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THE BOY SCOUTS OF AMERICA AS A “PLACE OF PUBLIC ACCOMMODATION”: DEVELOPMENTS IN STATE LAW

I. INTRODUCTION

Timothy Curran (“Curran”) was a member of Troop 37 of the Mount Diablo Council of the Boy Scouts of America (“BSA”) for over four years.¹ Eventually, plaintiff attained the rank of Eagle Scout, “the highest rank a Boy Scout can reach.”² Among other activities, he participated in leadership programs, was elected to two “honor camping organizations,” and attended the BSA’s “National Jamboree” in 1977.³ Curran remained active in the Boy Scouts until his eighteenth birthday in October 1979.⁴

Later the next year, in June and July 1980, the *Oakland Tribune* published a series on gay teenagers in which Curran agreed to an interview and identified himself as openly gay.⁵ The Executive Director of the Mount Diablo Council was alerted to the existence of the article but took no action until Curran submitted an application to attend the 1981 Boy Scouts of America National Jamboree.⁶ When Curran received notice that “only those adults who had been admitted as ‘scouters’—adult scoutmasters or assistant scoutmasters—were eligible to attend the national jamboree,” he attempted to apply for an assistant scoutmaster position.⁷ The Mount Diablo Council responded in part: “[w]e need to set an appointment to discuss this, but we can’t accept that application.”⁸

Curran was later informed that the Council rejected his application because of his homosexuality.⁹ After a meeting with the Executive Director of the Mount Diablo Council and a hearing by the Western Region of the BSA, Curran filed suit and claimed that the BSA’s “rejection of his application to become an assistant scoutmaster violated

1. *See* Curran v. Mount Diablo Council, 952 P.2d 218, 220 (Cal. 1998)(Curran II).

2. *Id.*

3. *Id.*

4. *See id.*

5. *See id.* at 220.

6. *See id.* at 221.

7. *Id.*

8. *Id.*

9. *See id.*

the Unruh Civil Rights Act.”¹⁰

The Supreme Court of California faced this factual scenario in the case of *Curran v. Mount Diablo Council of the Boy Scouts of America*.¹¹ The court did not side with Curran.¹² Instead, it decided that the BSA was free to discriminate against any individual that it chose to.¹³ Timothy Curran, if he wanted to remain active in the BSA, would have to move from California to a different state that did not permit the BSA to discriminate on the basis of sexual orientation.

In a remarkably similar factual situation, James Dale (“Dale”) entered the BSA as a Cub Scout when he was eight years old.¹⁴ Dale, who eventually advanced to the rank of Eagle Scout, was considered a “devoted and exemplary” member of the organization.¹⁵ He participated in the “Order of the Arrow,” “an affiliated honor camping association,” attended the 1985 National Boy Scout Jamboree as a delegate, and held many leadership positions within his troop.¹⁶

From approximately March 1989 to August 1990, Dale served as an Assistant Scoutmaster for Troop 73 in Matawan, New Jersey, after completing an application for adult membership and receiving approval from the BSA.¹⁷ However, on August 5, 1990, Dale received a letter from James W. Kay, Council Executive of Monmouth Council, that read in part:

After careful review, we have decided that your registration with the Boy Scouts of America should be revoked. We are therefore compelled to request that you sever any relations that you may have with the Boy Scouts of America.

You should understand that BSA membership registration is a

10. *Id.* at 222. The Unruh Civil Rights Act (“Unruh”) is the common name for California Civil Code section 51, California’s public accommodation statute. *Id.* at 219. For more on Unruh, *see infra* Part IV.B.

11. 952 P.2d 218, 218-19 (Cal. 1998) (Curran II).

12. *See id.* at 238-39.

13. *See id.* at 239. The court noted that, “even though the provisions of the Unruh Civil Rights Act do not apply to the membership policies of the Boy Scouts,” other legal grounds exist for Curran to attack the membership policies. *Id.* One such example is “the denial of tax exempt status” for organizations that continue to discriminate without penalty. *Id.* (citing *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (“upholding denial of federal tax-exempt status to private school that engaged in racial discrimination”).

14. *See Dale v. Boy Scouts of Am.*, 706 A.2d 270, 275 (N.J. Super. Ct. App. Div. 1998), *aff’d*, 734 A.2d 1196 (N.J. 1999).

15. *Id.*

16. *Id.*

17. *See id.*

privilege and is not automatically granted to everyone who applies. We reserve the right to refuse registration whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth.¹⁸

Dale wrote to Kay to request a reason for the decision and was informed by Kay that the BSA "specifically forbid[s] membership to homosexuals."¹⁹ Kay "became aware that [Dale] was an affirmed homosexual after reading the July 8, 1990 issue of the *Newark Star-Ledger* in which Dale was pictured in an article entitled 'Seminar Addresses Needs of Homosexual Teens' and labeled as the 'co-president of the Rutgers University Lesbian/Gay Alliance.'"²⁰

As a result, Dale claims that he was "stripped of all his scouting honors, including his Eagle Scout status" and was denied the opportunity to remain the Assistant Scoutmaster of Troop 73.²¹

James Dale brought suit in *Dale v. Boy Scouts of America*²² and maintained that the "BSA is a place of public accommodation . . . prohibited from discriminating on the basis of affectional or sexual orientation."²³ In an opinion issued on August 4, 1999, the Supreme Court of New Jersey confirmed that the BSA classified as a "place of public accommodation."²⁴ Therefore, the BSA was not free to discriminate against Dale on the basis of his sexual preference.²⁵ Accordingly, James Dale was permitted to serve as a Scoutmaster for the BSA in New Jersey, whereas he would not be allowed to do so in

18. *Id.* (quoting Letter from James W. Kay, Council Executive of Monmouth Council, to James Dale (July 19, 1990)).

19. *Id.* (quoting Letter from James W. Kay, Council Executive of Monmouth Council, to James Dale (Aug. 10, 1990)).

20. *Id.*; see Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (Newark), July 8, 1990, § 2, at 11.

21. *Id.* at 276.

22. 706 A.2d 270, *aff'd* 734 A.2d 1196 (N.J. 1999). For a full discussion of the *Dale* decision, see *infra* Part IV.A.

