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ANOTHER CHAPTER IN FIRST AMENDMENT JURISPRUDENCE: THE RIGHT TO EXCLUDE BASED ON SEXUAL ORIENTATION

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I. INTRODUCTION

Historically, the First Amendment has been regarded as a fundamental and essential right, preserving a person's liberty to speak and express herself without the threat of criminal punishment, censorship, or undue abridgement over the content of her message.[1] Indispensable to the First Amendment has been the right to associate with others to engage in protected expression, and to decide with whom one wishes to join in that pursuit, free from state interference.[2] This guarantee has become popularly known as the freedom of association and has been recognized by the courts as an equally important constitutional right.[3]

The First Amendment, however, is not absolute, particularly in the context of associational rights.[4] The state has robustly challenged through public accommodation statutes and anti-discrimination laws the right of people, especially in the guise of private organizations, to decide without impediment who may join them for expressive activities and private relationships.[5] An enormous tension has arisen between the individual's right to declare with whom she desires to associate and not to associate, and the compelling state interest to bestow upon every person the rights to equal benefit and enjoyment in a society unencumbered by prejudice and hatred.[6] Recently, this remarkable tension has sparked great controversy over the First Amendment rights of one such organization, the Boy Scouts of America.[7] A respected organization rich in tradition, the Boy Scouts has claimed an exclusive right to deny membership on the basis of sexual orientation.[8] A firestorm of debate has led to much litigation, and now finds itself at the pinnacle of its explosive rise to seek justice—the United States Supreme Court.

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1. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance."

2. Ann H. Jameson, Roberts v. United States Jaycees: *Discriminatory Membership Policy of a National Organization Held Not Protected by First Amendment Freedom of Association*, 34 CATH. U. L. REV. 1055, 1055 (Summer 1985).

3. Roberts v. United States Jaycees, 468 U.S. 609 (1984). *See also* NAACP v. State of Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

4. *Roberts*, 468 U.S. at 623.

5. Marissa L. Goodman, *A Scout is Morally Straight, Brave, Clean, Trustworthy . . . And Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825, 826-35 (Summer 1999).

6. *Id.* at 834-35.

7. *Id.* at 828.

8. *Id.*

II. THE FREEDOM OF ASSOCIATION

A. Early Development

The freedom of association is the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[9] It has been intimated that this right is so significant that the freedoms of speech, religion, assembly, and petitioning the government for the redress of grievances would not stand alone without a corresponding right to collectively join together as a group to attain these objectives.[10] Without question, the essence of human nature is to form communities where people can share similar ideas and beliefs and establish their own identity.[11] Only through the freedom of association can this sense of identity be preserved.

This right of association, however, did not immediately appear at the forefront of First Amendment protection. In fact, the First Amendment does not even specifically allude to any right of association.[12] It was not until 1958 that the Supreme Court finally recognized it as a First Amendment guarantee in *NAACP v. Alabama ex rel. Patterson*.[13] The Court declared that the state could not force the NAACP to disclose the names and addresses of its members.[14] Such disclosure would infringe upon the members' freedom of association, expose them to various economic harms, physical threats, and public scorn, and affect their ability to "engage in association for the advancement of beliefs and ideas."[15] Exposing the group to such harm would impose restraints on "[e]ffective advocacy of both public and private points of view, particularly controversial ones," which the court unequivocally determined to be "enhanced by group association."[16]

After *Patterson*, the Supreme Court continued to shape the contours of this fundamental right, identifying the means by which it could be abridged.[17] This included such governmental acts as exacting penalties or denying certain privileges and benefits to members of a disfavored organization,[18] mandating the disclosure of a group's membership lists or a person's association with a group that is the target of hostility[19] and interfering with the internal organization or essen-

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9. *Roberts*, 468 U.S. at 622.
10. *Id.*
11. Goodman, *supra* note 5, at 833.
12. Jameson, *supra* note 2, at 1055, 1059-60.
13. NAACP v. State of Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).
14. *Id.*
15. *Id.* at 460-63. The Court also held that to justify an impairment of this liberty interest, the state had to establish a sufficient compelling interest to support the restrain on the protected right of association.
16. *Id.* at 460.
17. Jameson, *supra* note 2, at 1061-66.
18. *Id.* at 1061 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 925 (1982) (imposing liability for presence at weekly NAACP meetings); Healy v. James, 408 U.S. 169, 175-76 (1972) (denying campus recognition of student group wishing to form local chapter of a student political organization because its "philosophy was antithetical to the school's policies")).
19. Jameson, *supra* note 2, at 1061 (citing Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 89 (1982) (requiring political candidate to disclose names and addresses of campaign contributions and recipients of campaign disbursements); Shelton v. Tucker, 364 U.S. 479, 480 (1960) (requiring teachers to report every organization they were members of as a condition of employment)).

tial activities of a group.[20] These governmental restraints all had the effect of impairing the group's ability to express its collective voice.[21] As in *Patterson*, these decisions placed the burden on the state to demonstrate a compelling interest that would warrant such intrusive governmental action.[22]

Ultimately, the Court faced the question whether the freedom to associate necessarily presumed a freedom not to associate, and how this right could be reconciled with social equality.[23] In *Evans v. Newton*, the Court formulated the principle that, absent state-sponsored inequality, there was a "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."[24] Based on this principle, the Court declared that a private golf club's ability to restrict membership based on race was essential to freedom of association.[25] In *Moose Lodge No. 107 v. Irvis*, the Court similarly upheld a private club's right to discriminate on the theory that the grant of a liquor license did not constitute state action to trigger the shield of equal protection.[26] There was a crucial distinction between *state* discriminatory conduct, which was constitutionally prohibited under the Fourteenth Amendment, and discriminatory action by purely *private* organizations, which escaped the grasp of equal protection and was constitutionally protected by the First Amendment.[27]

