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A Scout is Morally Straight, Brave, Clean, Trustworthy...and Heterosexual? Gays in the Boy Scouts of America

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NOTE

A SCOUT IS MORALLY STRAIGHT, BRAVE, CLEAN, TRUSTWORTHY . . . AND HETEROSEXUAL? GAYS IN THE BOY SCOUTS OF AMERICA

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I. INTRODUCTION

"On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight."

The federal and state governments' crusades against invidious discrimination are fought with a variety of statutory weapons. Included in this arsenal are state public accommodation laws which require groups that serve the public to do so equally, thus allowing individuals to use, without discrimination, the services offered by such groups. Since public accommodation statutes have been applied to a wide spectrum of groups ranging from privately owned restaurants to little league baseball teams, these laws have the potential of intruding into a group's practices and forcing the alteration of a group's membership criteria and policies.

The groups faced with the application of a public accommodation law do not greet this state intrusion with open arms. These groups reach into their arsenal of legal weaponry and counter with the constitutional...
defense of the right to freedom of association. This weapon is a powerful one in that a court’s affirmative application of the right will render the group constitutionally privileged to use discriminatory criteria, such as gender, race, and sexual orientation, in selecting its members. One group, in its zealous fight for this constitutional privilege and in response to litigation involving the public accommodation laws of various states, has repeatedly alleged that the forced inclusion of certain groups violates its members’ right to freedom of association. This group is none other than the Boy Scouts of America (“BSA”).

The BSA, an international hallmark of youth and scouting, has been involved in almost constant litigation concerning what the BSA refers to as the “‘[t]hree G’ membership policy—[the] ban[] [on] gays, godless[ness] and girls.” The BSA maintains that, by virtue of the private nature of its organization and of the beliefs it tries to instill, it has the “right” to exclude women, atheists, agnostics, and publicly avowed homosexuals. While federal and state courts have held that the BSA

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5. See, e.g., Board of Dirs. of Rotary Int’l v. Rotary Club, 481 U.S. 537, 548-49 (1987) (deciding that the members’ right of association does not outweigh the state’s compelling interest in eliminating discrimination against women); Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (hearing argument from the Jaycees that state interference with a person’s choice of whom they join with in a common endeavor implicates the freedom of association); Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 219 (Cal. 1998) (determining whether the California public accommodation statute may infringe upon the Boy Scouts of America’s (“BSA”) right of association under the First and Fourteenth Amendments).


8. See, e.g., Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1268 (7th Cir. 1993) (arguing that the plaintiff was denied membership because he refused to affirm his belief in God); Curran, 952 P.2d at 219 (explaining that the BSA rejected a homosexual’s application to be an adult leader); Randall v. Orange County Council, Boy Scouts of Am., 952 P.2d 261, 262 (Cal. 1998) (refusing to allow the plaintiffs to continue as Boy Scouts if they did not participate in the religion-related elements of the program); Yeaw v. Boy Scouts of Am., 64 Cal. Rptr. 2d 85, 85 (Cal. Ct. App. 1997) (arguing that the BSA is not under the purview of the California civil rights statute, and thus may exclude females), review granted and opinion superseded by 942 P.2d 415 (Cal. 1997), and review dismissed, cause remanded by 960 P.2d 509 (Cal. 1998); Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm’n on Human Rights and Opportunities, 528 A.2d 352, 356 (Conn. 1987) (denying the plaintiffs’ opportunity to serve as a Scoutmaster because of her gender); Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385, 395 (Kan. 1995) (excluding the plaintiff from an adult leadership position because of his unwillingness to profess a belief in, and duty to, a supreme being); Dale v. Boy Scouts of Am., 706 A.2d 270, 276 (N.J. Sup. Ct. App. Div. 1998), aff’d, No. A-195/196-97, 1999 N.J. LEXIS 995, at *1 (Aug. 4, 1999) (arguing that homosexuals may not register as adult leaders); Richardson v. Chicago Area Council of the Boy Scouts of Am., No. 92-E-80, 1996 WL 734724, at *1 (Chi. Comm’n Hum. Rel. Feb. 21, 1996), aff’d, No. 96 CH 03266, at 1 (Ill. Cir. Ct. Cook County Aug. 12, 1999) (unpublished opinion) (on file with the Hofstra Law Review) (prohibiting the employment of avowed homosexuals).
may exclude women,9 atheists, and agnostics,10 the courts are split as to whether the forced inclusion of gays would violate the BSA’s right to freedom of association.11

Some of this inconsistency can be attributed to the fact that each state has its own public accommodation law with unique statutory language. However, placing these statutory schemes aside, the courts have still reached opposite conclusions regarding the BSA’s alleged constitutional right to freedom of association. The judicial disparity on this constitutional issue paves the road for arguments before the United States Supreme Court.

This Note examines the BSA’s argument that it is entitled to discriminate against homosexuals in its membership policies on the constitutional ground of freedom of association. For purposes of analysis, this Note assumes that the BSA is a public accommodation.2 This assumption is imperative because if the BSA is not a public accommodation, but rather a private organization, it may employ discriminatory membership criteria and the constitutional defense of freedom of association is inapplicable.

Part II of this Note briefly reviews the various types of public accommodation laws, emphasizing the laws of New Jersey and California since the courts in these states have specifically ruled on this issue. Part III explores the doctrine of freedom of association, setting forth the present Supreme Court cases on the subject. Part IV analyzes the recent cases involving homosexuals and the BSA. Finally, in Part V, this Note applies the Supreme Court’s test for freedom of association to the BSA, and concludes that its members’ right to freedom of association will not be impinged upon by the forced inclusion of gays.

II. PUBLIC ACCOMMODATION STATUTES

At the end of the Civil War, Congress enacted the first federal public accommodation statute with the goal of eliminating discrimination in privately owned institutions that are open to the public.13 In 1883,
during the Civil Rights Cases, the Supreme Court found this piece of legislation unconstitutional.\textsuperscript{14} The states, exercising their legitimate police power,\textsuperscript{15} responded to the judicially created void by enacting their own public accommodation laws.\textsuperscript{16} Eighty years later, during the civil rights movement of the 1960s, Congress enacted another public accommodation law, Title II of the Civil Rights Act of 1964.\textsuperscript{17} Title II provides in part: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."\textsuperscript{18} Over the years, state public accommodation laws, rather than federal public accommodation laws, have been the more effective tool in combating discrimination.\textsuperscript{19}

The scope of state public accommodation statutes generally exceeds the scope of Title II in relation to both the classes of individuals they protect, and the types of organizations they govern.\textsuperscript{20} While they vary from one state to the next, state public accommodation statutes prohibit not only discrimination based on race, creed, color, national origin, ancestry, and religion, but also discrimination on the basis of age, disability, sex, affectional or sexual orientation, personal appearance, marital status, and familial status.\textsuperscript{21} The tricky aspect of state public accommodation laws is not necessarily the question of who is afforded protection, but rather the determination of what types of organizations fall within their regulatory ambit.

\begin{itemize}
\item Varela, supra note 2, at 932.
\item See Civil Rights Cases, 109 U.S. 3, 25 (1883).
\item See Griffin, supra note 13, at 1053.
\item See infra note 21.
\item Id.
\item 19. See Griffin, supra note 13, at 1050; Varela, supra note 2, at 932.
\item 21. See, e.g., CAL. CIV. CODE § 51 (West 1982 & Supp. 1999) (enumerating sex, race, color, religion, ancestry, national origin, or disability); CONN. GEN. STAT. ANN. § 46a-64 (West 1995) (including race, creed, color, national origin, ancestry, sex, marital status, age, lawful source of income, mental retardation, and mental or physical disability); D.C. CODE ANN. § 1-2501 (1992) (listing race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business); N.J. STAT. ANN. § 10:5-4 (West 1993) (providing for race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, or sex); N.Y. EXEC. LAW § 296(2)(a) (McKinney 1998) (enumerating race, creed, color, national origin, sex, disability, or marital status); R.I. GEN. LAWS § 11-24-2 (1994) (including race or color, religion, country of national origin, handicap, age, and sex).
\end{itemize}
The breadth of state public accommodation laws varies depending upon legislative definitions and judicial interpretations of what constitutes a public accommodation. Since Supreme Court limitations on the definition of "public accommodation" have largely been based on statutory construction rather than constitutional interpretation, states are essentially free to define "public accommodation" as they see fit. As such, some states define "public accommodation" in terms of general public access, while others focus on the type of business dealings an organization conducts. Other state definitions of "public accommodation" depend on whether an organization consistently meets at a fixed location. Still other state statutes appear to cover all organizations not protected by the constitutional right to intimate or expressive association.

Although states do not have to exempt certain organizations from their statutes, some do so on the grounds that such institutions are "private" or "distinctly private." To avoid every organization from claiming they are "private," states should define these terms with a great deal of specificity. Yet, regardless if the exemption is precisely defined, the trend in many state courts has been to interpret the exemption narrowly.

The construction and interpretation of state public accommodation statutes is explained by one commentator as a judicial activity subject to three variables. First, the judiciary will rely on the legislative intent of the statute in determining its application. However, this may not al-

22. See Griffin, supra note 13, at 1053.
23. See Varela, supra note 2, at 934.
24. See Frank, supra note 2, at 41 (citing 43 PA. CONS. STAT. ANN. § 954 (West 1991)).
25. See id. (citing both CAL. CIV. CODE § 51 (West 1982) and MIII STAT. ANN. § 363.01 (West 1991)).
27. See id. (citing N.J. STAT. ANN. § 10:5-5 (West 1993)). For a discussion of various states' judicial interpretations of their respective public accommodation laws, see Brown & Greene, supra note 20; John E. Theuman, Annotation, Exclusion or Expulsion from Association or Club as Violation of State Civil Rights Act, 38 A.L.R. 4th 628 (1985).
28. See, e.g., ARIZ. REV. STAT. ANN. § 41-1441(2) (West 1992) (excluding all places which are distinctly private in nature from the definition of public accommodation); D.C. CODE ANN. § 1-2502(24) (1981) (enumerating factors which must be considered when determining whether an organization is "distinctly private"); N.J. STAT. ANN. § 10:5-5(l) (West 1993) (exempting distinctly private places from the definition of public accommodation); N.Y. EXEC. LAW § 292(9) (McKinney 1993) (exempting specific types of institutions).
29. See Frank, supra note 2, at 50.
30. See Varela, supra note 2, at 934-35.
31. See id. at 934.
ways be a viable option since legislatures do not always include a section stating the purpose and/or the goals of the statute they are enacting.\textsuperscript{32} The second variable is the effects of interpreting a compound state anti-discrimination law.\textsuperscript{33} Since compound statutes are all-inclusive, prohibiting discrimination in employment, housing, and public accommodations, judges may impose a "sliding scale of importance" on different violations regardless of the legislative intent.\textsuperscript{34} Judges in states with compound public accommodation statutes will be less likely to find a violation of the public accommodation portion of the statute, than judges in states with separate public accommodation laws.\textsuperscript{35} The third and final variable in constructing and interpreting state public accommodation statutes is the existence of statutory language defining the terms of the statute.\textsuperscript{36} A statute can provide an express list of definitions relieving the judiciary from interpreting these terms,\textsuperscript{37} however the commentator suggests that some judges may still choose to interpret the statutory language using their own methodology of construction.\textsuperscript{38}

A state public accommodation law that specifically lists the types of organizations that constitute a "place of public accommodation" leaves little ambiguity, thus making it relatively simple for the court to apply. The disadvantage of such a precise definition is that it leaves the courts with little latitude to interpret the statute so as to effectuate its purpose and eliminate discrimination. On the other hand, an extremely general definition requires judicial interpretation and construction, and although it is more difficult to apply, it provides the judiciary with plenty of leeway. Given the polarity of these choices, perhaps the more suitable public accommodation law is one that defines "place of public

\begin{footnotesize}
\begin{enumerate}
\item See id. at 935 (stating that "some [statutes] begin with a legislative statement of purpose, making the judiciary's job relatively simple; other [statutes] are silent as to intended scope and purpose, relying on case law to fill in the blanks").
\item See id.
\item Id. (quoting Note, Public Accommodation Statutes: Is Ladies' Night Out?, 37 MERCER L. REV. 1605, 1618 (1986)).
\item See id. (asserting that this result occurs because "[t]he importance of a male not being able to buy a drink, attend a basketball game, or get his car washed for the same price as a female pales in comparison to someone not being able to obtain housing or employment because of his or her race or sex") (quoting Note, Public Accommodation Statutes: Is Ladies' Night Out?, 37 MERCER L. REV. 1605, 1618 (1986)).
\item See id.
\item See, e.g., N.J. STAT. ANN. § 10:5-5 (West 1993) (providing definitions of the terms used in the statute).
\item See Varela, supra note 2, at 935.
\end{enumerate}
\end{footnotesize}
accommodation” broadly and includes a nonexclusive list of the types of institutions that fall within this definition.39

California’s public accommodation law, the Unruh Civil Rights Act ("UCRA"),40 is an example of an extremely general statute. It provides in relevant part: “All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”41 The California legislature did not include a list of items illustrating the types of organizations that are “business establishments” under the UCRA. The absence of a qualifying list, coupled with the law’s broad scope, leaves the judiciary with a great deal of leeway to interpret and apply the statutory terms.

An example of a “middle of the road” statute that defines “public accommodation” broadly and includes a nonexclusive list is the New Jersey Law Against Discrimination (“LAD”).42 It reads:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.43

The LAD is a compound statute and arguably susceptible to the “sliding scale of importance.” The legislature provided some guidance as to how it intended the statute to be applied by including a section stating its findings and declarations,44 as well as a section dedicated to defining the LAD’s terms.45 Within this latter section is a nonexclusive list of the types of institutions the legislature intended the LAD to govern.46 Thus, the New Jersey legislature guided the judiciary on how and

39. For example, the New Jersey statute states: “‘A place of public accommodation’ shall include, but is not limited to: . . .” N.J. STAT. ANN. § 10:5-5(i) (West 1993).
41. Id.
43. Id. § 10:5-4.
44. See id. § 10:5-3.
45. See id. § 10:5-5.
46. See id. § 10:5-5(i).
to whom it intended the LAD to apply, at the same time leaving the judiciary enough latitude to accomplish the legislature's goal of eradicating discrimination.

The states' exercise of their reserved police power via the enactment of state public accommodation laws illustrates their recognition that discrimination takes many forms and hides behind many doors. For example, New Jersey justifies the potential intrusive nature of these laws by reiterating the ultimate goal of eradicating invidious discrimination. This justification is sometimes not enough. While the states have the best intentions, their police power is not absolute. In many situations it must be weighed against an organization's or group's right to freedom of association.

III. FREEDOM OF ASSOCIATION

Humans have an essential and fundamental need for a sense of community. An individual's family used to fulfill this need, but with each new generation, people have been moving further away from their extended families into ethnically diverse neighborhoods and, as a result, have lost that feeling of community. In an effort to reestablish that lost sense of community, people form or join organizations and groups, both public and private, which are composed of individuals with similar beliefs and ideals. While the need for community is once again fulfilled, the common, often unfortunate, result is the exclusion of individuals who are different, regardless of how minor the differences may be. Americans, the constituents of the "melting pot," are prime examples of this association process.