23. *Id.* at 277. Dale's claim of discrimination was analyzed under New Jersey's Law Against Discrimination ("LAD") (citing N.J. STAT. ANN. § 10:5-1 (West 1999)). See *id.* at 277-78. Under LAD, "affectional or sexual orientation" was defined as "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." *Id.* (quoting N.J. STAT. ANN. § 10:5-5hh (West 1999)). For further discussion of New Jersey's LAD, see *infra* Parts IV.A, V.

24. *Dale*, 734 A.2d at 1229.

25. See *id.*

California.

This Comment seeks to reconcile the differing opinions of California and New Jersey within the arena of "public accommodation" law. Part II provides background for the laws of "public accommodation" and pertinent details about the BSA. Part III of this Comment discusses the history of challenges to the BSA's discriminatory policies. Part IV will examine the *Dale* and *Curran II* decisions in full. Finally, this Comment will demonstrate that the discrepancies in public accommodation decisions are due, in large part, to the courts' methods of statutory construction. In particular, this Comment suggests that state courts should adopt the *Dale* interpretation of the term "place" as a "term of convenience, not of limitation,"²⁶ rather than the narrower construction of the term as utilized by the Supreme Court of California in *Curran II*.

II. BACKGROUND

In order to better understand the decisions regarding the BSA's membership policies, it is necessary to examine the history of public accommodation challenges to other organizations with restrictive membership policies. Then, an overview of the history of the BSA, its organizational goals, and membership policies follows.

A. Public Accommodation Law

Public accommodation law governs the rights of individuals and organizations to discriminate or restrict access to "public accommodations"²⁷ on the basis of "race, sex, religion, or the like."²⁸ Congress began to experiment with laws forbidding such restriction in response to increasing problems with racial discrimination in places of public accommodation.²⁹ Congress eventually enacted Title II of the Civil Rights Act of 1964.³⁰ Unlike previous statutes that prohibited discrimination in public accommodations, Title II was upheld as

26. *Dale*, 706 A.2d at 279 (quoting *National Org. for Women v. Little League Baseball Inc.*, 318 A.2d 33 (N.J. Super. Ct. App. Div. 1978)).

27. A "public accommodation" is defined as a "business establishment, that provides lodging, food, entertainment, or other services to the public; esp. (as defined by the Civil Rights Act of 1964), one that affects interstate commerce or is supported by State action." BLACK'S LAW DICTIONARY 1242 (7th ed. 1999).

28. John E. Theuman, Annotation, *Exclusion or Expulsion from Association or Club as Violation of State Civil Rights Act*, 38 A.L.R. 4th 628, 629 (1985).

29. See 15 AM. JUR. 2D *Civil Rights* § 28, at 337 (1976).

30. See 42 U.S.C. § 2000a(a)-(b) (1999). For further discussion of 42 U.S.C. § 2000a(a)-(b), see *infra* Parts III.A.2, V.

constitutional.³¹

While Title II contains an extensive list of entities that Congress clearly defined as public accommodations,³² courts have had considerable difficulty deciding whether “purely private clubs or other establishments which are not in fact open to the public” fit under Title II.³³ The key in most inquiries is the distinction between an association or a club that is “truly private” and those that constitute a “public business or accommodation which must be open to all.”³⁴ Generally, the outcome of these cases hinges on the “precise terms” of the particular civil rights act, including the term “place of public accommodation.”³⁵ While relying on “precise terms” of civil rights acts, courts also consider a variety of other factors when deciding whether an organization is a place of public accommodation.³⁶ One commentator suggested that courts consider the following: “[T]he extent of an association’s commercial activities or provision of services to the public, its ties to state or local government, and the presence or absence of any actual selectivity in the admission of members beyond the exclusion of the aggrieved minority.”³⁷

In this regard, “[a] number of courts have held that an organization cannot be a ‘place’ of public accommodation unless it conducts its activities at a fixed location.”³⁸ On the other hand, a minority of courts have decided that “even legitimate public service organizations” provide the general public with “commercial” business services.³⁹

31. *See id.* For example, the Federal Civil Rights Act of March 1, 1875 prohibited “racial discrimination in several [sic] types of public accommodations.” *Id.* However, the Act was declared unconstitutional because it violated principles of federalism. *See id.*

32. *See* 42 U.S.C. § 2000a(b)(1)–(4). Examples are inns, motels, restaurants, laundromats, and museums.

33. Theuman, *supra* note 28, at 629.

34. *Id.*

35. *Id.*

36. *See id.*

37. *Id.*

38. *Id.* at 629–30; *see* *United States Jaycees v. Richardet*, 666 P.2d 1008, 1012 (Alaska 1983) (holding that a nonprofit corporation with policy of not admitting women as full members was not a “place” of public accommodation because it had no “fixed geographical situs”); *see* *United States Jaycees v. Bloomfield*, 434 A.2d 1379, 1381 (D.C. Cir. 1981) (holding that an organization was not a “place” of public accommodation because it “[did] not operate from any particular place”).

39. Theuman, *supra* note 28, at 630; *see* *National Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 38 (N.J. Super. Ct. App. Div. 1974) (finding that ball field where Little League operates is a “‘place’ of public accommodation”); *United States Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E.2d 1199, 1204 (N.Y. 1983) (holding that no fixed location necessary for place of public accommodation); *United States Jaycees v.*

B. History and Policies of the BSA

In 1909, a boy came to the aid of Chicago publisher William D. Boyce, who was lost in the London fog.⁴⁰ After the boy guided Boyce to safety, Boyce offered him a tip.⁴¹ The boy refused, “explaining that as a Scout he would not take a tip for doing a Good Turn.”⁴² Inspired by this encounter, Boyce sought a meeting with Robert S. Baden-Powell, a British military hero credited with founding the Boy Scouts in Great Britain.⁴³ Boyce returned to the United States and incorporated the Boy Scouts of America under the laws of the District of Columbia on February 8, 1910.⁴⁴ The BSA was incorporated “to provide a program for community organizations that offers effective character, citizenship, and personal fitness training for youth.”⁴⁵ Further, the organization seeks to

develop American citizens who are physically, mentally, and emotionally fit; have a high degree of self-reliance as evidenced in such qualities as initiative, courage, and resourcefulness; have personal values based on religious concepts; have the desire and skills to help others; understand the principles of the American social, economic, and governmental systems; are knowledgeable about and take pride in their American heritage and understand our nation’s role in the world; *have a keen sense of respect for the basic rights of all people*; and are prepared to participate in and give leadership to American society.⁴⁶

Congress chartered the BSA in 1916.⁴⁷ Through incorporation, “Boy Scouting is made available to community organizations having similar

McClure, 305 N.W.2d 764, 772 (Minn. 1981) (holding that an organization need not operate on a “permanent site” to be a place of public accommodation).