In contrast, the Court in *Runyon v. McCrary* refused to uphold a private right to discriminate when challenged by a specific statute whose purpose was to guarantee equal access.[28] A private school that denied admission on the basis of race was sued under section 1981 of the Civil Rights Act of 1866, which proscribed racial discrimination in the making and enforcing of a contract.[29] Finding that the statute's scope extended to racial discrimination by schools, the Court conceded a right among parents to espouse segregation in schools, if that was their belief.[30] This did not, however, guarantee them a constitutional right to deny admission based on race.[31] The Court noted that the parents could still promote their message, even in the absence of a discriminatory policy by the school.[32] The decision illustrated how freedom of association did not necessarily entail a right to discriminate and to deny equal opportunity to others, especially when confronted with important legislation.[33] The effect of such legislation was not to

20. Jameson, *supra* note 2, at 1061 (citing Cousins v. Wigoda, 419 U.S. 477 (1975) (state attempted to interfere with the internal structure and organizations of the National Democratic Party by requiring election of certain delegates to the Democratic Convention)).
21. Jameson, *supra* note 2, at 1065.
22. *Id.* at 1060-65.
23. *Id.* at 1061-66.
24. Evans v. Newton, 382 U.S. 296, 298 (1966).
25. *Id.* at 299.
26. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972).
27. *Id.* at 172.
28. Runyon v. McCrary, 427 U.S. 160, 163-76 (1976).
29. *Id.* at 163-64.
30. *Id.*
31. *Id.* at 175-76.
32. *Id.* at 176.
33. *Id.*

impair the group's right to continue to advocate its view.[34] This transition marked the beginning of the tension between association and equality, and paved the way for a landmark decision.

B. The Modern Approach

The ever-growing tension between the fundamental rights of equality and association necessitated a deeper analysis of the scope of the freedom of association. In the early 1980s, another discriminatory policy led to a crucial Supreme Court decision.[35] The United States Jaycees was a non-profit membership corporation that expressly excluded women from regular membership and was limited to men between the ages of eighteen and thirty-five.[36] Those who were not eligible for regular membership, particularly women and older men, could only obtain associate membership, which did not carry with it the right to vote, hold a local or national office, or take part in leadership training and awards programs.[37] When the Minneapolis and St. Paul chapters of the Jaycees violated the organization's bylaws by including women as regular members, the president threatened to revoke their charters.[38] In due course, the two chapters brought discrimination charges under the Minnesota Human Rights Act, and the Jaycees responded by commencing an action challenging the Act as violative of, among other things, its freedom of association.[39]

In *Roberts v. United States Jaycees*, the Supreme Court held that the Jaycees' freedom of association would not be violated if it were required to admit women as regular members.[40] It found that the freedom of association encompassed a right of intimate association and a right of expressive association.[41] Intimate association pertained to the freedom of choosing and entering into highly personal and intimate relationships without intrusion by the state.[42] This protected the individual's right to affiliate herself with another person in order to define her identity and share ideas, beliefs, and other personal aspects.[43] The Court said that such associations were characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[44] Expressive association was the freedom to join with others in a group effort to engage in activities that were protected by the First Amendment.[45] The Court stated, however, that an infringement on this right could be "justified by regulations adopted to serve compelling

34. *Id.*
35. *Id.*
36. Roberts v. United States Jaycees, 468 U.S. 609, 613 (1984).
37. *Id.*
38. *Id.* at 614.
39. *Id.* at 614-15.
40. *Id.* at 621-29.
41. *Id.* at 617-18.
42. *Id.*
43. *Id.* at 618-19.
44. *Id.* at 620.
45. *Id.* at 618, 622-23.

state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[46]

The Court found that the Jaycees was not protected by a right of intimate association because its local chapters were large and unselective groups, which aside from age and sex, did not use any special criteria for admitting its applicants.[47] Furthermore, the chapters went out of their way to actively recruit new members.[48] Regular members often participated with women in various meetings, projects, and social functions, negating any sign of seclusion.[49] On the other hand, the Court conceded that by requiring the Jaycees to admit women, the statute abridged its right of expressive association by forcing the group to accept members it did not wish to associate with, thus "impair[ing] the ability of the original members to express only those views that brought them together."[50]

Nevertheless, the Court concluded that such an infringement was warranted by Minnesota's compelling interest in eliminating sex discrimination and serious social and personal harm.[51] In addition, the statute did not relate to expression in any way, but rather to equal access.[52] There was no indication, aside from stereotypical notions about women, that admitting them as regular members would have the effect of changing the group's views or philosophy which had nothing to do with gender.[53]

The articulation established by *Jaycees* was followed by the Court in two subsequent decisions. In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court rejected Rotary International's contention that forcing its private clubs to admit women would interfere with its members' freedom of association.[54] The variation in club size from less than twenty to over 900 members, the policy of reaching out to business and professional leaders from all occupations in order to reflect a diverse community of interests, and the involvement of business associates and competitors, including women, in the organization's regular activities, did not depict "the kind of intimate or private relation that warrants constitutional protection."[55] Similarly, accepting women as regular members would not change its message of "humanitarian service, high ethical standards in all vocations, good will, and peace," nor would it prevent it from continuing to open its doors to leading professionals from different communities, which positively included women.[56] Moreover, any impediment on expressive association was warranted by the legitimate interest in assuring equal access to women.[57]

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46. *Id.* at 623.
47. *Id.* at 621.
48. *Id.*
49. *Id.*
50. *Id.* at 623.
51. *Id.* at 623-25.
52. *Id.*
53. *Id.* at 623-28.
54. Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545-50 (1987).
55. *Id.* at 546-47.
56. *Id.* at 548-49.
57. *Id.* at 549.