As Alexis de Tocqueville stated: "In no country in the world has the principle of association been more successfully used, or applied to a greater multitude of objects, than in America." 

47. See Griffin, supra note 13, at 1053.
49. See Griffin, supra note 13, at 1053.
50. See Frank, supra note 2, at 31.
51. See id. at 32.
53. Andrew M. Perlman refers to this process as the "dual nature of the freedom of association," Perlman, supra note 52, at 113. Perlman argues that while the freedom of association permits and fosters exclusionary practices (a negative interest), it also "provides a basis for individuals to gain access to certain group activity (a positive interest)." Id. The negative interest in association is premised on inequality and discrimination, and the positive interest is based on the need to associate. See id. at 115. Perlman argues that the positive interest in association "provides a basis for trumping the negative right to association." Id.
What de Tocqueville failed to note was that along with America’s successful application of the idea of association comes America’s battle against inequality and discrimination.

The United States has been battling inequality and discrimination since its birth. Although the United States Constitution does not directly prohibit discrimination by individuals that are not state actors, some state legislatures, in recognition that discrimination harms not only its victims but society as well, have passed laws prohibiting discriminatory conduct. Despite the legislatures’ efforts to eliminate it, discrimination continues to cause individuals to suffer the indignities of exclusion and inequality “because inherent in the message of discrimination is the message that the excluded person is not good enough to be part of the group.” This message is often internalized by the people exposed to it, the negative stereotypes and hatred are then reinforced, and thus the vicious cycle continues. A state’s goal of promoting equality and eradicating discrimination comes into direct conflict with the individual’s need to maintain a sense of community and to associate with other similar individuals. This fundamental conflict exists at the core of the freedom of association argument.

Freedom of association is an issue fraught with tension and conflict. “The most obvious conflict raised, for example, involves the two virtual first principles of contemporary constitutional law: freedom and equality. The right to choose one’s associates (freedom) is pitted against the right to equal treatment (equality), a most fundamental conflict.” The conflict between associational freedom and equality can be viewed as one facet of the larger tension between “egalitarian, rights-oriented liberalism and communitarianism.”

56. See, e.g., N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1998) (declaring that discrimination threatens not only New Jersey residents, but also “the institutions and foundation of a free democratic State”).
57. Frank, supra note 2, at 36-37.
58. See id.
61. See id.
“as unqualified moral and political progress.” On the opposite end of the spectrum, the communitarian believes that a person’s identity is not derived from his choices, but rather from the communities in which he is involved. Anything that intrudes and erodes the community, including anti-discrimination laws, “concentrates power in the state, and ... reduces the vitality and diversity of public life.” According to egalitarians, the communitarian approach is an “invitation to prejudice.”

Regardless of how the opposing sides of the conflict are described, selecting one side may unfairly deprive an arbitrarily excluded group from obtaining goods and services, while choosing the other side may impinge upon the excluding group’s First Amendment rights. Although compromising a group’s right of association is risky, the crusade against invidious discrimination is a primary objective on judicial and legislative agendas. This serious and fundamental dilemma requires the delicate balancing of the competing interests. Throughout the years, the Supreme Court has dealt with these issues peripherally. In 1984, 

62. Id. at 1881-82.  
63. See id. at 1882.  
64. Id.  
65. Id.  
66. See Varela, supra note 2, at 926.  
67. See Marshall, supra note 55, at 70.  
68. In 1958, the Court recognized an implied right to freedom of association. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-63 (1958). The Court held that a state court order requiring the NAACP to disclose the names of its members violated the group’s right to freedom of association. See id. at 462. “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” Id. at 460.

In 1966, the Court, faced with racial inequality and an alleged violation of the Fourteenth Amendment, recognized the countervailing principles of freedom of association and equality. See Evans v. Newton, 382 U.S. 296, 298 (1966). Justice Douglas, delivering the majority opinion, wrote:

[One principle is] the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other [principle] is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality .... A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association.

Id. at 298-99. Justice Douglas reaffirmed this proposition in a later dissenting opinion in which he wrote:

The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting). Justice Douglas apparently believed that discrimination in private associations (as opposed to discrimination by state actors) overrides equality. This perspective was later rejected by the Supreme Court.
the Court decided the landmark case of *Roberts v. United States Jaycees*, and set forth the test that enables it to strike the requisite balance and resolve the conflict. Thereafter, the Supreme Court applied the *Jaycees* test to a handful of cases, some of which will be discussed in detail below.

A. Roberts v. United States Jaycees

In 1974 and 1975, respectively, the Minneapolis and St. Paul chapters of the United States Jaycees ("Jaycees") began admitting women as regular members in violation of the organization's by-laws, which limited regular membership to males between the ages of eighteen and thirty-five. In 1978, the president of the national Jaycees informed the two chapters that a motion to revoke their charters would be considered by the National Board of Directors. Immediately thereafter, both chapters filed charges of sex discrimination with the Minnesota Department of Human Rights alleging that the exclusion of women from regular membership violated the Minnesota Human Rights Act ("MHRA").

The Commissioner of the Minnesota Department of Human Rights conducted an investigation and found probable cause that the national Jaycees’ sanctioning of the two local chapters violated the MHRA. Before a hearing was held, the national Jaycees filed suit against various state officials in the United States District Court for the District of Minnesota, seeking a declaratory judgment and injunctive relief to enjoin enforcement of the MHRA. The national Jaycees alleged that requiring the organization to include women as regular members violated the male members’ rights to freedom of speech and association. The district court dismissed the suit without prejudice stating that the suit could be renewed if the administrative hearing resulted in a finding adverse to

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*See Roberts v. United States Jaycees, 468 U.S. 609, 617-24 (1984).*


70. *See id.* at 617-24.

71. *See id.* at 613-14.

72. *See id.* at 614.

73. *See id.* In 1982, the Minnesota Human Rights Act ("MHRA") stated: "It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." MINN. STAT. § 363.03(3) (1982).

74. *See Jaycees, 468 U.S. at 615.*

75. *See id.*

76. *See id.*
the Jaycees. The hearing before the Minnesota Human Rights Department proceeded and the examiner concluded that the Jaycees is a place of public accommodation within the MHRA, and the exclusion of women from regular membership was an unfair discriminatory practice. The Jaycees were ordered to refrain from discriminating against any member or applicant on the basis of sex, and from imposing any sanction on local chapters for admitting women as regular members.

The Jaycees renewed its suit in federal district court which certified to the Minnesota Supreme Court the question of whether the Jaycees should be considered a place of public accommodation under the MHRA. The Minnesota Supreme Court answered the question in the affirmative, and the district court held for the state officials. A divided Eighth Circuit Court of Appeals reversed that decision. The Court of Appeals held that the application of the MHRA to the Jaycees would be a "direct and substantial" interference with the organization's right to select its members, and the state's interest in eliminating discrimination was not "sufficiently compelling" to outweigh the interference with the organization's protected constitutional rights.

The Supreme Court reversed the Eighth Circuit's decision, articulating a balancing test to determine whether a state's anti-discrimination laws violate an organization's right to freedom of association. Ultimately, the Court held that the application of the MHRA to the Jaycees did not violate the Jaycees' constitutional rights.

The Court noted that there are two aspects to the right of freedom of association which are derived from two different constitutional sources. The first aspect, referred to as intimate association, is derived

77. See id.
78. See id. at 615-16.
79. See id. at 616.
80. See id.
81. See id.
82. See id.
83. Id. at 617 (quoting United States Jaycees v. McClure, 709 F.2d 1560, 1572 (8th Cir. 1983)).
84. See id.
85. The appeal was considered by only seven Justices of the Court. See Linder, supra note 60, at 1880. Chief Justice Burger and Justice Blackmun disqualified themselves because Burger was chapter president of the St. Paul Jaycees in 1935 and Blackmun was a former member of the Minneapolis Jaycees. See id.
86. See Jaycees, 468 U.S. at 617-29.
87. See id. at 630-31. Justice Brennan wrote the majority opinion for the Court. See id. at 612. Justice O'Connor wrote a concurring opinion. See id. at 631-40. Justice Rehnquist concurred in the judgment. See id. at 631.
88. See id. at 617-18; Linder, supra note 60, at 1884; Marshall, supra note 55, at 72.
from the Bill of Rights' preservation of certain highly personal and intimate relationships, and is afforded constitutional protection as a "fundamental element of personal liberty." The second type of associational freedom, expressive association, arises out of an individual's implicit First Amendment right to engage in expressive activities. The Court stated that the Constitution guarantees freedom of expressive association "as an indispensable means of preserving other individual liberties" such as freedom of speech and assembly. A successful argument under either associational freedom may suffice to insulate the group from a state's anti-discrimination laws, however, the Court noted that in some instances both forms may be implicated.

1. Freedom of Intimate Association

The right to freedom of intimate association protects certain groups' right to privacy. It is based on the recognition that people derive much of their "emotional enrichment" from their close relationships with others and that these relationships help define one's identity, which is "central to any concept of liberty." Since they enhance shared beliefs and ideas, as well as foster diversity, such personal bonds deserve a certain level of sanctuary from unwarranted state intrusion.

The Court noted that relationships protected by the freedom of intimate association are similar in nature to those concerning the family: marriage; childbirth; education and raising of children; and cohabitation with relatives. Because they involve "deep attachments," a high degree of commitment, and the sharing of "distinctly personal aspects of one's life," these types of relationships are extremely selective. Therefore, the right to exclude others is an essential characteristic of these relationships. While familial relationships exemplify the groups that are pro-

89. See Jaycees, 468 U.S. at 617-18.
90. Id. at 618. For an in-depth examination of the freedom of intimate association, see Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624 (1980).
91. See Jaycees, 468 U.S. at 618; Linder, supra note 60, at 1884.
92. Jaycees, 468 U.S. at 618.
93. See id. ("We therefore find it useful to consider separately the effect of applying the Minnesota statute to the Jaycees on what could be called its members' freedom of intimate association and their freedom of expressive association.").
94. See id.
95. See Varela, supra note 2, at 927.
97. See id. at 618-19.
98. See id. at 619.
99. See id. at 619-20.
100. See id. at 620.
tected by the freedom of intimate association, the Court recognized that other groups may be protected as well.  

Determining the limits of the protection of the freedom of association requires "a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." Factors that should be examined in making this determination include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."  

The Jaycees did not qualify as a group entitled to insulation from the MHRA pursuant to the freedom of intimate association. The Court emphasized that the local chapters of the Jaycees were large and did not employ selective criteria for judging new applicants for membership. The memberships of the Minneapolis and St. Paul chapters were approximately 400 each and, putting aside age and sex, neither the national nor the local chapters inquired into a new applicant's background. Membership was limited to males between the ages of eighteen and thirty-five, but the Court noted that women affiliated with the Jaycees attended meetings and participated in certain seminars and social functions. These facts led the Court to conclude that the Jaycees did not possess the personal characteristics that would trigger the protection of the freedom of intimate association. Eliminating the first issue, the Court then moved on to the examination of the Jaycees' purported right to freedom of expressive association.

2. Freedom of Expressive Association
The right to expressive association is characterized as an implicit First Amendment right that is imperative in the protection of the enumerated individual freedoms granted by the First Amendment. The Court stated that the "freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to en-

101. See id.
102. Id.
103. Id. at 620.
104. See id. at 621.
105. See id.
106. See id.
107. See id. at 613.
108. See id. at 621.
109. See id.
110. See id. at 622.
gage in group effort toward those ends were not also guaranteed."\textsuperscript{111} It further emphasized that the protection of collective expression is important in maintaining political, social, and cultural diversity, as well as in preserving minority expression from majority suppression.\textsuperscript{112} Thus, implicit in an individual's First Amendment freedoms is the corresponding right to associate with others in pursuit of cultural, political, religious, social, economic, and educational ends.\textsuperscript{113}

The Court, cognizant that unconstitutional government infringement upon expressive association can take numerous forms, was particularly concerned with a state's interference with a group's internal disposition.\textsuperscript{114} "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."\textsuperscript{115} Such an intrusion may consequently hinder the original member's ability to express those views that initially brought them together.\textsuperscript{116} "Freedom of association therefore plainly presupposes a freedom not to associate."\textsuperscript{117} To protect this interest, while ensuring a tie between the asserted right and an expressive activity, the Court concluded that a group's right to freedom of expressive association would be impinged if the group's "message or purpose was diluted or altered by the forced inclusion of another group."\textsuperscript{118} Essentially, there must be a nexus between the organization's exclusionary policy and its expressive practices. This conclusion, however, did not complete the Court's inquiry into this constitutional right. The Court's balancing test remained to be satisfied.

The Court's balancing test involves weighing the infringement upon a group's right to freedom of expressive association against the state's compelling interest in eradicating and preventing discrimination.\textsuperscript{119} The test is predicated upon the Court's conclusion that a group's right to freedom of expressive association is not absolute.\textsuperscript{120} "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of

\textsuperscript{111} Id.
\textsuperscript{112} See id.
\textsuperscript{113} See id.
\textsuperscript{114} See id. at 622-23.
\textsuperscript{115} Id. at 623.
\textsuperscript{116} See id.
\textsuperscript{117} Id.
\textsuperscript{118} Varela, supra note 2, at 928; see Jaycees, 468 U.S. at 626-28.
\textsuperscript{119} See Jaycees, 468 U.S. at 623.
\textsuperscript{120} See id.
associational freedoms." The Court, while recognizing that the deprivation of individual dignity and the denial of equal opportunities are harmful effects of discrimination, noted that state public accommodation statutes, with their goal of eliminating discrimination, "plainly serve[] compelling state interests of the highest order." If the statute "responds precisely to the substantive problem which legitimately concerns' the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose," its application will be the least restrictive means of effectuating the state's interests.

Although the Jaycees members' right to freedom of expressive association was implicated due to their numerous protected activities, they were ultimately unable to convince the Court to afford them constitutional protection. The Jaycees failed to prove that the forced inclusion of women would impede, alter, or dilute its members' ability to engage in expressive activities or the organization's ability "to disseminate its preferred views." The Court subsequently held that the Jaycees' associational message and purpose were only tenuously connected to gender exclusivity, and that the application of the MHRA to the Jaycees did not "impose[] any serious burdens on the male members' freedom of expressive association." The Court concluded its analysis by applying the balancing test. It stated that even if there were an "incidental abridgment" of the Jaycees' rights, this infringement would not outweigh Minnesota's legitimate interest in eradicating discrimination. Moreover, the Court held that the MHRA was the least restrictive means available to the state to accomplish its goals.

