus would divulge U.S. secrets. The idea that gay men would likely subvert also came about because of the fear that communists might secure information on the homosexual activities of federal government employees and attempt to blackmail the men into joining communist forces.[12]

In addition to public sector workers, thousands of gay men and women in the private sector experienced employment discrimination. One estimate placed around 20 percent of the American workforce as having faced a "loyalty security investigation" conducted by an American company.[13]

---

[10] Murdoch, *Courting Justice*, 33.
[11] Murdoch, *Courting Justice*, 38.
[12] Rimmerman, *The Politics of Gay Rights*, 33.
[13] Rimmerman, *The Politics of Gay Rights*, 33.

*One* Magazine was published amid severe discrimination against the homosexual community. Just as John Dale discovered in the 1990s during his legal fight to join the Boy Scouts, *One* magazine and its advocates witnessed firsthand the power that the court system wields in deciding the fate of gay rights.

In the case of magazines 1958 court case *One, Inc. v. Oleson* the Court power surprisingly resulted in a victory for gay civil rights. The magazine challenged the Ninth Circuit ruling in favor of the U.S. Post Office and took the case to the U.S. Supreme Court, eventually winning the first legal victory for gay rights. The Supreme Court ruled in 1958 to protect the magazine's right to publish material dealing with homosexuality.[14] Although the unanimous Supreme Court ruling would be the only pro-gay ruling the court made into the 1960s, *One* set a monumentally important precedent. Without the historic decision, gay rights might not have become a mainstream movement in the 1970s. The decision signaled to the small organizations trying to reshape the American public's perception of homosexuality, which made up the gay rights movement in the early years that the federal government at least *acknowledged* gays and lesbians as a social group with legal standing who faced discrimination in American society.

### Early Gay Rights Litigation and the Hostile Climate of Mid-Century America

During the 1950s, gay rights groups struggled to support themselves. While in the beginning these collectives educated Americans about homosexuality in an effort to decriminalize homosexuality. Increasingly prominent gay rights activists turned towards a more militant form of activism as a way of fighting back against rampant harassment and intimidation. Gay and lesbian Americans in the early 1950s often faced physical attacks coming from a variety of sources. Gay men and women were often beaten up as they came out of gay and lesbian bars.

[14] Rimmerman, *The Politics of Gay Rights*, 33.

Oftentimes, gays and lesbians faced the threat of violence and arrest at the hands of police officers outside of drinking establishments in Chicago, New York and Los Angeles.[15]

Following the California State Supreme Court decision in 1959 of *Vallegra v. Department of Alcoholic Beverage Control* gay men and women faced the threat of entrapment. The ruling struck down a bill passed by the California State Legislature that allowed police to shut down bars who provided a "resort for…sexual perverts."[16] The California Supreme Court found this law too unrestricted and ruled that officers had to prove that bar patrons engaged in some form of "homosexual conduct" while in the bar. This meant that police could not shut down a bar just because gays and lesbians were known to frequent the establishment, but rather had to affirm patrons were gay by proving that homosexual acts occurred on the premises.[17]

In cities throughout California police entrapped gay bar patrons.[18] Police would send in a handsome man, "dressed in tight pants" with the intent of luring one of the patrons into a compromising position. The police agent flirted with the target and then invited him or her to some other location outside the bar. Upon exiting police immediately arrested the "suspect" on charges of alleged homosexual "conduct."[19]

In addition to facing arrest, gay men and women encountered widespread employment discrimination. During the mid to late 1950s the Civil Service Commission fired gay and lesbian federal government employees due to the illegality of homosexuality.[20] Such harassment in the work place during the 1950s was commonplace. In 1950 approximately one fifth of the nation's

---

[15] Craig A. Rimmerman, *From Identity to Politics: The Lesbian and Gay Movements in The United States* (Philadelphia, PA: Temple University Press, 2002) 49.
[16] Patricia A. Cain, "Litigating for Lesbian and Gay Rights: A Legal History," *Virginia Law Review* (Virginia Law Review) 79, no. 7 (Oct. 1993) 1569.
[17] Rimmerman, *From Identity to Politics*, 50.
[18] Rimmerman, *From Identity to Politics*, 50.
[19] Rimmerman, *From Identity to Politics*, 50
[20] Marcus, *Making Gay History*, 21.

federal state and local laws barred gays and lesbians from employment. One person affected by these laws was Frank Kameny, a government astronomer. After allegations of his homosexuality surfaced, the U.S. Civil Service Commission, the government agency primarily tasked with ferreting out homosexuals within the federal government, fired Frank Kameny from his post in the U.S. Army Map Service. Since the professional community of astronomers was quite small and interconnected, most of his colleagues knew of Kameny's homosexuality and would not hire him due to fear of reprisal from the federal government.[21]

Determined to take part in the up and coming U.S. Space Program, Kameny took what he perceived as wrongful termination to court in June of 1959. After both a federal judge and the U.S. Court of Appeals for the District of Columbia dismissed the case, Kameny appealed to the U.S. Supreme Court. The impassioned petition for writ of *certiorari* openly disagreed with the notion of homosexuality as "immoral" behavior. Instead, Kameny argued that homosexuality should not preclude an individual from competing for gainful government employment on the "same basis as other citizens of the United States."[22] As with the many gay rights employment cases before Kameny's, *Franklin Edward Kameny v. Wilber M. Brucker, Secretary of the Army, et al*. (1961) did not yield immediate change in the laws governing public sector employment. The Supreme Court voted unanimously to reject Kameny's petition for *cert*.[23]

However, this defeat forged a new path for gay rights advocates who challenged widespread discrimination during the late 1950s and early 1960s. After the Supreme Court case, Kameny encouraged others to fight along side him; he took on a new career as an influential gay

[21] Murdoch, *Courting Justice*, 60.
[22] Murdoch, *Courting Justice*, 55.
[23] Murdoch, *Courting Justice*, 59.

rights activist and helped change the course of gay rights history by creating a more militant, antagonistic strand of gay rights activism.[24]

### Midcentury Legal Rights Strategy

In the mid to late 1950s Frank Kameny, along with several other activists adopted an aggressive legal rights strategy. This method of securing fundamental rights through the legal justice system was similar to the method implored by the NAACP in the years leading up to *Brown*. Plaintiffs would file a court case against a discriminatory law with the backing of gay rights non-profit agencies. These organizations would file *Amicus curiae* or "friends of the court" briefs on behalf of the entity suing, offering their legal services and expertise to the Court if they requested it. This tactic allowed gay rights organizations to both assist the plaintiff and guide policy through court decisions. By the 1960s, the legal rights strategy created substantial case law and precedent, which offered protection from discrimination and harassment.[25] This legal groundwork eventually set the stage for the widespread gay rights activism of the late 1960s.

This method was so effective that gay rights litigation groups continued using a legal rights strategy in the 1970s, 80s and 90s. From the 1970s onward, statewide ballot initiatives dealing with gay rights were common. Statewide ballot initiatives tended to result in defeat for gay rights advocates due to the lack of widespread support for gay rights referenda in many states at this time. Gay rights opponents have brought popular votes in at least 69 initiatives sponsored to repeal or prevent pro gay rights policies. Three-fourths of these ballot measures lead to defeat for gay rights advocates.[26]

---

[24] Murdoch, *Courting Justice*, 61.
[25] Rimmerman, *From Identity to Politics*, 49.
[26] Rimmerman, *From Identity to Politics*, 49.

As a result gay rights advocates utilized a legal rights strategy throughout the following decades. This strategy was used in *Dale*. The prestigious Lamda Legal Defense Fund, an organization devoted supporting gay rights through a combination of legal and education related endeavors, aided John Dale's attorney.

### Frank Kameny

On November 15th 1961 the first meeting of the Washington Chapter of the Mattachine Society took place. The organization, founded by the famous gay rights advocate Frank Kameny dramatically changed how American society viewed gay rights. The radicalized organization also changed how gays and lesbians viewed themselves and actively fought against intimidation.[27]

Frank Kameny focused on the politics of the federal government. He concentrated on civil service employment, security clearances and the uniformed military.[28] Securing protections from public sector workplace discrimination and striking down policies that allowed federal government agencies to take away accused homosexuals' security clearances.

Kameny and his followers started letter writing campaigns and picketed on the White House lawn and in front of Philadelphia's Independence Hall. Kameny also founded the Washington D.C. chapter of the American Civil Liberties Union; a national organization founded in 1920, aimed at safeguarding the rights and liberties of American citizens, and eventually persuaded the ACLU to fight for homosexual rights.[29] By 1964, Kameny convinced the ACLU to disapprove its 1957 statement declaring constitutional, sodomy laws in the United States, which often were used to oppress gay and lesbian Americans.[30] By the 1960s, ACLU attorneys

[27] Marcus, *Making Gay History*, 82.
[28] Marcus, *Making Gay History*, 84.
[29] Murdoch, *Courting Justice*, 61.
[30] Murdoch, *Courting Justice*, 62.

helped strong-arm the United States Postal Service into stopping its routine "targeting" of homosexuals. This practice took many forms, including the blacklisting gay magazine subscribers, and disrupting service to homosexual readership.[31]

After recruiting the ACLU Kameny set about trying to have the American Psychiatric Association repeal its medical classification of homosexuality as a "mental disease." Opponents of gay rights long used this distinction to deny rights to homosexuals.[32] Kameny, along with members of the Gay Activists Alliance (GAA) hosted numerous panels and discussion groups on the topic of the APA's categorization of homosexuality. Kameny and the ACLU argued that the "appallingly" pseudo-scientific literature supporting the classification was "unfounded." Eventually Kameny won the battle. In 1973 the APA declassified homosexuality as a "mental illness.[33]"

### The Stonewall Riots of 1969

In June of 1969 drag queens and other patrons of the Stonewall Inn in Greenwich Village in New York City took to the streets and protested the "unfair" police harassment of homosexuals that was commonplace in many American cities. This event, known as the Stonewall Riots of 1969 led to record enrollment in existing gay rights organizations. Young gay men and women, inspired by the successes of the Civil Rights Movement, founded many new groups as well.[34]

Soon gay rights activism exploded into a myriad of different groups, all fighting for increased liberty and equality for homosexuals. Organizations such as the Radicalesbians and the Gay Liberation Front (GLF) arranged sit-ins in the offices of newspapers and magazines that

---

[31] Murdoch, *Courting Justice*, 62.
[32] Murdoch, *Courting Justice*, 63.
[33] Rimmerman, *The Politics of Gay Rights*, 33.
[34] Rimmerman, *The Politics of Gay Rights*, 35.

printed negative information about gays and lesbians. Other groups, such as the Third World Gay Revolution, marched in the streets to protest police entrapment and detention as well as demonstrated in front of psychiatrist offices that demarcated homosexuality as a disease.[35] In addition gay rights organizations created new case law that protected gays and lesbians from federal government dismissals. In *Norton v. Macy* 1969, the D.C. Court of Appeals ruled that the Federal government had to justify firing a gay employee by demonstrating "some rational basis" behind its decision to fire a gay employee. Such a requirement applied to all federal dismissals of homosexuals by class action judgment four years later in *Society for Individual Rights, Inc. v. Hampton* in 1973.[36]

### Post-Stonewall Legal Rights Strategy

While in the 1950s, roughly fifty gay and lesbian "social change" organizations existed in the United States, by 1973, following Stonewall; activists that number had raised to approximately eight hundred.[37] These organizations followed a legal rights strategy. Gay rights organizations also sought to build institutions designed to create a "strong, cohesive, and visible community."[38]

Following the Stonewall Riots, many gay rights organization challenged the constitutionality of state sodomy laws. Police used sodomy laws, which criminalized "anal and oral sex," to arrest gay men who engaged in these sexual practices.[39] State Attorney General's Offices used the existence of state sodomy laws to challenge the legitimacy of the gay plaintiffs' claims of discrimination. By repealing sodomy laws, gay and lesbian activists eliminated a

---

[35] Rimmerman, *The Politics of Gay Rights*, 35.
[36] Walter L. Williams and Yolanda Retter, ed. *Gay and Lesbian Rights in the United States: A Documentary History* (Westport, Conn.: Greenwood Press, 2003), 70.
[37] Rimmerman, *The Politics of Gay Rights*, 35.
[38] Rimmerman, *The Politics of Gay Rights*, 36.
[39] Murdoch, *Courting Justice*, 180.

major source of legal precedent used to violate same-sex sexual privacy rights and took away a tool often used for discriminatory purposes in civil and criminal gay rights cases.

