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HATE EXPOSED TO THE LIGHT OF DAY: DETERMINING THE BOY SCOUTS OF AMERICA'S EXPRESSIVE PURPOSE SOLELY FROM OBJECTIVE EVIDENCE

Cara J. Frey

Abstract: In the 1980s, the U.S. Supreme Court took considerable steps toward decreasing the uncertainty surrounding an organization's associational freedoms by requiring an organization seeking to exclude individuals solely based on status to prove that its expressive purpose would be undermined if it included such members. However, these Supreme Court cases failed to establish any consistent approach to determining an organization's expressive purpose. Problems have arisen most acutely with the claims of gays seeking to be included in the Boy Scouts of America (BSA), an organization with a multifaceted and vague message. As the law now stands, courts have broad discretion to decide what facts are relevant in determining the BSA's expressive purpose. Unfortunately, this broad discretion has led to some courts' accepting the homophobic views of individual BSA members and leaders as the expressive purpose of the entire organization. This Comment proposes that the BSA's expressive purpose be determined only from objective evidence. If the BSA seeks constitutional protection to hate, its expressive purpose must be clearly defined in position statements, written in recruiting brochures, announced to sponsors, and referred to in either the original or amended bylaws.

On July 8, 1990, the *Newark Star-Ledger* published an article titled, "Seminar Addresses Needs of Homosexual Teens."¹ The article pictured James Dale and identified him as the co-president of the Rutgers University Lesbian/Gay Alliance.² Within a month, Dale received a letter from James W. Kay, council executive of the Monmouth Council of the Boy Scouts of America (BSA), informing Dale that the BSA had revoked his registration as an adult leader.³ In response to Dale's inquiry as to the grounds for his dismissal, Kay wrote: "[The] grounds for [this] membership revocation [are] the standards for leadership established by the [BSA], which specifically forbid membership to homosexuals."⁴

Ten years earlier, the *Oakland Tribune* had published an article on gay teenagers, based upon interviews with teenagers who openly identified themselves as gay.⁵ Timothy Curran, another former Boy Scout, was one

1. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1204-05, (N.J. 1999), *cert. granted*, 120 S. Ct. 865 (Jan. 14, 2000).

2. See *id.* at 1205.

3. See *id.*

4. *Id.*

5. See *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 220 (Cal. 1998).

of the teenagers interviewed for the article.⁶ After the *Tribune* published the article, Quentin Alexander, the executive director of the Mt. Diablo Council of the BSA, investigated whether Curran was still active in the program.⁷ When Alexander discovered that Curran was not still active, the BSA “took no further action.”⁸ However, shortly after release of the article, Curran applied to the Mt. Diablo Council to attend the 1981 BSA National Jamboree.⁹ Alexander told him that the BSA would not accept his application.¹⁰ When Curran asked if it was because he was gay, Alexander responded, “Yes, it is.”¹¹

Both Dale and Curran filed lawsuits against the BSA.¹² Ultimately, the New Jersey and California supreme courts considered whether the BSA could exclude a leader because he was openly gay.¹³ The *Dale* and *Curran* cases have not only revived the vigorous debate as to what constitutes a public accommodation, but have also inspired controversy over how courts define an organization’s expressive purpose. As the law now stands, courts have broad discretion to decide what facts are relevant in determining an organization’s expressive purpose.¹⁴ This broad discretion allows courts to determine the BSA’s expressive purpose from individual members’ personal views rather than from the BSA’s views as objectively stated in its literature. Courts, by relying on these individual members’ personal views, may therefore grant First Amendment protection of expressive association to the closeted views of the BSA. As a result, state antidiscrimination efforts are unduly frustrated.

While the First Amendment has been interpreted to protect the expression of hate,¹⁵ by no means has it been read, or should it be read, to favor it.¹⁶ On the contrary, the structure of the Constitution as a whole leaves the eradication of hate within the sphere of legitimate state

6. *See id.*

7. *See id.* at 221.

8. *Id.*

9. *See id.*

10. *See id.*

11. *Id.*

12. *See infra* Part II.B.1–2.

13. *See infra* Part II.B.1–2.

14. *See infra* Part II.B.1–4.

15. *See Village of Skokie v. National Socialist Party of Am.*, 373 N.E.2d 21, 25 (Ill. 1978) (“[U]se of the swastika is a symbolic form of free speech entitled to first amendment protections.”).

16. *See FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (“For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”).

interests.¹⁷ Public-accommodations laws are states' response to hate in certain odious forms.¹⁸ This Comment proposes that the BSA's expressive purpose be determined only from objective evidence. While the proposal allows the BSA to express its hatred, it also democratizes the process by which the BSA must articulate its message of hate if it seeks to shelter itself from public-accommodations laws by taking refuge in the First Amendment.¹⁹ If the BSA's "message" is hate, the objective analysis proposed here requires that the hate be exposed to the light of day—that it be made visible to members and potential members who then may decide whether to embrace such message. Only when the BSA democratically embraces hatred as its message should federal law immunize the BSA from state public-accommodations laws.²⁰

Part I of this Comment explores the tension between state public-accommodations laws and an organization's associational rights. In so doing, it discusses the *Roberts* trilogy,²¹ a line of U.S. Supreme Court cases that established a framework for balancing an individual's statutory right to be free from discrimination in places of public accommodation with an organization's constitutional right to associate freely with like-minded members. Additionally, Part I distinguishes the right of expressive association recognized by the *Roberts* trilogy from the right of free speech protected by *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.²² Part II provides the objective evidence relevant to determining the BSA's expressive purpose and examines how courts in four recent BSA cases have determined whether an anti-gay message is an expressive purpose of the BSA. Finally, Part III discusses the reasons courts should limit their analysis of the BSA's expressive purpose to objective evidence and suggests that if the BSA seeks to shelter itself from public-accommodations laws, its expressive purpose must be

17. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81–88 (1980).

18. See *Fuchilla v. Layman*, 537 A.2d 652, 660 (N.J. 1988) (“[T]he overarching goal of the [New Jersey Law Against Discrimination] is nothing less than the eradication ‘of the cancer of discrimination.’”); see also Pamela Griffin, Note, *Exclusion and Access in Public Accommodations: First Amendment Limitations upon State Law*, 16 Pac. L.J. 1047, 1056 (1985).

19. See *infra* Part III.

20. Under federal public-accommodations laws, sexual orientation is not a protected classification. See 42 U.S.C. § 2000a(a) (1994). As a result, under federal law the BSA is free to discriminate against gay scout leaders.

21. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

22. 515 U.S. 557 (1995).

defined in position statements, written in recruiting brochures, announced to sponsors, and referred to in either the original bylaws or amended bylaws.

I. TENSION BETWEEN LAWS BARRING DISCRIMINATION IN PUBLIC ACCOMMODATIONS AND AN ORGANIZATION'S CONSTITUTIONAL RIGHT TO EXPRESSIVE ASSOCIATION

Public-accommodations statutes prohibit discrimination by private organizations that control access to public facilities.²³ The goal of these statutes is to ensure that all members of society have equal access to goods and services.²⁴ However, in creating this equal right of access, the statutes may conflict with an organization's First Amendment right to associate with whomever it chooses.²⁵ As a result of this conflict, the U.S. Supreme Court has examined the impact of public-accommodations laws on the exercise of an organization's constitutional liberties in a number of cases.²⁶

A. *Public-Accommodations Laws Bar Private Organizations from Discriminating Against Individuals on the Basis of a Protected Characteristic*

States initially enacted public-accommodations legislation to fill the void created when the U.S. Supreme Court in 1882 struck down the first federal public-accommodations law in the *Civil Rights Cases*.²⁷ More than eighty years passed before Congress enacted a new law barring discrimination in public accommodations, Title II of the 1964 Civil

23. See Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs*, 2 Mich. J. Gender & L. 27, 41 (1994).

24. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

25. For a discussion of the inherent conflict between public-accommodations laws and the First Amendment, see generally Griffin, *supra* note 18.

26. See *Roberts*, 468 U.S. 609; *Rotary*, 481 U.S. 537; *New York State Club Ass'n*, 487 U.S. 1; *Hurley*, 515 U.S. 557.

27. 109 U.S. 3 (1883); see also Frank, *supra* note 23, at 41; Note, *Discrimination in Access to Public Places: A Survey of State and Federal Public-Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 239 (1978) [hereinafter *Survey*]; Paul Varela, Note, *A Scout Is Friendly: Freedom of Association and the State Effort to End Private Discrimination*, 30 Wm. & Mary L. Rev. 919, 932 (1989).