40. See The Boy Scouts of America, *Fact Sheet: What Is Boy Scouting?* (visited Feb. 23, 1999) <<http://www.bsa.scouting.org/factsheets/02-503.html>> (on file with Marquette Law Review) [hereinafter *Fact Sheet: What Is Boy Scouting?*].

41. See *id.*

42. The Boy Scouts of America, *Fact Sheet: Founders of Scouting and the BSA* (visited Feb. 23, 1999) <<http://www.bsa.scouting.org/factsheets/02-211.html>> (on file with Marquette Law Review) [hereinafter *Fact Sheet: Founders of Scouting*].

43. See *id.*

44. See *The Boy Scouts of America, Historical Highlights–1910’s* (visited Feb. 23, 1999) <<http://www.bsa.scouting.org/factsheets/02-511/1910.html>> (on file with Marquette Law Review) [hereinafter *Historical Highlights–1910’s*].

45. *Fact Sheet: What is Boy Scouting?*, *supra* note 40.

46. *Id.* (emphasis added).

47. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1212 (N.J. 1999).

interests and goals.”⁴⁸ An organization that takes a charter through the BSA is responsible for providing volunteer “leadership,” facilities, and other “support for the troop activities.”⁴⁹ “[P]rofessional organizations; governmental bodies; and religious, educational, civic, fraternal, business, labor, and citizens’ groups” serve as chartered organizations.⁵⁰ In this respect, Section 3 of the Charter reads as follows:

That the purpose of this corporation shall be to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by the Boy Scouts.⁵¹

Furthermore, the Charter also provides that the “object and purposes [of the BSA are] solely of a benevolent character and not for pecuniary profit to its members.”⁵² Finally, the BSA bylaws reinforce the “nonprofit” status of local BSA councils: “*Clause 1.* Local councils duly chartered by the Boy Scouts of America shall, wherever possible, become incorporated under the laws of their respective states pertaining to nonprofit corporations and pursuant to and consistent with these By-laws and the Rules and Regulations of the Boy Scouts of America.”⁵³

Scout membership in the BSA is “open to all who meet the membership requirement.”⁵⁴ Generally, membership privileges are extended “to boys who have earned the Arrow of Light,” Cub Scouting’s⁵⁵ highest award, or “have completed the fifth grade, or who are 11 through 17 years old.”⁵⁶ Adult leaders volunteer for positions, with a caveat that “no person shall be approved as a leader unless, in the

48. *Fact Sheet: What Is Boy Scouting?*, *supra* note 40.

49. *Id.*

50. *Id.*

51. *Seabourn v. Coronado Area Council*, 891 P.2d 385, 387–388 (Kan. 1995) (quoting BOY SCOUTS OF AMERICA CHARTER § 3).

52. *Id.* at 388 (quoting BOY SCOUTS OF AMERICA CHARTER § 3).

53. *Id.* (quoting BOY SCOUTS OF AMERICA BYLAWS, art. VI, § 6).

54. *Id.* (quoting BOY SCOUTS OF AMERICA BYLAWS, art. VI, § 1).

55. “Cub Scouting” is a “home-and neighborhood-centered program for boys 9 to 11 years of age” started in 1930 by the BSA. The Boy Scouts of America, *Fact Sheet: What Is Cub Scouting?* (visited November 3, 1999) <<http://www.bsa.scouting.org/factsheets/02-0502.html>> (on file with Marquette Law Review) [hereinafter *Fact Sheet: What Is Cub Scouting?*].

56. *Fact Sheet: What Is Boy Scouting?*, *supra* note 40.

judgment of the Corporation, that person possesses the moral, educational, and emotional qualities deemed necessary for leadership and satisfies such other leadership qualifications as it may from time to time require."⁵⁷

In 1911, the BSA had 61,495 members.⁵⁸ Currently, that number has grown to over one million active Boy Scouts and Varsity Scouts and over 500,000 adult volunteers in 53,174 troops or teams.⁵⁹ As of 1993, the BSA has had over ninety million members in its lifetime.⁶⁰

III. THE BOY SCOUTS OF AMERICA AND PUBLIC ACCOMMODATION LAW

The issue of whether the BSA is a place of public accommodation is one that has "vexed the courts for years."⁶¹ Although Oregon was the first state to address the issue in *Schwenk v. Boy Scouts of America*,⁶² the decision by no means set a standard for other states. Of the four states to examine the issue before 1998, Connecticut and California held that the BSA was a place of public accommodation under their respective state civil rights acts.⁶³ Kansas and Oregon disagreed.⁶⁴ Additionally, the Seventh Circuit Court of Appeals, in *Welsh v. Boy Scouts of America*,⁶⁵ sided with Kansas and Oregon when it held that the scouting organization was not a "place of public accommodation."⁶⁶

To further confuse the issue, in the spring of 1998 California and New Jersey released opinions deciding the issue. California, in *Curran*

57. *Seabourn*, 891 P.2d at 388 (quoting BOY SCOUTS OF AMERICA BYLAWS, art. VIII, § 1).

58. *Historical Highlights—1910's*, *supra* note 44.

59. *Fact Sheet: What Is Boy Scouting?*, *supra* note 40.

60. The Boy Scouts of America, *Historical Highlights—1990's* (visited Feb. 23, 1999) <<http://www.bsa.scouting.org/factsheets/02-511/1990.html>> (on file with Marquette Law Review).

61. *Discrimination Law: Scouts' Ban on Gays Splits the Courts*, A.B.A. J., June 1998, at 46.

62. 551 P.2d 465 (Or. 1976). For a full discussion of *Schwenk*, see *infra* Part III.1.A.

63. See *Quinnipiac Council v. Comm'n on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987); *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (Ct. App. 1983) (*Curran I*).