The United States Supreme Court received many petitions for *cert.* during this time requesting to repeal state laws prohibiting anal and oral sexual acts.[40] The issue was so important that several gay rights organizations during this time decided to focus solely on overturning state sodomy laws. Founded in 1973, the National Gay and Lesbian Task Force (NGTF) devoted itself to overturning state sodomy laws. This organization felt that repealing state sodomy laws was necessary to create a friendlier climate for other gay men and lesbians to come out. The repeal of repressive laws governing "private acts, performed by adults in a consensual manner" made it easier for homosexuals to publicly acknowledge their homosexuality. The thinking was cyclical. Increased numbers of openly gay men would result in greater widespread support for gay rights organizations, which in turn would foster an even better atmosphere.[41]

To this end, the NGTF filed numerous lawsuits on behalf of many homosexual plaintiffs. In *Doe et al. v. Commonwealth's Attorney for the City of Richmond et al.* the NGTF repealed Virginia Sodomy laws. The group argued that the sodomy law were discriminatory and lacked a sound scientific and policy basis. The NGTF used as proof the fact that homosexuality was no long classified as a "mental illness." They concluded that the "prosecution" and "imprisonment" of homosexuals, due to sodomitic acts, does nothing to "change" the sexual behavior of gays and lesbians, and thus, does not serve its function as a criminal statute to deter an undesirable behavior through punishment.[42]

When "Doe's" attorneys took the matter to the U.S. Supreme Court they added that freedom of expression under the first amendment protected gay men's right to privacy and that

[40] Murdoch, *Courting Justice*, 181.
[41] Murdoch, *Courting Justice*, 181.
[42] Murdoch, *Courting Justice*, 182.

the decision by the lower court "violated this right."[43] Virginia's Attorney General argued that such legislative acts did not discriminate due to their application to "all Virginians," that protecting "private consensual sodomitic acts" would "undermine" fornication and adultery laws, and that the "inconsequential" case does not merit the court's attention. In a significant blow to gay civil rights six of the nine Supreme Court justices affirmed the lower court's decision to allow Virginia's sodomy law to stand.

While roughly "half" the states in the United States had repealed their sodomy laws by the 1980s, employment discrimination was rampant in the early 1970s. By 1973 however, employment discrimination based on sexual orientation was on the decline. That year a federal court judge in California ruled that the Civil Service Commission must "forthwith cease" from firing gay federal government employees.[44] In the mid 1970s in *Singer v. United States Civil Service Commission et al.* the U.S. Supreme Court overturned a Ninth Circuit Court of Appeals ruling against a gay plaintiff, who had been fired for kissing a man in public.[45] In addition to the Court rulings, several states passed anti-discrimination employment measures as well in the 1970s.

### The "Lame Duck" Supreme Court of the Late 1970s and Early 80s

Towards the end of the 1970s several prominent gay rights groups emerged. These organizations utilized a legal rights strategy. The Lamda Legal Defense Fund (LDF) was one such gay rights legal nonprofit. Unfortunately for the gay rights organizations pursuing the legal rights strategy in the late 1970s and early 1980s the Supreme Court during this era turned a "deaf ear" to homosexual *cert* petitions. The Supreme Court turned away two promising cases that

[43] Murdoch, *Courting Justice*, 183.
[44] Murdoch, *Courting Justice*, 183.
[45] Murdoch, *Courting Justice*, 191.

dealt with military ban on gays in the armed forces. In *Hatheway v. Secretary of the Army* (1981) as well as *Beller v. Middendorf* (1981) homosexuals received dishonorable discharges once higher ups discovered each individual's homosexuality.[46] In *Acanfora v. Board of Education of Montgomery County*, the Supreme Court remained ambivalent to the bans several states passed that banned homosexuals from teaching in public schools. In an Oklahoma district school administrators fired a promising young earth science teacher once it was publicly known he was gay. After a federal judge reinstated the teacher, the school district posted the young man in a non-student "make-work" assignment.[47] The teacher sued and took the case to the Supreme Court. The Justices, without even discussing the merits of *Acanfora v. Board of Education*, denied *cert.*

Dismissal of teachers over homosexuality would significantly affect many teachers' careers over the years.[48] On November 26th 1974, school counselor Marjorie Rowland made the mistake of informing a colleague whom she maintained a close acquaintance with that she was bisexual. This woman, a school secretary, informed her superiors. Within a day or two the principal of the school asked Majorie to resign.[49] The counselor sued the district. She claimed that administrators fired her due to her sexual orientation."[50] After several disappointing losses in federal courts Rowland finally won a 1981 trial in rural Ohio. The jury concluded she lost her job solely because of her bisexuality and that the School District violated "Rowland's rights to equal protection and free speech" under the constitution.[51] The Jury awarded the impoverished Rowland over $50,000 in damages for "mental anguish, humiliation, and lost income."

---

[46] Rimmerman, *The Politics of Gay Rights*, 35
[47] Murdoch, *Courting Justice*, 177.
[48] Murdoch, *Courting Justice*, 240.
[49] Murdoch, *Courting Justice*, 238.
[50] Murdoch, *Courting Justice*, 239.
[51] Murdoch, *Courting Justice*, 239.

However, Marjorie's victory proved short lived. In March of 1984 a Sixth Circuit Court overturned the adjudication."[52] Marjorie appealed to the U.S. Supreme Court, who voted to reject Rowland's plea.[53]

### AIDS and its Impact on Major Gay Rights Litigation in the 1990s

In the 1986 decision *Bowers v. Hardwick*, the Justices ruled 5-4 against a gay couple charged with sodomy under Georgia State Law.[54] This epitomized the tepid attitude of the Supreme Court to homosexual case law in the 1980s. In the 1996 *Romer v. Evans* decision, however, the Court reversed *Bowers*. This was the first gay rights movement victory in almost a decade. The issue in *Romer*, unlike *Bowers* dealt with the appropriate application of the equal protection clause of the first ammendment rather than the constitutionality of sodomy laws. In 1992 the Colorado State Legislature passed an amendment that denied gay and lesbians the right to petition the government for a redress of grievances. Gay rights organizations argued that the Colorado Legislature denied Coloradan homosexuals equal protection under the law. In a landmark Supreme Court decision, the Court sided with the activists.

The decision was not unanimous, however. Justice Antonin Scalia in his dissent noted that the 1996 declaration directly contradicted *Bowers* and others agreed with Scalia's point. This demonstrates the indecisive attitude of the court towards gay and lesbian rights in the mid 1990s.[55] This equivocal attitude also appeared in AIDS-related litigation. Due to the extraordinary length of time it takes for cases to make their way to the Supreme Court, many AIDS rights litigants started *cert*. petitions for the U.S. Supreme Court in the 1990s. In fact, by the time the *Dale cert.* petition arrived in the Supreme Court, the justices were in the midst of

---

[52] Murdoch, *Courting Justice*, 239.
[53] Murdoch, *Courting Justice*, 244.
[54] Rimmerman, *The Politics of Gay Rights*, 390
[55] Rimmerman, *The Politics of Gay Rights*, 397.

also deciding on a substantial number of AIDS related case law, as such AIDS rights cases on the docket certainly factored into the minds of the Justices when they sat down to decide *Dale*.[56]

Unfortunately for the gay rights movement, the Supreme Court, just as it had done in Dale, ruled against gay and lesbian rights in several key AIDS rights cases in the 1990s. Throughout this time the Supreme Court refused to hear many other gay rights-related issues. Gay and lesbians' right to access the medical records of their partners were left undetermined. The Supreme Court refused to hear *Doe v. SEPTA* in 1995. The Supreme Court also refused to address the right of an employer to dismiss individuals diagnosed with AIDS.[57]

The Supreme Court also refused to hear gay rights immigration case law in the mid 1980s. During that time homosexuality remained classified as a "mental illness" under the organization responsible for handling legal immigration into the United States, the Immigration and Naturalization Service's (INS's) guidelines. Once the American Psychological Association (APA) declassified homosexuality as a mental illness, however, the organization which the INS relied on to exclude homosexuals, the U.S Public Health Service (PHS) ceased offering Class "A" certificates, which the INS used as documentation to justify excluding gay and lesbian immigrants. The INS claimed it could detain homosexuals without the PHS permits. Gay rights advocates sued. In appealing to the U.S. Supreme Court two cases, *Lesbian/Gay Freedom Day Committee, Inc. v. INS* and *In re Longstaff*, sparked contradictory opinions over whether the INS could or could not arrest and detain homosexuals without the U.S. Public Health permits. Despite the need for a final decision, the Supreme Court declined to hear the cases.

## Gay Rights Movement Legislation

### Local Efforts at Reform 1969 to 1981

[56] Rimmerman, *The Politics of Gay Rights*, 399.
[57] Rimmerman, *The Politics of Gay Rights*, 399.

In the years following the Stonewall Riots, university towns such as Boulder, Colorado, Ann Arbor, Michigan and Madison, Wisconsin became the centers of gay rights legislative activism. These city legislatures became the first to adopt legislation protecting gay and lesbian Americans from discrimination based on sexual orientation. Liberal college towns were the most open to adopting anti-discrimination laws for gays and lesbians. Two thirds of the first 28 communities to adopt such measures included college towns such as East Lansing, Michigan, Berkeley, California and Austin, Texas.[58]

Mega cities in the United States with "sizable" and "organized" gay communities were next to adopt substantial gay rights legislation. This included cities such as Atlanta, Los Angeles and New York City. Efforts succeeded in these cities mainly because of the urban gay communities that lobbied on behalf of themselves to their local representatives.[59]

In the 1970s the religious right rose to power and challenged the legal and legislative success of gays and lesbians. Traditionally apprehensive over the mainstream political process, the religious right shied away from many political circles during the 1950s and into the early to mid 1960s.[60] However, as evangelical revivalists realized the importance of "playing the political game" in order to counter what they perceived as a "monumental gay threat" with "its" hands "in the pockets of Hollywood, and the major news media."[61] Religious conservatives found homosexuality to be against "god's will." Afraid of the growing influence of gay rights groups, they organized around popular singer and songwriter and "devout Baptist" Anita Bryant

---

[58] Rimmerman, *The Politics of Gay Rights*, 271.
[59] Rimmerman, *The Politics of Gay Rights*, 272.
[60] John Gallagher, and Chris Bull, *Perfect Enemies: The Religious Right, the Gay Rights Movement, and the Politics of the 1990s* (New York: Crown Publishing, 1996), 22.
[61] Gallagher, *Perfect Enemies*, 122.

in the late 1970s. The inspirational and down-home "hokey" women railed against several gay rights initiatives aimed at extending equal employment and housing rights to homosexuals.[62]

Beginning with the successful repeal of a Miami-Dade County gay rights law Bryant went on to successfully overturn similar statutes in Eugene, Oregon, St. Paul Minnesota and Wichita, Kansas.[63] In the late 1980s and 1990s the Religious right would its further grow its ranks around the anti-gay leaders Reverends Pat Robertson and Jerry Falwell.[64]

In 1978 gay rights activists responded to the assault by the religious right. With the support of democrats and many California conservative party members including Governor Ronald Reagan, the Briggs' initiative, a measure up for public vote and supported by California State-Senator and gubernatorial candidate John Briggs, which would have prohibited openly gay public school teachers from teaching, failed to pass by more than one million votes.[65]

### Gay Rights Legislation from the 1980s to the early 1990s

Despite its victory in repealing the major California initiative, the gay rights movement found its influence and successes wane in the late 1970s due to the rise of conservatism. Beginning with the election of President Ronald Reagan in 1981 anti-gay Christian Conservative groups took hold of the national right wing agenda. In the late 1970s and early 1980s, the number of cities seeing gay rights initiatives pass substantially slowed.

However, with the growth of the AIDS rights movements in the late 1980s, a strong "surge" in gay rights laws passed by city and county legislatures took place. Many AIDS rights groups identified with the growing need for federal recognition of and funding for treatment and eventual cure for AIDS. The Acquired Immune Deficiency Syndrome or AIDS virus swept

---

[62] Rimmerman, *The Politics of Gay Rights*, 272.
[63] Rimmerman, *The Politics of Gay Rights*, 272.
[64] Gallagher, *Perfect Enemies*, 2.
[65] Gallagher, *Perfect Enemies*, 18.

across the United States and the world throughout much of the 1980s. Gay communities in urban areas, such as San Francisco and New York, took a particularly hard hit from this virus, in the form of countless deaths. This impact fostered strong ties between the AIDS movement and the gay rights movement and eventually cemented the two groups into a commanding voice for change.[66]

The birth of ACT UP, or the AIDS Coalition to Unleash Power at the turn of the 80s shows the heavy integration between the homosexual rights and AIDS rights movements. In 1979, ACT UP activists organized a national march to raise awareness of the AIDS virus. Many gays and lesbians participated in the event and vowed to return home an open homosexual, ready to fight for the end of the AIDS "menace."[67]

### Legislation during the 1990s

1990 was a successful year for homosexuals by many measures. In the late 1980s many state legislatures enacted statutes appending crimes against homosexuals as legally protected "hate crimes." This led to the 1990 passage of the Hate Crimes Statistics Act, which mandated that the FBI collect statistics about hate-motivated violence against homosexuals. Also during this time the Americans with Disabilities ACT of ADA became law. This bill protected those infected with the HIV-virus from discrimination.[68] In mid-1993 over 126 cities and counties adopted pro-gay legislation. By 1996 that figure jumped to about 160 communities.[69] In the 1990s the types of communities passing pro-gay rights legislation included smaller, less gay populated cities across the nation. Most notably these cities included small and suburban

---

[66] Rimmerman, *The Politics of Gay Rights*, 39.
[67] Rimmerman, *The Politics of Gay Rights*, 39.
[68] Rimmerman, *The Politics of Gay Rights*, 39.
[69] Rimmerman, *The Politics of Gay Rights*, 273.

"environments" in the Northeast, such as "Brighton N.Y., and Rockville Maryland."[70] Compared to the 1950s and 60s, the 1990s witnessed significant growth in state and local level pro-gay rights legislation.