121. Id.
122. See id. at 625.
123. Id. at 624.
124. Id. at 629 (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984)).
125. See id. at 622. The Court noted: "Over the years, the national and local levels of the organization have taken public positions on a number of diverse issues, and members ... regularly engage in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment." Id. at 626-27 (citations omitted).
126. See id. at 626-29.
127. Id. at 627. The Court also rejected the Jaycees' argument that the admission of women as full voting members would alter a symbolic message illustrated by the fact that women were not permitted to vote. See id.
128. See id. at 629.
129. Id. at 626.
130. See id. at 628-29.
131. Id. at 628.
132. See id. at 629-29.
133. See id.
In *Jaycees*, the Supreme Court constructed the test and set the stage for future freedom of association cases. Little did the Court know that the next case to deal with these issues would appear before it in the not-too-distant future. A mere three years later, *Board of Directors of Rotary International v. Rotary Club of Duarte* was argued and decided.

### B. Board of Directors of Rotary International v. Rotary Club of Duarte

Rotary International ("International") was a nonprofit corporation composed solely of "business and professional men," Each member of a Rotary Club was admitted pursuant to a "classification system," and was required to work in a leadership capacity in a business or profession. International's recommended club by-laws provided that all applicants be considered by a classifications committee which would determine whether the applicant's business is accurately described and conforms to the classification system. The by-laws further provided for a membership committee which would "evaluate[] the candidate's 'character, business and social standing, and general eligibility.'" Although membership was limited to men, women attended meetings, received awards, and gave speeches.

In 1977, the Rotary Club of Duarte, California ("Duarte Club") admitted three women in violation of the Rotary Club Constitution. Upon informing the Duarte Club that its actions violated club policy, International's Board of Directors conducted an internal hearing, re-

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135. Id. at 539 (quoting ROTARY MANUAL OF PROCEDURE 7 (1981)).
136. See id. at 540.
137. Id. at 540.
138. See id. at 541.
139. Id. at 540-41.
140. See id. at 541.
141. See id.
voked the Duarte Club’s charter, and terminated the club’s membership in International. 142

The Duarte Club, and two of its female members, filed a complaint in a California state court alleging that International’s actions violated the state’s public accommodation law, the UCRA. 143 The lower court found for International, and held that no violation of the UCRA occurred because neither International nor the Duarte Club were business establishments under the UCRA. 144 The California Court of Appeals reversed, finding both International and the Duarte Club to be business establishments within the meaning of the UCRA and therefore governed by its provisions. 145 The court rejected International’s argument that its all male membership policy was protected by the First Amendment right of freedom of association, and ordered reinstatement of the Duarte Club. 146 Since the California Supreme Court denied International’s petition for review, the United States Supreme Court, finding appellate jurisdiction, granted International’s petition for certiorari, and affirmed the decision of the California Court of Appeals. 147

The Court began its analysis by reaffirming Jaycees as the “framework for analyzing [International’s] constitutional claims.” 148 The Court restated the two types of associational freedoms, and briefly explained the basis for each. 149 Although the Rotary Club opinion reiterates, for the most part, the principles set forth in Jaycees, the Court further clarified in two ways the freedom of intimate association analysis previously set forth in Jaycees. First, the Court explained that although the types of relationships that have been afforded the protection of freedom of intimate association have typically been familial in nature, the Court had not attempted to define the boundaries of this constitutional right, and had never held that it was limited to family relationships. 150 The second clarification, set forth in a footnote, was in response to In-

142. See id.
143. See id. For an examination of the UCRA, see supra Part II.
144. See Rotary Club, 481 U.S. at 542.
145. See id. at 542-43.
146. See id. at 543.
147. See id. at 543-44. Justices Blackmun and O’Connor did not participate in the consideration of Rotary Club, and Justice Scalia concurred in the judgment. See id. at 538.
148. Id. at 544.
149. See id. at 544-49. The Court explained that the Jaycees opinion did not consider whether the relationships among the Kiwanis Club members were adequately intimate to warrant constitutional protection. See id. at 547 n.6. The discussion of the Kiwanis Club was limited to the observation that because the Minnesota court suggested the Kiwanis Clubs were not covered by the MHRA, the Jaycees argument that the MHRA was vague and overbroad failed. See id.
150. See id. at 545.
ternational’s argument that the Court ‘‘approved’ a distinction between the Jaycees and the Kiwanis Club in [Jaycees].’’151 The Court rejected this argument as a misinterpretation of Jaycees, and reaffirmed the fact-specific nature of a freedom of intimate association analysis.152 The Court refused to speculate as to the applicability of the constitutional right to the ‘‘many clubs and other entities with selective membership that are found throughout the country [because w]hether the ‘zone of privacy’ established by the First Amendment extends to a particular club or entity requires a careful inquiry into the objective characteristics of the particular relationships at issue.’’153

The Court applied the freedom of intimate association factors stated in Jaycees (‘‘size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship’’)154 and held that the relationships among the members of International and Duarte Club were insufficiently private and intimate to warrant constitutional protection.155 The Court noted that the size of local Rotary Clubs can range from less than twenty to greater than 900, and emphasized that there was no upper limit on the number of members in any local Rotary Club.156 Rotary Clubs are required to admit other Club members to meetings, and are encouraged to seek local media coverage of their activities and events.157 In short, although Rotary Club membership is not open to the general public, ‘‘Rotary Clubs, rather than carrying on their activities in an atmosphere of privacy, seek to keep their ‘windows and doors open to the whole world.’’’158

The Court, following the Jaycees framework, applied the freedom of expressive association test, and held that this constitutional protection was also unavailable to the Rotary Clubs.159 The Court stated that admitting women to Rotary Clubs would not significantly alter the existing members’ ability to pursue their various activities, nor would it require them to ‘‘abandon their basic goals . . . [or] their classification system.’’160 In any event, even if the application of the UCRA slightly encroaches the Rotary Club’s members’ right to expressive association,
such encroachment is justified because it effectuates the state’s compelling interest in eliminating gender discrimination.  

By this time, freedom of association had become the “hot issue,” and one year later the Court was once again confronted with it in New York State Club Ass’n v. City of New York.  

C. New York State Club Association v. City of New York  

In 1984, New York City amended its anti-discrimination public accommodation statute, the Human Rights Law (“HRL”), extending its reach and clarifying its private club exemption.  

Immediately thereafter, the New York State Club Association (“Association”), a nonprofit corporation consisting of 125 private clubs and associations in New York State, most of which were located in New York City, filed suit against the city and its officers alleging, among other things, that the HRL was facially unconstitutional on First and Fourteenth Amendment grounds.  

The trial court upheld the HRL, and the intermediate court affirmed.  

The New York State Court of Appeals affirmed the lower
courts' holdings in a unanimous opinion in which it rejected the First Amendment challenge, relying on the balancing test set forth in *Jaycees* and reaffirmed in *Rotary Club*. The Association's petition for certiorari was granted, and the Supreme Court subsequently affirmed.

The Court focused its analysis on the facial challenge to the HRL, thereby briefly discussing and quickly rejecting the freedom of association allegations. The Court held that the clubs and associations comprising the Association were unable to avail themselves of either associational right. With regard to the Association's purported right to intimate association, the court emphasized that the clubs subject to the HRL were predominantly commercial in nature and contained at least 400 members. The large membership made them comparable in size to the Jaycees and larger than many of the local Rotary Clubs, both of which were not afforded constitutional protection. The Court noted: "It may well be that a considerable amount of private or intimate association occurs in such a setting, ... but that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination . . . ."

The Court also abruptly rejected the Association's expressive association argument. It stated that most large clubs subject to the HRL are not associations "organized for specific expressive purposes . . . that [can] not . . . advocate [their] desired viewpoints nearly as effectively if [they] cannot confine [their] membership[s] to those who share the same sex, for example, or the same religion." The Association failed to identify those clubs that possessed such characteristics, and the Court refused to provide constitutional protection to any one club, "let alone a substantial number of them."

166. See id. at 7-8. The New York State Court of Appeals held that any infringement on the Association's existing members' right to expressive association due to the application of the HRL was justified because it was the least restrictive means to achieve the state's goal of eliminating invidious discrimination. See id.

167. See id. at 8.
168. See id. at 11.
169. See id.
170. See id. at 12. The Court noted that the HRL only applies to clubs offering "'regular meal service' and receiv[ing] regular payments 'directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.'" Id. (quoting N.Y.C. Admin. Code. § 8-102(9) (1986)). These characteristics, as well as the role strangers play in the clubs' happenings, led the Court to conclude that the clubs were commercial in nature. See id.

171. See id.
172. See id.
173. Id.
174. Id. at 13.
175. Id. at 14.
New York State Club Ass'n concluded the seemingly constant barrage of freedom of association cases, and provided the Court with a temporary respite from these issues. Since nothing in the law remains dormant for too long, in 1995 the Court was once again faced with these and other First Amendment issues in Hurley v. Irish-American Gay, Lesbian and Bisexual Group. Although the Court's analysis in Hurley was concerned with freedom of speech, the Court provided a brief freedom of association discussion.

D. Hurley v. Irish-American Gay, Lesbian and Bisexual Group

In 1992, a group of gay, lesbian, and bisexual descendants of Irish immigrants formed a group, the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB"), for the express purpose of marching in the South Boston St. Patrick's Day-Evacuation Day Parade. Although the organizers of the parade, the South Boston Allied War Veterans Council ("Council"), denied GLIB's application to participate in the 1992 parade, GLIB obtained a state court order requiring their inclusion and marched pursuant thereto. In 1993, after the Council again denied GLIB's application to march in the parade, GLIB brought suit claiming the Council’s discriminatory acts violated the State and Federal Constitutions and the state public accommodation statute.

The trial court held that the parade satisfied the statutory definition of "public accommodation" and was therefore subject to the statute. The court rejected the Council’s expressive association argument on the grounds that this type of constitutional protection would require the court to focus on a particular message, theme, or organization absent
"Given the [Council's] lack of selectivity in choosing participants and failure to circumscribe the marchers' message," the court found it "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." Moreover, the trial court found any possible infringement on the Council's right to expressive association to be slight—justified by the state's compelling interest in eliminating discrimination. The Supreme Judicial Court of Massachusetts affirmed, but held that the Council's First Amendment freedom of speech argument (as distinguished from the Council's freedom of association argument discussed in the trial court) "need not [be] decide[d] on the particular First Amendment theory involved" because the Council did not "demonstrate that the parade truly was an exercise of . . . First Amendment rights." The United States Supreme Court granted certiorari and later reversed the judgment of the Supreme Judicial Court of Massachusetts. The Court, relying on a freedom of speech analysis, held that the forced inclusion of GLIB violated the Council's First Amendment rights.

The Court first rejected the Supreme Judicial Court's conclusion that a parade has no expressive purpose and is therefore not entitled to constitutional protection. It then acknowledged Massachusetts' public accommodation law as a tool in the fight against discrimination; however, it was puzzled by the statute's peculiar application in the instant case. The Council did not prohibit individuals that were openly gay, lesbian, or bisexual to march in the parade since such actions would

182. See id. at 563.
184. See id.
185. See id.
186. Id. at 564 (omission in original).
187. See id. at 566.
188. See id. at 561.
189. See id. at 568-81.
190. See id. at 568-70. The Court stated "that 'symbolism is a primitive but effective way of communicating ideas'" and proceeded to cite a string of Supreme Court cases that supported this premise. Id. at 569 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943)) (alteration in original). "[A] narrow, succinctly articulable message is not a condition of constitutional protection," such that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." Id. at 569-70. Moreover, "[s]ince all speech inherently involves choices of what to say and what to leave unsaid," one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say."" Id. at 573 (quoting Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 11 (1986)) (plurality opinion) (citation omitted).
191. See id. at 571-73.
192. See id. at 572.
arguably be discriminatory. Instead, the Council denied admission to GLIB "as its own parade unit carrying its own banner." While the parade took place in public, the Court held that the Council's selection process for marching units was not a public accommodation, but rather an exhibition of free speech. Thus, the forced inclusion of GLIB infringed upon the Council's right to free speech, and was therefore unconstitutional.

In the second to last paragraph of the opinion, the Court briefly discussed the possible applicability of the Council's right to freedom of association. The Court reiterated the freedom of association holding in New York State Club Ass'n, and stated that "[i]f [it] were to analyze this case strictly along those lines, GLIB would lose." Just as a private club may deny membership to an applicant with opposing views, the Council may refuse admission to GLIB on the basis that it is an "expressive contingent with its own message."

Since the Court has not said otherwise, the Jaycees test is still the framework for analyzing a freedom of association claim. Although the Court has not heard another freedom of association case since Hurley, it is only a matter of time. The split in the state courts regarding the BSA's right to intimate and/or expressive association is ripe for Supreme Court resolution.

IV. HOMOSEXUALS AND THE BOY SCOUTS OF AMERICA

The BSA, incorporated in 1910 and chartered by Congress in 1916, is a corporation that provides, among other things, an educational program for boys and young men that helps "to build character, to train in the responsibilities of participating citizenship, and to develop personal fitness." Since 1910, there have been more than ninety million members of the BSA, and as of December 31, 1993, BSA membership was 5,355,401.

193. Id.
194. See id. at 573.
195. See id. at 580-81.
196. See id.
197. "[A]lthough the association provided public benefits to which a State could ensure equal access, it was also engaged in expressive activity; compelled access to the benefit, which was upheld, did not trespass on the organization's message itself." Id. at 580.
198. Id. (emphasis added).
199. Id. at 580-81.
200. About the BSA (visited Apr. 19, 1999)
201. See Historical Highlights - 1990's (visited Apr. 19, 1999)
The purpose of the BSA, as set forth in its charter, is "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by Boy Scouts." The BSA by-laws further provide: "In achieving this purpose, emphasis shall be placed upon its educational program and the oaths, promises, and codes of the Scouting program for character development, citizenship training, and mental and physical fitness." Finally, the BSA Mission Statement states:

It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.

The values we strive to instill are based on those found in the Scout Oath and Law.

To effectuate the above purpose and goals, the BSA offers five programs solely for boys and young men: the Tiger Cubs, Cub Scouting, Webelos Scouting, Boy Scouting, and Varsity Scouting.
Youth membership is limited to males who satisfy the program’s age requirement, who recognize an obligation to God pursuant to the BSA Declaration of Religious Principle, and who promise to observe the Scout Oath or Promise and the Scout Law. Adult volunteers must be recommended by the Scout Executive, and approved by the Council.
Executive Board. They "must possess the moral, educational, and emotional qualities that the [BSA] deems necessary to afford positive leadership to youth," they must be United States citizens, be the correct age, and they must pledge to believe in and follow the Declaration of Religious Principle, the Scout Oath or Promise, and the Scout Law.

Despite the lack of selectivity in the BSA's membership process, the BSA often finds itself the defendant in a case brought by a rejected BSA applicant. The plaintiffs/rejected applicants are usually women, atheists, agnostics, and homosexuals.