A year later, the Court declined to sustain a First Amendment challenge against a New York anti-discrimination statute by a conglomerate of private clubs.[58] Each club had a minimum of 400 members, with some involving nonmembers in meetings, commercial transactions and business relationships.[59] The statute did not require the clubs "to abandon or alter" any protected activities, such as the views they wished to convey.[60]

III. THE BOY SCOUTS OF AMERICA

The Boy Scouts of America is another organization that has maintained the freedom to decide without interference to whom it would open or close its doors of membership.[61] In the past, the Boy Scouts had declared a right to exclude individuals based on religion and sex.[62] The Boy Scouts also held as embedded in its tradition the right to exclude homosexuals.[63] Two interesting state cases warrant examination, both of which illustrate the tension between association and equality, and reflect the difficulty in reaching a consistent solution.

A. Dale v. Boy Scouts of America

The Boy Scouts has been a part of American tradition since the start of the twentieth century.[64] This organization seeks a diverse group of youths and adults to join together in a mission "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."[65] The guiding principles that propel this mission are found in the Scout Oath, which provides: "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."[66] The Scout Law also frames the values to which a scout must adhere, including, among other things, an aspiration to be "clean."[67]

James Dale had been a member of the Boy Scouts since he was eight.[68] Over the years, Dale earned great respect for his achievements and leadership.[69] He ultimately sought adult membership, only to be denied when it became public knowledge that he was gay.[70] Dale brought an action alleging that the Boy

58. New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 12-13 (1988) (quoting *Board of Dirs. of Rotary Int'l*, 481 U.S. at 548).
59. *Id.*
60. *Id.*
61. Goodman, *supra* note 5, at 827.
62. *Id.* at 851-53 (citing Yeaw v. Boy Scouts of Am., 64 Cal. Rptr. 2d 85, 85-87 (Cal. Ct. App. 1997); Welsh v. Boy Scout of Am., 993 F.2d 1267, 1268 (7th Cir. 1993)).
63. Goodman, *supra* note 5, at 827-28, 851-55.
64. *Id.*
65. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1200-02 (N.J. 1999) (quoting Boy Scout Mission Statement).
66. *Dale* 734 A.2d at 1202 (quoting ROBERT C. BIRKBY, THE BOY SCOUT HANDBOOK 549 (10th ed. 1990)).
67. *Dale*, 734 A.2d at 1202.
68. *Id.* at 1204.
69. *Id.*
70. *Id.*

Scouts' decision was in violation of the New Jersey Law Against Discrimination.[71] In response, the Boy Scouts claimed that under its Oath and Law, requiring a scout to be "morally straight" and "clean," it had the duty and constitutional right to exclude homosexuals from membership.[72] The trial court agreed, finding this implicit in the Boy Scouts' policy, which revealed a moral position contrary to homosexuality.[73] The Court held that to require Dale to be accepted as an adult member would violate the Boy Scouts' freedom of expressive association.[74] The Appellate Division disagreed.[75] It found no constitutional protection, based on the Boy Scouts' enormous size, its active recruitment policy, and its involvement with school and other public activities.[76] Additionally, it did not find that enforcing the statute would affect the Boy Scouts' ability to carry forth its message, which was to "instill values in young people," and "not to condemn homosexuality."[77]

The New Jersey Supreme Court first held that the anti-discrimination law applied to the Boy Scouts.[78] The statute, the goal of which was to extirpate "the cancer of discrimination,"[79] expressly granted everyone an opportunity "to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation," without being subjected to discrimination on the basis of "affectional or sexual orientation."[80] The court found that the Boy Scouts was a place of public accommodation within the meaning of the statute, because it reached out to members of the public to join its organization through solicitation activities in various places, and carried forth a close relationship with governmental entities.[81] By denying Dale the "privilege" and "advantage" of an assistant scoutmaster position on the basis of his homosexuality, the Boy Scouts clearly violated the statute.[82]

The court next focused on the critical First Amendment issue of whether applying the statute to the Boy Scouts' discriminatory policy based on sexual orientation transgressed its freedom of association.[83] With little difficulty, the court found that the Boy Scouts' freedom of intimate association was not in jeopardy.[84] The size of the local troop was quite large, often ranging between fifteen and thirty members and a number of adult leaders.[85] The troop did not appear to be selective in membership, since any boy between the ages of eleven and seventeen

71. *Id.*
72. *Id.* at 1205-06 (citing Dale v. Boy Scouts of Am., No. MON-C-330-92 (Ch. Div. 1995)).
73. *Dale*, 734 A.2d at 1206 (citing *Dale*, No. MON-C-330-92, at 6, 38-40).
74. *Dale*, 734 A.2d at 1206 (citing *Dale*, No. MON-C-330-92, at 71).
75. Dale v. Boy Scouts of Am., 308 N.J. Super. 516 (App. Div. 1998).
76. *Id.*
77. *Id.* at 549-50.
78. *Dale*, 734 A.2d at 1207-18.
79. *Id.* at 1208 (quoting Fuchilla v. Layman, 109 N.J. 319, 334 (N.J. 1988) (quoting Jackson v. Concord Co., 54 N.J. 113, 124 (N.J. 1969))).
80. *Dale*, 734 A.2d at 1207-08 (quoting N.J. STAT. ANN. § 10:5-4 (West 1993)).
81. *Dale* 734 A.2d at 1209-13.
82. *Id.* at 1218 (citing N.J. STAT. ANN. § 10:5-4 (1993)).
83. *Dale*, 734 A.2d at 1219-1228.
84. *Id.* at 1219-1222.
85. *Id.* at 1221.