### ENDA and DOMA

However, at the federal level legislature support remained low. In 1996, fearing state approval of gay marriage by the Hawaiian government, Republicans enacted a measure prohibiting federal recognition of gay marriage.[71] The bill known as the Defense of Marriage Act, passed.[72] At the same time an equality measure supported by gay rights activists, the Employment Non-Discrimination Act or ENDA, which contained a "ban" on bias against homosexuals in the American workplace, failed.[73]

## Public Opinion

### Public Opinion Towards the Gay Rights Movement

In the 1960s and 70s gays and lesbians had little public support. For example, in 1965 70 percent of national survey respondents labeled homosexuals as "more harmful" than helpful to American life, with only one percent taking the opposite stance.[74] In the early 1970s, 75 percent of Americans found homosexuality "always wrong."[75] During this time the American Psychological Association still classified homosexuality as a "mental illness," which prohibited gays and lesbians from making any gains in public support.

Public attitudes towards gays and lesbians from the late 1980s up to the *Dale* decision became more favorable over time. This is according to measurements of the so-called "feelings

[70] Rimmerman, *The Politics of Gay Rights*, 274.
[71] Rimmerman, *The Politics of Gay Rights*, 361.
[72] Rimmerman, *The Politics of Gay Rights*, 200.
[73] Rimmerman, *The Politics of Gay Rights*, 363.
[74] Rimmerman, *The Politics of Gay Rights*, 194.
[75] Persily, *Public Opinion and Constitutional Controversy*, 235.

thermometer" test, in which a survey participants are asked their "temperature" as measured in "degrees Fahrenheit" towards specific social groups, with higher temperatures meaning a more favorable opinion. The "temperature" of the public's feelings towards homosexuality increased from under 30 degrees two years before the 1990s, to over forty degrees by 1997. This resulted from the influence of the AIDS movement, which led to a rise in individuals "coming out."

In the late 1980s the spread of the AIDS virus led to an explosion in the amount of individuals who identified themselves as gay and lesbian. For example, a Los Angeles Times poll found that in 1984 54 percent of respondents reported that they did not know someone who was gay or lesbian. By 2004, just two decades later, only 27 percent made such a statement.[76] This increase in public opinion brought gay and lesbian issues to the forefront of national American politics. During the 1992 presidential race Democrats nominated Bill Clinton, who openly sought gays and lesbians for financial and political support during his campaign. [77]

In terms of the level of public support towards the specific aspects of the gay rights agenda, equal employment opportunities for gay and lesbian Americans remain higher than any other goal on the gay rights agenda. The "thermometer" in 2007 was close to 100 percent. Support for greater employment rights for gays and lesbians rose from 60% in 1977 to over 80 percent in 1999.[78] In terms of gay couples' right to adopt and the right of gays and lesbians to marry, support is nowhere near the level of employment rights. The initiative to introduce gay marriage as a legal option for gay and lesbian couples has increased to 40 percent in 2007.

While the level of support for gay marriage is rising, public approval for gay and lesbian individuals' right to enlist in military service, remains much stronger, from 60 percent in 1990 to

---

[76] Persily, *Public Opinion*, 237.
[77] Rimmerman, *The Politics of Gay Rights*, 40.
[78] Persily, *Public Opinion*, 237.

almost 80 percent in 2000.[79] Despite enthusiastic public support for a change in military policy, in the 1990s gays and lesbians unsuccessfully attempted to end the military ban on gays and lesbians. From the founding of the United States in the 18th century until the recent passage of a law repealing the military policy in 2010, military law prohibited homosexual activity for active military personnel. In 1993, amidst pressure from gay and lesbians rights groups to end the military ban on gays and lesbians, President Bill Clinton announced the establishment of a "Don't Ask Don't Tell" policy regulating gay and lesbian involvement in the military. This statute permitted gay and lesbian service members to remain in the military so long as they did not reveal their sexual orientation.

The fact that gays and lesbians failed at removing the policy in the 1990s, despite a widespread popular support, reveals that favorable public opinion is not always enough to sway federal government policy.[80] This fact reverberated in the *Dale* decision. In which the Supreme Court found that the Boy Scouts' first amendment right not to include gays and lesbians trumped any positive shift in public attitudes. Speaking for the majority in *Dale*, Chief Justice William Rehnquist proclaimed "greater societal acceptance of homosexuality" is "scarcely an argument for denying First Amendment protection."[81]

While public opinion alone does not reverse a decision, evidence collected from a variety of court sources suggests the Supreme Court is aware that strong public sentiment against the court can result in their decision not being obeyed. In deciding *Baker v. Carr* Supreme Court Justice Felix Frankfurter acknowledged the possible public backlash resultant from a decision. During deliberation of the 1962 Supreme Court case involving the ability of federal courts to

---

[79] Persily, *Public Opinion*, 237.
[80] David A.J. Richards, *Women, Gays, and The Constitution: The Grounds for Feminism and Gay Rights in Culture and Law* (Chicago: University of Chicago Press, 1998) 413.
[81] *Boy Scouts of America v. Dale*, 530 (U.S., 2000).

intervene in issues arising from the redistricting (reapportionment) process, Justice Frankfurter discussed the possibility of public backlash to federal intervention. Explaining that such a decision could, "bring the Court in conflict with political forces" that would ultimately "exacerbate" the political unrest present in the South so that such disagreement with the Court's decision related to "desegregation" would spread to other "regions" and other politicized court issues.[82] Justice Antonin Scalia also emphasized the vulnerability of the Court to "societal shifts in attitude." He explained that the notion of an "unchanging" institution proves an "unrealistic" expectation.[83]

In a variety of cases, the Court's decisions mirror public sentiment towards a particular issue facing the justices. This has held true for a variety of legal arenas. Constitutional law Expert Barry Friedman in his seminal work *The Will of the People: How Public Opinion Has Influenced the Supreme Court* wrote that the Supreme Court has rendered decisions on abortion, affirmative action, and gay rights that "implicitly and explicitly acknowledged" the state of public opinion towards such issues.[84] During the 1990s, in the years leading up to the *Dale* decision the Court also fell into line with a conservative Congress. The Court's decision in *United States v. Lopez* (1995) in which the Supreme Court struck down a federal law, which made carrying guns near schools illegal, one member of the Cato Institute, a political watchdog organization exclaimed "what is happening in the Supreme Court dovetails nicely with what's happening in the 104th Congress."[85]

During the years leading up to *Dale*, gays and lesbians trailed behind "welfare recipients" as the least accepted social group in the nation according to several national polls. This suggests

---

[82] David M. O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: Norton, 1986) 345.
[83] O'Brien, *Storm Center*, 343.
[84] Barry Friedman, *The Will of the People: How Public Opinion Has Influenced The Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009) 14.
[85] Friedman, *The Will of the People*, 356.

that "public support" for gay and lesbian rights, when compared to other groups traditionally discriminated against, remained specious. Gays and lesbians came in around 50% in a "feeling thermometer" poll in 2000, compared to "welfare recipients" which stood at 55 percent in 2000.

### Impact of the Mass Media on Supreme Court Gay Rights Decisions

The extent to which the mass media, comprised of major news organizations, regional and online outlets, foreshadows public opinion demonstrates the true power which public opinion yields in determining the Supreme Court's final opinion.

Law Professor Barry Friedman noted in his highly regarded work *The Will of the People* that when the Supreme Court hands down a civil rights related ruling, the mass media reacts to it, which then affects the American public's perception of the decision, either positively or negatively. This public reaction either reaffirms the Supreme Court's decision on an issue or shows a need for the Court to readdress their decision in light of the public's reaction.[86]

In gay rights cases, whenever the public learns of a gay rights ruling through the media, many in the public adopt negative feelings towards gay rights issues. This occurs even if opinion towards gay rights was on an upward trend before the ruling. In 1996 the Supreme Court decided *Romer v. Evans*. The Court found unconstitutional a Colorado statute that prohibited all state and local governments in Colorado from passing any anti-discrimination laws protecting individuals on the basis of sexual orientation. Following this decision gay rights activists and conservative groups agreed that the pro-gay rights decision led to a decrease in public support for gay marriage rights.[87] This decision, which required legal recognition of same sex couples, negatively influenced public opinion towards gay rights. Following the legalization of Gay Marriage in Hawaii in 1993, and civil unions in Vermont in 1999, numerous states enacted

[86] Friedman, *The Will of the People*, 15.
[87] Persily, *Public Opinion*, 240.

constitutional bans on legalizing homosexual relationships following the decisions. Many gay rights advocates pointed to this trend as evidence of increasingly hostile American attitudes towards gay relationships.[88]

Polls conducted on the public's reaction to gay rights cases found that after several highly publicized Supreme Court gay rights decisions public support for homosexuals dropped drastically. Those Americans who "strongly oppose" gay marriage grew an upwards of 10 percent, from 30 to 40 percent immediately following the 2003 *Lawrence v. Texas* decision, which struck down a Texas ban on same sex sodomy. News coverage following *Lawrence* focused heavily on the issue of "gay marriage" as well as "sodomy." Headlines in U.S. Newspapers that mentioned the word "sodomy" spiked during this time. Mentions went from under 5 mentions by major newspapers to over 600 mentions after only 7 days of coverage.[89] The portrayal of gay rights issues also was "very negative."[90] The rise in news reporting hostile to gay rights followed by a significant dip in public support for gay rights reveals that negative news coverage results in negative public opinion towards gay rights issues.

Negative news coverage of homosexuality swayed the public away from supporting gay rights following two precedential Supreme Court rulings on the issue. Public opinion clearly turned against gays and lesbians following the 1996 Supreme Court decision of *Romer*, as evidenced by the rapid escalation in anti-gay marriage amendments passed by state legislatures. In the years after *Lawrence v. Texas* (2003) the same pattern emerged. In the case of *Romer*, which occurred in 1996, public anxiety towards homosexuality rose at the same time *Dale* was making its way through federal courts. This suggests that the news coverage of states passing constitutional bans on gay marriage in the year after *Romer* influenced other state legislatures to

[88] Persily, *Public Opinion*, 240.
[89] Persily, *Public Opinion*, 243.
[90] Persily, *Public Opinion*, 243.

adopt such measures. This cycle clearly demonstrated to the Justices deciding *Dale* that the public remained hostile towards gay rights and reaffirmed to the Court that the public would back the Court's decision to find in favor of the Boy Scouts of America.

## Political Opinion and the Supreme Court

### The Impact of Law Clerks on the Decision Making of the U.S. Supreme Court

Law clerks assist a pre-assigned Supreme Court Justice in deliberating and rendering decisions as well as in writing and researching opinions. Law clerks play a critical role in the Supreme Court's functioning and impact Justices' thinking in cases where the Justice does not have an initial opinion. Justice William Rehnquist (1986- ) acknowledged in several 1957 articles on the subject of law clerk influence that the memoranda law clerks write for *certiorari* petitions "provides a chance for personal prejudices to be expressed."[91] The deliberation process, whereby some Justices discuss issues of a case with respective law clerks also provides an opportunity for clerks to "constructively" frame the case and thus potentially influence the leader's thinking on a particular issue. Supreme Court Justice Harold Burton's legal paper trail reflects that his clerks provided "considerable" input into his "decisional processes."[92]

Law clerk Alexander Bickel carried out important historical research on the issue of school desegregation when presented with the opportunity in the 1954 *Brown v. Board of Board of Education*. Examination of this research reveals that the "framework" provided by such important investigations might have influenced in a minor way Justice Frankfurter's perspective towards *Brown*.[93] While law clerks have the ability to put the issue in any case into a more focused perspective, it becomes clear that in historically important decisions, including *Dale*, law clerks do not "change" the minds or attitudes of the Justices. Even Chief Justice Frederick

---

[91] Richard Hodder-Williams, *The Politics of the US Supreme Court* (Boston: G. Allen & Unwin, 1980) 86.
[92] Hodder-Williams, *The Politics of the US Supreme Court*, 87.
[93] Hodder-Williams, *The Politics of the US Supreme Court*, 87.

Vinson, whom historians note as an indecisive leader provided his clerks with an outline he prepared beforehand and then let the clerks fill in the rest. Vinson then systematically went through each section taking out various pieces of arguments he disagreed with.[94] Despite the barriers erected by some justices, Supreme Court law clerks political agenda still exerts a considerable degree of influence on judicial decision-making. This is one of several ways political ideology saturates many aspects of Supreme Court jurisprudence.

### Historical Influence of Justices' Political Opinions on Decisions Rendered

The political ideologies of the Supreme Court clearly impact the Justices' final decisions in cases where justices' beliefs closely align with one side. In 1803 the Supreme Court under John Marshall believed Supreme Court's power should be strengthened. The Court acted on this belief in *Marbury v. Madison*, which granted the court the power of Judicial Review, or to render prior Congressional or Presidential decisions "unconstitutional" or "constitutional."[95]

In the 1930s, a time when the Supreme Court sided with businesses and powerful political bosses, the Court ruled in favor of "free market economic theory" and against "progressive" ideals, which often favored greater political and social representation and equality for industrial factory workers. In the 1923 *Atkins v. Children's Hospital*, a Supreme Court Justice emphasized the critical role of "individual freedom" in the promulgation of the "constitution" and the "common good."[96] In the 1920s through the 1940s Justice Hugo Black favored employees in railroad labor disputes, while Justice Pierce Butler, a former railroad company lawyer, preferred the companies. Butler favored the railroad companies in a variety of decisions throughout the 1940s. Their disputes led to an atypically large number of railroad-related cases granted *certiorari* during the early to mid 20th century. Even in the 1950s and 60s,

---

[94] Hodder-Williams, *The Politics of the US Supreme Court*, 87.
[95] Arthur Selwyn Miller, *The Supreme Court: Myth and Reality* (Westport, Conn: Greenwood Press, 1978) 67.
[96] Miller, *The Supreme Court: Myth and Reality*, 66.

when the Supreme Court majority was ideologically "liberal" during much of the tenure of Chief Justice Earl Warren, the "Warren Court" rendered many pro-civil rights decisions, including the 1954 *Brown v. Board of Education* case.