64. See *Seabourn v. Coronado Area Council*, 891 P.2d 385, 387 (holding that the "Boy Scouts [of America] is not 'public accommodation' under the Kansas Act Against Discrimination . . ."); *Schwenk*, 551 P.2d at 469 ("the term 'place of public accommodation' as used in the Act [Oregon's Public Accommodation Act] . . . was not intended to include the Boy Scouts of America . . .").

65. 993 F.2d 1267 (7th Cir. 1993).

66. *Id.* at 1269-75.

II, reversed its stance and held that BSA was not covered by Unruh, California's public accommodation statute.⁶⁷ New Jersey, on the other hand, decided that the organization fit within its statutory description as a place of public accommodation.⁶⁸ The Supreme Court of New Jersey affirmed this decision on January 5, 1999.⁶⁹

A. *Boy Scouts of America is not a Place of Public Accommodation*

1. Oregon's Public Accommodation Act and *Schwenk*

Carla Schwenk was the first individual to allege that the BSA's admission policies violated a state civil rights act. The Oregon Supreme Court, in *Schwenk v. Boy Scouts of America*,⁷⁰ held that the BSA was not required to accept the membership application of a nine-year-old female, Carla Schwenk.⁷¹ Specifically, the court determined that "the term place of public accommodation, as defined by . . . [Oregon's Public Accommodations Act] was not intended by the Oregon legislature to include the Boy Scouts of America."⁷²

In *Schwenk*, the Supreme Court of Oregon examined the language of the Public Accommodation Act to determine if Carla Schwenk had a legitimate claim.⁷³ The Oregon Public Accommodation Act defines a "place of public accommodation" as "any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise."⁷⁴ The Act "does not include any institution, bona fide club or place of accommodation which is in its nature distinctly private."⁷⁵

The *Schwenk* court inferred that the legislative history behind the Act proposed to "prohibit discrimination by *business or commercial*

67. See *Curran v. Mount Diablo Council*, 952 P.2d 218, 220 (Cal. 1998) (*Curran II*) (holding that BSA does not fall within the category of "business establishments" as that language is used in the Unruh Civil Rights Act.); see also *Randall v. Orange County Council*, 952 P.2d 261 (Cal. 1998) (companion case to *Curran II*).

68. See *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 274 (N.J. Sup. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999) (holding that the BSA "is a place of public accommodation under New Jersey's Law Against Discrimination ("LAD")).

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

70. 551 P.2d 465 (Or. 1976).

71. See *id.* at 469.

72. *Id.* at 469.

73. *Id.* at 466-69.

74. OR. REV. STAT. § 30.675(1) (1997).

75. OR. REV. STAT. § 30.675(2). This and similar language in civil rights statutes is typically defined as "private club" or "distinctly private" exceptions. *Id.*

enterprises which offer goods or services to the public.”⁷⁶ The court concluded that although the BSA is a chartered organization, it does not “offer goods [or] services to the public” and therefore falls outside the purview of the Act.⁷⁷

2. Title II of the Civil Rights Act of 1964 and *Welsh*

The Court of Appeals for the Seventh Circuit, in *Welsh v. Boy Scouts of America*, addressed a “matter of first impression for the federal courts” under Title II.⁷⁸ This decision, handed down in 1993, sided with the Oregon Supreme Court’s conclusion that the BSA was not a place of public accommodation.⁷⁹

Welsh involved a father and his seven-year-old son who refused to affirm his belief in God.⁸⁰ The father and son were denied admission to the scout troop on the grounds that the son, Mark, refused to “comply with [BSA’s] Constitution and By-laws.”⁸¹ Specifically, *Welsh* violated the ideal promulgated in the Scout Oath.⁸² The Scout Oath reads, “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.”⁸³ Mark and Elliot *Welsh* subsequently filed suit against the BSA for “practicing unlawful religious discrimination” under Title II of the Civil Rights Act of 1964.⁸⁴ They demanded that the federal courts “force” the BSA to admit Mark as a member.⁸⁵

Title II of the Civil Rights Act provides, in pertinent part: “Equal access. 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.”⁸⁶

Title II also defines a public accommodation as an “entity” whose

76. *Schwenk*, 551 P.2d at 468 (emphasis added).

77. *Id.* at 469 (emphasis omitted).

78. 993 F.2d 1267, 1268 (7th Cir. 1993).

79. *See id.* at 1278.

80. *See id.* at 1268.

81. *Id.*

82. *See id.*

83. *See Fact Sheet: What Is Boy Scouting?*, *supra* note 40 (emphasis added).

84. *Welsh*, 993 F.2d at 1268.

85. *Id.*

86. *Id.* at 1268 (quoting 42 U.S.C. § 2000a(a) (1964)).

operations “affect commerce.”⁸⁷ While examining this language, the Seventh Circuit concerned itself with Congress’s intent when it enacted Title II.⁸⁸ The court, after reading the statute for “its plain meaning,” concluded that Congress never intended for organizations that lack a “close connection to a structural facility” to fall within the Title II definition of “public accommodation.”⁸⁹

The *Welsh* court acknowledged that state and federal courts have interpreted state statutes and Title II to apply to groups like the BSA.⁹⁰ However, the court dismissed these decisions. With regard to the state courts, the Seventh Circuit stated that the respective state public accommodation statutes were “far broader and more inclusive than” the

87. *Id.* at 1270 (quoting 42 U.S.C. § 12,181 (West Supp. 1992)). Defining “public accommodation” as:

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office or a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Id. at 1270, n.2 (quoting Americans with Disabilities Act, 42 U.S.C.A. §12,181 (West Supp. 1992)).

88. *See id.* at 1269.

89. *Id.*

90. *See id.* at 1271–72.