could join, and there was no upper limit on the number of new members.[86] The purpose of each troop was "'to produce inclusive, not exclusive membership,'" —one that represented the entire population.[87] This was accomplished through special advertising and solicitation programs.[88] In addition, each troop often invited nonmembers to attend meetings and other activities.[89] Thus, there was nothing to indicate that the Boy Scouts was a private and exclusive organization to trigger a protected right of intimate association.[90]

Somewhat more difficult was the determination of whether the Boy Scouts' freedom of expressive association had been violated. After careful analysis, the court decided that the application of New Jersey law did not amount to a constitutional violation, because it did not adversely affect each member's ability to join with one another to espouse their common message, which was not impaired by Dale's membership.[91] The Boy Scouts vigorously argued that based on its Scout Law and Oath, it was bound to respect and uphold certain moral principles that were completely opposed to homosexuality.[92] In particular, it maintained that a scout's duty to be "morally straight" and "clean" made it self-evident that the Boy Scouts viewed homosexuality as immoral.[93] The Boy Scouts taught those principles to its members as an essential part of its message.[94] To admit a homosexual, it argued, would completely eviscerate those moral principles to which it held so true.[95]

Nonetheless, the New Jersey Supreme Court solidly rejected these contentions.[96] It stated that the Boy Scouts did not join together to advance a common message that homosexuality was immoral, but rather, to simply express "a belief in moral values" and "encourage the moral development of its members."[97] A review of both the Scout Oath and Law made it apparent that the duties to be "morally straight" and "clean" were not specifically connected to homosexuality.[98] In fact, neither the Scout Oath or Law expressly stated anything about sexuality, or the immorality of homosexuality. Instead, "morally straight" and "clean" appeared to prescribe a duty to simply be a good person: To have respect for others, to be honest, faithful, thoughtful, and clean in the sense of not being mean-spirited toward others, or using profanity or cruel language directed at racial groups or those with physical or mental limitations.[99] Neither did this imply that homosexuality was immoral.[100] Evidence showed that the Boy Scouts'

86. *Id.*
87. *Id.* at 1222 (quoting Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987)).
88. *Dale*, 734 A.2d at 1221.
89. *Id.* at 1222.
90. *Id.*
91. *Id.* at 1222-28.
92. *Id.* at 1223.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1223-25.
97. *Id.* at 1223.
98. *Id.* at 1224.
99. *Id.*
100. *Id.*

religious sponsors differed in their views toward homosexuality.[101] Thus, Dale's membership would not, in any way, hinder the other members in their common pursuit to live honorably, set high standards for themselves, and serve others.[102] In fact, Dale himself was equally committed to attaining these goals.[103] Consequently, the court held that Dale was expelled not because his membership conflicted with this message, but merely because of his status as a homosexual.[104]

The court also emphasized the "compelling interest of this State to eliminate the destructive consequences of discrimination from our society," as an important policy which was advanced by the New Jersey statute.[105] Revealing the fact that prejudice and intolerance have led victims of discrimination to be shut off "from full participation in the social, economic, and political life of our country," the court found a necessity, in the spirit of democracy and equality, to shield these victims from such egregious conduct.[106] This protection equally extended to those subject to discrimination based on sexual orientation, who suffered just as much hardship as those historically discriminated against based on other classifications such as race or sex.[107] Moreover, the statute fulfilled this compelling policy without any reference to one's viewpoint.[108] Even if admitting Dale slightly infringed on the Boy Scouts' right of association, such an infringement was warranted and outweighed by this paramount concern of New Jersey.[109]

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

In sheer contrast, the California case of *Curran v. Mount Diablo Council of Boy Scouts of America* presents a very similar set of facts and issues, yet with a completely different result.[110] The final disposition of the case was decided just one year prior to *Dale*.[111] Timothy Curran, like Dale, had an untarnished reputation and aspired to be a scout leader.[112] He wanted to be an adult troop leader and made his intention known to the Mount Diablo Council, a scouting organization in northern California, after he had openly and publicly acknowledged his homosexuality to the local press.[113] In addition, he made it clear that part of the reason he sought to be a scout leader was to convey his pride in being gay and the message that there was nothing wrong with it.[114] The Council informed

101. *Id.* at 1224-25.
102. *Id.* at 1225.
103. *Id.*
104. *Id.* at 1225-26.
105. *Id.* at 1227.
106. *Id.* at 1227-28.
107. *Id.* at 1227 (citing Dale v. Boy Scouts of Am., 318 N.J. Super. 516, 549 (App. Div. 1998)).
108. *Dale*, 734 A.2d at 1228.
109. *Id.* 734 A.2d at 1228 (citing Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987)).
110. Curran v. Mount Diablo Council of Boy Scourts of Am., 29 Cal. Rptr. 2d 580 (Cal. Ct. App. 1994); Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218 (Cal. 1998).
111. *Curran*, 29 Cal. Rptr. 2d at 585.
112. *Id.*
113. *Id.*
114. *Id.*

Curran that he would not be approved as an adult leader because his open embrace of homosexuality would conflict with the Boy Scouts' standards for role models and leaders.[115]