### The Political Spectrum of the Justices at the Time of *Dale*

Political ideology clearly influences judicial decision-making. This is quantitatively proven by a comprehensive study conducted in the American Political Science Review by Jeffrey Segal and Albert Cover, Associate Professors of Political Science at Stony Brook University. Segal and Cover compared every Supreme Court Justice since Hugo Black in the 1930s in terms of their ideological positions on civil rights issues, as provided by content analysis of newspaper editorials. Researchers focused on newspaper editorials from the time of presidential nomination to U.S. Senate confirmation. A thorough focus on editorials written about each justice enabled the researchers to procure a wealth of information on each and every Justice, and eliminated much of the biases present in Senate Judiciary Committee meetings.[97] The study used Justices' votes from a few decades before the Warren Court to the present day as the dependent variable for the study. Analysts compared editorial comments about each Justices' record on civil rights case law to the Justices' actual votes on civil rights cases while on the Supreme Court.

Student researchers analyzed opinion pieces in newspapers by reading through numerous articles on the justices and rating each paragraph for "political ideological content." The assistants characterized each passage as "liberal, moderate, conservative or not applicable." Then condensed the data and inputted the statistics into a formula leading to a "range" scale.[98] In an updated data sheet, the scale ranged from 0 (very conservative) to 1 (very liberal). Ranges

[97] Jeffrey A. Segal, Albert D. Cover, "Ideological Values and the Votes of the U.S. Supreme Court Justices," *The American Political Science Review* 83, no. 2 (June, 1989): 560.
[98] Segal, "Ideological Values," 559.

from .4 to .6 were moderate. .3 to .35, "moderate conservative," and .6 to .65, "moderate liberal." A "very conservative" justice ran from .0 as a base score to .2 and a "very liberal" score varied from .8 to 1.

Looking at the justices who decided *The Boy Scouts of America and Monmouth Council, et. al., Petitioners v. James Dale* shows that the court was staunchly conservative at the time. Table 1.1 provides a look at the overall attitudes of the Court. According to the chart produced below the Court clearly had a "conservative" majority (a score from above .2 to just under .3). The court's "total" ideological score and corresponding political ideology, which is the average of the "averages" of each justices' ideological score for the majority opinion and dissenting opinion, respectively, provides part of the basis for this conclusion.

**Table 1.1**

| *Supreme Court Justice* ***(Maj. Opinion)*** | *Chief Justice (CJ)* | *Ideology Score (0-1)* | *Political Ideology (Very Conservativeà Very Liberal)* |
|---|---|---|---|
| Kennedy | | .365 | Moderate Conservative |
| O'Connor | | .415 | Moderate |
| Rehnquist | CJ | .045 | Very Conservative |
| Scalia | | .000 | Very Conservative (Base) |
| Thomas | | .160 | Very Conservative |
| **Avg.** | **CJ** | **.197** | **Very Conservative** |
| *Supreme Court Justice* ***(Dissent)*** | *Chief Justice (CJ)* | *Ideology Score (0-1)* | *Political Ideology (Very Conservativeà Very Liberal)* |
| Breyer | | .475 | Moderate |
| Ginsburg | | .680 | Liberal |
| Souter | | .325 | Moderate Conservative |
| Stevens | | .250 (.62 assumed) | Moderate Liberal* |
| **Avg.** | **0** | **.31375 (.525)** | **Moderate*** |
| **Total:** | **XX** | **.255375** | **Conservative** |

*See discussion below

Glancing at the justices who composed the "majority" (maj.) "opinion" versus those in the "minority" or "dissenting" opinion reveals that political beliefs of the Supreme Court Justices comprised one of the determinative factors behind the Supreme Court Justices' decisions in *Boy Scouts of America v. Dale*. Every one of the "very conservative" and "conservative" justices ruled against John Dale's right to membership in the Boy Scouts as a scoutmaster (recognized as the 'majority' opinion, which found in favor the Boy Scouts and against openly gay scoutmasters' right to participate in the Boy Scouts) whereas the one "liberal," Justice Ruth Bader Ginsburg, disagreed with the Supreme Court's findings.

According to the "feelings thermometer" test, conservative ideology serves as a "consistent, strong predictor of individuals' attitudes towards gays and lesbians." With conservative attitudes corresponding to "cooler" feelings and a greater likelihood of "opposition to gay rights."[99] Additionally, individuals who grew up in the "Reagan" era (much of the 1980s) had an increased probability of having negative feelings towards gay rights issues. Public opinion data show that Americans who grew up during the heightened conservatism of President Ronald Reagan's administration (much of the 1980s) proved a "significant" source of anti-gay rights viewpoints.[100] This demonstrates the general anti-gay attitude of the Reagan administration. Former-President Ronald Reagan's influence on the *Dale* decision should not be understated. Reagan appointed among other justices Antonin Scalia, who yielded a "base score" of 0, the most conservative ideological number possible under the Segal-Cover scale. Seeing as Supreme Court appointees reflect their nominating president's ideological views before appointment to the Court, Scalia's anti-gay rights position in *Dale* indicates that conservatives

[99] Persily, *Public Opinion*, 238.
[100] Rimmerman, *The Politics of Gay Rights*, 423.

from the Reagan era are more likely to hold anti-gay views and therefore voting against gay rights.

Considering neoconservatives like Supreme Court Justice Antonin Scalia and Chief Justice William Rehnquist believe in a modified form of the traditional values of the 1950s and early 60s, voted against gay rights in *Dale* and Ruth Bader Ginsburg, a firm believer in civil rights causes, as evidenced by her high-"liberal" score of .68, voted for it, reinforces the notion that justices clearly split along ideological lines in *Dale*. Although Justice John Paul Stevens, labeled statistically as a "conservative" sided with Mr. Dale, which might suggest a weaker the correlation. Justice John Paul Stevens considers himself a "liberal" on civil rights issues. On a variety of civil rights cases throughout his tenure, including race-based educational standards, Stevens held a "liberal" position, often splitting off from social conservatives.[101] The fact that the only true ideological "conservative" on the "dissent" side of the decision, Supreme Court Justice John Paul Stevens, would be considered more a "moderate-liberal" speaks to the steep ideological divide in the justices deciding *Dale* as well as proves that the Justices who decided *Dale* voted based on their political values more so than precedent or shrewd juridical analysis, or effective administration of the law.

Comparing the ideological number produced on for each Justice against his or her rulings, investigators found a .8 correlation between the measured ideologies of justices and the votes of each justice in major civil rights court decisions. Segal and Cover also added that, due to the probable existence of measurement error and the study's approach, the actual ideological connection to voting patterns (the correlation) more than likely stands "significantly higher" than

[101] Jeffrey Rosen, "The Dissenter, Justice John Paul Stevens," *New York Times*, September 23, 2007, http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html.

the calculated figure.[102] This suggests that the conservative, anti-gay rights political ideology of the Court at the time of *Dale* heavily contributed to the Court's decision to deny John Dale's request to remain in the Boy Scouts.

## Internalist Energy

For the gay rights movement, a graph showing the number of groups and people participating in furthering gay and lesbians liberties over the past fifty years since the movement's birth in the early 1950s would resemble a "roller coaster" in many ways. Historian John D'Emilio noted that the 1940s, 1960s and 80s characterized times of many new rights achieved and a rapid increase in the number of gay rights supporters and activists. Additionally, during these decades gays and lesbians "came out" in significantly larger numbers compared to other eras. Many joined the numerous gay rights organizations that sprang up during these times, centered on developing new goals and novel approaches to reaching those objectives. The 1950s, 70s and 90s, on the other hand, epitomized cycles where gay rights organizations achieved fewer new rights. Also, a sharp refocusing of gay rights activists' goals took place during these years, where the activists trimmed the lengthy agenda leftover from more active phases.[103]

The 1950s and much of the 60s saw a dormant gay rights movement. The Mattachine Society and the Daughters of Bilitis comprised the mainstream gay rights organizations seeking change and gay rights organizations mainly focused their efforts on challenging heterosexual dominance and homophobia through educational efforts aimed at creating an atmosphere in which gay and lesbians could discuss the *idea* of homosexuality without facing arrest or intimidation.

---

[102] Segal, "Ideological Values," 562.
[103] Rimmerman, *The Politics of Gay Rights*, 33.

The rioting of drag queens outside of the Stonewall Tavern in Greenwich Village in New York City triggered a massive response from gays and lesbians shortly following the incident. The riot, and the following harassment by police inspired a new, younger generation of "gay revolutionaries," brought up in 1960s America, where social groups traditionally discriminated against jockeyed to increase their social and political power from within and outside of the American government.

Following Stonewall, already inspired by the organizational and tactical efforts of gay rights activist Frank Kameny, whose brash form of activism often involved no-violent protests and mass demonstrations as well as legal challenges to discriminatory laws, groups such as the Gay Liberation Front adopted a "militant" stance towards the rampant discrimination gays and lesbians faced in America in the 1960s. These individuals protested in the streets, marched in parades and performed to disrupt heterosexual social life.

Clearly a vibrant energy swept into the hearts and minds of gays and lesbians across the United States. This renewed energy sprang from the "new language" of gay rights. Gays and lesbians adopted an "oppression-based" rhetoric during the early 1970s. The idea that society oppressed gays and lesbians and that the way to prevent further oppression involved "coming out" of the closet, or "coming to terms" with one's homosexuality, came to fruition at this time and encouraged, for the first time, many gays and lesbians to admit their sexual orientation to others. As a result of this newfound identity gay rights organizations saw their memberships triple overnight.[104] Hundreds of new gay rights organizations also came on the scene. The night before Stonewall, roughly 50 gay rights organizations existed in America. Four years after

[104] Rimmerman, *The Politics of Gay Rights*, 35.

Stonewall, over 800 active gay rights organizations fought against discrimination in the United States.[105]

Possibly a result of the pent up energy of a gay populace tired of oppression, many gays and lesbians found the exact goals and purpose of the gay rights movement's message of the 1960s unclear. For many different organizations existed, all with different charters and decrees. Following this truly explosive period, gay rights organizations, having found a chance to "catch their breath" so to speak, focused on one of two goals throughout the 1970s. (1) Reform laws, public policies and institutional practices that discriminated against homosexuals and/or (2) build institutions designed to create strong, stable, active community. While most gay rights organizations fit neatly into one or two camps, the process of "institutionalization" demanded a highly developed interrelationship between various gay rights organizations.[106] As a result, many adopted a "legal rights strategy," in which gay attorneys in the 1970s, brought up for the first time in a society in which "queer studies" and "sexuality law" existed in the nation's law schools as a result of gay institutionalization, where gay and lesbians sought to found libraries, schools and community centers friendly to gays and lesbians, fought valiantly alongside gay and lesbian plaintiffs fighting for equal opportunities in the employment arena.

Effective change took many forms. Due to increased visibility, half of the states in the US repealed their sodomy laws by the early 1970s. Many cities also enacted anti-discrimination laws based on sexual orientation. The America Psychiatric Association in 1973 eliminated homosexuality from its list of mental disorders and in 1975 the Civil Service Commission dropped its blanket ban on federal employment of Gays and Lesbians. For the first time national candidates spoke in favor of gay rights. President Carter invited gay and lesbian leaders to the

---

[105] Rimmerman, *The Politics of Gay Rights*, 35.
[106] Rimmerman, *The Politics of Gay Rights*, 36.

White House to discuss their goals and in 1980 the Democratic Party added the "gay rights" agenda to its national goals for change in America.[107]

Despite gay friendly law reform and greater equality, gays and lesbians soon witnessed a shocking backlash against their accomplishments. The rise of conservatism and the "religious right," a collection of organizations and nonprofit councils funded by virulently anti-gay evangelical Christians, leading to the term "Christian Right," in the 1980s led to many achievements being rolled back and a marked decrease in new pro-gay rights legislation and legal decisions as a result of politicians who were once friendly to gay and lesbian activists, shy away for fear of losing elections due to the rise of an empowered evangelical electorate hostile to gay rights.

While much of the 1980s marked a depressing, low point for the gay rights movement. The growth of the AIDS movement in the late 1980s witnessed a revival of internal energy within the gay rights movement. Closeted homosexuals across the country, struck by the horrific disease, soon had to "come clean" to their straight partners about their orientation. As a result, a rapid escalation in the number of homosexuals "coming out" in the United States brought about an energetic zest within the gay rights community as AIDS legislation and gay rights legislation passed in many state legislatures.[108]

In 1987 a half million gays and lesbians and other individuals stricken with the AIDS virus protested in the nation's capital for the federal government to recognize and "fight" AIDS as well as to promote gay and lesbian rights.[109] This event became known as the "March on Washington" and signaled for the first that gay rights took center stage in national political debates. The gay rights movement also took part in the passage of the Hate Crimes Statistics

[107] Rimmerman, *The Politics of Gay Rights*, 37.
[108] Rimmerman, *The Politics of Gay Rights*, 37.
[109] Rimmerman, *The Politics of Gay Rights*, 39.