Rights Act.²⁸ While Title II provides some protection to certain groups of people, state laws historically provide the most effective means of preventing discrimination.²⁹

Public-accommodations statutes do not prohibit all forms of discrimination, only discrimination based on enumerated classifications. While they vary from state to state, most public-accommodations statutes prohibit discrimination based on race, color, religion, sex, and national origin,³⁰ and some state and municipal statutes also prohibit discrimination on the basis of other classifications, including affectional or sexual orientation.³¹ It is important to note that in the vast majority of states, where sexual orientation is not a protected classification, gays and lesbians have no statutory cause of action against an organization that has excluded them solely based on their sexual orientation.

The scope of state public-accommodations statutes varies depending upon legislative definitions and judicial interpretations of what constitutes a public accommodation.³² In some states, satisfying the public-accommodations definition depends on whether the organization exists at a particular physical place.³³ Other states define public

28. Pub. L. No. 88-352, 78 Stat. 243 (1964) (codified as amended at 42 U.S.C. §§ 2000a to 2000a-6 (1994)). The statute states: "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." 42 U.S.C. § 2000a(a).

29. See *Survey*, *supra* note 27, at 238-40.

30. See, e.g., Wash. Rev. Code § 49.60.030(1) (1998) (listing race; creed; color; national origin; sex; presence of any sensory, mental, or physical disability; or use of trained dog guide or service animal); 775 Ill. Comp. Stat. Ann. 5/1-102 (West 1993) (listing race; color; religion; sex; national origin; ancestry; age; marital status; physical or mental handicap; or unfavorable discharge from military service).

31. See, e.g., Mass. Gen. Laws. Ann. ch. 272, § 98 (Law. Co-op. 1992) (prohibiting discrimination on account of sexual orientation); N.J. Stat. Ann. § 10:5-4 (West 1993 & Supp. 1999) (prohibiting discrimination on account of affectional or sexual orientation). For a survey of state and municipal laws against sexual-orientation discrimination, see William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 356-61 (1999).

32. See Frank, *supra* note 23, at 41; Marissa L. Goodman, Note, *A Scout Is Morally Straight, Brave, Clean, Trustworthy . . . and Heterosexual? Gays in the Boy Scouts of America*, 27 Hofstra L. Rev. 825, 830 (1999); Varela, *supra* note 27, at 934.

33. See, e.g., N.J. Stat. Ann. § 10:5-4 (providing that "[a]ll persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation"); see also Frank, *supra* note 23, at 41.

accommodations in terms of public use,³⁴ while some states define it in terms of the business aspects of an organization.³⁵ Importantly, if a court determines that an organization is not a public accommodation, but rather a private organization, the organization may carry out its membership practices as it sees fit.

B. Freedom of Expressive Association Guarantees an Organization the Right to Choose Its Members

A state's goal of promoting equality may directly conflict with an organization's desire to associate with those it favors and not to associate with those it disfavors. The conflict between associational freedom and equal access "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)."³⁶ Choosing one could result in the unfair denial of goods and services to an excluded group.³⁷ Choosing the other could extinguish the First Amendment rights of the excluding groups.³⁸

While the word "associate" does not appear in the text of the First Amendment, the Supreme Court has recognized that freedom of expressive association is rooted in the First Amendment's right to petition the government for redress of grievances, right to free speech, and right to freedom of assembly.³⁹ In *NAACP v. Alabama ex rel. Patterson*,⁴⁰ the Court for the first time discussed an individual's right to freedom of association, concluding that "[i]t 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

34. See, e.g., Or. Rev. Stat. § 30.675 (1997) (barring discrimination in "any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise"); see also Frank, *supra* note 23, at 41.

35. See, e.g., Cal. Civ. Code § 51 (West 1982 & Supp. 2000) (providing that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever"); see also Frank, *supra* note 23, at 41.

36. William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 69 (1986).

37. See Varela, *supra* note 27, at 926.

38. See *id.*

39. See *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

40. 357 U.S. 449 (1958).

Clause of the Fourteenth Amendment.”⁴¹ Courts have relied on *Patterson* to protect expressive groups formed to promote minority viewpoints as well as nonminority organizations advocating the right to be free from intrusion by minority groups.⁴²

C. *Balancing State Public-Accommodations Laws with an Organization's Constitutional Right to Expressive Association*

In considering this fundamental conflict between associational freedom and equality, the U.S. Supreme Court has developed a framework to determine when a state's interest in promoting equal opportunity outweighs an organization's First Amendment associational rights.⁴³ This framework rests on the principle that an individual's statutory right to be free from discrimination in public accommodations takes precedence over an organization's constitutional right to expressive association *unless* that organization can establish a genuine connection between its exclusionary policy and its expressive activities.⁴⁴ Therefore, an organization may discriminate in its membership only when the organization's expressive purpose would be substantially burdened by forced inclusion of members of the unwelcome classification.⁴⁵ This right should be distinguished from an organization's constitutional right to exclude from its membership persons who advocate a message that the organization wishes not to disseminate.⁴⁶

I. *Roberts v. United States Jaycees: No Constitutional Protection Is Warranted When Associational Purposes Are Only Tenuously Connected to Exclusivity*

The Supreme Court first addressed the requisite link between an organization's expressive purpose and its exclusionary membership

41. *Id.* at 460.

42. See Shawn M. Larsen, Note, *For Blacks Only: The Associational Freedoms of Private Minority Clubs*, 49 Case W. Res. L. Rev. 359, 369 (1999) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

43. See *Roberts*, 468 U.S. 609; *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

44. See *Roberts*, 468 U.S. at 628.

45. See *id.* at 627–28.

46. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 574–75 (1995).

policy in *Roberts v. United States Jaycees*.⁴⁷ The United States Jaycees (Jaycees), founded in 1920, is a nonprofit membership organization.⁴⁸ The Jaycees' objective, as explained in its bylaws, is to pursue "such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States."⁴⁹ In 1974, the Minneapolis chapter of the Jaycees began admitting women as "regular members," an act prohibited by the national organization's bylaws.⁵⁰ After the president of the national organization warned the local chapter that its charter might be revoked if it continued to admit women, the local chapter filed charges of discrimination under the Minnesota Human Rights Act.⁵¹ The national organization contended that by forcing it to admit women as full voting members, the Act violated the male members' constitutional rights of free speech and association.⁵² Agreeing with the national organization, the Eighth Circuit determined that the First Amendment's freedom of association protected the Jaycees' right to choose its members because "the advocacy of political and public causes, selected by the membership, [was] not [an] insubstantial part of [its activities]."⁵³ The court concluded that applying the Minnesota statute to the Jaycees would directly interfere with that freedom because allowing women into the organization would result in "some change in the Jaycees' philosophical cast."⁵⁴

The U.S. Supreme Court, reversing the Eighth Circuit decision, concluded that the Jaycees failed to demonstrate that admitting women as full voting members would burden the Jaycees' ability to engage in protected activities or disseminate particular views.⁵⁵ Disallowing "unsupported generalizations" about the attitudes of men and women, the Court held that the Jaycees' gender exclusivity was only tenuously connected to its associational purposes and therefore did not warrant constitutional protection.⁵⁶ In reaching this conclusion, the Court

47. 468 U.S. 609 (1984).

48. *See id.* at 612.

49. *Id.*

50. *See id.* at 614.

51. *See id.*

52. *See id.* at 615.

53. *Id.* at 616–17 (internal quotation omitted).

54. *Id.* at 617 (internal quotation omitted).

55. *See id.* at 627.

56. *Id.* at 628.

established a framework to determine when an organization's constitutional right of expressive association outweighs a state's goal of equal opportunity. For the Jaycees' right of expressive association to be constitutionally protected, the Jaycees had to make a "substantial" showing that admitting unwelcome members would "change the content or impact of the organization's speech."⁵⁷ Although the Court established the requirement that an organization's expressive purpose must be impaired by inclusion of disfavored individuals, it did not provide guidance as to how to determine an organization's expressive purpose.