In defense of its decision to exclude women, the BSA argues that allowing women to become members runs contrary to the very purpose behind the formation of the all male scouting group. It argues that the numerous "male" references in the BSA charter and by-laws support this proposition. The BSA further states that although it is nonsectarian, all youth and adult members must recognize a duty to God. This long standing position can also be found in the BSA's by-laws under "Declaration of Religious Principle." Finally, the BSA also maintains that publicly avowed homosexuals cannot be members. Who the homosexuals are, and what they represent, is contrary to the BSA's beliefs. Unlike the BSA's stance on women and atheists, its views on gays are not in their charter or by-laws. As evidence of its position, the BSA points to the terms "morally straight" and "clean" as well as a 1978 internal memorandum, a 1983 written statement, and 1991 and 1993 position statements.

215. Boy Scouts of America Adult Registration Application, supra note 204.
216. All applicants for leadership positions must be at least 21 years of age. See id. Applicants for assistant adult volunteer positions must be 18 years of age or older. See id.
217. See id.
218. See supra note 8.
220. See id. at 86-87.
222. See supra note 210.
224. See Dale, 706 A.2d at 277; Richardson, 1996 WL 734724, at *10.
225. See Curran, 952 P.2d at 225 n.5, 225-26 n.7; Dale, 706 A.2d at 288-90; Richardson,
The terms "morally straight" and "clean" are located in the Scout Oath and Scout Law, respectively. The definitions of the Scout Oath phrases and Scout Law terms are found in the Boy Scout Handbook. Accordingly, to be a morally straight Scout one must strive:

To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

As described in the Scout Law, a "clean" Scout "keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean." The Handbook goes on to explain:

You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can't help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.

There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.

Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults.

The BSA consistently argues that the forced inclusion of homosexuals runs contrary to the meaning of these terms.

The 1978 memo is a policy statement, in question and answer format, addressed to the BSA's Executive Council from its Chief Scout Executive. It was never openly distributed within the BSA hierarchy. The memo states in relevant part:

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1996 WL 734724, at *30-*32.
226. See supra note 204.
227. BIRKBY, supra note 1, at 551 (emphasis omitted).
228. Id. at 561 (emphasis omitted).
229. Id.
231. See id. at *31.
Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

A. No. The [BSA] is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select those who in our judgment meet our standards and qualifications for leadership.

Q. May an individual who openly declares himself to be a homosexual be a registered unit member?

A. No. As the [BSA] is a private, membership organization, participation in the program is a privilege and not a right. We do not feel that membership of such individuals is in the best interests of Scouting.

The next written declaration concerning the BSA’s view on homosexuals was the 1983 statement from the Legal Counsel of the BSA. It states: “Avowed or known homosexuals are not permitted to register in the [BSA]. Membership in the organization is a privilege, not a right, and the [BSA] has determined that homosexuality and Scouting are not compatible. No units will be chartered to known homosexual groups or individuals.”

The 1991 Position Statement states:

We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts.

Because of these beliefs, the [BSA] does not accept homosexuals as members or as leaders, whether in volunteer or professional capacities.

Our position on this issue is based solely upon our desire to provide the appropriate environment and role models which reflect Scouting’s values and beliefs.

In 1993, the BSA refined and redrafted the 1991 Position Statement to state:

233. Id. at 225 n.5.
The [BSA] does not ask prospective members about their sexual preference, nor do we check on the sexual orientation of boys who are already Scouts.

The reality is that Scouting serves children who have no knowledge of, or interest in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day.

Membership in Scouting is open to all youth who meet basic requirements for membership and who agree to live by the applicable oath and law . . .

The [BSA] has always reflected the expectations that Scouting families have had for the organization.

We do not believe that homosexuals provide a role model consistent with these expectations.

Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.235

The 1993 Position Statement makes clear that the BSA will deny the applications of both homosexual adults and youth, and expel any current homosexual members.

Utilizing the above arguments and evidence, the BSA has been successful in excluding women, atheists, and agnostics.236 Its battle against the forced inclusion of homosexuals, however, has been decidedly more difficult.

The highest court in California,237 an appellate court in New Jersey,238 and the Chicago Commission on Human Relations239 all have ruled on cases involving gays and the BSA. The New Jersey and California courts both ruled on whether the BSA, as a public accommoda-

235. *Id.* at 276-77.
236. *See supra* note 8.
238. *See Dale*, 706 A.2d at 270. For a discussion of the New Jersey Supreme Court’s opinion and order affirming the New Jersey Superior Court, Appellate Division, *see infra* notes 470-96, and accompanying text.
tion, must admit publicly avowed homosexuals. The Chicago Commission on Human Relations ruled on whether the BSA, pursuant to Chicago's employment ordinance, must employ a homosexual. While the New Jersey and California courts' holdings were diametrical, this dichotomy may be attributable, in part, to the differences in each of the states' public accommodation laws. Of particular interest to this Note is the fact that the Superior Court of New Jersey and the Chicago Commission on Human Relations concluded that the BSA's associational rights were not violated, whereas the California Superior Court, in a concurring opinion, concluded they were. The judicial opinions of Dale v. Boy Scouts of America and Curran v. Mount Diablo Council of the Boy Scouts of America and the administrative opinion of Richardson v. Chicago Area Council of the Boy Scouts of America are summarized below, with an emphasis on the courts' and commission's rationale concerning the BSA's right to freedom of association.

A. Dale v. Boy Scouts of America

James Dale had been associated with the Boy Scouts of America for most of his life. He joined the Cub Scouts when he was eight and as he grew older, progressed through the corresponding BSA programs. Throughout his BSA tenure, Dale earned thirty merit badges, held many troop leadership positions, including junior assistant Scoutmaster, and, as a symbol of his devotion and exemplary Boy Scout conduct, achieved the highest rank of Eagle Scout. He had been active in and received from the Order of the Arrow, an affiliated camping association, the highest possible honor of Vigil. He was also chosen as a delegate to the 1985 National Boy Scout Jamboree and was selected to speak at numerous Monmouth Boy Scout Council functions.

In March, 1989, seven months after his eighteenth birthday, Dale applied for adult registration membership, a prerequisite for service as a volunteer adult leader. His membership was approved, and when he

240. See Curran, 952 P.2d at 219; Dale, 706 A.2d at 274.
243. 952 P.2d 218 (Cal. 1998).
245. See Dale, 706 A.2d at 275.
246. See id.
247. See id.
248. See id.
249. See id.
250. See id.
was not away attending college at Rutgers University, he served as an assistant Scoutmaster in a local troop.\textsuperscript{251}

Dale publicly declared his homosexuality during his second year at Rutgers.\textsuperscript{252} Thereafter he participated in a newspaper article entitled \textit{Seminar Addresses Needs of Homosexual Teens}, in which he was described as the co-president of the Rutgers University Lesbian/Gay Alliance and was quoted as saying that he had only pretended to be straight during high school.\textsuperscript{253}

On August 5, 1990, when Dale was twenty years old, he was informed in a letter from James W. Kay, Council Executive of Monmouth Council, that his adult registration had been revoked and that he should "sever" all relations with the BSA.\textsuperscript{254} Kay further stated that "BSA membership registration is a privilege ... [that may be] refuse[d] ... whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth."\textsuperscript{255} In a letter dated August 10, 1990, Kay responded to Dale's inquiries regarding the grounds for his expulsion. Kay stated that Dale's membership was revoked pursuant to the BSA's "standards for leadership ... which specifically forbid membership to homosexuals."\textsuperscript{256} Kay later explained in a deposition that the newspaper article had been brought to his attention and that by publicly avowing his homosexuality, Dale illustrated his failure to live by the Scout Oath and Law.\textsuperscript{257} Dale was subsequently told that since the BSA Northeast Region Review Committee supported his expulsion, his presence at the regional review meeting would have "no useful purpose."\textsuperscript{258}

Dale filed suit against the BSA alleging that the BSA is a public accommodation under New Jersey's public accommodation law, the LAD, and that its discriminatory conduct violated the LAD.\textsuperscript{259} The BSA argued that it did not satisfy the LAD's definition of a public accommodation, that it was a private club pursuant to the LAD's private club exception, and, in the alternative, that if it were deemed a public accom-

\begin{thebibliography}{99}
\bibitem{251} See \textit{id}.
\bibitem{252} See \textit{id}.
\bibitem{253} See \textit{id}.
\bibitem{254} See \textit{id}.
\bibitem{255} \textit{Id}.
\bibitem{256} \textit{Id}.
\bibitem{257} See \textit{id}.
\bibitem{258} \textit{Id} at 275-76.
\bibitem{259} See \textit{id} at 277. For an examination of the New Jersey Law Against Discrimination ("LAD"), see \textit{supra} Part II.
\end{thebibliography}
modation, the forced inclusion of homosexuals would violate its mem-
bers’ right to freedom of association.260

The trial court found for the BSA, concluding that since the BSA
has no fixed physical locale, the BSA is not a place of public accom-
modation under the LAD.261 The court further noted that the BSA is a dis-
tinctly private organization qualifying under the LAD’s private club ex-
ception.262 Finally, the trial judge concluded that the BSA’s members’
right to expressive association would be violated if the BSA were forced
to accept homosexuals as members.263 He stated that “‘[a]ccording to
[the BSA’s] mission and purpose, [it] has determined that an assistant
scoutmaster who is an active sodomist is simply incompatible with
scouting and is not morally straight.’”264

The New Jersey Superior Court, Appellate Division reversed the
trial court decision, and held that the BSA was in fact a public accom-
modation under the LAD, that the BSA had violated the LAD by dis-
criminating against the Plaintiff on the basis of sexual orientation, and
that the forced inclusion of homosexuals does not abridge the BSA’s
right to expressive association.265

The court began by examining the factors that combine to qualify
an organization as a “place of public accommodation.”266 The court re-
jected the trial court’s conclusion that to qualify as a “place of public
accommodation” an organization must be linked to a fixed physical
place.267 Such a conclusion is “irrational” because people who “operate
from a fixed ‘place’ are [no] more apt to discriminate than those who
meet at varying locales.”268 Advertisements that encourage new mem-
bership as well as lenient membership criteria were found to be addi-
tional factors that could render an association a public accommoda-
tion.269

The Superior Court held that the BSA is a public accommodation
and subject to the anti-discrimination provisions of the LAD.270 The

260. See Dale, 706 A.2d at 277-93.
261. See id. at 277-78.
262. See id. at 277.
263. See id.
264. Id. at 288 (first alteration in original).
265. See id. at 274. The court also rejected the BSA’s claim that it was exempt from the stat-
ute under the LAD’s private club exception. See id. at 283.
266. See id. at 278-83.
267. See id. at 278-80.
268. Id. at 279.
269. See id. at 280-83.
270. See id. at 283.
BSA’s advertising campaigns to induce new membership and their invitation to the general public at large “to join their ranks” were two factors that the court placed great emphasis on. The court rejected the BSA’s argument that the proper focus should be on the “more restrictive and selective” adult membership, but rather examined the anti-gay membership policy of the BSA as a national association.

Finally, the court noted the BSA’s partnership and involvement with numerous public entities and organizations. This holding, while settling an important issue, opened the door to an even larger one—the possible infringement of the BSA’s constitutional rights.

The Superior Court’s inquiry into the possible violation of the BSA’s right to intimate and/or expressive association began with a summary of the rules set forth in Jaycees, Rotary Club, and New York Club Ass’n. It laid out the different criteria for the two associational freedoms and concluded that an “organization or club asserting the freedom has a substantial burden of demonstrating a strong relationship between its expressive activities and its discriminatory practice.”

The BSA was unable to avail itself of the right to intimate association. The court, in one paragraph, quickly eliminated any possible discussion of this right by noting that the BSA has five million members, that it engages in aggressive advertising, and that it is involved in the activities of public entities including public schools. These characteristics and actions nullify many of the intimate association factors, thereby rendering the right inapplicable.

The court’s rejection of the BSA’s argument that the inclusion of gays violated its right to expressive association required a more in depth analysis. The court began by accepting the fundamental premise that the BSA’s social, educational, and civic goals and activities were in fact expressive and protected by the First Amendment. The court ultimately concluded that “the BSA’s collective ‘expressive purpose’ is not to condemn homosexuality” but rather, as stated in its Charter, bylaws

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271. See id. at 280-81. The court mentioned the BSA’s national television campaigns, its public relations firms, the production of magazine inserts, local councils’ radio and television spots, and “school nights.” See id. at 281.

272. See id. at 282. “We reject the suggestion that the BSA organization as a whole is not a place of public accommodation because more stringent membership criteria are applied to a single component of the organization, its adult members.” Id.

273. See id. at 282-83.

274. Id. at 287.

275. See id. at 286.

276. See supra Part III.A.1.

277. See Dale, 706 A.2d at 287-88.
and mission statement, to train and educate boys in outdoor activities, patriotism, courage, and respect for the family. Therefore, including homosexuals would not significantly alter or affect "the BSA's ability to express its collective views on scouting, or to instill in the scouts those qualities of leadership, courage and integrity to which the BSA has traditionally adhered."

In support of its argument that avowed homosexuals are "at odds" with its expressive purpose, the BSA pointed to the Scout Oath term "morally straight," the Scout Law term "clean," the 1978 internal memorandum and the 1991 and 1993 Position Statements. The BSA maintained that homosexuals cannot effectively disseminate the BSA's morally straight values when a homosexual's "message" conflicts with the very definitions of "morally straight" and "clean," terms that portray the BSA's expressive purpose. The BSA also contended that the 1978 memorandum and the 1991 and 1993 Position Statements further illustrated its collective expressive ideals.

Both arguments were rejected by the court—the reliance on the terms "morally straight" and "clean" on the basis of being "of recent vintage," and the position statements on the grounds of being mere litigation responses. The court noted that the explanation for the exclusion of gays provided in the 1978 memorandum, which contained the BSA's first reference to homosexuals, was that the BSA was a private organization, and not that homosexuality conflicted with the terms "morally straight" and "clean." The court further emphasized that the Position Statements were produced during the time the BSA's anti-gay policy was under judicial attack in California. The court refused to "accept the proposition that this 'Position Statement,' issued for the first time seventy-six years after Congress granted the BSA its Charter, represents a collective 'expression' of ideals and beliefs that brought the boy scouts together."