Act, which mandated FBI intervention on hate-motivated violence in America, and included sexual orientation as one of the "protected" identities.[110]

While the late eighties witnessed an explosion in growth and activities for the gay rights movement, the 1990s was a period of "slow" progress, achievement and activity within the gay rights movement.[111] On a variety of initiatives, the gay rights movement fell flat. The movement's rise to national prominence—as an issue on the national presidential campaign agenda in 1992—was offset by its lack of success in the congressional and legal arenas. In the fight for gay marriage rights, homosexuals fell flat. After becoming a national issue during the presidential races in 1996, opposition lead by the Christian Coalition, a national organization devoted to promoting evangelical Christian moral values, together with several other national and state-wide conservative Christian groups passed a Marriage Protection Resolution at a political rally in Iowa.

Clearly, gay relationship rights did not achieve the same public support as other gay rights initiatives. Even in these other arenas, however, gay rights advocates suffered tremendously at the hands of the Christian right. In 1993 President Bill Clinton attempted to end the military exclusion on homosexuality in his first term as president. Upon meeting intense resistance from a Republican controlled Congress as well as Military establishment uneasy about letting gay men and women openly serve, Clinton compromised. Clinton founded the "Don't Ask Don't Tell" policy, where the military rule prohibiting gays in the military was amended to explain that homosexuality was "at odds" with the proper military unit cohesion, and that "openly" gay recruits would be dismissed upon revealing their sexual orientation.[112]

---

[110] Rimmerman, *The Politics of Gay Rights*, 39.
[111] Rimmerman, *The Politics of Gay Rights*, 49.
[112] Rimmerman, *The Politics of Gay Rights*, 252.

The Human Rights Campaign (HRC) during this time took on the long overdue task of securing federal rights legislation to protect gays and lesbians in the workplace. At this time the HRC fought for ENDA (the Employment Non-Discrimination Act) legislation banning sexual orientation discrimination in civilian and non-religious employment.[113] Unfortunately, this failed to pass due to a newly re-empowered evangelical right wing of the Republican Party, in power from the mid 1990s until the mid 2000s.[114]

The 1990s, where gay rights activists struggled to pass major pieces of national legislation providing critical protections for gays and lesbians and securing greater equality under the law, provided the social and political context for *Dale*. John's plea for inclusion into the Boy Scouts appears just one of many examples throughout the 1990s where the government, reinforced by public apprehensiveness and a powerful group of fundamentalist Christian politicians and lobbyists, denied gays and lesbians rights afforded to many other social groups in American society.

## External Events

The gay rights movement had ground left to cover in the 1990s. Despite all the obstacles against them, one other, less blatant "misfortune" fell upon the gay rights movement in the 1990s. In the late 1960s and 1980s, the gay rights movement experienced rapid growth in both its membership ranks as well as in its lasting achievements. These accomplishments came about, as historian John D'Emilio pointed out, due to the influence of events outside the direct control of the gay rights movement itself, which "propelled" the movement forward with great speed and momentum. These periods of social and political progress, where multiple gay rights laws passed and societal attitudes shifted towards greater acceptance of gays and lesbians occurred

[113] Rimmerman, *The Politics of Gay Rights*, 60.
[114] Rimmerman, *The Politics of Gay Rights*, 200.

following the release of the "Kinsey studies" on human sexuality, and the rise of the Mattachine Society in the late 1940s and early 1950s, the Stonewall Riots of 1969 as well as the AIDS epidemic of the 1980s.[115]

The first "leap" forward took place when the small organizations, loosely tied together by a common goal of promoting a positive public perception of homosexuality, which made up the gay rights movement in the 1940s and 50s first witnessed a substantial societal advancement of public attitudes towards homosexuality. For the first time gays and lesbians in America saw themselves as an oppressed social group, similar to African Americans' position at the time. Groups founded during this time such as the Mattachine Society and the lesbian organization the Daughters of Bilitis initiated a dialogue which framed gays and lesbians as a sexual minority in need of better understanding as much by heterosexual individuals as by homosexuals, who struggled to understand their sexuality in these early days when being "straight" or heterosexual, was the only legal sexual orientation allowed in American society due to state laws in place at the time banning sodomy, defined as anal or oral sexual acts.[116] These organizations, through small group discussions amongst other homosexuals as well as with mixed groups of gay and "straight" individuals, homosexuals developed this identity and also framed homosexuality in a new light, one in which created a vocabulary with which sexual orientations other than heterosexual could be talked about without fear of dire social or legal consequences.

By the late 1950s, the actions of gay rights organizations, as well as those few brave individuals who sought to challenge American attitudes towards homosexuality, including famed gay rights activist-turned-lawyer Frank Kameny, enabled homosexuality to loose some of the "taboo," or offensiveness associated with the topic as evidenced by the Supreme Court victory

[115] Rimmerman, *The Politics of Gay Rights*, 42.
[116] Rimmerman, *The Politics of Gay Rights*, 42.

for the gay magazine *One: The Homosexual Magazine* in 1958, which cleared the way for further pro-gay rights litigation by breaking down the social and legal barriers to greater equality for gay and lesbian Americans. Gay rights historian Eric Marcus noted that the *One* decision "legitimized" homosexuals as a group deserving of the public's (and the court's) attention.[117]

This period of increasing public acceptability of gays and lesbians subsided by the beginning of the 1960s. Queer studies historian John D'Emilio charged that the "effort required to launch" a broad, assertive movement during this time, "exhausted" the limited political will and any "opportunity" for the gay rights movement to continue growing.[118] With the rioting that took place outside the Stonewall Inn in the Greenwich Village neighborhood of Manhattan in 1969, however, the gay rights movement once again took off, reaching a new level of public tolerance in the form of numerous gay rights legislation during this period. The revitalized political "will" of the gay rights movement was reinforced by the other movements fighting for social change during the radical upheaval of the late 1960s as well as from the brave actions of the drag queens who fought against oppressive police in the Stonewall riots, which clearly depicted gays and lesbians as an "oppressed" minority with legitimate social concerns in need of redress.[119]

The rise of the religious Christian right in the United States during the 1970s and much of the 1980s led to a rolling back of many of the state and local anti-discrimination laws passed in the 1970s, which protected homosexuals from discrimination and harassment in the workplace. This period of little betterment of gay rights quickly fell away with The AIDS movement in the 1980s. This social and political effort by gay and lesbian rights groups, along with several racial empowerment organizations to achieve federal government recognition of the AIDS or Auto

---

[117] Marcus, *Making Gay History*, 21.
[118] Rimmerman, *The Politics of Gay Rights*, 43.
[119] Williams, *Gay and Lesbian Rights in the United States*, 70.

Immune Deficiency Syndrome, virus killing many Americans during this time, empowered many gays and lesbians to "come out" of the "closet," and to take part in the gay rights movement's broader objectives of improving societal attitudes and policies towards gays and lesbians.[120]

In the 1990s, gay and lesbian activists seeking to transform public opinion witnessed unprecedented political influence. In the 1992 Presidential Campaign, Presidential Candidate and future President of the United States Bill Clinton openly sought votes from gay and lesbian political activists, holding a political rally in the predominantly gay neighborhood of West Hollywood in California. This power though, soon gave way to a period of federal government hostility to gay and lesbian Americans. Many major pieces of federal gay rights legislation failed to pass in the United States Congress during this time, including ENDA, or the Employment Non-Discrimination Act, federal legislation designed to end private sector, non-religious employment discrimination towards gays and lesbians.

## *Brown* and the Civil Rights Movement

The ability for outside events to energize the gay rights movement and result in massive legal and legislative changes as evidenced by the periods of significant headway following major events with the potential to impact homosexual activists' causes mirrored the influence that numerous factors, both external and internal to the movement for civil rights in the 1950s and 60s, played in the growth of the Civil Rights Movement in the 1940s and 50s. The groundbreaking 1954 Supreme Court decision *Brown v. Board of Education of Topeka Kansas* resulted in a pro-African American rights decision due to the culmination of a variety of political and social forces, which, taken together enabled civil rights activists fighting for progressive reform of education laws prohibiting racial desegregation in the United States, to successfully

[120] Rimmerman, *The Politics of Gay Rights*, 43.

overturn such laws through the courts. These factors were similar to those that led to the landmark gay rights Supreme Court decision *Boy Scouts of America v. Dale*. The forces ranged from the amount of case law supporting a pro-civil rights decision to the historical legacy of civil rights legislation in the United States, and the impact of public opinion and historic events, to the overall political ideology of the Supreme Court in *Brown*.

Unlike *Dale*, however, the *Brown* decision resulted in a historic victory for African American civil rights in the United States. The efforts of the National Association for the Advancement of Colored People, or the NAACP during the 1930s and 40s, who through a series of cases broke down segregation in colleges and universities in the United States in the years prior to the *Brown* decision helped lead to the Supreme Court's pro-civil rights decision by providing education-related desegregation precedent. The Court historically relied on legal precedent in rendering its decisions. As such, the existence of prior Supreme Court decisions supporting desegregation of educational institutions bolstered the legitimacy of the Supreme Court's ruling in Brown. The Justices knew this fact, this made a decision to desegregate public schools more plausible in the Court's mind and therefore made a pro-civil rights verdict more likely. The Warren Court, the court under the Chief Justice Earl Warren, which decided *Brown*, attempted to mitigate Southern resistance to the a desegregation verdict to the furthest extent possible. As evidenced by several Justices' desire for a unanimous Court decision for the 1954 case, so as to signal a strong, determined Court to Southern politicians who stood likely to disregard the ruling. The Justices likely saw the prior Supreme Court decisions ordering desegregation of public universities as excellent sources of case law with which to draw upon to help quell the backlash from Southern politicians in the legislature. This benefit undoubtedly

made the Supreme Court more willing to render a verdict, which struck down legalized segregation in American public schools.

Congress' passage of the 14th amendment in 1868 assisted civil rights activists' struggle in *Brown* to end *de jure* or legalized segregation in public schools by showing constitutional and federal government support for African American civil rights. This amendment was reinforced by several key civil rights acts in the late nineteenth century aimed at strengthening the power of Congress and the executive branch to enforce the civil rights of African Americans, which were guaranteed by the post-civil war constitutional amendments, which included, in addition to the 14th also encompassed the other "Reconstruction" ammendments, the thirteenth and fifteenth.

Historically, a record of federal government recognition of civil rights led to greater success for civil libertarians fighting legal inequality in the Supreme Court. This is due to the fact that the Supreme Court, in cases dealing with minorities protected by constitutional amendments, in examining the civil rights groups' claims, gave more deference to the group's request for greater equality. The Court was more likely to acknowledge the need for an anti-discrimination ruling due to the legislative and executive branches prior acknowledgement of that groups' right to receive constitutional protection. This willingness lies in the Court's deference to those branches due to the Court's reliance on the other two branches for enforcement of its decisions.

While case law and legislation aided supporters of desegregation in *Brown*, public support of desegregation of public schools, a noted influence on Justices' decision making in civil rights cases, remained mixed in the 1930s and 1940s. The American public remained apprehensive about fully supporting the civil rights movement's aim of ending desegregation of public schools. This was demonstrated in the sympathetic public opinion towards racial

separation in the early 1950s. Based on this, it is unlikely that public opinion was favorable enough to significantly shape *Brown*. Historic civil rights victories on the other hand, which lasted from the end of World War II in 1945 to the *Brown* decision in 1954, and included such events as United States President Harry Truman's Executive Order in 1948 to racially integrate the armed forces, demonstrated increasing public awareness and tolerance for desegregation. These advancements suggested to Justices deciding *Brown* that the American public could weather a decision to unify American public schools.

This increasingly tolerant public attitude towards desegregation made a decision to desegregate public schools more plausible for the Supreme Court. The Justices recognized the need for public support in order for a decision to integrate public schools to be enforced by the executive branch. This growth of public support moved in concert with the overall "liberal," pro-civil right political ideology of several Supreme Court Justices who decided *Brown v. Board of Education* in 1954. The Supreme Court's unanimous ruling in *Brown* and several cases following it suggests that the liberal ideology was a determinative factor in *Brown v. Board of Education*.