2. Board of Directors of Rotary International v. Rotary Club: *There Is No Constitutional Protection to Exclude When Application of Public-Accommodations Statute Does Not Alter an Organization's Basic Goals*

In *Board of Directors of Rotary International v. Rotary Club*,⁵⁸ the Supreme Court again faced the question whether an organization could exclude women based on the claim that exclusion of women was part of the group's expressive purpose.⁵⁹ Rotary International is a nonprofit corporation founded in 1905.⁶⁰ Prior to this case, the Rotary Manual stated that it was "an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world."⁶¹ Membership in Rotary Clubs was open only to men and, as the General Secretary of Rotary International testified, this exclusion of women was "an aspect of fellowship . . . that [was] enjoyed by the . . . male membership."⁶²

In 1977, after the Rotary Club of Duarte began admitting women to active membership, Rotary International revoked its charter and terminated its membership.⁶³ The Duarte Club and two of its women members filed a complaint alleging that Rotary International's actions violated California's public-accommodations law, the Unruh Civil Rights

57. *Id.*

58. 481 U.S. 537 (1987).

59. *See id.* at 539.

60. *See id.*

61. *Id.*

62. *Id.* at 541.

63. *See id.*

Act.⁶⁴ Rotary International contended that the Unruh Act's requiring California Rotary Clubs to admit women members conflicted with the Rotary Club's right of expressive association.⁶⁵ Affirming the California Court of Appeal, the U.S. Supreme Court concluded that admitting women to Rotary Clubs would not "affect in any significant way" the existing members' ability to achieve their various purposes.⁶⁶ Application of the public-accommodations statute did not require the Rotary Clubs to "alter any of [their] activities" or "abandon their basic goals" as stated in their manual.⁶⁷ As in *Roberts*, the Court concluded that the Rotary Clubs should not be afforded constitutional protection of expressive association in their effort to exclude women.⁶⁸

3. New York State Club Ass'n v. City of New York: *Organizations Must Show a Necessary Connection Between Expressive Purpose and Exclusionary Policy*

One year after *Rotary*, the Supreme Court in *New York State Club Ass'n v. City of New York*⁶⁹ again used the *Roberts* framework to hold that certain organizations should not be afforded constitutional protection to exclude individuals based on membership in a protected class.⁷⁰ A consortium of private clubs sought judgment declaring unconstitutional a New York City human rights law prohibiting discrimination.⁷¹ Because the law did not require the organizations "to abandon or alter" any protected First Amendment activities, the Court held that the law did not infringe upon members' rights of expressive association.⁷² The law did not prohibit organizations from excluding individuals who espoused contrary views, but simply prohibited an organization from using sex, race, and other protected classifications as "shorthand measures" for determining membership.⁷³ The Court recognized that if an organization could prove that it was organized for specific expressive purposes and

64. See *id.*; see also Cal. Civ. Code § 51 (West 1982 & Supp. 2000).

65. See *Rotary*, 481 U.S. at 543.

66. *Id.* at 547-48.

67. *Id.*

68. See *id.* at 549.

69. 487 U.S. 1 (1988).

70. See *id.* at 13.

71. See *id.* at 7.

72. *Id.* at 13 (quoting *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548 (1987)).

73. *Id.*

that it would not be able to promote its views “nearly as effectively” if it could not limit its membership to those who share the same status-based characteristics, the organization was free to exclude.⁷⁴ The Court noted, however, that most of the organizations covered by the law would not be able to show this connection between their expressive purpose and exclusionary policy.⁷⁵

D. Hurley v. Irish-American Gay, Lesbian & Bisexual Group:
Distinguishing Free Speech from Expressive Association

In 1995, the Supreme Court was once again faced with balancing an organization's First Amendment rights against an individual's right to be free from discrimination in public accommodations. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*,⁷⁶ a group of gay, lesbian, and bisexual descendants of Irish immigrants (GLIB) filed suit alleging violations of Massachusetts' public-accommodations law after being denied a permit to march in the St. Patrick's Day-Evacuation Day Parade.⁷⁷ The trial court, following the *Roberts* trilogy, held that inclusion of GLIB did not infringe on the parade's expressive association rights.⁷⁸ Because the parade included numerous groups espousing conflicting messages, the trial court determined that the parade had no expressive purpose.⁷⁹ On appeal to the Massachusetts Supreme Judicial Court, the parade organizers framed their defense in terms of free speech, rather than expressive association.⁸⁰ However, the court also rejected this defense.⁸¹

Reversing the Massachusetts Supreme Judicial Court's decision, the U.S. Supreme Court found that the public-accommodations statute violated the parade organizers' freedom of speech.⁸² The Court concluded that an organization's right of free speech includes the right to control the content of its speech, and it may therefore exclude from its

74. *Id.*

75. *See id.*

76. 515 U.S. 557 (1995).

77. *See id.* at 561.

78. *See id.* at 563.

79. *See id.*

80. *See id.* at 564.

81. *See id.* at 563–64.

82. *See id.* at 573.

membership persons who advocate a position contrary to the organization's message.⁸³ Central to this holding was the Court's acceptance of the parade organizers' assertion that by excluding GLIB, it did not intend to exclude gays and lesbians from the parade, but instead declined to include GLIB's message.⁸⁴

Although the *Roberts* trilogy played a prominent role in the state-court rulings, these cases had almost no significance in the Supreme Court proceeding.⁸⁵ The *Roberts* trilogy was absent from the Court's decision because the Court decided the case on free-speech rather than expressive-association grounds.⁸⁶ Nevertheless, in the last passages of *Hurley*, the Court concluded that the outcome of the case would not differ under the *Roberts* trilogy.⁸⁷ As a result of this dictum, one scholar has suggested that *Hurley* has the potential to weaken the *Roberts* framework.⁸⁸ Unlike *Hurley*, the *Roberts* trilogy carefully examined the expressive purposes of an organization to determine whether the forced inclusion of a protected class of individuals would substantially burden any clearly defined expressive goals of the organization.⁸⁹ This part of the *Roberts* framework led the Massachusetts state courts to conclude that because almost every group that wanted to march in the parade was allowed to do so, the parade had no clearly defined expressive purpose.⁹⁰ However, the Court took a different approach, stating that "a narrow, succinctly articulable message is not a condition of constitutional protection."⁹¹ Under this "lenient approach,"⁹² the parade organizers had no burden of proving the parade's expressive purpose or, more generally, that the parade had a specific message.⁹³

The *Hurley* Court's protection of free speech is distinct from the Court's jurisprudence regarding expressive purpose.⁹⁴ *Hurley* protects an

83. *See id.* at 574–75.

84. *See id.* at 572.

85. *See* Darren Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. Pa. J. Const. L. 85, 98 (1998) (discussing "application" of *Roberts* trilogy in *Hurley*).

86. *See Hurley*, 515 U.S. at 573–80.

87. *See id.* at 580–81.

88. *See* Hutchinson, *supra* note 85, at 102.

89. *See id.*

90. *See Hurley*, 515 U.S. at 562–64.

91. *Id.* at 569.

92. Hutchinson, *supra* note 85, at 102.

93. *See Hurley*, 515 U.S. at 569–70.

94. *See infra* Part II.B.1, 4.

organization's constitutional right to exclude from its membership persons who *advocate a message* that an organization wishes not to disseminate.⁹⁵ The *Roberts* trilogy, on the other hand, protects an organization's right to exclude from its membership persons of a *particular protected classification* where mere admission of these persons would impede the organization's expressive purpose.⁹⁶ To receive constitutional protection, membership organizations must still prove that the application of a public-accommodations statute would conflict with or significantly impair their members' specific expressive purposes and activities.

II. DETERMINING THE EXPRESSIVE PURPOSE OF THE BOY SCOUTS OF AMERICA

The *Roberts* trilogy's lack of guidance on how courts should determine an organization's expressive purpose is highlighted in cases involving the BSA, an organization with a multifaceted and vague message. The BSA's stated purpose is to instill ethics in young boys and provide skills training and social activities. Indeed, the organization's Charter,⁹⁷ Bylaws,⁹⁸ and Mission Statement⁹⁹ all promote this goal. Nevertheless, the BSA has also expressed its desire to be treated as an expressive association for promoting the message that homosexuality is immoral.¹⁰⁰ Determining whether the BSA's discriminatory policy warrants First Amendment associational protection depends on whether the court finds that an anti-gay message, like patriotism, reverence, and knot tying, is an expressive purpose of the BSA. This determination,

95. See *Hurley*, 515 U.S. at 574.

96. See *supra* Part I.C.1-3.

97. The BSA Charter states that the purpose of the BSA 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." Goodman, *supra* note 32, at 850 n.202 (quoting Boy Scouts of Am., *Charter and Bylaws* 3 (1993)).

98. The BSA Bylaws describe the manner in which this purpose shall be achieved, stating that "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." *Id.* at 850 n.203 (quoting Boy Scouts of Am., *Charter and Bylaws* 6 (1993)).