Placing the timing of the production of these documents aside, the court also found it difficult to reconcile the purported fundamental ex-

278. See id. at 288.
279. Id.
280. See id. at 289-90. There was no reference to the 1983 statement from the Legal Counsel of the BSA in the Dale opinion.
281. See id.
282. See id.
283. See id.
284. See id.
285. See id. at 290.
286. Id.
pressive nature of the BSA’s anti-gay policy with the complete absence of this policy from the BSA’s Charter, by-laws, rules and regulations, handbooks, and membership applications.\textsuperscript{287} This policy was never incorporated into these documents nor distributed “throughout the BSA hierarchy.”\textsuperscript{288} Proof of this lack of knowledge was provided by numerous affidavits of present Boy Scouts and adult leaders, all stating that they did not know such a policy existed.\textsuperscript{289} The court also found irreconcilable the BSA’s failure to expel sponsors and heterosexual scouts who publicly condemn the BSA’s anti-gay practice,\textsuperscript{290} with its adamancy in excluding homosexual members “[who say] absolutely nothing about the morality or lifestyle of homosexuals,” but who have disclosed their sexual orientation.\textsuperscript{291} This disparity undermined the BSA’s argument “that its collective purpose is to ‘exclude individuals who do not share the views that the club’s members wished to promote.’”\textsuperscript{292}

The BSA’s contention that the Supreme Court case \textit{Hurley} was on point and binding was also rejected by the court.\textsuperscript{293} After a synopsis of the facts and holding of \textit{Hurley}, the court distinguished it from the instant action as a freedom of speech case.\textsuperscript{294} It noted that the \textit{Hurley} Court did not conduct a freedom of association analysis under the \textit{Jaycees} test but rather, in dictum, “observed parenthetically” that GLIB would lose under a freedom of association analysis “because it could be ‘refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club’s existing members.’”\textsuperscript{295} The court further distinguished \textit{Hurley} on factual grounds by stating that “[u]nlike a parade, where the ‘marchers . . . are making some sort of collective point,’ the BSA is a national organization focusing its energy and resources on activities aimed at the physical, moral and spiritual development of boys and young men.”\textsuperscript{296} It concluded that

\begin{thebibliography}{99}
\bibitem{287} See id.
\bibitem{288} Id.
\bibitem{289} See id.
\bibitem{290} See id. at 290-91. The court noted that the United Methodist Church, the Union of American Hebrew Congregations and other religious organizations that sponsor the BSA have publicly opposed the BSA’s anti-gay policy. See id.
\bibitem{291} Id. at 291.
\bibitem{292} Id. (quoting \textit{New York State Club Ass’n v. City of New York}, 487 U.S. 1, 13 (1988)).
\bibitem{293} See id. at 293.
\bibitem{294} See id. at 291-93.
\bibitem{295} Id. at 293 (quoting \textit{Hurley v. Irish-American Gay, Lesbian, and Bisexual Group}, 515 U.S. 557, 580-81 (1995)).
\bibitem{296} Id. (quoting \textit{Hurley}, 515 U.S. at 568).
\end{thebibliography}
homosexual members do not "hamper" these goals nor do they impinge upon the BSA’s ability to express its views. An interesting portion of the majority opinion is the rejection of the trial court’s conclusion that an “active sodomist is ... incompatible with scouting.” Facialy, the conclusion was simply incorrect in that Dale had been expelled because he was a publicly avowed homosexual, not because he was “an active sodomist.” However, the court dug deeper and observed that such a statement illustrates “the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts, or will instill in them ideas about the homosexual lifestyle.” While the BSA has never publicly admitted such fears, the court was fully aware that homophobia and stereotypical notions of homosexuality exist today and, to a certain degree, may underlie the BSA’s anti-gay position.

B. Curran v. Mount Diablo Council of the Boy Scouts of America

Like James Dale, Timothy Curran was an exemplary Boy Scout achieving the highest rank of Eagle Scout, receiving many scouting honors, and participating in a BSA leadership development program, as well as the 1977 BSA National Jamboree. Although his official membership expired on his eighteenth birthday, Curran maintained contact with the BSA and participated in many of its activities.

At the age of sixteen, Curran told his parents he was gay. He had a gay social life separate from his life at school and had been integrating himself with the underground active gay youth in the San Francisco Bay Area. At seventeen, Curran began calling himself a gay youth activist and in 1980, he took a male date to his senior prom. All of this information was included in a three part article on gay teenagers published

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297. See id.
298. Id. at 288.
299. See id. at 288-89.
300. Id. at 289.
301. See id.
303. See id.
304. See id. at 220-21.
305. See id. at 221.
306. See id.
The article and Curran’s participation in it were brought to the attention of Quentin Alexander, Executive Director of the Mount Diablo Council of the BSA. Alexander inquired as to the status of Curran’s BSA membership and, upon learning that he was no longer an active member, chose to take no further action.

Curran subsequently submitted an application to attend the 1981 BSA National Jamboree. Alexander, relying on the fact that Curran was not a registered adult member of any BSA troop, sent a letter to Curran denying his application. Shortly thereafter, Curran called Alexander inquiring as to the reasons for his denial at which time Alexander explained that only registered adult members can attend the Jamboree. When Curran responded that he would file an adult application, Alexander explained that he would be unable to accept that application. Upon further questioning by Curran, Alexander admitted that the denial of his application was due to Curran’s homosexuality. Curran then agreed to meet with Alexander to discuss the issue.

At that meeting Alexander showed Curran the Oakland Tribune article and asked him “if [he] espoused that lifestyle still.” Curran responded in the affirmative and stated that “he specifically wanted to [be in the scouts]—because he so firmly believed personally in a homosexual lifestyle that there was ... not anything wrong with it, and he wanted to make sure that other kids understood that.” Alexander then reiterated the denial of Curran’s application.

Curran sought review of his rejected application with the Western Region of the BSA. The BSA agreed to conduct a hearing; however, it stated that if the underlying facts remained the same, a hearing would be

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307. See id. at 220.
308. See id.
309. See id. at 221.
310. See id.
311. See id.
312. See id.
313. See id.
314. See id.
315. See id.
316. See id.
317. Id.
318. Id. at 222 (alteration in original).
319. See id.
320. See id.
unproductive.\textsuperscript{321} Shortly thereafter Curran filed an action alleging, among other things, that the BSA's denial of his application based solely upon his avowed homosexuality violated the California public accommodation statute, the UCRA.\textsuperscript{322}

The trial was bifurcated with the first phase limited to the issue of whether the BSA was a "business establishment" under the UCRA, and the second phase limited to whether the application of the UCRA would violate the BSA's members' constitutional rights to intimate and expressive association.\textsuperscript{323} The trial court concluded that the BSA was a "business establishment" and subject to the UCRA, however, it ultimately found for the BSA on the constitutional issue.\textsuperscript{324}

At the close of the first phase, the trial court concluded that although the facts of the case and the circumstances surrounding the BSA were not on point with California's case law interpreting the UCRA, the BSA's "public orientation and prominence in the community rightfully place[d] it within the regulatory ambit of the [UCRA]."\textsuperscript{325} In reaching its decision, the trial court relied on the inclusive nature of the BSA's membership criteria, the BSA's active recruitment of new members, its regular fund raising activities, its media publications, as well as its ownership of a large physical plant, maintenance of a summer camp facility, and operation of a retail shop.\textsuperscript{326} In addition, the court noted that to hold otherwise "would endorse a 'right' to discriminate on the part of an organization serving a unique position in our society."\textsuperscript{327} A finding that the BSA is private and therefore able to discriminate on the basis of race, ancestry, disability, etc. "would send a stark message about what the ideals of this country really mean, a message that is not true."\textsuperscript{328}

The trial court then proceeded to the second phase of the trial to determine if the inclusion of gays would violate the BSA's members' right to intimate and/or expressive association. The BSA's argument regarding its members' right to intimate association was dismissed based on its size, non-selective membership, public orientation, and wide

\textsuperscript{321} See id.
\textsuperscript{322} See id. For an examination of the Unruh Civil Rights Act ("UCRA"), see supra Part II.
\textsuperscript{323} See Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 222, 224 (Cal. 1998). The BSA referred to the freedom of association argument as an affirmative defense. See id. at 224.
\textsuperscript{324} See id. at 224-27.
\textsuperscript{325} Id. at 224.
\textsuperscript{326} See id. at 223-24.
\textsuperscript{327} Id. at 224.
\textsuperscript{328} Id.
community presence. However, since the BSA’s activities were “overwhelmingly expressive” and the BSA illustrated the requisite nexus between its expressive activities and its exclusionary policy, the court held that the BSA’s members’ right to expressive association would be violated. The Court accepted the BSA’s contention that its expressive ideals concerning sexual morality are addressed in the Scout Oath and Law and that homosexuality directly conflicts with them. The Scout Oath and Law, combined with the limited yet consistent BSA written statements, and the testimony from BSA leaders concerning its anti-gay policy, were enough evidence to prove the necessary connection.

Both parties appealed to the California Court of Appeals which, in a divided decision, affirmed the judgment for the BSA. The appellate court agreed that the BSA’s right to expressive association would be violated if it were required to include homosexuals; however, it overruled the remainder of the trial court’s findings and held: (1) the BSA is not a business establishment under the UCRA; and (2) the application of the UCRA would violate the BSA’s right to intimate association. The dissenting opinion disagreed with the majority on all issues, concluding that the BSA is a business establishment and the acceptance of gays would not violate either associational right. The California Supreme Court granted review and, relying solely on the conclusion that the BSA is not a business establishment under the UCRA, affirmed the decision of the court of appeals.

The Curran majority opinion was devoted entirely to a discussion of the UCRA. The court began by providing a summary of the statute’s legislative history. It explained the impetus behind the creation of the public accommodation statute and discussed its many prior drafts. The court discussed the four main California cases interpreting the UCRA, and emphasized the court’s consistent approach in interpreting the term

329. See id. at 225.
330. See id. at 225-27.
331. See id. at 225-26.
332. See id.
333. See id. at 227.
334. See id.
335. See id.
336. See id. at 227, 239.
337. See id. at 229-30.
"all business establishments of every kind ... in the broadest sense reasonably possible." The selectivity of the organization's membership policies, the allowance of nonmember participation for a fee, the occurrence of business transactions, and the similarities between the organization and a public amusement are factors the court looked to in its interpretation of the statute.

Although the California courts have generally interpreted the UCRA broadly, the Curran court was unwilling to extend the UCRA's scope to include the BSA. The court concluded that the UCRA was not intended to govern "charitable, expressive, and social organizations, like the [BSA], whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members." The plaintiff's argument that the BSA's admission policies are nonselective and open to the public was rejected by the court as insufficient to constitute a business establishment, public accommodation or public amusement. The court further distinguished the BSA's business dealings (through its retail shops and licensing of its insignia), as distinct from its primary functions and not indicative of a "commercial purveyor of the primary incidents and benefits of membership in the organization." The trial court's concern that the BSA, as a private organization, will be free to discriminate on any basis, was also dismissed by the Curran court on the grounds that victims of other types of discrimination may sue under other anti-discrimination statutes. The Curran court concluded the majority opinion by putting the ball back in the legislature's court. It stated that if the legislature wanted to extend the scope of the UCRA so as to incorporate "charitable, expressive and social organizations" like the BSA, it has the authority, subject to constitutional constraints, to do so.

Since the Curran majority sustained the judgment for the BSA based on statutory interpretation and application, it refrained from discussing the BSA's constitutional argument of freedom of association.

339. See id. at 236 (quoting Burks v. Poppy Constr. Co., 370 P.2d 313 (Cal. 1962)).
340. See id. at 234-37. "[I]n carrying on such activities for a fee, [a] club operates as the functional equivalent of a commercial caterer or commercial recreational resort—classic forms of "business establishments" . . . ." Id. at 234 (quoting Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 792 (Cal. 1995)).
341. Id. at 236.
342. See id.  "[M]embership in the [BSA] is not simply a ticket of admission to a recreational facility that is open to a large segment of the public . . . ." Id. at 236.
343. Id. at 238.
344. See id. at 238-39.
345. See id. at 239.
Justice Kennard, however, believing ambiguous statutory terms should be construed so as to avoid constitutional problems, addressed the constitutional issues in a concurring opinion where he concluded that application of the UCRA to the BSA would violate its members’ First Amendment rights.\(^{346}\)

Although there was no indication in the procedural history that the BSA alleged a freedom of speech violation, Justice Kennard concurrently addressed the potential infringement of the BSA’s constitutional rights to both freedom of speech and freedom of association. He explained the basis and importance of both freedoms and briefly summarized the freedom of speech principles set forth in Hurley.\(^{347}\) The Jaycees two part freedom of association test was not discussed in detail. However, Justice Kennard stated that in each case where the United States Supreme Court rejected a freedom of association challenge to the application of a state’s public accommodation law, the Court always emphasized “that the law that withstood constitutional scrutiny either ‘require[d] no change in the [organization’s] creed’ and ‘impose[d] no restrictions on the organization’s ability to exclude individuals with ideologies or philosophies different from those of its existing members.’”\(^{348}\) Justice Kennard, however, failed to mention the requisite nexus between the organization’s expressive activities and exclusionary policy or the Supreme Court’s freedom of association balancing test.

What Justice Kennard did devote a large portion of his concurrence to was the Court’s analysis in Hurley. He summarized the Supreme Court’s freedom of speech analysis and concluded that the Hurley Court’s brief discussion of freedom of association was “an alternative basis for [the Court’s] decision.”\(^{349}\) As such, Justice Kennard viewed Hurley as “on point” and binding on the California court.\(^{350}\)

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346. See id. at 252-57 (Kennard, J., concurring).
347. See id. at 253-54. “The right to freely express one’s beliefs or ideas, unpopular as they may be, is essential to ‘nearly every other form of freedom.’” Id. (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)). “‘An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.’” Id. (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).
348. Id. at 255 (quoting Jaycees, 468 U.S. at 627) (alterations in original). Justice Kennard also stated that the public accommodation statutes that withstood the freedom of association challenge “erected no obstacle to ‘a club seek[ing] to exclude individuals who do not share the views that the club’s members wish to promote’ or did ‘not require the clubs to abandon or alter’ any expressive activities.” Id. (citations omitted) (alteration in original).
349. Id.
350. See id.
Justice Kennard accepted the trial court's finding that the BSA was primarily an expressive organization and ultimately concluded that had the California court held that the BSA's membership policies were subject to the UCRA, the BSA would have had a "compelling argument" that forcing it to accept homosexuals, or anyone else with views contrary to the BSA's "guiding precepts," would violate its members' First Amendment rights to freedom of speech and association. Justice Kennard characterized the BSA's anti-gay policy as a "basic precept" and, based on Curran's statement to Alexander that he wanted other kids to understand that there was nothing wrong with homosexuality, viewed Curran's interest in adult membership as a vehicle for the promotion of views contrary to that precept. Finally, in a footnote, Justice Kennard stated that he was not persuaded by the New Jersey Superior Court's holding in Dale. Justice Kennard believed the Dale court missed the critical issue which he characterized as "[w]hether granting [Dale] the relief he sought would violate the First Amendment right of the Boy Scouts, by means of its policy and membership decisions, to choose the content of the organization's own message." However, Justice Kennard failed to note that this issue is based on freedom of speech and that the BSA never alleged such a violation in Dale. Justice Kennard concluded his concurrence by comparing the BSA to the NAACP and the B'nai B'rith. He stated:

Could the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite? If the First Amendment protects the membership decisions of these groups, must it not afford the same protection to the membership decisions of the Boy Scouts?

Justice Kennard obviously believed that it must.