Title II definition of “public accommodation.”⁹¹ As to the federal court decisions, the Seventh Circuit determined that Title II only applied when the group “conducted public meetings in public facilities or operated *facilities* open to the public.”⁹² These “facilities” included “swimming pools, gyms, sports fields and golf courses.”⁹³ Notably, the Seventh Circuit was unable to find a single case that applied Title II to a “membership organization . . . whose purpose is not closely connected to a particular facility.”⁹⁴

Accordingly, the crux of the Seventh Circuit’s analysis involved determining if the BSA was connected to a “structural facility.”⁹⁵ The record indicated that the “typical Boy Scout gathering” involves boys meeting *privately in a home*.⁹⁶ The court reasoned that the “private home” is not the “type of facility” classifiable as a “place of public accommodation” under Title II.⁹⁷ Accordingly, the BSA was outside of the purview of Title II in *Welsh II*.⁹⁸

3. Kansas Act Against Discrimination and *Seabourn*

Kansas entered the fray in 1995, when the Supreme Court of Kansas issued its opinion in *Seabourn v. Coronado Area Council*.⁹⁹ Here, the

91. *Id.* at 1271 (citing *Quinnipiac Council v. Comm’n on Human Rights and Opportunities*, 528 A.2d 352, 357–58 (Conn. 1987); *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal. App. 3d 712, 727, 195 Cal. Rptr. 325, 334 (1983)(Curran I); *United States Jaycees v. McClure*, 305 N.W.2d 764, 776 (Minn. 1981)).

92. *Id.* at 1272 (citing *Smith v. YMCA of Montgomery*, 462 F.2d 634, 636 (5th Cir. 1972) (YMCA operated gymnasiums, a health club and swimming pools); *Nesmith v. YMCA of Raleigh*, 397 F.2d 96, 99-100 (4th Cir. 1968) (same); *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 790 (E.D. Pa. 1989), *aff’d*, 894 F.2d 83 (3d Cir. 1990) (club operated swimming pool); *Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 956 (W.D. Tex. 1987) (club owned 400 acres of land for hunting and fishing); *United States v. Slidell Youth Football Ass’n*, 387 F. Supp. 474, 477 (E.D. La. 1974) (youth football league owned a recreational facility with fields, grandstand, and a concession stand); *Auerbach v. African Am. Teachers Ass’n*, 356 F. Supp. 1046, 1047 (E.D.N.Y. 1973) (organization held public meetings in a public school auditorium); *Wesley v. City of Savannah*, 294 F. Supp. 698, 703 (S.D. Ga. 1969) (city operated a public golf course and was barred from hosting a racially discriminatory golf tournament); *Williams v. Rescue Fire Co.*, 254 F. Supp. 556, 563 (D. Md. 1966) (non-profit association operated a swimming pool and skating rink)).

93. *Id.*

94. *Id.*

95. *Id.* at 1269–76.

96. *Id.* at 1272 (citing *Welsh v. Boy Scouts of Am.*, 787 F. Supp. 1511, 1516 (N.D. Ill. 1992) (*Welsh II*)).

97. *Id.* at 1274.

98. *See id.* at 1276.

99. 891 P.2d 385 (Kan. 1995).

plaintiff, Bradley Seabourn, active in the BSA for nearly twenty years, was denied the opportunity to serve as an adult leader with the BSA after his refusal to reaffirm his belief in God.¹⁰⁰ The refusal was prompted by Seabourn's letter of September 9, 1991 to the Boy Scouts Coronado Council President. The letter expressed the following:

When I say the Pledge of Allegiance, I pledge my oath to "one Nation, under 'nothing.'" When I say the Scout oath, I promise to "do my duty, to 'nothing' and my Country. . . ." When I say the Scout Law, I say a Scout is "reverent" to "nothing." Call me a believer in "nothing," a nonbeliever, or call me an Atheist—they are one and the same.¹⁰¹

The BSA Coronado Council President responded by rejecting Seabourn's Boy Scout registration.¹⁰² Seabourn filed suit under the Kansas Act Against Discrimination ("KAAD")¹⁰³ in September of 1992.¹⁰⁴

Following a grant of summary judgment in which the trial court held

100. *See id.* at 391.

101. *Id.* (quoting Letter from Bradley Seabourn to Council President, Coronado Area Council, Boy Scouts of America (Sept. 9, 1991)).

102. *See id.*

103. The pertinent portions of KAAD read as follows:

The practice or policy of discrimination against individuals in employment relations, in relation to free and public accommodations, in housing by reason of race, religion, color, sex, disability, national origin or ancestry or in housing by reason of familial status is a matter of concern to the state, since such discrimination threatens not only the rights and privileges of the inhabitants of the state of Kansas but menaces the institutions and foundations of a free democratic state.

KAN. STAT. ANN. § 44-1001 (1993). Additionally, KAAD defines "public accommodations" as:

[A]ny person who caters or offers goods, services, facilities and accommodations to the public. Public accommodations include, but are not limited to, any lodging establishment or food service establishment, as defined by K.S.A. 36-501 and amendments thereto; any bar, tavern, barbershop, beauty parlor, theater, skating rink, bowling alley, billiard parlor, amusement park, recreation park, swimming pool, lake, gymnasium, mortuary or cemetery which is open to the public; or any public transportation facility. Public accommodations do not include a religious or nonprofit fraternal or social association or corporation.

KAN. STAT. ANN. § 44-1002(h) (1993).

104. *Seabourn*, 891 P.2d at 392.

that "Boy Scouts is not a public accommodation,"¹⁰⁵ the Supreme Court of Kansas affirmed the opinion of the lower court.¹⁰⁶ The court focused on the language of "public accommodation" under KAAD.¹⁰⁷ Relying on *Kansas Commission on Civil Rights v. Sears, Roebuck & Co.*,¹⁰⁸ the *Seabourn* court determined that "public accommodations" include "those places of business which are held open to the general public and where members of the general public are invited to come for business purposes."¹⁰⁹ The court then examined the record to determine the motives and purposes of the BSA.¹¹⁰ It concluded that the BSA has "no business purpose other than maintaining the objectives and programs to which the operation of its facilities is merely incidental."¹¹¹ After *Seabourn*, the BSA in Kansas was free to reject the applications of those unwilling to profess a belief in God.¹¹²

B. Boy Scouts of America is a Place of Public Accommodation

Connecticut took a different course from Oregon, Kansas, and the Seventh Circuit, where, in *Quinnipiac Council v. Commission on Human Rights and Opportunities*, the Supreme Court of Connecticut was asked to decide the rights of a woman who was denied the right to serve as scoutmaster.¹¹³ Catherine Pollard, the defendant in *Quinnipiac*, applied twice, in 1974, and in 1976, for the position of scoutmaster for Boy Scout Troop 13.¹¹⁴ Pollard, who had "a long history of active involvement" with the BSA, served as "de facto scoutmaster" for the troop periodically from 1972 to 1976.¹¹⁵ Nevertheless, BSA rejected Pollard's application on the grounds that "scoutmasters be *men* at least 21 years of age."¹¹⁶

After Pollard filed a complaint, the Commission on Human Rights

105. *Id.* at 387.