## *Brown* Case Law

In 1850 an African American father, Benjamin F. Roberts sued the Boston Public School System over the requirement that African Americans attend separate schools from Whites. At the time, his daughter, Sarah, was required to travel long distance to a school for Black children, when the White school was located right down the street from the Robert's residence. Benjamin Roberts argued, "Separate schools violated the constitutional rights of black children" and instilled in African American children a sense of inferiority when compared to White children. The Court overseeing the case, however, disagreed. They explained that Black children were

"entitled" to the same rights as White children and that they "doubted" a change in "law" would bring about "any change in prejudice."[121]

The case *Roberts v. Boston*, the first Race-based education case in American Jurisprudential history, typified the many cases brought by African American families who fought against legalized racial segregation in American education, in the 1890s and 1900s. Following the Civil War in 1865, education for African Americans became far more accessible and many Blacks embraced schooling at the secondary and higher education levels. A plethora of new Black colleges and universities arose during this time. In addition, Black schoolteachers from the North swarmed into the South to offer instruction to former slaves. Schools such as Howard University (1867) and Philander Smith College (1877) established a group of African American elites as well as an educated Black middle class. [122]

The period of reconstruction lasted until the late 19th century, when, following the withdrawal of federal troops from the South, White southerners again resorted to fear, intimidation and repression of African Americans. During this time firebombing was common to force African American political leaders into silence.[123] African American political and social power ceased to exist by the 1880s in much of the American South. New legislative measures enacted to repress African Americans came about during this time in the form of "black codes" and "Jim Crow laws." The Black Codes systematically repressed African Americans and kept many Blacks in a perpetual state of poverty and servitude.[124] Such laws enabled Police Officers to arrest jobless or homeless Blacks for vagrancy and trespassing, required African Americans to

---

[121] Gloria J. Browne-Marshall, *Race, Law and American Society: 1607 to Present* (New York: Taylor and Francis Group, 2007) 19.
[122] Gloria J. Browne-Marshall, *Race, Law and American Society*, 19.
[123] Patterson, *Brown v. Board of Education*, 4.
[124] Abraham L. Davis, and Barbara Luck, *The Supreme Court, Race and Civil Rights* (Thousand Oaks, CA: Sage Publications, 1995) 12.

carry passes when travelling, and prohibited interracial marriage. Punishment for violations of these laws ranged from whippings to the death penalty, which was reserved for Black men convicted of "raping" White women (while also ignoring instances of White men who raped Black women.)[125] "Jim Crow" laws, named after a song and dance caricature of African Americans entitled "Jump Jim Crow," were a series of laws erected in the South that required separate public accommodations for Black and White people. Legislatures across the South enacted laws that required racially segregated telephone booths, train cars, bus stations, churches, and even drinking fountains.[126]

The separate facilities mandated by "Jim Crow" laws often meant that African Americans' facilities were woefully inept compared to those of White Americans.[127] Schools reserved for African Americans were particularly unequal with those of Whites. In rural areas school buildings for Blacks consisted of a log cabin with a tin roof. In many agrarian counties, there was no high school for Blacks. Teachers in less populated districts often had no more than a fourth grade education. Public schools in urban areas proved inadequate as well to that of Whites. Schools for African Americans often were hastily constructed, and highly overcrowded. "Double sessions" in some elementary schools in Atlanta, Georgia, limited Black students to only three hours per day of classroom instruction, the rest of the day the students not in school would roam the streets.[128] While many Blacks in the South remained politically and socially alienated, some African American activists attempted to address institutional inequality. Homer Plessy challenged the constitutionality of a Louisiana statute forcing Blacks to sit in the front passenger car of steam engine locomotive trains (which threw soot and ash into the front section

---

[125] Davis, *The Supreme Court*, 12.
[126] Davis, *The Supreme Court*, 59.
[127]
[128] Patterson, *Brown v. Board of Education*, 11.

of the train) in 1896. He argued much of what *Roberts* asserted before, that the law violated the 13th and 14th amendments and posted a "badge of inferiority" on African Americans.[129] The Supreme Court in *Plessy v. Ferguson* (1896) however, squarely rejected this argument, it ruled that "separate institutions" are not necessarily "inherently unequal," so long as separate facilities are provided "for both races."

This landmark decision set the stage for *Brown* more than 40 years later. Where the Supreme Court tore down the "separate but equal" doctrine implemented in *Plessy*. While suffering a blow by *Plessy*, at the dawn of the 20th century African Americans were poised to take on racial discrimination with the rise of a new class of lawyers and statesmen, thanks to the founding of Black law schools during this time. Attorney and future Supreme Court Justice, Thurgood Marshall, utilized the National Association for the Advancement of Colored People or the NAACP, an organization designed to protect and promote African American civil freedoms, to take on the *Plessy* doctrine. Marshall joined the group in the 1920s, helping to revive the defunct Baltimore branch of the organization.[130]

In the 1930s, the state of Black education was disastrous as most African Americans had no more than a "fourth grade education" compared to over "8.5 years for White Americans." In the Atlanta public school system the average spending on facilities was just over $200.00 for Black schoolchildren compared with $570 for Whites.[131] Marshall and the NAACP were committed to desegregating the failing public school system for Blacks so as to raise African American children out of educational "poverty."[132]

---

[129] Marshall, *Race, Law and American Society*, 22.
[130] Mark V. Tushnet, *Making Civil Right Law: Thurgood Marshall and 1936 to 1961* (New York: Oxford University Press, 1994) 10.
[131] Patterson, *Brown v. Board of Education*, *12.*
[132] Tushnet, *Making Civil Right Law*, 13.

Many American states in the 1930s and 1940s did not have separate, "financially and academically equivalent" collegiate, graduate or professional school facilities for Blacks students. This prohibited African American prospective applicants from gaining higher education, because often these students were denied admission to these schools based on their race. The NAACP and Thurgood Marshall solved this problem and created legal precedent in support of desegregation, when they represented these applicants in civil suit cases specifically designed and chosen to challenge States' educational segregation laws. Civil Rights lawyers in a number of states successfully forced Federal courts to find in favor of college level racial desegregation by appealing to the *Plessy* decision's rule that racial segregation in public schools was constitutional so long as Blacks and Whites attended separate, "equal" schools.

Marshall and the NAACP as well as the NAACP Legal Defense and Education Fund, an organization founded by Marshall in the 1930s with the intent of sharp, focused attacks on legal barriers to racial discrimination, used this segregationist decision as a "weapon" against itself.[133] They represented rejected Black applicants to state universities in states without "equal" alternative higher educational institutions for African Americans and demanded the Court, based on the *Plessy* requirement, take action. The strategy worked. The Supreme Court required the state to either build a "separate" Blacks-only school, or desegregate the existing state-run institution. These actions made collegiate segregation too "expensive" to maintain and resulted in many states desegregating public law schools, medical schools and universities.[134]

In 1936 the NAACP supported Lloyd Gaines a law school hopeful denied admission to the University of Missouri Law School due "solely" to his race.[135] In 1938, the case went before the Supreme Court where the justices ruled in Gaines' favor. The court found that the

[133] Patterson, *Brown v. Board of Education*, *13.*
[134] Tushnet, *Making Civil Right Law*, 12.
[135] Patterson, *Brown v. Board of Education*, 16.

prospective applicant "was entitled" to the "equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education."[136] As such the Supreme Court accepted racial integration in *State of Missouri Ex. Rel. Gaines v. Canada* (1938) at the professional school level, according to the 14th amendment to the constitution, which protected African Americans from infringement upon their rights by state and local governments.

In two other cases the Supreme Court added to the amount of Supreme Court jurisprudence that indirectly challenged the "separate but equal" doctrine. In *Sipuel v. Board of Regents* (1948) the Supreme Court ruled that Sipuel must be admitted to the University of Oklahoma. In 1950, the case *McLaurin v. Oklahoma* established that George W. McLaurin, a Black applicant, had to be admitted to graduate school at the University of Oklahoma.[137] In a number of decisions, the Supreme Court ruled against segregationist efforts, promoting the idea of desegregated public schools in the process.

## *Brown* Legislation

Just as the Supreme Court provided a historical context for the *Brown* decision in which the Federal government consistently reinforced African American liberties, including education-related freedoms, through pro-civil rights Supreme Court precedent, the almost century-long congressional commitment to the preservation of African American's freedoms that started with the 14th amendment to the constitution, also fortified the *Brown* decision. Congress passed this amendment shortly following the American Civil War (1861-1865). The 14th amendment declared, among many other important precedents, that no state or local government could infringe upon the natural rights, "life, liberty or property," of its citizenry.

---

[136] Patterson, *Brown v. Board of Education*, 16.
[137] Marshall, *Race, Law and American Society*, 26.

The Civil Rights Acts of 1866, 1870, 1871 and 1875, all aimed at reinforcement of the 14th amendment's protection of African Americans from the rampant and widespread discrimination characteristic of the era, supplemented the 14th amendment in aiding civil rights organizers' position in *Brown*. These acts expanded prohibitions against discriminatory actions and gave the executive branch more comprehensive and effective enforcement powers. Provisions of the Civil Rights Acts of 1866, 1870, 1871 and 1875 included a section that made it a federal crime for any state representative to deprive his or her citizenry of constitutionally protected rights. Other parts prohibited state government removal of protection provided by "laws of the United States," which included civil rights amendments passed by the United States Congress.[138]

The Civil Rights Act of 1866 guaranteed Blacks the right to purchase, lease and use "real property," that is, purchasable land and buildings.[139] The Civil Rights Act of 1866, as well as many other laws passed during the age of "Reconstruction" or the period immediately following the Civil War, where the South redeveloped its economy and infrastructure and remained under heavy Federal oversight and control, originally provided key protections that guaranteed African America's right to use public accommodations. In addition, the Civil Rights Act of 1877 allowed African Americans to file civil suits for damages against state and local officials who "abridge" the right to "life, liberty or property."[140] The Civil Rights Act of 1875 even contained a public accommodation's law provision making it illegal to deny African Americans the right to use of public facilities.[141]

---

[138] Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties and Justice* (Washington D.C.: CQ Press, 2004) 656.
[139] Epstein, *Constitutional Law for a Changing America*, 658.
[140] Epstein, *Constitutional Law for a Changing America*, 656.
[141] J. Harvie Wilkinson III, *From Brown to Bakke, The Supreme Court and School Integration: 1954-1978* (New York: Oxford University Press, 1976) 16.

Although the Supreme Court overturned this law in 1877, many of these pieces of legislation exemplified the Federal government's longstanding commitment to secure African Americans' civil liberties. In making decisions in civil rights cases, Supreme Court Justices consider the level of federal government and constitutional protection afforded the social group in a particular case.[142] Generally this has meant that the more protections offered to the petitioners' social class, the more likely a decision will advance civil rights. Since these major pieces of Federal legislation provided considerable safeguards to African American civil liberties these pieces of legislation clearly aided civil rights leaders' efforts to desegregate public schools in *Brown v. Board of Education*.

## *Brown*, Public Opinion, Historic Events and The 1960s Movement for Civil Rights

Public opinion towards segregation in the early to mid 1940s remained relatively mixed. A poll conducted in 1942 by the National Opinion Research Center (NORC) found that 84 percent of respondents taken from a sample of both Northerners and Southerners, supported residential segregation. They believed that, "separate sections" in cities should be reserved for Black families to live in.[143] In addition, the majority of White Americans polled favored school segregation. 66 percent favored separate schools for White and Black children and only 30 percent preferred the "same" facilities.[144]

In addition, the belief that African American's access to opportunity was "equal," with respect to Whites held firmly in public opinion. 85 percent believed that Blacks living in the respondent's town had the "same chance" as Whites to get a good education. Individuals polled also attributed the disproportionate number of impoverished African Americans in America and the lack of educational attainment compared to Whites to a "lack of ambition," the most common

[142] Hodder-Williams, The Politics of the US Supreme Court,
[143] Persily, *Public* Opinion, 20.
[144] Persily, *Public* Opinion, 20.

explanation at nearly 35 percent, rather than to the effects of racism and systemic oppression.[145] As Columbia Law professor, Nathaniel Persily notes, the "cornerstone" of the *Brown* decision was that "separate facilities are inherently unequal," and that African Americans did not have equal educational opportunities.[146] As Persily suggested, NORC's findings show the American public had not yet adopted the view of the Justices in *Brown*, that African Americans had unequal access to the tools necessary to prosper.

While public support remained weak for desegregation of public schools during the World War II years of 1942 to 1945, several historic victories for civil rights activists in the post-World War II years suggest that the American public's stance towards African American civil liberties became progressively more empathetic with each passing year between 1945 and 1953. The racist society created by Nazi Germany in the 1930s and 40s, which classified and systematically oppressed peoples based on ethnic and racial as well as sexual characteristics and ultimately began a mechanized process of extermination of individuals based on race, known as as the holocaust and turned the American as well as world mindset against racism and the oppression of peoples based on skin color or ethnic origin.[147]

With the defeat of Nazi Germany in 1945 came the onset of the over 50 year military and political stalemate between the United States and the Soviet Union known as the "Cold War." During this era the United States attempted to promote democracy and an economic system relying on private investment and individualism, while the Soviet Union promulgated communism or the belief in top-down government control of private industry. The global competition between the two "superpowers" in the late 1940s led to the Soviet Union pointing

[145] Persily, *Public* Opinion, 20.
[146] Persily, *Public* Opinion, 20.
[147] Friedman, *The Will of the People*, 244.

out the similarity between the United States' oppression of African Americans and the repression of Jewish peoples in Nazi Germany.