C. Richardson v. Chicago Area Council of the Boy Scouts of America

Keith Richardson had been involved in the Boy Scouts of America from the time he was seven years old through age twenty-one. He
achieved the rank of Eagle Scout in the minimum amount of time necessary, was an assistant patrol leader, a senior patrol leader, a junior assistant Scoutmaster, and a Vigil Honor member of the Order of the Arrow. Richardson attended the BSA’s National Leadership seminars and lectures and was a Scout Camp Commissioner in charge of four to five counselors and adults. In addition to his BSA membership, Richardson joined the BSA Explorer program where he was elected Regional Explorer Chairman, sat on the Explorer National Cabinet and was Administration Chairperson of the National Explorer Conference. Throughout his BSA tenure, Richardson was never made aware of the BSA’s position on homosexuality. The morality or immorality of homosexuality, the importance of heterosexuality, and sexual orientation in general were never directly discussed or indirectly conveyed.

Richardson acknowledged his homosexuality and became comfortable with it in his early twenties. At this time Richardson sought employment in “risqué jobs,” which included restaurants and bars that cater to the homosexual population. In the spring of 1992, Richardson decided to leave the “food and beverage” industry and seek employment with the not-for-profit organization, Forgotten Scouts. One of the Forgotten Scouts’ purposes is to illustrate that the BSA’s anti-gay policy is “wrong . . . and should be changed.” Pursuant to this goal, Richardson contacted the spokesperson for the Chicago Area Council of the BSA (“CAC”), Susan Teplinsky, and asked if the BSA would hire a gay man. Teplinsky, in accordance with the BSA’s employment policy concerning the hiring of homosexuals, responded “no way.”

The BSA’s current written employment policy was established in 1993 and states in pertinent part:

With respect to positions limited to professional Scouters or, because of their close relationship to the mission of Scouting, positions limited

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357. See id.
358. See id.
359. See id. The Explorer program is a coeducational program for young people ages 14 through 20. See id.
360. See id. at *4.
361. See id.
362. See id.
363. See id.
364. See id. at *4-5.
365. Id. at *5 (quoting Tr. Apr. 5, 1995, at 278).
366. See id.
367. Id.
to registered members of the [BSA], acceptance of the Declaration of Religious Principle, the Scout Oath and the Scout Law is required.

Accordingly, in exercise of its constitutional right to bring the values of Scouting to its youth members, [the BSA] will not employ atheists, agnostics, known or avowed homosexuals or others as professional Scouters or in other capacities in which such employment would tend to interfere with its mission of reinforcing the values of the Scout Oath and the Scout Law in young people.

The policy of the [BSA] is to comply with nondiscrimination laws to the extent that may constitutionally be applied to it.

In May, 1992, Richardson filed a complaint with the Chicago Commission on Human Relations alleging that the BSA’s employment policies violated the Chicago Human Rights Ordinance (“CHRO”). To eliminate a potential standing problem, Richardson sent a letter and his resume to the CAC indicating that he was gay and interested in an employment position. The CAC responded by sending Richardson a copy of the revised BSA employment policy regarding the hiring of publicly avowed homosexuals. The litigation continued and the CAC asserted, among other things, that the application of the CHRO violated its First Amendment right to freedom of associational expression.

An administrative hearing was held between April 5, 1995 and April 21, 1995. On February 21, 1996, the Commission issued its Final Ruling on Liability and Damages where it held that the CAC’s employment policy discriminates on the basis of sexual orientation in violation of the CHRO, and since opposition to homosexuality is not an expressive purpose of the CAC, its right to freedom of association would not be infringed. Furthermore, any slight infringement on this constitutional right is substantially outweighed by the government’s compelling interest in eradicating discrimination.

368. Id. at *9-*10.
369. See id. at *1-*2.
370. See id. at *6.
371. See id.
372. See id. at *1. The Chicago Area Council (“CAC”) also argued that it was exempt from the Chicago Human Rights Ordinance (“CHRO”) as a religious organization and that application of the CHRO would violate its right to freedom of speech. See id.
373. See id. at *2.
374. See id. at *1.
375. See id. The Commission also held that the CAC is not exempt from the CHRO as a religious organization and that the CAC’s right to freedom of speech is not violated. See id.
The constitutional argument of freedom of association can be raised in numerous contexts. While the more common scenario is the application of a state public accommodation law, the issue may also be raised in response to the application of an anti-discrimination employment law. Since Richardson sought and was denied employment, not simply membership as in Dale and Curran, the BSA’s constitutional defense was raised in the employment law setting.  

The Commission began its constitutional discussion by rejecting Hurley as binding and declaring the principles set forth in Jaycees and Rotary Club to be the applicable standards. The facts and holding of Hurley were summarized and then distinguished from the instant case. The Commission concluded that, unlike the selection of parade contingents, the selection of an employee “has little, if any, expressive qualities inherent in it.” In addition, the “peculiar” application of Massachusetts’ public accommodation law to the South Boston Parade was distinguished from the traditional regulation of discriminatory employment policies. Thus, the Commission concluded that while an organization may, pursuant to the right to freedom of association, exclude individuals with views contrary to its own beliefs, an organization’s right to expressive association is not absolute. The constitutional right will only protect an organization’s “expressive goals . . . from unwarranted governmental intrusion.” As applied to the instant action, “[i]nherent in the term ‘expressive goal’ . . . is the requirement that opposition to homosexuality be embodied in some writing or oral statement which is identified as a goal, philosophy, belief or value of Scouting and further it must be expressed as one of Scouting’s goals.”

As in Curran and Dale, the CAC argued that, as evidenced by the Scout Oath and Law and the terms “morally straight” and “clean,” the

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376. The Commission provides a detailed analysis of the CHRO’s applicability to the BSA. See id. at *23-*26. However, since the focus of this Note is primarily on freedom of association and secondarily on public accommodation statutes, the CHRO portion of the administrative opinion will not be addressed. What will be discussed at length is the Commission’s rationale for rejecting the CAC’s argument that application of the CHRO will violate its right to freedom of expressive association. Since the CAC’s right to intimate association was not addressed by the Commission, the assumption may be drawn that the right was not asserted.

377. See id. at *30.
378. See id. at *28-*30.
379. Id. at *30.
380. See id. at *29-*30.
381. See id. at *29.
382. Id.
383. Id. at *30.
exclusion of gays has always been an expressive purpose of the BSA. 384 The Commission, unconvinced by this argument, found that the opposition to homosexuality is not an expressive goal of the CAC or BSA and that the CAC’s anti-gay policy is nothing more than a discriminatory hiring policy. 385

The Commission rejected the CAC’s argument that the terms “morally straight” and “clean” found in the Scout Oath and Law illustrate the expressive goal of opposition to homosexuality. 386 The definitions of these terms, as provided in the BSA Handbook, do not contain any reference to sexual orientation. 387 While the CAC witnesses testified that they interpreted the terms to refer to being heterosexual, the Commission, not challenging their sincerity, concluded that the BSA leaders’ “personal interpretations have no basis in Scouting doctrine.” 388 The CAC countered by asserting that “only Scouting can speak for Scouting.” 389 However, the Commission also rejected this argument, stating that “an organization with a defined body of doctrine cannot just choose to interpret its goals differently from their stated meaning merely to justify a discriminatory hiring policy.” 390 Moreover, the leaders of the BSA can not attribute a discriminatory definition to the Scout Oath or Law when it does not possess such a meaning. 391

In addition to analyzing the CAC’s interpretation of the Scout Oath and Law, the Commission reviewed thousands of pages of BSA materials and noted that while the expressive beliefs and goals concerning patriotism, courage, and self reliance are contained throughout, nowhere in the literature could the Commission find heterosexuality as a goal to be instilled in BSA members. 392 The BSA’s purported expressive goal of opposing homosexuality was not included in its charter, bylaws, mission statements, annual reports, or handbooks, and no witness testified that as part of his Scouting experience he was taught the virtues of heterosexuality or the evils and immorality of homosexuality. 393 In fact, the Commission noted that the Scouting literature emphasized that discussions concerning sex should take place within the family because the

384. See id. at *31.
385. See id. at *30-*32.
386. See id. at *30-*31.
387. See id. at *31.
388. Id.
389. Id. at *31 (quoting Resp’t Reply Br. at 12).
390. Id. at *32.
391. See id. at *32.
392. See id. at *30.
393. See id. at *30-*31.
subject of sex "is not construed to be Scouting's proper area, and [because Scout leaders] are probably not well qualified to [discuss such matters]." The Commission rejected the revised 1993 written employment policy as a response to litigation and concluded that the only written expressive goal of opposing homosexuals was the 1978 internal memorandum that was not distributed throughout the BSA. This evidence alone was found to be insufficient to indicate that one of the CAC's expressive goals was the opposition to homosexuality.

At the core of the CAC's argument is the notion that were it required to employ homosexuals, its ability to express its views would be hindered. Finding that the CAC did not have the expressive goal of opposing homosexuality, the Commission held that applying the CHRO and mandating the employment of otherwise qualified homosexual individuals would not interfere with the CAC's expressive activities or hinder its ability to express its views. The CAC could still require its employees to communicate BSA policy as well as restrict the expression of their contrary views. The CAC, however, argued that the mere presence of a homosexual employee requires the abandonment of its stated belief that homosexuality is immoral. The Commission provided four grounds for rejecting this argument. First, it reiterated its finding that the BSA's anti-gay policy is a discriminatory employment policy and not an expressive goal. Second, it stated that the government often requires an employer to abandon its discriminatory practices. The very nature of anti-discrimination employment laws mandate changes in employer behavior. Third, it rejected the underlying assumption that an employee's homosexuality will be evident and known to all. Finally, the Commission employed the Supreme Court's balancing test and concluded that even if the application of the CHRO interferes slightly with the CAC's expressive activities, such interfer-

394. Id. at *31 (quoting Ex. R22 at 74).
395. The Commission did not discuss the 1991 or 1993 position statements, perhaps because they dealt with homosexual members rather than homosexual employees.
396. See id. at *34.
397. See id. at *34-37.
398. See id. at *34.
399. See id. at *35.
400. See id.
401. See id.
402. See id.
403. See id.
ence is justified by the city's compelling interest in the elimination of invidious discrimination.404

In reaching these conclusions, the Commission expressly rejected the California Appellate Court's rationale in Curran.405 The Curran appellate court emphasized Curran's motives for seeking adult membership and the influence the Scoutmaster and assistant Scoutmaster have on their Scouts.406 It concluded that an avowed homosexual assistant Scoutmaster would cause the Scouts to believe that homosexuality is morally straight and would increase the likelihood that they would engage in such conduct.407 Aside from noting the falsity of this conclusion,408 the Commission distinguished the instant case by pointing out that Scout Executives, unlike assistant Scoutmasters, are paid employees that have little direct contact with the Scouts.409 Moreover, it was noted that the Curran court "concluded that it was Curran's conduct and advocacy, rather than his status, that caused his exclusion."410 In the instant case, the rejection of Richardson's application for employment was based solely on his sexual orientation.411 Since the CAC was unable to avail itself of the constitutional defense of freedom of association, its anti-gay employment decisions were found by the Commission to be discriminatory and illegal under the CHRO.412

404. See id. at *35, *37-*40.
405. See id. at *35-37.
406. See id. at *35; supra Part IV.B. Curran "specifically wanted to [be in the Scouts]—because he so firmly believed personally in a homosexual lifestyle that there was, quote, not anything wrong with it and he wanted to make sure that other kids understood that." Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 222 (Cal. 1998) (quoting Timothy Curran, the plaintiff in the case) (alteration in original).
407. See Richardson, 1996 WL 734724, at *36.
408. The Commission stated:
   According to Dr. Bryant Welch, . . . ["a Harvard educated clinical psychologist who has been employed as senior policy advisor for the American Psychological Association since 1986"]; . . . the accepted research and literature in the scientific community accepts the fact that sexual orientation is most likely set early in life, prior to age six.
   Id. at *14. In addition, "Dr. Welch testified that studies have shown that children raised by gay parents are no more likely to identify as homosexual than those raised by heterosexual parents."
   Id. "With regard to the fear that homosexual [men] will molest [young boys]," Dr. Welch testified that "a study of predatory sexual behavior and pedophilia has shown that these types of behaviors are overwhelmingly characteristic of men who are heterosexual and insecure in their own sexual identities as heterosexual, rather than of men who are homosexual."
   Id.
409. See id. at *35.
410. Id. at *36.
411. See id.
412. See id. at *1-*2.
V. FREEDOM OF ASSOCIATION AND THE BOY SCOUTS OF AMERICA

Over the years the BSA has been involved in continuous litigation involving the exclusion of women and atheists. In almost every case the BSA asserts its constitutional right to freedom of association and although the rationale varies, courts usually find for the BSA. The litigation regarding the BSA’s anti-gay policy is changing this pattern. While superficially the BSA’s exclusion of homosexuals appears no different than its exclusion of atheists or women, a difference does exist and it lies within the judiciary—the courts are split as to whether the BSA’s constitutional right to intimate and/or expressive association allows them to exclude homosexuals. This lack of uniformity will ultimately lead to the steps of the United States Supreme Court. When it does, the Court should apply the *Jaycees* freedom of association test and conclude that the forced inclusion of homosexuals will not violate the BSA’s constitutional right to freedom of association.

To begin, Justice Kennard’s conclusion that *Hurley* is binding on a freedom of association analysis is simply incorrect. The holding in *Hurley* was based on the violation of the Council’s (the private parade organizers) freedom of speech.413 The brief discussion of freedom of association was unnecessary to the holding, rendering it conclusory dictum. The Court did not summarize the principles of the doctrine of freedom of association, nor did it discuss the factors of intimate association, the requisite impingement of the group’s expressive message, or the balancing test. The Court all but conceded that the case was decided on a freedom of speech analysis when it stated in its conclusion that its “holding ... rests not on any particular view about the Council’s message but on the Nation’s commitment to protect freedom of speech.”414

Assuming Justice Kennard is correct and the one paragraph discussion of freedom of association was not dictum but rather an alternative basis for the Court’s holding, *Hurley* can still be distinguished from a case involving the BSA’s anti-gay membership policy. While the marching unit selection process in *Hurley* was afforded constitutional protection on the basis that it was a symbolic exhibition of free speech, the membership selection processes in *Jaycees*, *Rotary Club*, and *New York Club Ass’n* were not afforded the same protection. In fact, the *Jaycees* Court explicitly rejected the Jaycees’ argument that the admission of women as full voting members would alter a symbolic message por-

414. *Id.*
trayed by the fact that women were not permitted to vote. This inconsistency illustrates that Hurley focuses on freedom of speech and Jaycees, Rotary Club, and New York Club Ass'n focus on freedom of association. Since the BSA's membership selection process is at issue, the test promulgated in Jaycees and clarified in Rotary Club and New York Club Ass'n governs the BSA's freedom of association argument.

A. Freedom of Intimate Association and the Boy Scouts of America

The right to intimate association presupposes deep attachments and high selectivity. While familial relationships exemplify the groups that are usually protected by this right, the Supreme Court stated that the right can protect other groups as well. The Court listed several factors to be explored in an intimate association analysis, however it has focused on the factors of selectivity, purpose, and size. As such, these factors will be applied to the BSA to determine if it is within the zone of privacy.