106. *See id.*

107. *Id.* at 392.

108. 532 P.2d 1263 (Kan. 1975). In *Sears*, William J. Minner was refused a line of credit from Sears based upon his race. *Id.* at 1266. Minner sued under KAAD, and the court held that any establishment or business "not expressly listed" under KAAD could still fall within the purview of the Act. *Id.*

109. 891 P.2d at 399 (emphasis in original).

110. *See id.* at 406.

111. *Id.*

112. *See id.* at 406.

113. 528 A.2d 352, 354 (Conn. 1987).

114. *See id.* at 355.

115. *Id.*

116. *Id.* (emphasis added).

and Opportunities (“CHRO”) determined that Quinnipiac Council was “statutorily obligated to offer Pollard a position as Scoutmaster.”¹¹⁷ However, on appeal, the trial court disagreed with CHRO and held that, under Connecticut’s public accommodation statute, the BSA was not a place of public accommodation.¹¹⁸ The trial court reasoned that the position of scoutmaster is not covered under the statute as “‘services,’ ‘goods’ or ‘facilities.’”¹¹⁹

The Supreme Court of Connecticut, on appeals from both parties, determined that the “statute [did] not automatically exclude” the BSA because it had no “fixed physical situs.”¹²⁰ The court then addressed the issue of discrimination.

The *Quinnipiac* court focused its “discrimination” inquiry on whether the BSA was an “‘establishment’ that serves the general public, [that] has denied access to its goods and services to a member of a protected class.”¹²¹ The court, instead of focusing on access to the BSA “as a whole,” limited its inquiry to Pollard’s *individual access* to the position of scoutmaster.¹²² In this regard, her claims specified that Pollard was “denied access to an ‘accommodation’ because the plaintiff denied her the opportunity *to be of service* to the plaintiff.”¹²³ However,

117. *Id.* at 354.

118. *See id.* at 355.

119. *Id.* (quoting CONN. GEN. STAT. § 46A-64 (West 1995)). In 1987, the statute provided, in part:

All persons within the jurisdiction of this state shall be entitled to full and equal accommodations in every place of public accommodation, resort, or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons; and any denial of such accommodation by reason of race, creed, color, national origin, ancestry, sex, marital status, age or physical disability, including, but not limited to, blindness or deafness of the applicant therefor shall be a violation of the provisions of this section A place of public accommodation, resort, or amusement within the meaning of this section means any establishment, which caters or offers its services or facilities or goods to the general public, including, but not limited to, public housing projects and all other forms of publicly assisted housing, and further including any housing accommodation, commercial property or building lot

Id. at 354 (quoting CONN. GEN. STAT. § 53-35(a) (current version at CONN. GEN. STAT. ANN. § 46a-64 (West 1995))).

120. *Id.* at 358.

121. *Id.* at 358 (quoting CONN. GEN. STAT. § 53-35(a) (current version at CONN. GEN. STAT. ANN. § 46a-64 (West 1995))).

122. *Id.* at 359 (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122-23 (1985)) (emphasis in original).

123. *Id.* at 360 (emphasis in original).

because the public accommodation statute does not include the “proffer of services,” the court concluded that there was no deprivation of an “accommodation” in *Quinnipiac*.¹²⁴ Therefore, although the *Quinnipiac* court categorized the BSA as a place of public accommodation, it refused to admit Pollard’s claim of discrimination under section 53-35(a).¹²⁵

IV. RECENT DEVELOPMENTS IN PUBLIC ACCOMMODATION LAW

A. *New Jersey’s Law Against Discrimination and Dale*

Dale alleged that the actions of the BSA violated New Jersey’s Law Against Discrimination (“LAD”).¹²⁶ LAD provides the following:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and any other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.¹²⁷

The statute contains a lengthy list of facilities that fall within the rubric of “place of public accommodation.”¹²⁸ The statutory language

124. *Id.*

125. *Id.*

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

127. N.J. STAT. ANN. § 10:5-4 (West 1993 & Supp. 1999).

128. *Id.* § 10:5-5.

“A place of public accommodation” shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place or hall; any theatre, motion-picture house, music hall, roof garden, skating rink,

indicates that the list is not all-inclusive.¹²⁹ Additionally, a portion of LAD excepts any “institution, bona fide club, or place of accommodation, which is in its nature distinctly private.”¹³⁰

The trial court ruled in favor of the BSA.¹³¹ It concluded that the LAD definition of place of public accommodation did not encompass the BSA.¹³² In fact, the trial court determined that the BSA qualified for the “private club exception” under LAD.¹³³

The Superior Court of New Jersey, Appellate Division over-turned the lower court on both issues.¹³⁴ With regard to the question of whether the BSA was a place of public accommodation under LAD, the court answered affirmatively.¹³⁵ Following the reasoning of *Little League*,¹³⁶ and *Fraser v. Robin Dee Day Camp*,¹³⁷ the appellate court held that the “BSA and its local councils are places of public accommodation.”¹³⁸ Specifically, the court reasoned that the “BSA invites ‘the public at large’ to join its ranks and is dependent upon the broad-based participation of members of the general public.”¹³⁹

The Superior Court of New Jersey also disagreed with the trial court on the issue of whether the BSA qualified for the “private club exception” under LAD.¹⁴⁰ Here, the court determined that as a public accommodation, the BSA “cannot be characterized as ‘distinctly private.’”¹⁴¹ Accordingly, the “private club exception” did not cover the

swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.

Id. § 10:5-5(1).

129. *Id.*

130. *Id.*

131. *See Dale*, 706 A.2d at 277.

132. *See id.*

133. *Id.*

134. *See id.* at 283.

135. *See id.* at 280-83.

136. *National Org. for Women v. Little League Baseball Inc.*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974).

137. 210 A.2d 208, 211-13 (N.J. 1965).

138. *Dale*, 706 A.2d at 280.