Curran brought suit under the Unruh Act, which prohibited discrimination in "business establishments."[116] The trial court first held that the Boy Scouts was a "business establishment" under the Act, since a "business" broadly included any organization unless it was a small, intimate or private club.[117] Because the Council had about 13,500 scouts in its district, lacked selectivity in membership, and had "public orientation and prominence in the community," it was unable to establish that it was a small private club and therefore escaped the reach of the Unruh Act.[118] The court then held that to apply the Act to require the Boy Scouts to accept Curran as scout leader would violate its freedom of association, because it would gravely interfere with its expressive activities.[119] Specifically, the court found that the Boy Scouts had historically and traditionally regarded homosexuality as immoral behavior, and excluding Curran was essential to defend this belief.[120] To do otherwise would adversely impact its ability to express its message.[121]

The appellate court's decision, for purposes of the First Amendment issue, was the most important part of the litigation.[122] The court of appeals first considered whether the Boy Scouts' freedom of expressive association was at risk of being curtailed.[123] It emphasized that this right was a fundamental liberty that "assumes a group of like-minded individuals associating for the purposes of promoting shared ideas, values and philosophies," may identify the people that make up that association, and restrict it to those people only.[124] The court of appeals declared that a law that substantially interfered with this right was unconstitutional, and accordingly, that Curran's membership in the scouts would amount to an intrusive and significant violation.[125]

The court opined that a close look at the viewpoints and beliefs of the Boy Scouts would reveal the "expressive voice of its members."[126] It disagreed with the contention that an examination should be made of the beliefs of individual members, because "the expressions of the group are the expressions of the members."[127] With this in mind, the court found that the Boy Scouts, as an organization, had a well-established and unequivocal belief that homosexuality was immoral and inharmonious with the requirements that a scout be "morally

115. *Id.*
116. *Id.* at 582; CAL. CIV. CODE § 51 (West 1982).
117. *Curran*, 29 Cal Rptr. 2d at 583.
118. *Id.*
119. *Id.* at 583-84.
120. *Id.*
121. *Id.*
122. *Id.* at 584-98.
123. *Id.* at 584-93.
124. *Id.* at 586 (citing Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122 (1981)).
125. *Curran*, 29 Cal. Rptr. 2d at 586.
126. *Id.* at 587.
127. *Id.* at 587-88.

straight" and "clean."[128] The court based this finding largely on the un-contradicted testimony of various members that this was always their common understanding of the organization's general belief to which they pledged to adhere.[129]

Consequently, the court held that Curran's inclusion as a scout leader and a role model would completely interfere with the expressive activities of the Boy Scouts.[130] In doing so, the court focused on the effect that Curran's message would have on the other members, particularly the younger ones.[131] It determined that in light of Curran's position as a leader, counselor, teacher, and role model, his advocacy and support of homosexuality would invade upon the scout members' principles.[132] This would create the real possibility that these members would be affected, and perhaps even inspired, to believe in the morality of homosexuality and to engage in such conduct.[133] By looking up to Curran as an adult figure, it seemed quite conceivable to the court that the younger scouts would begin to question their own sexual mores and behavior and that this would ultimately "break apart the moral compact that holds together scouting's close associations with traditional religions that believe homosexuality is immoral."[134]

Hence, the court determined that Curran was not excluded simply because of his status as a homosexual, as the *Dale* court decided, but rather, "because he was a model and advocate of the homosexual lifestyle."[135] He was excluded because of his message and its underlying conduct.[136] Once again, the court made it clear that it was the *effect* on the young members that was so important.[137]

Additionally, and contrary to *Dale*, the court of appeals did not give credence to the idea that any interference with the Boy Scouts' freedom of expressive association was justified by California's compelling interest in eliminating discrimination in business establishments.[138] Under the Unruh Act, the court found that this interest was not as broad as it may have seemed.[139] Instead, California's objective was to enable everyone to have an equal opportunity to enjoy economic or commercial advantages, such as through business or employment relationships, as well as the social benefits of public accommodations.[140] But outside of the commercial context, this interest did not apply.[141] The court found that the Boy Scouts did not provide any form of economic or business incentive to its members, nor did it function as a traditional public accommodation.[142] Rather,

128. *Id.* at 588.
129. *Id.* at 588-89.
130. *Id.* at 589-93.
131. *Id.* at 590-91.
132. *Id.*
133. *Id.*
134. *Id.* at 591.
135. *Id.*
136. *Id.* at 591-92.
137. *Id.* at 592.
138. *Id.* at 593-95.
139. *Id.*
140. *Id.* at 594.
141. *Id.* at 593-94.
142. *Id.*

the organization was established simply to provide its members with a sense of "interpersonal association" through a set of common values.[143] In this context, there could be no "compelling interest in ensuring equal access to such advantages as business and professional opportunities and skills," because no such advantages were at stake.[144] Moreover, the court felt that every act of discrimination could not automatically give rise to a compelling state interest, because the interest in "personal dignity cannot be considered compelling in the abstract."[145] The harms caused by everyday acts of prejudice cannot always be regulated by the state.[146]

Finally, the court held that the Unruh Act could not be applied to regulate Mount Diablo Council's conduct, because it was not a "business establishment."[147] It noted that the organization had no business or commercial purpose, nor did it offer a traditional public accommodation, distinguishing it from Rotary and Jaycees.[148] Instead, it viewed the Boy Scouts as a charitable organization whose success and attraction did not depend on its profit or any identifiable outward characteristics of its location, but on "the sense of community among its participants."[149] Furthermore, and in contrast to *Dale*, the court held that enforcing the Unruh Act against the Boy Scouts would violate its right of private association, because the troops were "small, intimate, primary groups where the relationships can be characterized as continuous, close and personal."[150] In particular, each troop was comprised of patrols with between twelve and thirty boys, a scoutmaster and assistant scoutmaster.[151] Each troop had the common purpose of teaching values to its members and was selective in different ways. All members had to abide by the Scout Oath and Law and each member chose which troop to join, often on "a pre-existing personal affinity."[152] Within each troop, the relationships were "personal and intimate."[153] Thus, the court held that to apply the statute would interfere with these personal relationships.[154]

On appeal, the California Supreme Court affirmed the court of appeal's decision.[155] However, it did not consider the issue of freedom of association, but based its decision solely on the determination that the Boy Scouts was not a "business establishment" under the Unruh Act.[156] Nevertheless, the decision cast a final blow to Curran and others similarly situated.