The membership criteria for the Boy Scouts is not highly selective. According to the Boy Scout Handbook, the selection of a Boy Scout member is based on three prerequisites; a Scout must: (1) be a boy who has completed the fifth grade, earned the Arrow of Light Award, or be between the ages 11 and 17; (2) find a Scout troop near his home; and, (3) complete the Boy Scout joining requirements which include understanding and agreeing to live by the Scout Oath, the Scout Law, the Scout motto, the Scout slogan, and the Outdoor Code. Although not

416. See id. at 619-20.
418. See New York State Club Ass'n v. City of New York, 487 U.S. 1, 12 (1988); Rotary Club, 481 U.S. at 545-47; Jaycees, 468 U.S. at 620-22.
419. See Jaycees, 468 U.S. at 620-22.
420. See BIRKBY, supra note 1, at 2. The joining requirements include: submitting a Boy Scout application and health history signed by a parent or guardian; repeating the Pledge of Allegiance; demonstrating the Scout salute, sign, and handclasp; tying the square knot; describing the Scout badge; completing the exercises in the BSA pamphlet How to Protect Your Children from Child Abuse: A Parent's Guide with a parent; and participating in a Scoutmaster conference. See id. at 4. The Scout motto is: "Be Prepared." The Scout slogan is: "Do A Good Turn Daily." Id. at 9. The Scout Outdoor Code provides:

"As an American, I will do my best to -
Be clean in my outdoor manners,
Be careful with fire,
Be considerate in the outdoors, and
Be conservation-minded."

Id. at 55.
included as a joining requirement, all Boy Scouts must also declare a belief in God. The prerequisites are not illustrative of a highly selective organization and, in actuality, the BSA almost never denies membership to a boy who meets the age requirement and rarely does it cast out a boy who fails to live by the Boy Scout ideals.

The selectivity of the BSA’s adult membership criteria is less clear. The BSA adult application vaguely states that “[t]he applicant must possess the moral, educational, and emotional qualities that the [BSA] deems necessary to afford positive leadership to youth.” Exactly how these determinations are made is not explained. The only concrete requirements provided are age, U.S. citizenship, and subscription to the Declaration of Religious Principle, Scout Oath/Promise and Law. Although there is no indication as to how readily the BSA accepts an adult volunteer, the adult membership criteria, while not as lenient as the youth membership criteria, is not overly selective. Thus, regardless of whether or not a court accepts the BSA’s argument that its adult membership criteria are restrictive and selective, the BSA as a whole is not a highly selective organization simply because more rigorous membership criteria are applied to a single component.

The BSA is not an exclusive group. Non-members may be invited to participate in troop meetings, and purchases from the Boy Scout retail store, including the Boy Scout Handbook and Scoutmaster Handbook, can be made by anyone. The only exception is that of the Boy Scout uniform, which can only be purchased by registered members. In addition, the BSA has described its challenge as a year round recruitment process to get as many qualified boys to try its “product.” One commentator has suggested that the absence of exclusionary policies and rules is due to the lack of interest from nonmembers. While this may be true, with the exception of the exclusivity as to who may

421. See Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1278 (7th Cir. 1993); Randall v. Orange County Council, Boy Scouts of Am., 952 F.2d 261, 266 (Cal. 1998); Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385, 406 (Kan. 1995).
422. See Varela, supra note 2, at 939-40.
423. Boy Scouts of America Adult Registration Application, supra note 204.
424. See id.
426. See BIRKBY, supra note 1, at 3; Varela, supra note 2, at 942.
427. See BIRKBY, supra note 1, at 567.
428. See Boy Scouts of America, The Scoutmaster Handbook 90-191 (1997) “[A]s one BSA spokesman has explained ‘I think of scouting as a product and we’ve got to get the product into the hands of as many consumers as we can.’” Dale, 706 A.2d at 281.
429. See Varela, supra note 2, at 942.
wear the Boy Scout uniform, the absence of exclusionary rules and the acceptance of limited nonmember participation leads to the conclusion that the BSA is not an exclusive private group.

The determination of whether the BSA's size warrants constitutional protection pursuant to the right to intimate association will depend upon which level of the organization's hierarchy—the patrol, the troop, the regional council or the national BSA—will be examined by the Court. The patrol is viewed as the way to get every boy involved in troop activities, and while much activity occurs within a patrol, the weekly meetings and monthly hikes and campouts are organized and conducted by the troop. In addition, advancement through the Boy Scout ranks must be overseen and approved by the Scoutmaster not the Patrol Leader. With regard to the regional council, it is primarily administrative; however, it offers training for adult Scout Leaders and organizes large events, such as camporees, for the numerous troops within its jurisdiction. Yet regardless of how much activity occurs at the different levels, the national BSA maintains control of the various groups in that the BSA's nationally established membership policies, established by the national BSA, are uniformly applied throughout the hierarchy. Since this fact is determinative, the focus should be on the national BSA's five million members, an amount far in excess of a small

430. The patrol is a group of three to eight Boy Scouts led by a Patrol Leader, a Boy Scout elected by the members of the patrol. See BIRKBY, supra note 1, at 10-11. Each patrol has a name, often an animal, its own flag, emblem and call—for example if the patrol's name is the Wolf Patrol, the Patrol's call is a howl. See id. at 10-11, 535-41. A troop is comprised of approximately thirty to forty boys, is the combination of a number of patrols, and is headed by a Scoutmaster. See id. at 11-12, 542-44; Varela, supra note 2, at 939. The area in which a troop is located is referred to as a district. See BIRKBY, supra note 1, at 546. The regional council oversees many districts and is run by a full time staff. See id. at 546.

431. The BSA explains this idea in the "Johnny Counts" section of the Scoutmaster Handbook:

A patrol is a small group—three to eight boys—and each boy counts. Each boy gets involved, even the shy boy and the lazy boy, because he has to. They need him. In a troop of 30 or 40 Scouts—and no patrols—Johnny would be just another face in a long, long line—a Johnny Who. But in a patrol, no matter how many boys in the troop, Johnny's friends know who he is, and what he can do, and why they need him. BOY SCOUTS OF AMERICA, supra note 428, at 33-34.

432. With the Scoutmasters' approval and participation, patrols may enjoy day hikes and other outdoor activities. On some occasions portions of troop meetings are set aside for individual patrols to meet. Patrols may also meet in addition to the weekly troop meeting. See BIRKBY, supra note 1, at 535-44.

433. See id. at 544.

434. See id. at 12.

435. See id. at 546.
intimate group.\textsuperscript{436} If, however, the Court de-emphasizes this fact and examines the regional council, whose membership can well exceed one thousand,\textsuperscript{437} or the troop, whose membership hovers around thirty boys,\textsuperscript{438} the size factor will remain unsatisfied; the membership at both levels exceeds that of the smallest Rotary Club which was not afforded intimate association protection. It appears that the BSA will only be able to satisfy the size variable by convincing the Court to examine the patrol group, a group of approximately ten boys whose "home [is] in the troop."\textsuperscript{439} However, satisfaction of one of the Court's many intimate association factors does not guarantee that the BSA will be afforded this constitutional protection.

Although the right to intimate association is not limited to family and marriage, the Court has been reluctant to apply the right to groups that do not possess at least some familial-like characteristics. The BSA has admitted that what draws young boys to its organization is the excitement of outdoor activities.\textsuperscript{440} While the organization tries to instill its ideals and foster a family-like atmosphere, the dynamics of the organization are not familial in that they are not private and intimate. The relationships that form within the BSA are not "the most attenuated of personal attachments,"\textsuperscript{441} however, affording the BSA constitutional protection under the right to intimate association would radically expand its scope and application.

\footnotesize{\textsuperscript{436} See Historical Highlights -1990's, supra note 201.  
\textsuperscript{437} See David A. Avila, Boy Scouts Seek Donations to Defray Litigation Costs, L.A. TIMES, Dec. 6, 1992, at B4 (estimating the number of scouts participating in the Orange County Boy Scouts to be 90,000); Wilma Norton, More Kids Joining Boy Scouts' Ranks, ST. PETERSBURG TIMES, Oct. 1, 1997, at 20 ("In Pinellas and West Pasco, the area covered by the West Central Florida Boy Scout Council, the number of Scouts now is approaching 11,000."); Ross Werland, Scout Salute, CHICAGO TRIB., Feb. 6, 1994, at 1 ("[T]he number of boys in the Scouting program of the Northeast Illinois Council, extending from Evanston to the Wisconsin border, has swelled over the last 10 years to 15,200 . . ."); see also Stewart Ain, Plan to Merge Scouts Upsets Some Leaders, N.Y. TIMES, Apr. 25, 1999, at 3 (explaining that the merger between the Nassau County Council, whose membership is approximately 12,500, with the Suffolk County Council, whose membership is nearly 21,000, has been proposed); Anne Driscoll, Noteworthy, BOSTON GLOBE, Oct. 25, 1998, at 2 (noting that the Yankee Clipper Council, which serves 9,500 young people).  
\textsuperscript{438} See Varela, supra note 2, at 939.  
\textsuperscript{439} BIRKBY, supra note 1, at 10.  
\textsuperscript{440} See BOY SCOUTS OF AMERICA, supra note 428, at 3, 69.  
\textsuperscript{441} Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).}
B. Freedom of Expressive Association and the Boy Scouts of America

An organization seeking constitutional immunity under the right to expressive association must show that it is involved in some type of expressive activity, and that the forced inclusion of the excluded group would alter the existing members’ ability to express their views, pursue their goals, or engage in their expressive activities. In short, does the presence of the excluded individuals compromise the expressive purpose of the group? Yet even if an organization answers this question affirmatively, it may still fall within the regulatory ambit of a state public accommodation law. Infringement of the organization’s right to expressive association is justified if the law is the least restrictive means to effectuate the state’s compelling interest in the elimination of discrimination. The BSA is an organization that has sought this constitutional insulation from the forced inclusion of the “three Gs.” While the BSA’s right to expressive association is applicable and often successful in the exclusion of girls and atheists, the applicability flounders in the context of the inclusion of homosexuals.

As a preliminary matter, there is no question that the BSA is involved in many expressive activities. From its inception in the early 1900’s, the BSA has always strived to be more than a tutor for tying knots and pitching tents, though these are important aspects as well. Rather, the BSA has sought to teach and instill the ideals of courage, patriotism, self-reliance, citizenship and trustworthiness, to name a few. The teaching of the Scout Oath, Law, Motto and Slogan, as well as the troop discussions of these positive traits, all constitute constitutionally protected expressive activities.

However, for a successful expressive association argument, the BSA must show that including homosexuals undermines its expressive purpose. In an effort to satisfy this burden, the BSA has pointed to the terms “morally straight” and “clean” and has produced four documents

442. See supra Part III.
443. See Whitman, supra note 7, at 50.
444. See Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1278 (7th Cir. 1993); Randall v. Orange County Council, Boy Scouts of Am., 952 P.2d 261, 266 (Cal. 1998); Yeaw v. Boy Scouts of Am., 64 Cal. Rptr. 2d 85, 93 (Cal. Ct. App. 1997), review granted and opinion superseded by 942 P.2d 415 (Cal. 1997), and review dismissed, cause remanded by 960 P.2d 509 (Cal. 1998); Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm’n on Human Rights and Opportunities, 528 A.2d 352, 360 (Conn. 1987); Seaboun v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385, 406 (Kan. 1995).
all stating that homosexuals are excluded from Scouting. This evidence is unconvincing. Nowhere in the definitions of “morally straight” or “clean” are there references to sexuality. In fact, the only mention of sexuality is contained in the Boy Scout Handbook, which advises scouts to be sexually responsible to women, children, their beliefs, and themselves. Scouts are told to discuss sexual issues with their religious leaders, parents, teachers, and Scoutmasters. The addition of Scoutmasters to this list is a recent change to the original BSA policy which was to defer conversations and questions regarding sex to the Scout’s parents and/or religious leaders. Perhaps this change was made to bolster the argument that since the BSA views homosexuality as immoral, a homosexual Scoutmaster or assistant Scoutmaster will be unable to fulfill his potential duties and relate to the sexual issues of the young Scout. In any event, heterosexuality is not encouraged and homosexuality is not explicitly condemned.

The use of the 1978 internal memorandum, the 1983 written memorandum, and the 1991 and 1993 position statements as evidence that one of the BSA’s fundamental expressive purposes is the immorality of homosexuality and the exclusion of gays is weak. The 1978 memorandum was distributed only to a select group of Boy Scout leaders and the 1983 written statement, as well as the position statements, were drafted in the wake of the Curran and Dale litigations. However, giving the BSA the benefit of the doubt and assuming the timing of the statements were a coincidence, the complete absence of this policy from 1910 through 1978 creates some doubt as to its fundamental nature. Comparatively, the emphasis on the importance of an all male organization and a belief in God are documented back to the incorporation of the BSA. Hence, the argument that the inclusion of women and atheists runs contrary to the views that initially brought at least some of the BSA members together is valid. This premise can not be applied to the BSA’s exclusion of gays. The failure to disseminate this view throughout the BSA hierarchy and amend the organization’s charter, by-laws, rules and regulations, handbooks, and even applications for membership to in-
clude the anti-gay policy simply undermines the BSA’s argument that the policy is a fundamental expressive purpose of the organization.

The three aims of the BSA, as described in the Scoutmaster Handbook, are: building character; fostering citizenship; and developing fitness. To accomplish these goals the BSA emphasizes the ideals in the Scout Oath and Law as well as teaching outdoor survival skills. The BSA maintains that the inclusion of homosexuals impinges upon its ability to carry out these goals yet they provide no explanation as to how. The BSA has not explained how a homosexual, former Eagle Scout, assistant Scoutmaster is less competent than a heterosexual assistant Scoutmaster in teaching the importance of courage and self-reliance or how to tie the square knot or use a compass. In short, the BSA has not shown the requisite nexus between their exclusionary policy and their expressive purposes. The organization simply states that homosexuality conflicts with the BSA’s fundamental ideals and, pursuant to its members’ right to expressive association, it has the right to “exclude individuals who do not share the views that [its] members wish to promote.”

In response to this argument the Dale court noted the BSA’s inconsistent application of the expulsion of individuals with views contrary to those that its members wish to promote. The BSA has not expelled sponsors or members who publicly criticize its anti-gay policy. An example of the BSA’s disparate treatment is the case of Steven Cozza of Petaluma, California.

Steven Cozza is a 12 year old active Boy Scout who has recently completed the requirements for Eagle Scout. He has publicly declared that the BSA’s anti-gay policy is discriminatory and contrary to the ideals of the Scout Law. He stated:

The Scout Law says a Scout should be kind. He should treat others as he would want to be treated. I don’t know anyone who wants to be discriminated against the way the [BSA] discriminates against gays. My dad and I were told we can’t even bring this issue up at our meeting with other Scouts in our troop.
Cozza and his father, an assistant Scoutmaster, have not been expelled from the BSA and yet the BSA maintain that its members view homosexuality as immoral. Perhaps the more appropriate question is: Do the five million members believe this, or is it the opinion of the BSA leaders?