99. The BSA Mission Statement provides: "The mission of the Boy Scouts of America is to prepare young people to make ethical choices over their lifetimes by instilling in them the values of the Scout Oath and Law." Boy Scouts of America Adult Application, No. 28-5010.

100. See, e.g., Brief for Defendant-Respondents at 29-32, *Dale v. Boy Scouts of Am.*, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998) (No. A-2427-95T3) (on file with author).

however, has proven controversial and lays the foundation for arguments currently before the U.S. Supreme Court.

A. Evidence Relevant to Determining the BSA's Expressive Purpose

In four recent cases, the BSA has argued, through testimony by leaders and members, that forced inclusion of gay troop leaders would undermine its anti-gay message.¹⁰¹ The BSA argues that the words “morally straight” and “clean” in the Scout Oath¹⁰² and Law¹⁰³ stand for the proposition that homosexuality is immoral.¹⁰⁴ According to the *Boy Scout Handbook*, to be a “morally straight” Scout

[You must] be a person of strong character [and] your relationships with others should be honest and open. You should respect and defend the rights of all people. Be clean in your speech and actions, and remain faithful in your religious beliefs. The values you practice as a Scout will help you shape a life of virtue and self-reliance.¹⁰⁵

To be a “clean” Scout one should “keep[] his body and mind fit[,] . . . choose[] the company of those who live by high standards[, and] . . . help[] keep his home and community clean.”¹⁰⁶ The *Handbook* further explains the meaning of “clean”:

You can't avoid getting dirty when you work and play hard. But when the game is over or the job is done, that kind of dirt washes off with soap and water.

101. See, e.g., *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580, 585 (Cal. Ct. App. 1994).

102. The Scout Oath states:

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.

Boy Scouts of Am., *The Boy Scout Handbook* 9 (11th ed. 1998).

103. The Scout Law provides: “A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent.” *Id.*

104. See, e.g., *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1224 (N.J. 1999), *cert. granted*, 120 S. Ct. 865 (Jan. 14, 2000).

105. Boy Scouts of Am., *supra* note 102, at 46.

106. *Id.* at 53.

There's another kind of dirt, though, that can't be scrubbed away. It is the kind that shows up in foul language and harmful thoughts and actions.

Swearwords and dirty stories are often used as weapons to ridicule other people and hurt their feelings. The same is true of racial slurs and jokes that make fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such tasteless behavior. He avoids it in his own words and deeds.¹⁰⁷

In addition to relying on the words "morally straight" and "clean" to support its position that an anti-gay message is an expressive purpose of the organization, the BSA also relies on a 1978 internal memorandum, a 1983 written statement, and 1991 and 1993 position statements.¹⁰⁸ The 1978 memo is a policy statement in question-and-answer form that was never openly distributed within the BSA hierarchy or to members or Scout leaders.¹⁰⁹ The memo asks whether an openly gay individual can be a Scout leader or registered unit member.¹¹⁰ The BSA responds in the negative, stating that membership is a privilege and that homosexuality and leadership/membership in Scouting are inconsistent.¹¹¹ In a written statement five years later, the BSA's Legal Counsel reiterated the 1978 internal memo by stating that "[a]vowed 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."¹¹²

The first position statement was published in 1991, restating why the BSA would not accept gays as members or leaders.¹¹³ Focusing on "homosexual conduct" rather than on the exclusion of gays, the statement read: "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

107. *Id.*

108. *See, e.g., Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 225 n.5 (Cal. 1998); *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 289-90 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196, 1224 (N.J. 1999), *cert. granted*, 120 S. Ct. 865 (Jan. 14, 2000).

109. *See Richardson v. Chicago Area Council of the Boy Scouts of Am.*, No. 92-E-80, 1996 WL 734724, at *10 (Chicago Comm'n on Human Relations Feb. 21, 1996).

110. *See id.*

111. *See id.*

112. *Curran*, 952 P.2d at 225 n.5.

113. *See Dale*, 706 A.2d at 290.

homosexuals do not provide a desirable role model for Scouts.”¹¹⁴ In 1993, the BSA redrafted the 1991 position statement stating again that the BSA will “not allow for the registration of avowed homosexuals as members or as leaders.”¹¹⁵

B. The Boy Scouts Cases: Examining How Each Court Determined Whether an Anti-Gay Message Is an Expressive Purpose of the BSA

The Supreme Court of New Jersey,¹¹⁶ the Supreme Court of California,¹¹⁷ an appellate court in California,¹¹⁸ and the Chicago Commission on Human Relations¹¹⁹ all have considered whether the BSA, as a public accommodation, must admit gay leaders. Two of the cases concluded that an anti-gay message is not an expressive purpose of the BSA, and therefore forced inclusion of gays would not violate the BSA’s associational rights.¹²⁰ On the other hand, the concurring opinions in the other two cases concluded that an anti-gay message is an expressive purpose of the BSA, and as a result forced inclusion of gays would violate the BSA’s associational rights.¹²¹ While the concurring opinions do not carry significant precedential weight, their analyses, coupled with the analyses of the cases finding no anti-gay expressive purpose, illustrate the debate over whether courts should allow the BSA to shelter itself from public-accommodations laws by providing the BSA with First Amendment associational protection. For this reason, it is valuable to examine all four cases, including the relevant concurring opinions.

114. *Id.*

115. *Id.* at 276–77.

116. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999), *cert. granted*, 120 S. Ct. 865 (Jan. 14, 2000).

117. *See Curran*, 952 P.2d at 252 (Kennard, J., concurring).

118. *See Merino v. San Diego County Council of the Boy Scouts of Am.*, Nos. D021969, D022829, 1997 WL 1145151, at *9 (Cal. Ct. App. May 21, 1997) (Huffman, J., concurring).

119. *See Richardson v. Chicago Area Council of the Boy Scouts of Am.*, No. 92-E-80, 1996 WL 734724, at *1 (Chicago Comm’n on Human Relations Feb. 21, 1996).

120. *See infra* Part II.B.1, 4.

121. *See infra* Part II.B.2–3.

1. *Dale v. Boy Scouts of America: Anti-Gay Message Is Not an Expressive Purpose of the BSA and Therefore Does Not Warrant Constitutional Protection*

In *Dale v. Boy Scouts of America*,¹²² the Supreme Court of New Jersey held that because an anti-gay message was not the BSA's expressive purpose, the BSA could not exclude an openly gay scout leader solely based on his sexual orientation.¹²³ After an exemplary career as a Boy Scout, James Dale became an assistant scoutmaster of Troop 73.¹²⁴ On July 8, 1990, the *Newark Star-Ledger* published an article in which Dale stated that he was gay but did not identify himself as a BSA leader or member, or express an opinion about any BSA policies.¹²⁵ Shortly after the *Star-Ledger* printed the article, the BSA revoked Dale's leadership privileges because "[the BSA] does not admit avowed homosexuals to membership in the organization."¹²⁶

In Dale's lawsuit against the BSA, the trial court held that the BSA could not be forced to accept Dale without violating the BSA's constitutional right of expressive association.¹²⁷ Equating the words "clean" and "morally straight" with anti-homosexuality, the court found that the BSA had always had a policy of excluding "active homosexuals" and concluded that according to the BSA's mission and purpose, an assistant scoutmaster who is an active sodomist is incompatible with Scouting and could never be "morally straight."¹²⁸ The judge concluded that the presence of a publicly avowed active homosexual is "absolutely antithetical to the purpose of Scouting."¹²⁹

The appellate division, relying on the *Roberts* framework, reversed the trial court decision and concluded that enforcement of New Jersey's Law Against Discrimination would not "affect in 'any significant way' BSA's

122. 734 A.2d 1196 (N.J. 1999), *cert. granted*, 120 S. Ct. 865 (Jan. 14, 2000).

123. *See id.* at 1223.

124. *See id.* at 1204.

125. *See id.* at 1225.

126. *Id.* at 1205.

127. *See Dale v. Boy Scouts of Am.*, No. MON-C-330-92, slip op. at 71 (N.J. Super. Ct. Ch. Div. Nov. 3, 1995), *rev'd*, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *cert. granted*, 120 S. Ct. 865 (Jan. 14, 2000).

128. *Id.* at 38, 42.