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143. *Id.* at 594 (quoting Welsh v. Boy Scouts of Am., 787 F. Supp. 1511, 1540 (N.D. Ill. 1992)).
144. *Curran*, 29 Cal. Rptr. 2d at 594.
145. *Id.*
146. *Id.*
147. *Id.* at 596-602.
148. *Id.* at 599-602.
149. *Id.* (quoting Welsh v. Boy Scouts of Am., 787 F. Supp. 1511, 1539 (N.D. Ill. 1992)).
150. *Curran*, 29 Cal. Rptr. 2d at 597-98.
151. *Id.* at 598.
152. *Id.*
153. *Id.*
154. *Id.*
155. Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218 (Cal. 1998).
156. *Id.* at 236.

IV. COMING TO A RESOLUTION

On January 14, 2000, the United States Supreme Court decided to consider *Dale*.[157] While one can predict what the outcome will be, the Court nonetheless faces a myriad of questions which, for the most part, remain unanswered and difficult to resolve. *Dale* and *Curran* both make this very clear, and certainly, in resolving them, any court would face a daunting task.

A. Intimate Association

Perhaps the least discernible issue presented by these cases is whether or not the Boy Scouts has a protected right of intimate association. *Jaycees* made it clear that only those relationships that are characterized by small size, selectivity and private seclusion, and that involve a sense of "deep attachments and commitments," merit constitutional protection.[158] The *Dale* court's finding that the Boy Scouts lacks those essential components was quite convincing.[159] The fact that it—like the Jaycees and Rotary—attempts to reach out to a broad segment of the community for membership, and invites nonmembers to its meetings and activities weighs against the Boy Scouts. This characteristic clearly refutes the exclusive nature that *Jaycees* found so crucial. Similarly, when the court looks at the Boy Scouts as one organization, the size is enormous, numbering well into the millions worldwide.[160]

At the same time, the question of "size" is also vague. It is not clear whether this determination must be made by analysis of the organization as a whole, or based on the individual troop, whose membership may be as few as eight, and limited to no more than thirty.[161] Arguably, this constitutes a "small size" under *Jaycees*. However, *Dale* considered this to be a "large size," noting in particular that the Court in *Rotary Club* specifically decided that a club with only twenty members was too much.[162] Yet, on the other hand, the *Curran* majority felt that a size of three to eight boys was "undeniably small."[163] Does this mean that "small size" is confined to groups with less than twenty members? Ten? Should constitutional protection turn on such an arbitrary "headcount"?

Additionally, another problem is determining how selective the Boy Scouts must be. The only visible requirements are age, citizenship, and adherence to a belief in God, the Scout Oath and the Scout Law.[164] Apart from this, the Boy Scouts does not appear very selective.[165] The *Dale* majority obviously agreed,

157. Tony Mauro, *High Court to test Boy Scouts' claim of First Amendment right to exclude gay*, FREEDOM FORUM (Jan. 19, 2000) <http://www.freedomforum.org/speech/2000/1/19sctboyscouts.asp>.

158. Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984).

159. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1219-22 (N.J. 1999).

160. Paul Varela, *A Scout is Friendly: Freedom of Association and the State Effort to End Private Discrimination*, 30 WM & MARY L. REV. 919, 939 (1989).

161. *Id.*

162. *Dale*, 734 A.2d at 1221.

163. Curran v. Mount Diablo Council of the Boy Scouts of Am., 29 Cal. Rptr. 2d 580, 598 (Cal. App. 2 Dist. 1994).

164. Goodman, *supra* note 5, at 877.

165. *Id.*

finding that any boy within the required age group could join, and that membership was rarely denied.[166] On the other hand, *Curran* deems these requirements to establish selectivity.[167] A related argument is that because the scouts share personal experiences, a set of values and beliefs, and close friendships, all while engaging in activities together, they share a common bond that satisfies *Jaycee's* sense of "deep attachments and commitments."[168] Whether or not this type of personal affiliation justifies constitutional protection is also uncertain.

B. Expressive Association

Determining whether or not inclusion of a homosexual would destroy the Boy Scouts' freedom of expressive association remains a troublesome and perplexing issue. To make matters more difficult, *Dale* and *Curran* not only come to opposite conclusions on this issue, but appear to approach it in somewhat different ways.

1. Focusing on the common purpose and goal as the "message."

The *Dale* majority focused on the real message behind the Boy Scouts, and in particular, what the members were collectively trying to achieve.[169] In doing so, the court strictly interpreted the meanings of "morally straight" and "clean" from the Scout Oath and Law, and found that no reference or implication to sexuality or homosexuality was made.[170] In essence, *Dale* requires the Boy Scouts to prove that one of the core reasons that all of the members join together is to espouse the message that homosexuality is immoral.[171] While subconsciously, this might be one purpose of the Boy Scouts, the ultimate purpose seems to be to promote good moral values. It seems highly unlikely that a prospective scout would desire to join the Boy Scouts out of a motivation to share and advocate his view that homosexuality is immoral.