This embarrassed United States political leaders, and made U.S. efforts at demonstrating the prowess of capitalism to war torn Europe and Asia, problematic. Russian leaders balked at the supposed "prosperity" of U.S. capitalism, pointing out that many African Americans did not enjoy such opportunities and implied that nations who adopted capitalism would see segments of their population excluded from the system.[148] This threat, along with the noble actions of African American soldiers during World War II, which for the first time took part in major combat operations on the ground and in the air through all-black fighting units like the group of African American men from Tuskegee, Alabama who carried out impressive air strikes against German weaponry factories and became known as the Tuskegee Airmen, led President Harry S. Truman in 1948 to desegregate the Armed Forces through his Executive Order 9981.[149] The policy change signaled to the world that the United States aimed to correct the problems associated with segregation and that other countries looking towards democracy should not feel apprehensive about their own social systems becoming permanently dysfunctional. [150]

The desegregation of the military led to further unification efforts for American public institutions. During this time, intercollegiate athletic organizations integrated teams. Star Black baseball players such as Jackie Robinson and Joe Louis joined White teammates on major league baseball teams for the first time as major and minor league sports teams integrated.[151] In Southern urban areas, city governments integrated police forces. Several Southern state universities desegregated during this time. The University of Virginia gradually desegregated

---

[148] Friedman, *The Will of the People*, 245.
[149] Persily, *Public* Opinion, 20.
[150] Persily, *Public* Opinion, 20.
[151] Friedman, *The Will of the People*, 243.

throughout the 1950s.[152] Blacks also saw gains in political and legal representation, as law schools integrated and black voter registration jumped from 3% in 1940 to 20% in 1950.[153] In 1947 the Committee on Civil Rights, convened by President Harry S. Truman to discuss federal civil rights issues, recommended new federal legislation to protect voter rights. This decision, advanced by the highest levels within the Federal Government would eventually result in new, powerful federal civil rights legislation in the 1960s. The committee's finding also embodied the newfound political and social power of African Americans in the late 1940s and early 1950s. Which came in the form of greater participation in politics and the court system as well as the gradual integration of Blacks into formerly White-only institutions in American society.[154]

The Civil Rights Movement took its roots in the Reconstruction era following the American Civil War in the mid 19th century. This was a time period where the American South, recently defeated by the American Union forces, surrendered to the North and was in the process of being rebuilt economically, financially and politically. During this time period African Americans, recently freed by the thirteenth, fourteenth and fifteenth amendments saw increased political power in the form of greater participation of Blacks in the political process. This lead to increased numbers of Black political figures. The presence of American Union troops helped to encourage this participation.

By the late 19th century, however, the Reconstruction era ended due to political pressure from White Southern Political leaders to end the presence of United States soldiers in the South. Once Northern Republican leaders, the key players in enforcing the constitutional amendments protecting African Americans, removed Northern troops from Southern cities, White Southerners

---

[152] Brian Kay, "The History of Desegregation at the University of Virginia 1950-1969" (Undergraduate Honors Essay, University of Virginia, 1979) 28.
[153] Persily, *Public* Opinion, 21.
[154] Derrick A. Bell, *Race Racism and American Law* (Boston: Little, Brown and Co., 1980) 145.

ended the advancement of African American civil rights through the enactment of "Jim Crow" laws and "Black Codes" that prohibited racial unity through such measures as banning integrated public accommodations. Many states enacted poll taxes, which disenfranchised Black voters in the South by maintaining strict requirements on when and where the taxes may be payed, usually in locations and on days inconvenient for many African Americans, such as in White suburban neighborhoods difficult to get to for African Americans living in urban areas. Making it even more difficult for African Americans to exercise their voting rights, some administrators of poll taxes refused to accept payment from Black voters, as evidenced by the Supreme Court case United States v. Dogan, in which voters in one Mississippi county alleged the local sheriff and tax collector blatantly refused to accept and issue a receipt of payment, required to vote in state elections.[155] Many of these measures lasted until well into the 20th century. With Poll taxes finally struck down by the Supreme Court in Texas and Alabama in 1966.[156]

The dire political, economic and social problems that affected African Americans following reconstruction continued to affect African Americans in the 1940s and 50s. The modern African American civil rights movement of the 1960s, which saw the passage of landmark legislation effectively barring racial discrimination in housing, and other public accommodations as well as voting policies designed to disenfranchise Blacks, came to fruition due to the committed efforts of organizations like the NAACP. These organizations fought for substantial changes to legal systems erected in Southern States to marginalize African Americans in the 1920s 1930s, 40s and 50s. The pro-civil rights *Brown* decision was made possible due to the direct efforts of these organizations, who invested countless hours in legal research, opinion writing, drafting of memorandums of law and summaries of court precedent and who

[155] Bell, *Race Racism and American Law*, 142.
[156] Bell, *Race Racism and American Law*, 143.

passionately argued before the Court many times prior to and including *Brown v. Board of Education.* African American lawyers, such as Thurgood Marshall were instrumental in the growth of the National Association for the Advancement of Colored People or the NAACP. Marshall, like many other Black attorneys started his career working for a local branch of the NAACP. Marshall found great success in becoming a civil rights advocate. He eventually worked his way up the ranks until he was a leading attorney in many civil rights suits brought against discriminatory public agencies. He argued in both the *Sweat v. Painter* case, which desegregated the University of Texas Law School, and he successfully defeated public school segregation in *Brown*.[157]

The numerous victories for African American civil rights groups such as the NAACP in the years preceding *Brown* made the eventual decision to desegregate public schools less controversial and provided a pro-desegregation legacy which indicated to the Justices that desegregation of public schools in the United States was simply a natural extension of the recent advances in African American civil rights in the 1930s and 40s.

## Political Opinions of the Supreme Court Justices in *Brown*

The Supreme Court in several cases following the *Brown v. Board of Education* decision in 1954 penned several more decisions mandating school desegregation in one form or another. Professor of Political Science at Morehouse College in Atlanta, Dr. Abraham L. Davis argued the volumes of cases supporting desegregation show a "clear-cut policy" by the Warren Court that demonstrated "consistent support" for civil rights, to a greater extent than "any previous court."[158] The evidence reinforces Dr. Davis' claim. From post-*Brown* 1954 to 1958, a span of four years, the Supreme Court decided seven school desegregation cases, each with the Supreme

[157] Bell, *Race Racism and American Law*, 377.
[158] Davis, *The Supreme Court*, 116.

Court affirming its commitment to the desegregation mandate set fourth in *Brown v. Board of Education of Topeka Kansas*.[159]

Additionally, in each case the Supreme Court ruled unanimously. In *Boiling v. Sharpe* a 1954 case where the Court declared that segregated District of Columbia public schools violated the fifth amendment's "due process" clause, which among other aspects, demanded that the United States government respect the constitutionally-guaranteed rights of its citizens.[160] In *Board of Trustees of University of North Carolina v. Frazier*, a 1956 case, the Court denied the University of North Carolina's request to continue denying African American student's admission based on race.[161] In 1958 the Court cited the Supremacy Clause of the Constitution of the United States, which states that federal law trumps state law when federalist conflicts arise between the two, when it ruled nine to zero in *Cooper v. Aaron* that governors and state legislators could not delay desegregation of its public schools. This reinforced *Brown* by making the 1954 ruling "binding" on the states.[162]

The Court's continual bolstering of the desegregation mandate in *Brown* in the late 1950s demonstrates the perseverance and determination of the Court to ensuring its ruling was not ignored by Southern leaders. This stamina, evidenced by the lengthy post-*Brown* precedent proves that the Court under the direction of Chief Justice Early Warren held an overwhelming "liberal, pro-civil rights" political ideological orientation. This orientation undoubtedly helped ensure the Supreme Court's ruling in *Brown* that legalized, *De Jure* public school segregation, was unconstitutional due to the proven historical tendency of the Supreme Court to heavily rely on political ideology when deciding major civil rights cases. This juridical habit clearly took

[159] Davis, *The Supreme Court*, 118.
[160] Davis, *The Supreme Court*, 118.
[161] Davis, *The Supreme Court*, 118.
[162] Davis, *The Supreme Court*, 118.

place in *Brown*, as evinced by the unprecedented pro-civil rights orientation of the Warren Court and that Court's ardent stance against legalized segregation throughout the 1950s.

## *Brown* and *Dale*: Compared

Clearly judicial political opinion played a substantial role in the end result of a pro-civil rights *Brown* decision. Examination of this decision, when compared to the Supreme Court's ruling in *Dale*, where the Court ruled against a gay man's right to inclusion in the Boy Scouts of America, yields why the latter turned out to be a loss for civil rights in America.

### Case Law: Compared

In terms of the role of case law, in Brown there was a long history of civil rights case law dealing with African American civil rights, including case law that dealt with racial segregation of public institutions, including schools. The court case of *Roberts v. Boston* in 1850 was the earliest case, setting the date for the beginning of African American's attempts to desegregate American school systems at more than 150 years ago.

Civil rights advocates in *Brown* benefitted from this lengthy history of civil rights cases dealing with African Americans. This is due to the fact that the 200 year history of African American civil rights led the Court to use a "strict standard of scrutiny," when analyzing the school districts' resistance to desegregation claim.[163] This method of Supreme Court judicial review, where the Court examines a case and declares an issue unconstitutional or constitutional, demands the highest burden of proof for the government in *Brown* to prove desegregation is justified. This made the school districts' job far more difficult and in turn aided civil rights leaders vying for public school desegregation.

[163] Hodder-Williams, *The Politics of the U.S. Supreme Court*, 170.

Additionally, in deciding *Brown*, the Supreme Court Justices had recent, directly applicable rulings, that dealt with public university desegregation, in which the Court demanded unification of those public higher educational institutions. The Supreme Court cases of *State of Missouri Ex. Rel. Gaines v. Canada* (1938) and *Sipuel v. Board of Regents* (1948) took place within a couple decades before *Brown v. Board of Education* and both mandated the inclusion of black students into state schools.

The Supreme Court historically used legal precedent in to support its decisions. The more recent and more directly applicable the case law, the stronger the precedent supported a particular verdict and the more compelling that verdict was for the Justices. This further legitimized the Court's ruling in the eyes of the public, legislature and executive branches of government. The recent Supreme Court precedents set by the cases mandating public college desegregation supported public secondary and grammar school desegregation because the Justices knew that such case law could dutifully reinforce a decision to desegregate schools. This made such a widely perceived radical decision more practical in the eyes of the Justices deciding *Brown* and thus made a near unanimous pro-desegregation ruling more likely to occur. The definite threat of Southern resistance to the Court's ruling seemed less severe in the minds of the Justices due to their ability to draw upon the prior Court precedent when the Court ruled in *Brown.*

While the Court in *Brown* found a wealth of strong legal precedent with which to back up a pro-desegregation decision, the Supreme Court in *Dale* found substantially less case law that supported a ruling to force the Boy Scouts to accept homosexual scout leaders. The reasons for this are partly due to the fact that there is far less judicial history behind the gay rights movement when compared to the African American civil rights movement. This made justifying a pro-gay

rights ruling in *Dale* far more difficult for the Supreme Court to justify. The first victory for the gay rights movement occurred with the 1958 *One* decision. Since that point there were relatively few Supreme Court decisions related to gay rights legal issues.

This meant that the Court did not apply a "strict standard of scrutiny" which contributed to the Supreme Court's majority anti-gay rights ruling.

## Legislation: Compared

The extended history of pro-civil rights legislation, lasting over 200 years strengthened anti-discrimination efforts to secure a "strict scrutiny" standard of review in *Brown*. With origins in the Civil Rights Amendments, the Thirteenth, Fourteenth and Fifteenth Amendments to the U.S. Constitution, passed in the post-Civil War years between 1865 and 1870. These legislative victories for civil rights were reinforced by the adoption of Civil Rights Acts in the late 19th century, the Civil Rights Acts of 1866, and 1870 as well as 1871 and others. These pieces of legislation represented an historic legacy of federal government recognition of the need to protect African American civil rights. When deciding civil rights cases in the past, the longer the history of federal government protection, as well as the greater the number of legislative and executive branch actions in support of constitutional protection of a social group in a civil rights case, the more likely that the hearing would be reviewed under "strict" scrutiny standards. The longstanding legislative history behind African American civil rights aided the NAACP's efforts in *Brown* in that it helped establish a "strict" standard of review in that trial.

In contrast little federal government legislation that mandated constitutional protection of homosexuals from discrimination existed at the time of *Dale*. This made securing constitutional protection under anti-discrimination laws and thus forcing inclusion of Dale into the Boy Scouts far more difficult to achieve, compared to the task civil rights organizers faced in *Brown.* The Employment Non-Discrimination Act or ENDA failed to pass in the 1990s and remains ten years

into the 21st Century unsuccessfully passed in Congress. While at the same time the Defense of Marriage Amendment, or DOMA passed and was signed into law and gay and lesbian rights groups failed to overturn the military ban on homosexuals in the 1990s, during the years leading up to *Dale*. This suggested to the Justices that the federal government did not wholly support gay rights and thus "strict scrutiny" standards should not apply, which ultimately hurt gay rights activists in *Dale*.

## Public Opinion: Compared

In terms of public opinion, the perceptions of the American public towards desegregation in the years leading up to *Brown* remained mixed. While favorable public opinion was on the rise, as evidenced by President Harry Truman's Executive Order desegregating the armed forces, polling conducted by a reputable survey firm suggested that public support of desegregation of public schools did not reach more than 30 percent. This suggests that public opinion was not a determinative factor in *Brown*.

For *Dale*, public tolerance of homosexuals remained mixed in the 1990s. A 2000 poll showed gays and lesbians trailing behind "welfare recipients," in a survey of American attitudes towards various social groups. This made homosexuals the least accepted social group in America in the years preceding *Dale*. This negative public sentiment towards gays and lesbians suggests that public opinion had little to no positive effect on the Justices' ruling in Dale. While public opinion can serve as a powerful motivating factor for Supreme Court Justices, in the 2000 Supreme Court decisions' case, as well as in *Brown*, public opinion would not have aided gay or civil rights activists to a substantial extent.

## Political Opinion: Compared

Political ideology was the most prescient factor in both Supreme Court decisions. The Court that decided Brown was the most liberal court in the entire history of the Supreme Court in

the United States according to constitutional law professor Barry Friedman. This is evidenced by the Supreme Court's insistence on ending de jure segregation in numerous pro-civil rights rulings that followed Brown, including *Boiling v. Sharpe* (1954) and *Cooper v. Aaron* (1958). In addition, the Supreme Court has a historical legacy of political opinion influencing judicial decisions. Justices admit to this impact, including the most outspoken critic on the issue of "Judicial Activism" or Justices political biases influencing decisions, Supreme Court Justice Antonin Scalia.