129. *Id.* at 71.

ability to express [its] views and to carry out [its] activities.”¹³⁰ Focusing on the fact that the BSA’s Congressional Charter, Bylaws, rules and regulations, and handbooks all are devoid of an anti-gay message, the court refused to accept the alleged fundamental expressive nature of the BSA’s anti-gay policy.¹³¹ The court emphasized that this policy was never integrated into BSA documents, never written in application or recruiting materials, never distributed throughout the BSA hierarchy, never distributed to members, volunteers, or recruits, and never presented to the public as representative of BSA’s official position.¹³² Furthermore, the court opined that the BSA’s inclusive membership policy, as well as its Congressional Charter stating that the BSA’s Bylaws and rules will not be “inconsistent with the law of the United States of America, or any State thereof,” align with the purposes of New Jersey’s Law Against Discrimination.¹³³ Finally, the court reasoned that the BSA’s failure to expel sponsors and heterosexual scouts who criticize the BSA’s discriminatory policy contradicts its policy of excluding a gay leader “who says absolutely nothing about the morality or lifestyle of homosexuals,” but who has simply been honest about his sexual orientation.¹³⁴

The Supreme Court of New Jersey, affirming the appellate division’s decision, concluded that because anti-gay teaching was not the BSA’s expressive purpose or “shared goal,” the BSA could not exclude Dale solely based on his sexual orientation.¹³⁵ The court refused to equate “morally straight” and “clean” with the condemnation of homosexuality.¹³⁶ Furthermore, the court declined to view the 1978 position paper as representative of the members’ shared views, observing that the paper, written seventy-six years after Congress granted the BSA its Charter, was never disseminated to members or leaders.¹³⁷ Additionally, the court gave no credence to the self-serving position papers written

130. Dale v. Boy Scouts of Am., 706 A.2d 270, 288 (N.J. Super. Ct. App. Div. 1998), *aff’d*, 734 A.2d 1196, 1224 (N.J. 1999), *cert. granted*, 120 S. Ct. 865 (Jan. 14, 2000).

131. *See id.* at 290.

132. *See id.*

133. *Id.* at 288.

134. *Id.* at 291.

135. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1224 (N.J. 1999), *cert. granted*, 120 S Ct. 865 (Jan. 14, 2000).

136. *See id.*

137. *See id.* at 1224 n.12.

after Dale's expulsion in preparation for litigation.¹³⁸ Also, like the appellate division, the supreme court perceived the BSA sponsors' diverse views about homosexuality as further evidence that an anti-gay message was not a unifying associational goal of the organization.¹³⁹ Finally, the court held that the BSA's litigation stance on homosexuality was antithetical to the organization's all-inclusive policy and revealed that the BSA's expulsion of Dale was solely based on prejudice.¹⁴⁰

The court distinguished *Hurley*, concluding that Dale's status as a leader was not equivalent to a group's marching in a parade.¹⁴¹ The court explained that *Hurley* protects an organization's constitutional right to exclude from its membership persons who *advocate a message* that an organization wishes not to disseminate.¹⁴² The court reasoned that unlike a marcher in a parade, Dale did not participate in the BSA to "make a point" about sexuality.¹⁴³ Dale's mere presence in the organization was not symbolic of the BSA's endorsement of homosexuality and, therefore, reinstatement of Dale would not compel the BSA to advocate any message.¹⁴⁴ Forcing the BSA to accept Dale, the court concluded, was not an infringement on the BSA's constitutional right of free speech.¹⁴⁵

This case is currently on appeal to the U.S. Supreme Court. The Court granted certiorari on January 14, 2000¹⁴⁶ and heard oral arguments on April 26, 2000. The Court is considering the following question: "Does state law requiring Boy Scout troop to appoint avowed homosexual and gay rights activist as assistant scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridge First Amendment rights of freedom of speech and freedom of association."¹⁴⁷

138. *See id.* Presumably, if the position papers had been written before Dale's expulsion, the BSA would have had a more persuasive argument that an anti-gay message was an expressive purpose. This argument may still have failed because the papers were never disseminated to members or leaders and the anti-gay message was still absent from most Scouting literature. Furthermore, the BSA, as would be required to overcome New Jersey's compelling interest in eradicating discrimination, did not prove that its members associate with one another at least in some significant part to convey anti-gay views as a shared position.

139. *See id.* at 1224–25.

140. *See id.* at 1226.

141. *See id.* at 1229.

142. *See id.*

143. *Id.*

144. *See id.*

145. *See id.*

146. *See Boy Scouts of Am. v. Dale*, 120 S. Ct. 865 (Jan. 14, 2000).

147. 68 U.S.L.W. 3449.

2. Curran v. Mount Diablo Council of the Boy Scouts of America:
*Opposition to Homosexuality Is an Expressive Purpose of the BSA
That Warrants Constitutional Protection*

Although the Supreme Court of California in *Curran v. Mount Diablo Council of the Boy Scouts of America*¹⁴⁸ held that the BSA was not subject to California's public-accommodations statute,¹⁴⁹ the concurrence noted that the BSA would have a compelling argument that its associational rights would be violated if it was forced to include gay scout leaders.¹⁵⁰ Timothy Curran achieved the highest possible BSA rank, that of Eagle Scout.¹⁵¹ His membership ended automatically when he turned eighteen years old.¹⁵² After his eighteenth birthday, although he was no longer an official member of the BSA, Curran continued to participate in his former troop's activities.¹⁵³ It was during this time, the summer of 1980, that the *Oakland Tribune* featured Curran in an article on gay teenagers.¹⁵⁴ Nothing in the article mentioned Curran's relationship to the BSA.¹⁵⁵

After the BSA declined Curran's application to be an assistant master, Curran met with Quentin Alexander, executive director of the Mt. Diablo Council of the BSA.¹⁵⁶ During the meeting, Alexander asked "if [Curran] espoused that lifestyle still."¹⁵⁷ Curran told Alexander that he did 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."¹⁵⁸ Alexander indicated that the BSA could not accept Curran's application.¹⁵⁹ Curran filed suit against the BSA alleging that the BSA's rejection of his application to become an

148. 952 P.2d 218 (Cal. 1998).

149. *See id.* at 238.

150. *See id.* at 254 (Kennard, J., concurring).

151. *See id.* at 220.

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.* at 221.

156. *See id.*

157. *Id.*

158. *Id.* at 222.

159. *See id.*

assistant scoutmaster violated California's public-accommodations statute, the Unruh Civil Rights Act.¹⁶⁰

The California Court of Appeal affirmed the trial court's decision that the BSA is an expressive association whose expressive activities would be substantially interfered with if the Unruh Act applied.¹⁶¹ Without distinguishing whether Curran's exclusion was based on his status or his conduct, the court held that the BSA does not have to express publicly its view that homosexuality is immoral to be afforded constitutional protection.¹⁶² The court further rejected Curran's argument that to protect the BSA's expressive association, the members must have joined together because of a belief in the immorality of homosexual conduct.¹⁶³ Instead, the appellate court relied on the trial court's factual finding that opposition to homosexual conduct has been a longstanding part of the BSA's belief system, even if this was not the principal reason for forming the BSA.¹⁶⁴ In determining the BSA's views, the trial court, discrediting Curran's witnesses, relied upon the defense witnesses who allegedly expressed the organization's views.¹⁶⁵ This testimony from the BSA leaders concerning its anti-gay policy, combined with the court's interpretation of "morally straight" and "clean," was the only evidence the court used to justify the necessary connection between the BSA's expressive purpose concerning sexual morality and the BSA's discriminatory policy.¹⁶⁶

On appeal, the Supreme Court of California never arrived at the expressive-association issue because it held that the BSA is not a "business establishment" and therefore not subject to California's public-accommodations statute.¹⁶⁷ Nevertheless, Justice Kennard, in a concurring opinion, concluded that had the court found that the BSA was a business establishment, the BSA's constitutional rights likely would have outweighed the state's goal of equal opportunity.¹⁶⁸ In arriving at this

160. *See id.*

161. *See Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580, 590 (Cal. Ct. App. 1994), *aff'd on other grounds*, 952 P.2d 218 (Cal. 1998).

162. *See id.* at 586.

163. *See id.* at 586–87.

164. *See id.* at 588.

165. *See id.* at 588–89.

166. *See id.* at 584–89.

167. *See Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 238–39 (Cal. 1998).