Dale's analysis also appears to be consistent with *Jaycees*, which emphasized that the focus should be whether the forced inclusion will "impair the ability of the original members to express *only those views that brought them together*."[172] This could not then include any view that is merely incidental or subsidiary to that essential common purpose. Moreover, in order to succeed, the Boy Scouts must prove that "including homosexuals undermines its expressive purpose."[173] In *Dale*, the Boy Scouts failed to show that Dale's inclusion would compromise its common purpose of being righteous and virtuous, and therefore failed to satisfy *Jaycee's* impairment test.[174] What also seems quite relevant to the *Dale* determination is the fact that Dale himself aspired to attain these goals as any

166. *Dale*, 734 A.2d at 1221.
167. *Curran*, 29 Cal. Rptr. 2d at 598.
168. Varela, *supra* note 160, at 940; Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984).
169. *Dale*, 734 A.2d at 1222-25.
170. *Id.* at 1224.
171. *Id.*
172. *Jaycees*, 468 U.S. at 623 (emphasis added).
173. Goodman, *supra* note 5, at 880.
174. *Dale*, 734 A.2d at 1223-25.

other scout member would.[175] Thus, the motivation of the person seeking membership appears to play a role, especially where that person seeks to join in pursuit of the same goal as the other members of that organization.

2. Focusing on the organization's views and beliefs as the "message."

Curran, on the other hand, appeared to focus not so much on the purpose behind scout membership, but on the common beliefs and ideals of the scouts, and the effect on these common beliefs and ideals of admitting a homosexual scout leader.[176] The court was concerned with the threat a homosexual role model and advocate would impose to his younger counterparts, who could conceivably start to question their own beliefs and values about sexuality.[177] In essence, admitting Curran would tear apart the mutual bond between the scouts that had existed since its inception, a shared set of values that was an essential part of their identity.

By focusing on the effect on the Boy Scouts' shared values and beliefs, however, the court appears to have widened the scope of expressive association. *Jaycees* seemed to stand for the proposition that the group's expressive purpose had to be undermined, and not necessarily every belief or view that was associated with that purpose.[178] Certainly, some men in Jaycees may have had disfavorable views toward women, but this did not mean, as the Court found, that they could not achieve the purposes for which their organization was formed.[179] Similarly, regardless of what the Boy Scouts believes about homosexuality, this is not necessarily connected with its ability to convey a message to be kind or good. While the scouts' anti-homosexual beliefs might be at stake, *Curran* does not seem to establish this crucial connection between those beliefs and its ultimate purpose. Moreover, under *Curran's* analysis, an organization may argue that the inclusion of someone it dislikes would have an undesired effect on its beliefs, thus violating its right of expressive association, even if the purpose for which it was formed remains unscathed.

On the other hand, adherence to these ideals is arguably indispensable to the success of the Boy Scouts, because a scout leader acts as a role model and the driving force that brings the scouts together for their expressive purpose.[180] If the leader urges a position that is opposed to those ideals, the strength of the Boy Scouts could be severely eroded, and its ability to join together and engage in a common pursuit could be impaired.[181] Thus, the effect an admission has on ideals might be relevant, especially when it has such long-term consequences, and when the motivation of the applicant is to advocate and teach a view that is antithetical to the "moral compact."[182]

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175. *Id.* at 1225.
176. Curran v. Mount Diablo Council of the Boy Scouts of Am., 29 Cal. Rptr. 2d 580, 589-93 (Cal. App. 2 Dist. 1994).
177. *Id.*
178. Roberts v. United States Jaycees, 468 U.S. 609 (1984).
179. *Id.* at 627.
180. *Id.*
181. Varela, *supra* note 160, at 946-47.
182. *Curran*, 29 Cal. Rptr. 2d at 593.

C. Association or Equality?

Perhaps the most arduous question facing the courts after *Dale* and *Curran* is whether a strong and legitimate interest of the state to end discrimination mandates the admission of a homosexual, even if that would impair the Boy Scouts' expressive pursuit. The *Dale* court felt that such an infringement would be justified in light of "the destructive consequences of discrimination" in today's society and the need to adhere to a fundamental principle of equality.[183] *Curran*, on the other hand, did not agree that the state had an overriding interest to curb discrimination outside the commercial context.[184]

This difference may be attributed to the fact that the New Jersey statute focused on the "the underlying problems we face as a society"[185] and sought to eradicate discrimination based on sexual orientation in general to prevent the "stigmatizing injury" and "personal hardship" it produced.[186] The California statute was more confined to protecting the business and commercial interests of homosexuals, and not necessarily every personal or moral interest that could be gained socially.[187] In essence, there are two competing state interests involved.[188] The first is to ensure "equal access to the goods and services" of the organization, and the second is to eradicate "the 'stigmatizing injury' that results from exclusionary policies based on 'archaic and overbroad assumptions about the relative needs and capacities'" of the excluded individual.[189]

It is not clear what the Court finds to be the important state interest. If the interest is to insure equal opportunity to goods and services, then arguably, the state has no compelling interest to prohibit the Boy Scouts from discriminating based on sexual orientation. The Boy Scouts is not an organization that engages in business arrangements nor provides any employment opportunities, economic advantages, or services to the public. This feature raises the question of whether the Boy Scouts is a place of public accommodation or a business organization.[190] However, if the state's purpose is to put an end to discrimination based on sexual orientation in society, the Boy Scouts is subject to regulation, because its policy of exclusion results in a serious social and personal harm to the individual.