139. *Id.* (citations omitted).

140. *See id.* at 283.

141. *Id.* The court considered the suggestion that the BSA was not a private club

BSA in *Dale*.¹⁴²

The appellate court's next step was to discuss the BSA's assertion that its "fundamental right to freedom of expression" allowed it to discriminate on the basis of sexual preference.¹⁴³ Although the trial judge accepted this argument, the appellate court reversed.¹⁴⁴

Freedom of association was divided into two categories in *Roberts v. United States Jaycees*.¹⁴⁵ First, "freedom of intimate association" protects individuals from government intrusion into their "choice to maintain intimate or private associations with others."¹⁴⁶ The appellate court, however, determined that freedom of intimate association was not at issue in the present case.¹⁴⁷

"Freedom of expressive association," on the other hand, was implicated by the facts of *Dale*.¹⁴⁸ This form of freedom of association involves "a correlative right to an individual's freedom to speak."¹⁴⁹ The *Roberts* court indicated that this right is not "absolute."¹⁵⁰ That is, "compelling state interests" might justify infringement of "freedom of expressive association" if less intrusive means are not available.¹⁵¹

Following the reasoning of *Roberts*, the *Dale* court examined the record for evidence that the BSA had satisfied its substantial burden of "demonstrating a strong relationship between its expressive activities and its discriminatory practice."¹⁵² The court asked whether the State of New Jersey's compelling interest to fight discriminatory practices through the LAD impinged upon the BSA's rights to expressive association.¹⁵³ The court concluded that the LAD did not affect "in 'any

because of its relatively non-selective membership policies. *See id.* at 282. However, the court held that selectivity of membership is not dispositive. *See id.*

142. *Id.* at 283.

143. *Id.* at 284-85.

144. *See id.* at 284-90.

145. 468 U.S. 609, 617 (1984).

146. *Dale*, 706 A.2d at 285-86 (citing *Roberts*, 468 U.S. at 617-18).

147. *See id.* at 286. *Roberts* posited that "freedom of intimate association" was only available to those groups having "relative smallness," "selectivity," and "seclusion from others." *Dale*, 706 A.2d 285-86 (quoting *Roberts*, 468 U.S. at 620). Because the BSA membership totals nearly five million, "is open to all boys," and engages in "aggressive advertising," the organization fails to meet the criteria established in *Roberts*. *Id.*

148. *Id.* at 286-88.

149. *Id.* at 286 (citing *Roberts*, 468 U.S. at 622).

150. *Id.* (quoting *Roberts*, 468 U.S. at 623).

151. *Id.*

152. *Id.* at 287.

153. *See id.* at 287-88.

significant way” the scouting organization’s purposes.¹⁵⁴

Following the BSA’s petition for certification and Dale’s cross-petition for certification on the dismissal claims, the Supreme Court of New Jersey heard the case on January 5, 1999. The court began its analysis of the case by highlighting the idea set forth in *Fraser*:¹⁵⁵ places of public accommodation are “not limited to those enumerated” in LAD.¹⁵⁶ Instead, the places listed were meant to be “merely illustrative of the accommodations the Legislature intended to be within the scope of the statute.”¹⁵⁷ Like the appellate court, the supreme court reasoned that the outcome of the case should not hinge on the interpretation of the term “place.”¹⁵⁸ “[T]o have the LAD’s reach turn on the definition of “place” is irrational because “places do not discriminate; people who own and operate places do.”¹⁵⁹ Accordingly, the Supreme Court of New Jersey determined that the Boy Scouts, like other membership groups that meet at a “moving situs,”¹⁶⁰ still falls within the auspices of LAD’s definition of “place.”¹⁶¹

The court’s next inquiry was whether the BSA is a “public accommodation.”¹⁶² Here, the court used a three-pronged inquiry by asking (1) whether the organization “engages in broad public solicitation,” (2) whether the organization is closely related with government or other public accommodations, or (3) whether the organization is similar to “recognized public accommodations.”¹⁶³

As to the first element of the inquiry, the court enunciated that “[b]road public solicitation has consistently been a principal

154. *Id.* at 288. The BSA charter lays out the mission, purposes and fundamental beliefs of the group. *See id.* The charter specifies that BSA intends “to promote . . . 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.” *Id.* (quoting BOY SCOUTS OF AMERICA CHARTER § 3).

155. *Fraser v. Robin Dee Day Camp*, 210 A.2d 208, 211 (N.J. 1965).

156. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1208 (N.J. 1999) (citing *Fraser*, 210 A.2d at 211).

157. *Id.* (quoting *Fraser*, 210 A.2d at 211).

158. *Id.* at 1210.

159. *Id.* (quoting *Dale*, 706 A.2d at 279 (quoting *Welsh v. Boy Scouts of Am.*, 993 F.2d at 1282 (7th Cir. 1993) (Cummins, J., dissenting))).

160. *Id.* at 1210 (quoting *National Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974)). The supreme court explained that a “public conveyance, like a train” can be a “place” even though it has a moving situs. *Little League*, 318 A.2d at 37 (citing N.J. STAT. ANN. 10:5-5(1)(“public conveyance”).

161. *Id.* at 1248.

162. *Id.* at 1210-13.

163. *Id.* at 1210.

characteristic of public accommodations.”¹⁶⁴ In this regard, the BSA’s media campaign is pervasive.¹⁶⁵ The organization spent more than one million dollars on a television advertising campaign in 1989.¹⁶⁶ Other advertisements appeared in national periodicals *Redbook* and *Sports Afield*.¹⁶⁷ The court hypothesized, however, that the “invitation extended by a Boy Scout each time he wears his uniform in public” is “perhaps the most powerful invitation of all.”¹⁶⁸ On these facts, the Supreme Court of New Jersey concluded that the BSA engages in broad solicitation.¹⁶⁹

The Supreme Court of New Jersey then discussed the implications of the BSA’s relationships with government and other public accommodations.¹⁷⁰ The court recognized that the BSA has a close relationship with the federal government, the President of the United States, and the military.¹⁷¹ In fact, since 1910, each President of the United States has served as Honorary President of the BSA while in office.¹⁷² Moreover, the BSA provides that “seventy-eight percent of the members of the 100th Congress participated in scouting.”¹⁷³

The BSA also has close ties with state and local governments.¹⁷⁴ The court recognized that New Jersey State agencies stock BSA-owned lakes

164. *Id.* Numerous decisions support the idea that, by extending an invitation to the public to join, an organization is a “public accommodation.” *Id.* (citing *Clover Hill Swimming Club, Inc. v. Goldsboro*, 219 A.2d 161, 165 (N.J. 1966) (holding that “an establishment which by advertising or otherwise extends an invitation to the public generally is a place of public accommodation”)); *Id.* (citing *Sellers v. Philip’s Barber Shop*, 217 A.2d 121, 123–24 (N.J. 1966) (holding that “[an] establishment which caters to the public or by advertising or other forms of invitation induces patronage generally is a place of public accommodation”).