168. *See id.* at 254 (Kennard, J., concurring).

conclusion, Kennard relied on the trial court's finding that the official position of the BSA is that "homosexuality is immoral and incompatible with the BSA Oath and Law."¹⁶⁹ According to Justice Kennard, the BSA would have had a "compelling argument" that forcing it to accept gay scout leaders, or anyone else with views contrary to the BSA's "guiding precepts," would violate the BSA's First Amendment associational rights.¹⁷⁰

3. *Merino v. San Diego County Council of the Boy Scouts of America: An Openly Gay Leader Inherently Advocates a Message Contrary to the BSA's Anti-Gay View*

California's Fourth District Court of Appeals also addressed the application of California's public-accommodations statute to the BSA in *Merino v. San Diego County Council of the Boy Scouts of America*.¹⁷¹ Although the majority concluded that the BSA is not a "business establishment" and therefore exempt from the statute,¹⁷² Judge Huffman filed a concurring opinion stating that even if the BSA met the definition of business establishment, forced inclusion of Merino, a scout leader who was suspended for publicly announcing that he was gay, would be an unconstitutional intrusion on the BSA's associational rights.¹⁷³ Contrary to the trial court's factual finding, Judge Huffman concluded that an anti-gay message, like patriotism, courage, and self-reliance, is an expressive purpose of the BSA.¹⁷⁴ Although no evidence showed that the BSA framed its defense in terms of free speech rather than expressive association, Judge Huffman relied on *Hurley*, equating Merino's openness about his sexuality with expressive conduct to justify the BSA's constitutional right to exclude Merino.¹⁷⁵

169. *Id.* (Kennard, J., concurring).

170. *Id.* (Kennard, J., concurring).

171. Nos. D021969, D022829, 1997 WL 1145151 (Cal. Ct. App. May 21, 1997).

172. *See id.* at *8.

173. *See id.* at *13 (Huffman, J., concurring).

174. *See id.* (Huffman, J., concurring).

175. *See id.* (Huffman, J., concurring).

4. *Richardson v. Chicago Area Council of the Boy Scouts of America: BSA's Opposition to Homosexuality Is a Discriminatory Hiring Practice, Not an Expressive Purpose*

In *Richardson v. Chicago Area Council of the Boy Scouts of America*,¹⁷⁶ the Chicago Commission on Human Relations concluded that the BSA's employment policies excluding gays violated the Chicago Human Rights Ordinance.¹⁷⁷ The Commission began its expressive-association analysis by distinguishing *Hurley*.¹⁷⁸ In contrast to *Hurley*, where the Court protected the discriminating organization's freedom of speech, the BSA urged the Commission to protect its discriminatory policy based on its expressive associational rights.¹⁷⁹ The Commission explained that, unlike in *Hurley*, the BSA must prove that opposition to homosexuality is an "expressive goal."¹⁸⁰ "Inherent 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."¹⁸¹ The BSA argued that opposition to homosexuality always has been one of its expressive purposes as evidenced by the terms "morally straight" and "clean."¹⁸² The Commission, unconvinced by this argument, concluded that opposition to homosexuality is not an expressive goal of the BSA and that the BSA's anti-gay policy is simply a discriminatory hiring practice.¹⁸³ In rejecting the BSA's argument, the Commission concluded that not only are the terms "morally straight" and "clean" vague, but nowhere in these terms' definitions are there any references to sexual

176. No. 92-E-80, 1996 WL 734724 (Chicago Comm'n on Human Relations Feb. 21, 1996). In an unpublished opinion, the Illinois Circuit Court of Cook County affirmed the Commission's decision. See *Chicago Area Council of Boy Scouts of Am. v. Richardson*, No. 96 CH 03266, at 1 (Ill. Cir. Ct. Aug. 12, 1999) (on file with author). At the time this Comment went to publication, the Illinois Appellate Court had agreed to hear the appeal. See *Chicago Area Council of Boy Scouts of Am. v. Richardson*, No. 96 CH 03266, at 1 (Ill. Cir. Ct. Aug. 12, 1999), *appeal docketed*, No. 1-993018 (Ill. App. Ct. Aug. 23, 1999).

177. See *Richardson*, 1996 WL 734724, at *1. Although this case was in the employment context, the Commission's analysis mirrored expressive-purpose analysis.

178. See *id.* at *29.

179. See *id.*

180. *Id.* at *30.

181. *Id.*

182. See *id.* at *31.

183. See *id.* at *33-34.

orientation.¹⁸⁴ While the BSA witnesses testified that they believed the terms referred to being heterosexual, the Commission concluded that the BSA leaders' "personal interpretations have no basis in Scouting doctrine."¹⁸⁵ The BSA argued that its goals are whatever its leadership says they are, that "only Scouting can speak for Scouting."¹⁸⁶ The BSA argued that because the BSA leadership has taken the position that the words "morally straight" and "clean" refer to being heterosexual, it is irrelevant what others within Scouting believe or what the *Handbook* states.¹⁸⁷ The Commission, however, 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."¹⁸⁸

The Commission could not find any evidence of the BSA's anti-gay message in the thousands of pages of Scouting literature, recruiting brochures and videos, handbooks, annual reports, and correspondence they reviewed.¹⁸⁹ The Commission discredited the BSA's revised 1993 written employment policy as a response to litigation and concluded that the only written expressive goal of opposing homosexuality was the 1978 internal memorandum.¹⁹⁰ The court found this evidence alone insufficient to indicate that one of the BSA's expressive goals was opposition to homosexuality.

III. COURTS SHOULD RELY ONLY ON CLEAR AND OBJECTIVE EVIDENCE TO DETERMINE THE BOY SCOUTS OF AMERICA'S EXPRESSIVE PURPOSE

A major shortcoming of the *Roberts* trilogy is its failure to provide guidance on how courts should determine an organization's expressive purpose. As the BSA cases demonstrate, in the absence of specific guidelines, the courts have broad discretion to decide what facts are relevant. With this discretion, courts have allowed the subjective views of individual BSA members and leaders to be mistaken for the

184. *See id.* at *31.

185. *Id.*

186. *Id.*

187. *See id.*

188. *Id.* at *32.

189. *See id.* at *30-31.

190. *See id.* at *31.

organization's expressive purpose. To address this problem, courts should limit their analysis of expressive purpose to objective evidence to prevent witnesses' personal interpretations of the BSA's expressive purpose from coloring its stated meaning. Furthermore, limiting analysis to objective evidence would preclude courts from using subjective evidence as a scapegoat for espousing homophobic or heterosexual¹⁹¹ readings of the BSA's vaguely articulated purpose. When the BSA seeks to shelter itself from antidiscrimination laws by taking refuge in the First Amendment, its message of hate should be clearly articulated in position statements distributed internally and externally, written in recruiting brochures, announced to sponsors, and referred to in either the original bylaws or amended bylaws. When courts afford constitutional protection to less discernible expressive purposes, the state's goal of equal opportunity is frustrated.

A. *Limiting Analysis to Objective Evidence Prevents Witnesses' Personal Interpretations of the BSA's Expressive Purpose from Coloring Its Stated Meaning*

By relying on witnesses' personal interpretations of the BSA's purposes and beliefs, courts have permitted the BSA, an organization with a defined body of doctrine, simply to tailor its goals and purposes to its particular litigation needs. As a result, courts' interpretations of the BSA's expressive purpose may be based on their perceptions of witnesses' sincerity and whether the proffered witnesses are representative of the membership as a whole. If courts limit their analysis to clear and objective evidence when determining whether the BSA's goals are linked to its exclusionary policy, the BSA would not be permitted to stray from its explicitly stated purposes nor would it be allowed to take advantage of the ambiguities created by its vaguely articulated message.

An example of a court's limiting its analysis to objective evidence is found in *Invisible Empire of the Knights of the Ku Klux Klan v. Thurmont*.¹⁹² In that case, the court, upholding the KKK's right to

191. As used here, "heterosexism" is the view that heterosexuality is "natural" and that lesbian and gay sexuality is inferior. See Rhonda Copelon, *A Crime Not Fit to Be Named: Sex, Lies, and the Constitution*, in *The Politics of Law: A Progressive Critique* 177, 191 n.2 (David Kairys ed., 1990). This view is systematically implemented through law, custom, and other vehicles. See *id.* "Heterosexism" should be distinguished from "homophobia," which is the fear and loathing of lesbians and gay men. See *id.*

192. 700 F. Supp. 281 (D. Md. 1988).

exclude nonwhites and non-Christians from its parade, concluded that the testimony of the KKK's grand dragon that he did not believe in white supremacy was irrelevant.¹⁹³ The court instead noted that it was clear from the KKK's brochures that the group as a whole believed in white supremacy.¹⁹⁴ Not even the grand dragon's testimony could disconnect the membership from the message.