Even if the Court finds a compelling state interest with regard to the Boy Scouts' discriminatory exclusion of homosexuals, the question remains whether the policy of equal access and opportunity that is so fundamental to our democracy outweighs the important constitutional right of association. This question may be the most difficult of all, and one that the Court is not ready to answer. It is difficult to weigh the important interest in eradicating hate within our society against the equally forceful desire to preserve freedom of association.

183. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1227 (N.J. 1999).
184. *Curran*, 29 Cal. Rptr. 2d at 593.
185. *Dale*, 734 A.2d at 1227 n.15.
186. *Id.* (quoting Dale v. Boy Scouts of Am., 308 N.J. Super. 516, 549 (App. Div. 1998)).
187. *Dale*, 308 N.J. at 593-95.
188. *Id.*
189. Goodman, *supra* note 5, at 883 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984)).
190. *See Dale*, 734 A.2d at 1207-18; *Curran*, 29 Cal. Rptr. 2d at 596-602.

Nevertheless, it is a critical issue that will have significant consequences not only to the Boy Scouts, but also to countless private organizations all over the country in the years to come.

V. POSTSCRIPT

On June 28, 2000, the Supreme Court of the United States, in a dramatic opinion delivered by Chief Justice Rehnquist and joined by Justices O' Connor, Scalia, Kennedy, and Thomas, reversed the decision of the New Jersey Supreme Court and held that the application of New Jersey's public accommodations law would do violence to the Boy Scouts' right of expressive association.[191] The majority concluded that the presence of Dale would interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs.[192] In doing so, the Court focused on the sincerely held beliefs and values claimed by the Boy Scouts and accepted them as true, rather than attempt to independently ascertain what the "true message" behind the Boy Scouts really was.[193] It strongly differed with the New Jersey's court's approach in finding that the Boy Scout's views conflicted with its ultimate purpose, saying that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[194]

Accordingly, in giving such deference to what the Boy Scouts avowed as its true expression, the Court found that to allow Dale to remain in the Boy Scouts would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[195] In sharp contrast to the reasoning of the New Jersey court, the Court stated that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."[196]

The Court used *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* as an analogy.[197] Just as the Court there had determined that the presence of an Irish-American gay, lesbian and bisexual group in a parade would interfere with the parade organizer's choice not to express a particular view, regardless of the fact that the overarching goal of the parade was not to express any view about homosexuals, the Court similarly felt that Dale's presence would

191. Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2446-58 (2000).
192. *Id.* at 2454.
193. *Id.* at 2453. Note that the Court emphasized the fact that the Boy Scouts had always (and consistently) maintained its position regarding homosexuals, and cited *Curran v. Mt. Diablo Council of Boy Scouts of America* as an example of this consistency.
194. *Id.* at 2452.
195. *Id.* at 2454.
196. *Id.*
197. *Id.* (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995)).

be completely incompatible with the values instilled in the Boy Scouts, even if the main purpose behind it was not to advocate against homosexual conduct.[198]

Finally, the Court addressed the issue of whether the state's compelling interest in eradicating discrimination justified an infringement on the Boy Scout's right of expressive association.[199] While conceding that the Court had previously determined that states have a significant interest in preventing discrimination through the use of public accommodation laws, it noted that in those cases, enforcement of these laws did not "materially interfere with the ideas that the organization sought to express."[200] The majority distinguished the case before them as one where enforcing the anti-discrimination statute would actually thwart the organization's choice to express those ideals: To "retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct."[201] In light of this distinction, the Court concluded that New Jersey's interests in ending discrimination did not warrant such an infringement on the Boy Scout's First Amendment right.

On the other hand, Justice Stevens, joined by Justices Souter, Ginsberg, and Breyer in dissent, felt that the majority's interpretation of the right of expressive association was too broad.[202] Like the New Jersey Supreme Court, the dissent took the position that the right of expressive association could not simply rest on any form of expressive activity or policy, but rather, on a mutually common purpose.[203] In turn, it was only when enforcement of the anti-discrimination law seriously impaired that shared purpose that the right of expressive association would be violated.[204] The dissent strongly questioned the majority's position that the court must defer to the organization's contention concerning its form of expression.[205] Instead, the dissent would make the independent inquiry of whether the organization is actually expressing a clear and unmistakable message that would be impeded by enforcing the statute.[206] It warned that to defer to any viewpoint claimed by the organization as its innate expression would be tantamount to "[s]hielding a litigant's claim from judicial scrutiny," and would consequently "render civil rights legislation a nullity . . . ."[207] The dissent found, therefore, that the Boy Scouts did not express such a clear message that would be infringed upon by the New Jersey statute.[208]

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198. *Id.* at 2454-55 (The Court declared that "[t]he fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.").

199. *Id.* at 2455-58.

200. *Id.* at 2456 (citing Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984); Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987)).

201. *Id.* at 2457.

202. *Id.* at 2468-2472.

203. *Id.* at 2469.

204. *Id.*

205. *Id.* at 2470.

206. *Id.* at 2471.

207. *Id.*

208. *Id.* at 2472.

Both the majority and dissenting opinions appear to represent the split in the approach to resolving whether an organization's right of expressive association is violated. The ultimate question is whether one must look for an underlying group message that would be seriously burdened, or simply defer to the organization's "internal" values and beliefs and protect them from any interference? One must also ask whether, to be constitutionally protected under the First Amendment, it is sufficient to say that an organization need not be required to collectively convey a certain message, but instead, need only partake in some form of expressive activity. If so, then the repercussions of this decision could be significant. Our efforts to break down the wall of discrimination could be suppressed by a reinforced right of expressive association, broadly defined by any conceivable ideas or beliefs within the organization, regardless of how relevant or material they may be to the ultimate purpose of that group.