The final aspect of an expressive association analysis is found in the Court's balancing test. Assuming that the BSA can prove the connection between its anti-gay policy and expressive purposes, it may still be forced to comply with the public accommodation law and include homosexuals. This, however, is entirely based on whether a court will find the elimination of the BSA's exclusionary policy a compelling state interest.

In Jaycees the Supreme Court noted two types of compelling state interests. The first was ensuring equal access to the goods and services provided by the Jaycees. Specifically, by virtue of the Jaycees' discriminatory policies, women were being denied access to the intangible goods and services of leadership skills, employment promotions, and business contacts. The second compelling state interest was eliminating and preventing the "stigmatizing injury" that results from exclusionary policies based on "archaic and overbroad assumptions about the relative needs and capacities of the sexes." The severity of the stigmatizing injury caused by exclusionary policies varies with the circumstances and is often subjective.

Given the nature of the BSA and the activities it conducts, it is unlikely that a court will find the denial of access to BSA services a compelling state interest. High school students maintain that membership in the BSA, especially as an Eagle Scout, is viewed positively by college admission boards, and although "networking" may occur during large BSA events such as the Jamborees, these goods and services are tenuous and do not resemble those offered by the Jaycees and Rotary Clubs. As

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456. See E-mail Interview with Scott Cozza, supra note 453 (on file with the Hofstra Law Review).
458. See id. at 626.
459. Id. at 625.
460. Interview with Scott Goodman, eleventh grade high school student, in Searingtown, N.Y. (Jan. 5, 1999) (on file with the Hofstra Law Review). The California trial court rejected this argument and the California Supreme Court addressed it in Curran in a footnote. The California Supreme Court stated that "from the evidence presented at trial the trial court found that participation in scouting does not enhance 'a Boy Scout's chances of getting into the college of his choice.'" Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 228 n.11 (1998).
one commentator notes: “Even a bridge club in which little is related other than tasteless jokes may occasionally spawn a business arrangement. Yet, as this example illustrates, it surely overstates the equal access interest to characterize it as compelling with respect to every organization.”

The more persuasive argument is that the BSA’s anti-gay policies create a stigmatizing injury to homosexuals. The BSA is excluding homosexuals based on the “archaic and overbroad assumption” that homosexuality is immoral. Although not mentioned explicitly, an additional possible reason for the exclusion of gays is based on the even more “archaic and overbroad assumption” that homosexual Scout leaders will molest the Scouts. The BSA’s exclusionary policy not only compromises the dignity and self-worth of homosexuals, it “reinforces the false notion that it is unsafe to have homosexuals around young boys.”

Categorizing the elimination of these discriminatory beliefs as a compelling state interest depends on whether the courts view discrimination against homosexuals as invidious and harmful as discrimination based on race, gender, or religion. One commentator notes that “[t]he forced integration of the BSA matters precisely because the integration of the BSA is trivial.” Perhaps this was said when the first woman or the first black man sought admission to an organization with exclusionary policies. The integration of the BSA matters precisely because the elimination of discrimination is important.

VI. CONCLUSION

The constitutional right to freedom of association does not insulate the BSA from state public accommodation laws. Though it maintains that homosexuality conflicts with its expressive purposes and its mem-

464. Frank, supra note 2, at 36.
465. Varela, supra note 2, at 955.
bers’ expressive views, the real issue is the fear of child molestation.\textsuperscript{466} The BSA has not said this. Not only is it extremely politically incorrect, but one can not exclude individuals for crimes they have not committed or for events that may or may not occur. Nevertheless, this fear exists in the minds of parents and acts as the impetus for the exclusionary policies.\textsuperscript{467}

No one is denying that the BSA is an organization that has many positive attributes. It facilitates friendships, it attempts to instill the ideals of courage, self-reliance, and citizenship, and above all, it teaches boys how to pitch a tent and tie a sheepshank knot. Yet, it discriminates against homosexuals. The BSA’s anti-gay policy not only excludes an entire class of individuals, it sends a mixed message to its members.

The Scout Law states a Scout is trustworthy, “\textit{Honesty is a part of his code of conduct}.”\textsuperscript{468} Except if the Scout is gay. Since the BSA only excludes known and avowed homosexuals, so long as a gay Scout lies to himself, his friends, and his family, he should be able to maintain his BSA membership. The Scout Law also provides that a Scout is brave, “\textit{He has the courage to stand for what he thinks is right even if others laugh at him or threaten him}.”\textsuperscript{469} Except if he's gay. If a gay Scout musters up the courage to admit his homosexuality he is expelled from the BSA. While this dichotomy may make sense to the BSA leaders up high, it makes no sense to James Dale, Timothy Curran, Keith Richardson, Steven Cozza, and the rest of us down below.

\textbf{POSTSCRIPT}

On August 4, and August 12, 1999, respectively, as this issue was going to press, the Dale\textsuperscript{470} and Richardson\textsuperscript{471} decisions were both affirmed. A unanimous New Jersey Supreme Court concluded that the BSA, as a public accommodation, violated the LAD by excluding James Dale from membership.\textsuperscript{472} The Circuit Court of Cook County, Illinois held, in part, that the BSA’s employment policy, which was to deny

\begin{itemize}
\item \textsuperscript{466} See supra note 463.
\item \textsuperscript{467} See Peggy O’Crowley, Gay Leader Challenges the Scouts; State High Court Weighs Exclusion, TIMES-PICAYUNE, Feb. 7, 1999, at 17 (stating that some parents would remove their sons from the BSA if they knew the scoutmaster was gay); Thompson, supra note 463, at 6.
\item \textsuperscript{468} BIRKBY, supra note 1, at 553.
\item \textsuperscript{469} Id. at 558.
\item \textsuperscript{470} 706 A.2d 270 (N.J. Sup. Ct App. Div. 1998); see supra Part IV.A.
\item \textsuperscript{471} No. 92-E-80, 1996 WL 734724, at *1 (Chi. Comm’n Hum. Rel. Feb. 21, 1996); see supra Part IV.C.
\end{itemize}
employment to known or avowed homosexuals, violated the CHRO.\textsuperscript{473} In addition, and of primary concern for the purpose of this Note, both courts found that the forced inclusion of homosexuals does not violate the BSA’s members’ right to freedom of intimate and/or expressive association. Although both courts addressed the application of their respective state anti-discrimination laws to the BSA, in the interest of brevity, I shall only discuss the courts’ analysis of the BSA’s purported right to freedom of association.

Dale v. Boy Scouts of America
Revisited

The New Jersey Supreme Court’s analysis of the BSA’s constitutional argument began with an examination of the Supreme Court’s rules governing an organization’s right to freedom of association. The court summarized the \textit{Jaycees} and \textit{Rotary Club} holdings and found that “‘size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship’”\textsuperscript{474} were factors to be considered in determining whether “a protectable intimate association right [was] present.”\textsuperscript{475} Applying these factors, the court found that the BSA’s large, nonselective membership, inclusive purpose, and open invitation to nonmembers to attend BSA meetings and functions, established that the BSA is not “‘sufficiently personal or private to warrant constitutional protection’ under the freedom of intimate association.”\textsuperscript{476}

Once again, the BSA maintained that the court should evaluate its freedom of intimate association claim by examining the local troop rather than the national organization.\textsuperscript{477} The court explained that since the size of a troop is greater than the smallest Rotary Club, neither level grants a right of freedom of intimate association; however, because the argument is stronger at the troop level, the court applied the remaining intimate association factors to the local troop.\textsuperscript{478} Nonetheless, the BSA’s argument was unsuccessful. The unselective nature of the BSA, specifically, the fact that the BSA has stated that “any boy” is welcome, the

\textsuperscript{473} See Richardson v. Chicago Area Council of the Boy Scouts of Am., No. 96 CH 03266, at 1, 9-10 (Ill. Cir. Ct. Cook County Aug. 12, 1999) (unpublished opinion) (on file with the Hofstra Law Review).

\textsuperscript{474} Dale, 1999 N.J. LEXIS 995, at *85 (quoting Board of Dirs. v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987)).

\textsuperscript{475} Id.

\textsuperscript{476} Id.

\textsuperscript{477} See id. at *85-*86.

\textsuperscript{478} See id. at *86.
absence of an upper limit on the number of members, and the inclusive
purpose of the BSA which is to “ensure that its membership ‘is repre-
sentative of all of the population’” led the court to conclude that the
BSA may not maintain a viable intimate association argument.479

The court’s expressive association argument was somewhat more
in depth. The requisite nexus between a group’s exclusionary policy and
expressive activities was explained, and the Jaycees balancing test was
summarized.480 The court acknowledged that the BSA expresses a belief
in moral values, however, it remained unconvinced that a “shared goal
of [the BSA] is to associate in order to preserve the view that homo-
sexuality is immoral.”481 Therefore, the court concluded that the appli-
cation of the LAD does not violate the BSA’s members’ right to fre-
dom of expressive association because it “does not have a significant
impact on [the] BSA members’ ability to associate with one another in
pursuit of shared views.”482

Unlike the Superior Court of New Jersey and the Chicago Com-
mission on Human Relations, the New Jersey Supreme Court only ex-
amined the Scout Oath and Law in determining whether the BSA
“associates for the expressive purpose of advocating the immorality of
homosexuality.”483 The court dismissed the BSA’s 1978 internal memo-
randum in a footnote “observ[ing] that the position paper was not dis-
seminated to [BSA] members, and declin[ing], therefore, to view it as
representative of the members’ shared views.”484 The remaining position
statements and other written documents were criticized for being issued
after Dale’s expulsion; “[t]he self-serving nature of these papers is ap-
parent.”485 With regard to the argument that the terms “morally straight”
and “clean” represent the BSA’s view that homosexuality is immoral,
the court rejected that proposition stating the terms do not facially ex-
press any stance on sexuality, much less the opinion that homosexuality
is immoral.486

An additional factor the court emphasized was the disparity be-
tween the BSA’s litigation stance on homosexuality and the organiza-
tion’s inclusion of sponsors and members with opposing views.487

479. Id. at *85-*87.
480. See id. at *88-*92.
481. Id. at *93-*94.
482. Id. at *92.
483. Id. at *94 n.12.
484. Id.
485. Id.
486. See id. at *95-*96.
487. See id. at *101-*03. The BSA has renewed the charters of sponsors whose positions on
Moreover, the court found it difficult to reconcile the BSA's anti-gay policy with its basic philosophy and goal of open membership. The BSA's discriminatory exclusion of gays clearly contradicts its commitment to having a "diverse and representative membership," as well as its objective which is to see "that all eligible youth have the opportunity to affiliate with the [BSA]."\textsuperscript{488} Concluding that the BSA's expulsion of Dale was based on prejudice rather than a unified expressive position, the court proceeded to apply the \textit{Jaycees} balancing test.

Given the pervasiveness of bigotry and New Jersey's commitment to protecting the victims of invidious discrimination, the court found that the LAD serves a compelling state interest and that its application "'abridges no more speech or associational freedom than is necessary to accomplish that purpose.'"\textsuperscript{489} Therefore, even if Dale's participation impinges the BSA's expressive purpose, the "'infringement is justified because it serves ... [New Jersey's] compelling interest in eliminating discrimination' based on sexual orientation."\textsuperscript{490}

The issue of whether \textit{Hurley} is binding as a freedom of association case or distinguishable as a freedom of speech case was not addressed by the court. Although the Superior Court held that \textit{Hurley} was inapplicable because it was a freedom of speech case, the Supreme Court discussed \textit{Hurley} under a separate section entitled "Freedom of Speech."\textsuperscript{491} Nonetheless, after summarizing the facts and holding of the case, the court found \textit{Hurley} distinguishable on factual grounds.\textsuperscript{492} It held that the position of a gay scout leader was not equivalent to a gay group marching under its own banner in a parade.\textsuperscript{493} In addition, unlike a parade where the marchers are making some sort of collective point, Dale's participation in the BSA was not to make a point on homosexuality.\textsuperscript{494} Dale continues to seek admission because he respects and believes in the organization.\textsuperscript{495} Unfortunately the sentiment is not shared; the BSA plans to appeal the New Jersey decision to the Supreme Court of the

\footnotesize{the morality of homosexuality differ from those of the BSA. See id. at *97 n.13.}

\textsuperscript{488} \textit{Id.} at *101-02.
\textsuperscript{489} \textit{Id.} at *109 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984)).
\textsuperscript{490} \textit{Id.} (quoting Board of Dirs. v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987)) (alterations in original).
\textsuperscript{491} \textit{See id.} at *110.
\textsuperscript{492} \textit{See id.} at *112.
\textsuperscript{493} \textit{See id.}
\textsuperscript{494} \textit{See id.} at *113 (citing \textit{Hurley} v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568 (1995)).
\textsuperscript{495} \textit{See id.}
United States with the hope that the Court will endorse its discriminatory behavior and classify it as a valid constitutional right.496

Richardson v. Chicago Area Council of the
Boy Scouts of America
Revisited

In affirming the Commission’s holding, Judge Stephen Schiller summarily rejected the BSA’s constitutional argument.497 At the beginning of his opinion, Judge Schiller noted that a trial court’s standard of review for administrative findings is limited.498 Administrative conclusions of fact and law “must be accorded substantial weight and deference,” however, when constitutional issues are implicated the trial judge “must independently decide whether the record is sufficient to warrant a decision’s impact on those interests.”499 Consistent with this premise, Judge Schiller deferred to two of the Commission’s findings: (1) the importance of heterosexuality is neither a goal of the CAC nor a message that the organization seeks to disseminate; and (2) the CAC’s general lack of selectivity in its membership policies undermines the contention that the group is a “‘distinctly private organization’ entitled to the claimed constitutional protection.”500 Moreover, Judge Schiller noted that the record supported the Commission’s conclusion that the CAC does not associate “to express themselves sexually or to discuss sex.”501

While the court concluded that the CAC’s reliance on Hurley was misplaced, the basis for distinguishing Hurley was not fully explained.502 Finally, Judge Schiller noted the recent Dale decision by the New Jersey Supreme Court and concluded that “[t]he Commission’s determination in this respect is supported by the evidence in the record and consistent with the Dale court’s determination.”503

The CAC and national BSA expressed their disappointment in the Circuit Court ruling and stated their intentions to appeal the decision.504


498. See id. at 2.

499. Id.

500. Id. at 6.

501. Id. at 5.

502. See id. The issue of whether Hurley governs freedom of speech cases or freedom of association cases was not addressed.

503. Id. at 6

504. See Frank J. Murray, Court Again Rules Against Scouts on Gays, WASH. TIMES, Aug.
Instead of expending time and energy in the preparation of an appellate brief, the BSA ought to consider what the courts are saying about its policies. "The courts' collective message to the [BSA] is powerful, clear and unmistakable[:]" the BSA's discriminatory exclusion of homosexuals will no longer be tolerated.\(^5\)

\textit{Marissa L. Goodman}*