By affording constitutional protection to the impressions of designated leaders, courts allow the secrecy of the elite's interpretations of the organization's message to override the democracy of the group's definition of its message. In the BSA cases, if "only Scouting can speak for Scouting,"¹⁹⁵ as the BSA argues, there would be few limits on the BSA's personal interpretations of its message. What would happen if the BSA, through witness testimony, suddenly advocated exclusion of Jewish or African-American leaders simply because the BSA leadership at that time personally interpreted the words "morally straight" and "clean" to mean that scout leaders must be Protestant or white? According to the BSA's argument, this should be permissible. It seems highly improbable that courts today, however, would infuse the words "morally straight" and "clean" with religion or race, even if the BSA leadership took that position. Yet courts have been willing to infuse these words with a sexual orientation simply because certain members of the BSA leadership personally believed in the immorality of homosexuality. This secrecy of the elite leadership is antithetical to the *Roberts* trilogy's requirement that a clearly defined expressive purpose be a condition of constitutional protection.¹⁹⁶

The BSA's attempt to assert a First Amendment freedom-of-association defense by characterizing its anti-gay policy as an expressive goal of Scouting is similar to the attempt made twenty years ago by Dade Christian School to justify its refusal to accept black students on freedom-of-religion grounds.¹⁹⁷ In *Brown v. Dade Christian Schools, Inc.*,¹⁹⁸ the court refused to give any deference to leaders' testimony and instead looked only at objective evidence to determine whether the

193. *See id.* at 289 n.2.

194. *See id.*

195. *Richardson*, 1996 WL 734724, at *31.

196. *See supra* Part I.C; *see also* Hutchinson, *supra* note 85, at 102.

197. *See Richardson*, 1996 WL 734724, at *32 (citing *Brown v. Dade Christian Schs., Inc.*, 556 F.2d 310 (5th Cir. 1977)).

198. 556 F.2d 310 (5th Cir. 1977).

school's policy of segregation was the result of religious exercise.¹⁹⁹ In that case, a secular school asserted that forced integration would violate its First Amendment right of free exercise of religion.²⁰⁰ The court found, however, that because none of the school's written tenets included anything related to segregation of schools or separation of races, the First Amendment would not validate the discriminatory policy.²⁰¹ The court stated that "the absence of references to school segregation in written literature stating the church's beliefs, distributed to members of the church and the public by leaders of the church and administrators of the school, is strong evidence that school segregation is not the exercise of religion."²⁰² After hearing testimony from individuals including the original vice-president, the concurrence recognized that there were individuals within the school who held sincere beliefs concerning segregation.²⁰³ In fact, Dr. Arthur E. Kreft, the school's principal, testified at his deposition that enrolling blacks would alienate him from God "in the sense that I would be disobedient, according to my beliefs in the Scriptures."²⁰⁴ Nevertheless, the court held:

[T]he refusal by Dade Christian School to admit a black child was an institutional action taken by an institution whose patrons are, according to the evidence, divided in their beliefs on the religious justification for racial segregation. In such a situation the only practical course open to a Court is to *examine the corporate beliefs of the institution involved, as adopted or promulgated or carried forward as an institutional concept*. To do otherwise would allow the institution to pick and choose which of its members' potentially conflicting beliefs it wished to assert at any given time. Thus, an avowedly secular school should not be permitted to interpose a free exercise defense to a § 1981 action merely because it can find some of its patrons who have a sincere religiously based belief in racial segregation.²⁰⁵

Unlike in *Dade Christian Schools*, the *Curran* court fell prey to relying on "witnesses uniquely qualified" to testify that the stand against

199. *See id.* at 312–13.

200. *See id.* at 311.

201. *See id.* at 312.

202. *Id.*

203. *See id.* at 318–19 (Brown, C.J., concurring).

204. *Id.* at 318 (Brown, C.J., concurring).

205. *Id.* at 313 (emphasis added).

homosexual conduct is part of the BSA belief system.²⁰⁶ The *Curran* court stated:

Especially in a volunteer organization, where members who disagree with the organization's expressions are free to leave at any time, the organization is an appropriate vehicle to raise the expressive association rights of its members since for all practical purposes the expressions of the group are the expressions of the members.²⁰⁷

To say that the organization and its members are in every practical sense identical is a fiction created to support the trial court's reliance on the particular "uniquely qualified" witnesses that the lawyers for the BSA called to the stand to express the "organization's" message. Thus, an avowedly all-inclusive organization should not be permitted to interpose a freedom-of-association defense to a legitimate state public-accommodations law merely because some of its leaders or members sincerely believe that gay people are antithetical to the BSA belief system. Rather than giving preferential weight to uniquely qualified witnesses, courts should, like in *Dade Christian Schools, Richardson, and Thurmont*, solely consider the BSA's objective materials.

B. Limiting Analysis to Objective Evidence Is the Most Prudent Means by Which a Court Can Arrive at an Unbiased Interpretation of the BSA's Expressive Purpose

While cases revolving around social issues are couched in legal doctrine, it would be naïve to ignore the impact of societal values and perceptions on these decisions. Simply put, the law reflects societal biases and prejudices. Although the social categories of discrimination may change over time, there is always a legally stigmatized group. To prevent further stigmatization of gays, courts in the BSA cases should limit their analysis of expressive purpose to objective evidence to interpret, without bias, the BSA's vaguely articulated message.

This history of judicially sanctioned stigmatization is readily apparent in legal opinions throughout history. In *Dred Scott v. Sandford*,²⁰⁸ a

206. *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580, 585 (Cal. Ct. App. 1994), *aff'd on other grounds*, 952 P.2d 218 (Cal. 1998).

207. *Id.* at 587-88.

208. 60 U.S. (19 How.) 393 (1856).

former slave sought recognition as a free citizen.²⁰⁹ Relying on the constitutional framers' intent, the Court denied Dred Scott's claim of freedom and pronounced the constitutional inferiority of African-American people.²¹⁰ One hundred years later, in *In re Strittmater's Estate*,²¹¹ the court considered a woman insane due to her "morbid aversion to men and [her devotion to] feminism to a neurotic extreme."²¹² As such, the court held that she did not have testamentary capacity and her bequest to the National Women's Party was revoked due to the court's perception of her insanity.²¹³

Just as racism and sexism controlled those courts' opinions, so too can a court's homophobia²¹⁴ affect its decision.²¹⁵ Judges often bring to the resolution of gay-rights lawsuits a deep and unrecognized homophobia that leads to a process by which the oppression of gays and lesbians, like that of African-Americans and women, is rationalized as a protection of intimate life and "family values."²¹⁶ This bias was exhibited in *Ratchford v. Gay Lib*,²¹⁷ where Justice William Rehnquist in dissent used the imagery of disease to discuss gay sexual life.²¹⁸ He wrote, "[T]he question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles."²¹⁹ As one legal scholar noted, to compare homosexuality and contagious disease is "quintessential homophobia."²²⁰ Justice Rehnquist's comparison is reminiscent of *The Eternal Jew's* depiction of the Jews of Poland as diseased, corrupt, filthy, and perverse.²²¹ In this film, footage of rats

209. *See id.* at 400.

210. *See id.* at 409.

211. 53 A.2d 205 (N.J. 1947).

212. *Id.* at 205.

213. *See id.* at 206.

214. *See* Copelon, *supra* note 191, at 191 n.2.

215. *See* David A.J. Richards, *Women, Gays, and the Constitution* 346–54 (1998).

216. *See id.* at 349; *see also* Copelon, *supra* note 191, at 178.

217. 434 U.S. 1080 (1978) (Rehnquist and Blackmun, JJ., dissenting from Supreme Court's refusal to review order requiring recognition of gay-rights group).

218. *See id.* at 1084 (Rehnquist and Blackmun, JJ., dissenting).

219. *Id.* (Rehnquist and Blackmun, JJ., dissenting).

220. Copelon, *supra* note 191, at 179.

221. *See* Stig Hornshøj-Møller, *Stig Hornshøj-Møller on Der Ewige Jude* (last modified Feb. 21, 1999) <<http://www.holocaust-history.org/der-ewige-jude>> (describing Hornshøj-Møller's analysis of Nazi propaganda film *The Eternal Jew*).

squirming from sewers and leaping at the camera is interspersed with photos of Rabbis and a narration explaining the Jews' rat-like behavior.²²² The gross depiction there, however, was in the most famous Nazi propaganda film, rather than in the courtroom.