This meant that the Court would have been highly motivated to end racial segregation due to the Justices ardent objections to it and the fact that political ideology serves as a powerful, compelling factor behind judicial decision making. The declaration of segregation as unconstitutional in *Brown* was a natural extension of the Justices' liberal political agendas at the time of the ruling and ensured a pro-civil rights decision in *Brown v. Board of Education* in 1954.

While the Supreme Court was overwhelmingly conservative at the time of the *Dale* decision, political ideology nevertheless influenced the Supreme Court Justices in that decision as well. Analysis of each Justices' political ideologies, as measured by the highly accurate Segal-Cover political ideology test, developed by renowned political scientists Jeffrey Segal and Alfred Cover, shows that the Court was decidedly "conservative" at the time of *Dale*, with two of the most hardline conservatives of the 20th century both on the Court at the time. In the 2000 verdict, the Supreme Court Justices voted along ideological lines in regards to whether their opinion towards gay rights was favorable or unfavorable. Justices who scored as "conservatives" when examined by the Segal-Cover test voted against John Dale's inclusion in the Boy Scouts of America, while the more liberal and civil rights friendly justices voted for Dale's right to

participate in the Boy Scouts of America. Thus, in both cases political ideology turned out to be a powerful motivating factor behind the Justices' eventual decisions.

## Internal and External Factors: Compared

As a result of the positive influences of World War II and the Cold War, in the years leading up to Brown, civil rights activists achieved substantial victories for African American civil rights in the United States. The Desegregation of the Armed Forces under then-President Harry Truman's Executive Order 9981, the integration of major league sports teams, the admittance of African Americans into major American colleges and universities as well as Police departments in urban areas across the nation, which unified their forces in the late 1940s and early 1950s. These positive changes helped sway the Supreme Court in *Brown* at least recognize a legitimate need for further enforcement of African American civil liberties. The advancements in African Americans social as well as political and legal standing ultimately helped the NAACP win a landmark victory in Brown in that the improvements demonstrated that the American public and government leaders would likely tolerate a ruling that ordered desegregation of public schools. This further encouraged the Supreme Court Justices to find in favor of civil rights activists in *Brown*.

In terms of the influence of externalist and internalist factors on the Supreme Court in *Dale,* little to no major events outside the movement positively shaped the gay rights movement in a way that would lead to increased public support for gay rights as well as growth in the actual gay rights movement itself in the 1990s. This led to little to no advancement in homosexual rights during much of that decade. No motivating external events came about during the 1990s, the years leading up to *Dale*, which could have spurred growth in the gay rights movement, as took place in 1969 with the Stonewall Riots and in the 1980s with the growth of the movement for federal government recognition and treatment of the AIDS virus. The lack of external

events that could galvanize large segments of gays and lesbians and incorporate them into the political rights arena made the possibility of greater participation in the gay rights movement and the subsequent advancement of gay civil rights, a spurious idea. The lackluster performance by gay rights organizations in the 1990s helped lead the Court in *Dale* to apply a standard of review less stringent than the "strict scrutiny" test applied in *Brown*. The inability for the gay rights movement to secure federal government legislation to help legitimize the position of gay rights activists in *Dale*, exacerbated by the lack of substantial case law and legislative history behind the gay rights guaranteed a less strict standard of review by the Supreme Court in *Dale*.

## Conclusion

*Dale* capped nearly a decade of slowed gay rights progress. During much of the 1990s, the amount of federal and state gay civil rights protections successfully passed, declined while public apprehension towards gay rights rose due in part to

The relatively weak stamina of gay rights activists and the rise of opposition towards the gay rights movement resulted in several upsets to homosexual equality in the United States in the mid 1990s. One such event was Congress' enactment of what came to be known as the "Don't Ask, Don't Tell" law in 1993. This was a military policy that banned homosexuals from openly serving in the armed forces due to fear that including avowed homosexual service members would undermine military unit cohesion and effectiveness.

The mid-1990s stood in stark contrast to the late 1980s and early 1990s in terms of gay rights progress. Just a few years before the passage of the military prohibition, gay rights activism flourished socially, culturally and politically due to Washington's choice throughout much of the 1980s to ignore the devastation caused by the AIDS virus.

The crusade to force the federal government to recognize and stop the spread of the AIDS epidemic through public funding of prevention and treatment efforts paved the way for a rise in gay rights activism in the late 1980s. Gay and lesbian communities joined forces with African American civil rights groups and other social movements affected by the disease to for a broad coalition to combat the AIDS virus. Events such as the "Million Man March" where a half-million individuals affected by the disease pushed the national political parties to pledge to fight the deadly illness. These large gathering also served as a platform with which gay rights organizations could promote homosexual civil rights initiatives like ending legalized employment discrimination against gays and lesbians and individuals infected with AIDS.

This opportunity eventually led to the inclusion of gay men and women into national party politics. The AIDS epidemic provided the basis for gay rights to move forward politically and socially. News organizations began to portray gay and lesbian issues in a non-stereotypical manner and television shows started featuring homosexual characters. In the early 1990s gay men and women began to see a shift in how the topic of homosexuality was approached by politicians. Instead of secretive, private meetings with homosexual activists, politicians openly courted gay and lesbian activist groups in public. In 1992, then-presidential candidate Bill Clinton openly courted gay and lesbian groups during his presidential run. This signaled the first time that a major political candidate fully acknowledged gays and lesbians as a legitimate social group that faced widespread discrimination.

The extent to which the AIDS rights movement positively shaped the future of gay and lesbian rights in America in the 1980s and the way in which public opposition to the gay rights movement hampered gay rights progress in the decade after demonstrates the forceful effect that various factors both external and internal have on civil rights movements.

Historically, these forces have come together. Such as in *Brown*, when the civil rights movement surged forward with advancements in civil rights for African Americans. Had this occurred alone, the result would not have been systematic desegregation in *Brown*. However, advancements in the years following World War II, when taken into consideration with the historic legacy of African American civil rights case law and legislation, and the "strict scrutiny" review standards that this past enabled, the powerful force of directly applicable case law in the 1930s and 40s supporting school desegregation, as well as the Justices' pro-civil rights orientation, the civil rights movement was able to successfully persuade the United States Supreme Court in *Brown v. Board of Education* to declare segregated schools unconstitutional and mandate desegregation of American public schools in the mid-1950s.

For John Dale, the case, which bears his name, did not symbolize an epic civil rights victory but instead a failure of the movement with which he fought alongside. The gay and lesbian rights movement in the 1990s suffered from lackluster performance by its members. Membership numbers slid, the number of cases the movement could afford to take on dropped as a result, and further advancement of homosexual rights suffered. Just as in *Brown*, the inadequate performance of the gay rights movement in the years before the landmark decision, alone, would not have necessarily doomed the gay rights movement to suffer a setback in *Dale*. Had a substantial recent case law, a century long history of legislation, and a liberal leaning Court existed when the Supreme Court decided *Dale*, the probability for civil rights success would become far more likely. However, the relatively brief existence of the Gay Rights movement, when compared to the storied past of civil rights, which resulted in far less Supreme Court gay rights precedent which Dale's attorneys could draw upon to support their brief, as well as the lack of directly applicable, recent case law supporting Dale's inclusion into the Boy

Scouts, combined with the conservative anti-gay rights political ideology of the Supreme Court Justices to culminate in the Supreme Court rejection of Dale's plea for inclusion into the Boy Scouts of America.

## Bibliography

Backer, Larry Cata. "Disciplining judicial interpretation of fundamental rights: First Amendment decadence in Southworth and Boy Scouts of America and European alternatives." *Tulsa Law Journal* 36, no. 1 (2000): 117-151.

Becker, Theodore Lewis, ed. *The Impact of Supreme Court Decisions: Empirical Studies*. New York: Oxford University Press, 1969.

Bell, Derrick A. *Race Racism and American Law*. Boston: Little, Brown and Co., 1980.

Brown-Marshall, Gloria J. *Race, Law, and American Society : 1607 to Present*. New York: Routledge, Taylor & Francis Group, 2007.

Cardozo, Benjamin N. *The Nature of the Judicial Process*. New Haven: Yale University Press, 1921.

Data Research Inc. *US Supreme Court Education Cases*. Rosemount, Minn.: Data Research Inc., 1993

Davis, Abraham L. and Barbara Luck. *The Supreme Court, Race and Civil Rights*. Thousand Oaks, CA: Sage Publications, 1995.

Devol, Kenneth S. *Mass Media and The Supreme Court: the Legacy of the Warren Years*. New York: Hastings House, 1971.

Epstein, Lee and Thomas G. Walker. *Constitutional Law for a Changing America: Right Liberties and Justice*. Washington, D.C.: CQ Press, 1998.

Epstein, Richard A. "The Constitutional Perils of Moderation: The Case of the Boy Scouts." *Southern California Law Review* 74, (November, 2000): 119-144.

Freed, Mayer G. and Daniel D. Polsby. "Race, Religion, Public Policy: Bob Jones University v. United States." *The Supreme Court Review* (1983): 1-31.

Friedman, Barry. *The Will of the People: How Public Opinion Has Influenced The Supreme Court and Shaped the Meaning of the Constitution*. New York: Farrar, Straus and Giroux, 2009.

Gallagher, John and Chris Bull. Perfect Enemies: *The Religious Right, the Gay Rights Movement, and the Politics of the 1990s*. New York: Crown Publishing, 1996.

Gearey, David P. "New Protections after Boy Scouts of America v Dale: A Private University's First Amendment Right to Pursue Diversity." *The University of Chicago Law Review* 71, no. 4 (August, 2004): 1583-1604.

Graham, Hugh Davis. *Civil rights and the Presidency: Race and Gender in American Politics, 1960-1972*. New York: Oxford University Press, 1992.

Hodder-Williams, Richard. *The Politics of the US Supreme Court*. Boston: G. Allen & Unwin, 1980.

Kay, Brian. "The History of Desegregation at the University of Virginia 1950-1969." Undergraduate Honors Essay., University of Virginia, 1979.

Koppelman, Andrew and Tobias Barrington Wolff. *A Right To Discriminate? : How the Case of Boy Scouts of America v. James Dale Warped the Law of Free Association*. New Haven: Yale University Press, 2009.

Kutler, Stanley I., ed. *The Supreme Court and The Constitution: Readings in American Constitutional History*. New York: Norton, 1984.

Marcus, Eric. *Making Gay History: The Half-Century Fight for Lesbian and Gay Equal Rights.* New York: Perennial, 2002.

Martin, Waldo E. *Brown v. Board of Education: A Brief History with Documents*. Boston: Bedford/St. Martins, 1998.

Miller, Arthur Selwyn. *The Supreme Court: Myth and Reality*. Westport, Conn: Greenwood Press, 1978.

Murdoch, Joyce and Deb Price. *Courting Justice: Gay Men and Lesbians v. The Supreme Court*. New York: Basic Books, 2001.

O'Brien, David M. *Storm Center: The Supreme Court in American Politics*. New York: Norton, 1986.

Patterson, James T. *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*. New York: Oxford University Press, 2001.

Persily, Nathaniel, Jack Citran and Patrick J. Egan. *Public Opinion and Constitutional Controversy*. New York: Oxford University Press, 2008.

Richards, David A.J. *Women, Gays, and The Constitution: The Grounds for Feminism and Gay Rights in Culture and Law*. Chicago: University of Chicago Press, 1998.

Rimmerman, Craig A. *From Identity to Politics: The Lesbian and Gay Movements in The United States.* Philadelphia, PA: Temple University Press, 2002.

Rimmerman, Craig A., Kenneth D. Wald and Clyde Wilcox, ed. *The Politics of Gay Rights*. Chicago: University of Chicago Press, 2000.

Rosen, Jeffrey, "The Dissenter, Justice John Paul Stevens." *New York Times*, September 23, 2007. http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html.

Segal, Jeffrey A., Cover, Albert D. "Ideological Values and the Votes of the U.S. Supreme Court Justices." *The American Political Science Review*, 83, no. 2 (June, 1989): 557-565.

Segal, Jeffrey A., Lee Epstein; Charles M. Cameron, and Harold J. Spaeth. "Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005." State University of New York at Stony Brook. http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf.

Stoutenborough, James W., Donald P. Haider-Markel, Mahalley D. Allen. "Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases."

Theoharis, Jeane and Athan G. Theoharis. *These Yet to be United States: Civil Rights and Civil Liberties in America Since 1945*. Belmont, CA: Wadsworth/Thomson Learning, 2003.

Tushnet, Mark V. *Making Civil Rights Law: Thurgood Marshall and The Supreme Court*. New York: Oxford University Press, 1994.

The United States Supreme Court. The United States Supreme Court Reports. *Boy Scouts of America v. Dale*. 530 U.S. 640 (2000).
———. United States Supreme Court Reports. *Syllabus*, 2000.
———. United States Supreme Court Reports. *Opinion*, 2000.
———. United States Supreme Court Reports. *Dissent*, *Stevens,* 2000.
———. United States Supreme Court Reports. *Dissent, Souter*, 2000.

Wilkinson, J. Harvie. *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978*. New York: Oxford University Press, 1979.

Williams, Walter L. and Yolanda Retter, ed. *Gay and Lesbian Rights in the United States: A Documentary History*. Westport, Conn.: Greenwood Press, 2003.