For a court to identify the neutral words "morally straight" and "clean" as found in the Boy Scout Oath with heterosexuality and, by inference, "not morally straight" and "not clean" with homosexuality, is also quintessentially homophobic. Without admitting personal bias, the *Dale* trial court concluded that it was "abundantly clear from the proofs presented by the BSA" that homosexuality is not "morally straight" or "clean."²²³ In support of this, the court in its "Legal Analysis" relied on the Bible, referring to the King James Version's depiction of the destruction of Sodom and Gomorrah by "fire and brimstone rained down by the Lord" and equating "sexual depravity" in that biblical story with "active homosexuality."²²⁴ The court also discussed the "Judeo-Christian tradition" that has "always" considered an act of sodomy to be a "gravely serious moral wrong" and concluded that "the major religions of the civilized world all deem [homosexuality] immoral."²²⁵ As if the preceding "analysis" did not suffice, the trial court further wrote: "Clearly, if Dale had engaged in criminal activity such as using or dealing in controlled dangerous substances; if he were a rapist or murderer or pederast there could be no basis to claim a violation of [New Jersey Law Against Discrimination] in revoking his commission as an assistant scoutmaster."²²⁶ Like Justice Rehnquist's use of the imagery of disease to discuss gay sexual life, the trial court's comparison of Dale's sexuality to being a rapist and child molester perpetuates the degrading, cruel, and unfounded stereotypes that have plagued stigmatized groups of people throughout history.

While the *Dale* trial court infused the words "morally straight" and "clean" with a sexual orientation by comparing Dale's sexuality to being a rapist and child molester, Justice Kennard concluded her concurrence

222. *See id.*

223. *Dale v. Boy Scouts of Am.*, No. MON-C-330-92, slip op. at 38 (N.J. Super. Ct. Ch. Div. Nov. 3, 1995), *rev'd*, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *cert. granted*, 120 S. Ct. 865 (Jan. 14, 2000).

224. *Id.* at 39.

225. *Id.* at 39, 43.

226. *Id.* at 43.

in *Curran* by comparing the BSA to the NAACP and the B'nai B'rith.²²⁷ She rhetorically asked, "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?"²²⁸ The more appropriate question would have been whether gays are so antithetical to the BSA that they deserve to be compared to Klansmen and anti-Semites. Comparing gays to Klansmen and anti-Semites is similar to Justice Rehnquist's comparison of homosexuality to a contagious disease and the *Dale* trial court's comparison of a gay man to a rapist and child molester. To be labeled diseased or to be called a rapist, child molester, Klansmen, or anti-Semite is to be deemed deviant. When courts compare gay people to these deviant groups, they implicitly brand gays abnormal and invoke images of fear, avoidance, and outrage. These images, created by the courts' biases, inevitably form the basis of their legal opinions.

Courts that treat a gay person's openness about his or her identity as "advocacy" again fall prey to heterosexist, if not homophobic, biases and, in the process, grant constitutional protection to "overbroad assumptions" based on nothing more than stereotypical notions that the Supreme Court warned against in *Roberts*.²²⁹ Without any evidence that Merino had expressed views on the morality of homosexuality, Judge Huffman in concurrence wrote, "A person who is an avowed homosexual who seeks to serve as a scout leader is manifesting views that are at odds with those of the organization on the issue of leadership criteria."²³⁰ Merely stating or revealing one's sexual orientation, however, should not constitute advocacy for First Amendment purposes. The antidiscrimination protections that embody public-accommodations laws become illusory if the very means of making one's status known can justify discrimination against that person.²³¹ "Such penalties would make the promise of equality a sham for lesbian and gay citizens, comparable

227. See *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 257 (Cal. 1998) (Kennard, J., concurring).

228. *Id.*

229. *Roberts v. United States Jaycees*, 468 U.S. 609, 625, 628 (1984).

230. *Merino v. San Diego County Council of the Boy Scouts of Am.*, Nos. D021969, D022829, 1997 WL 1145151, at *13 (Cal. Ct. App. May 21, 1997) (Huffman, J., concurring).

231. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1238 (N.J. 1999) (Handler, J., concurring).

to denying religion-based protection to Jews who wear yarmulkes or Christians who wear crosses.²³²

This is even truer when the distinguishing group characteristics are invisible.²³³ As one scholar explained, suppression of identity speech—speech that promotes or professes homosexuality—leads to a “compelled falsehood.”²³⁴ Without identity speech, most persons are assumed to be heterosexual.²³⁵ To force silence is to force persons who are not heterosexual to lie.²³⁶ As the *Scout Handbook* explains, “A Scout is trustworthy. A Scout tells the truth. He is honest, and he keeps his promises.”²³⁷ It is dishonesty, not homosexuality, that is truly antithetical to the BSA belief system.

Limiting analysis of expressive purpose to objective evidence will expose such homophobia and heterosexism as the courts’ biases, and the courts’ alone. Witness testimony offers courts a scapegoat for espousing homophobic or heterosexist readings of the BSA’s vaguely articulated purpose. The courts thereby implicitly assist the BSA in sheltering itself from antidiscrimination laws. By relying only on objective evidence, courts would be less likely to infuse the BSA materials with their own biases.

B. Limiting Analysis of Expressive Purpose to Objective Evidence Protects Constitutional Rights

When courts rely on subjective evidence, there is a greater chance that individual constitutional rights will be violated. When the *Curran* court of appeals noted that members who disagree with the BSA’s opinions are free to leave at any time,²³⁸ it made a significant assumption: that

232. Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695, 1718 (1993).

233. Dissenting from the Court’s denial of certiorari, Justice William Brennan noted with respect to a plaintiff who had been fired after informing coworkers of her bisexuality, “[I]t is realistically impossible to separate her spoken statements from her status.” *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1016 n.11 (1985). For discussions of the interdependence between speech and identity for gays and lesbians, see, e.g., Eskridge, *supra* note 31, at 180; Hunter, *supra* note 232, at 1718; and Brian C. Murchison, *Speech and the Self-Realization Value*, 33 Harv. C.R.-C.L. L. Rev. 443 (1998).

234. Hunter, *supra* note 232, at 1718.

235. *See id.*

236. *See id.* at 1719.

237. Boy Scouts of Am., *supra* note 102, at 47.

238. *See supra* note 207 and accompanying text.

members actually *know* the opinions. The BSA, as an expressive organization, chooses a set of values it wants inculcated. It is inconsistent for the BSA to seek constitutional protection as an expressive association if it fails to reveal all of these values, especially one that directly interferes with the state's goal of equal opportunity. The members cannot truly know all of the BSA's opinions if the BSA is willing to make only selected opinions known. Additionally, parents who permit their sons to join the BSA have an associational right not to associate with homophobes. Freedom of association protects not only the right to associate but the right not to associate.²³⁹ If the BSA seeks to shelter itself from public-accommodations laws, parents must understand the BSA teachings so they can choose whether they want their children to join an organization that discriminates.

IV. CONCLUSION

Like the words of the Constitution or those of the Bible, the words of the Scout Oath and Scout Law have different meanings for different people.²⁴⁰ The BSA's witnesses equated the words contained in the Oath and Law exclusively with the status and practice of heterosexuality.²⁴¹ These views were epitomized by the testimony of William McCloughlin, the director of personnel administration of the National Council of the BSA, who stated that in his opinion all behavior related to homosexual orientation is "immoral or indecent."²⁴² McCloughlin testified that a gay man is not able to devote himself to others, simply because he is gay.²⁴³ The expelled scout leaders and their witnesses, on the other hand, never understood the words "morally straight" or "clean" to refer to sexual orientation in any way.²⁴⁴ This contraposition evidences the fact that the BSA has failed to elevate its asserted anti-gay message to a level that warrants constitutional protection as an expressive purpose.

Courts should limit their analysis of expressive purpose to objective evidence. With this limitation, the BSA would be forced to articulate

239. *See* *Abod v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977).

240. *See* *Richardson v. Chicago Area Council of the Boy Scouts of Am.*, No. 92-E-80, 1996 WL 734724, at *12 (Chicago Comm'n on Human Relations Feb. 21, 1996).

241. *See id.*

242. *Id.* at *11.

243. *See id.*

244. *See id.* at *12.

publicly its hatred, which has instead only been revealed by subjective witness testimony and substantiated as a result of courts' biases. With this limitation, gays may perhaps win one small legal and social battle—courts may recognize that gays are not as antithetical to the Boy Scouts of America as anti-Semites are to the B'nai B'rith or white supremacists are to the NAACP.