165. *See id.* at 1210.

166. *See id.* at 1211. Kim Foltz of the *New York Times* described national BSA advertisements as “hip.” *Id.* (quoting Kim Foltz, *TV Ad’s Hip Pitch: It’s ‘Cool’ to be a Boy Scout*, N.Y. TIMES, Oct. 30, 1989). A BSA Representative said of the advertising campaign: “scouting [is] a product and we’ve got to get the product into the hands of as many consumers as we can.” *Id.* (quoting Foltz, *supra*) (alteration in original).

167. *See id.*

168. *Id.* The court explained that the BSA “invites the curiosity and awareness of others” by requiring or encouraging that its members wear their uniforms in public. *Id.* Several examples are when Scouts wear the uniforms to school, “School Nights,” and public demonstrations. *See id.*

169. *See id.*

170. *See id.* at 1211–13.

171. *See id.* at 1212. Congress granted a charter to the BSA in 1916. *See id.* Another Congressional Act provides the BSA with “equipment, supplies, and services” on behalf of the federal government. *Id.*; see 10 U.S.C.A. § 2544 (West 1998).

172. *See Dale*, 734 A.2d at 1213.

173. *Id.*

174. *See id.* at 1212.

with fish and exempt the BSA from having to pay fees to register its motor vehicles.¹⁷⁵ Local government agencies, such as fire departments, routinely sponsor scouting units.¹⁷⁶ However, the court reasoned that it is the BSA's close connection with public schools and school-affiliated groups that "constitutes its single most beneficial governmental relationship."¹⁷⁷ Public schools and community colleges routinely host scouting events and provide places for scouts to meet.¹⁷⁸

The final step of the Supreme Court of New Jersey's analysis of the BSA as a public accommodation was to determine whether the BSA resembled "recognized and enumerated places of public accommodation."¹⁷⁹ The court had little difficulty concluding that the BSA was a public accommodation.¹⁸⁰ "Given Boy Scouts' public solicitation activities, and considering its close relationship with governmental entities, it is not surprising that Boy Scouts resembles many of the recognized and enumerated places of public accommodation."¹⁸¹ Past decisions such as *Fraser*¹⁸² and *Little League*¹⁸³ were used as a benchmark for comparison.¹⁸⁴ These cases enumerated the principle that the "'educational or recreational' nature"—the day camp in *Fraser* and the baseball field in *Little League*—of an organization was a primary factor in whether it was a "place of public accommodation."¹⁸⁵ The court noted that the BSA is also of the "educational and recreational nature."¹⁸⁶ Given this, the BSA was of the same nature as "recognized and enumerated places of public accommodation."¹⁸⁷

175. *See id.*

176. *See id.*

177. *Id.*

178. *See id.* at 1213. The recruiting tool of "School Nights" is an excellent example of how intertwined the BSA is with local schools. *See id.* On "School Nights," schools open their doors to local scouts to hold meetings and recruit students from that school. *See id.* Besides "School Nights," local schools provide facilities for scouts to meet during the school day. *See id.* In 1992, close to over 700,000 scouts participated in the "Learning for Life Curriculum." *See id.*

179. *Id.*

180. *See id.*

181. *Id.* at 1213.

182. *Fraser v. Robin Dee Day Camp*, 210 A.2d 202 (N.J. 1965).

183. *National Org. for Women v. Little League Baseball, Inc.*, 312 A.2d 33 (N.J. Super. Ct. App. Div. 1974).

184. *See Dale*, 734 A.2d at 1213; *Fraser*, 210 A.2d at 202; *Little League*, 318 A.2d at 37.

185. *Dale*, 734 A.2d at 1213.

186. *Id.*

187. *Id.*

As a public accommodation, the *Dale* court explained that the BSA is subject to the provisions of the LAD in that it cannot “deny any person ‘accommodations, advantages, facilities, and privileges . . . because of . . . sexual orientation.’”¹⁸⁸ Accordingly, the BSA, in similar arguments to those that it advanced before the appellate court, contended that it met several of the exceptions to LAD.¹⁸⁹ Specifically, the BSA argued that, even if it is a public accommodation, it falls outside of the auspices of LAD because it is (1) “‘distinctly private,’”¹⁹⁰ (2) a “‘religious educational facility,’”¹⁹¹ and (3) *in loco parentis*.¹⁹²

188. *Id.* at 1229 (quoting N.J. STAT. ANN. § 10:5-4 (West 1993 & Supp. 1999)).

189. *See id.* at 1213.

190. The “distinctly private” or “private club” exception is inherent in the language of most civil rights statutes. LAD reads, for instance, “[n]othing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of public accommodation, which is in its nature distinctly private.” *Id.* at 1213 (quoting N.J. STAT. ANN. § 10:5-51 (West 1997)). While the *Dale* court did not question the BSA’s status as a private club, its inquiry focused on whether the organization was “distinctly private.” *Id.* The court relied on its decision in *Clover Hill v. Swimming Club, Inc.*, where it declared that “not every establishment using the ‘club’ label can be considered ‘distinctly private.’” *Id.* at 1214 (quoting *Clover Hill*, 219 A.2d at 165). With this in mind, the court examined the membership policies of the BSA. *See id.* 1214-17. Normally, solicitation of a broad membership and selectivity in membership are factors that courts consider in making the determination if a club is “distinctly private.” *See id.* at 1214. Looking to a New York decision, the court distinguished that “[o]rganizations which routinely accept applicants and place no subjective limits on the number of persons eligible for membership are not private clubs.” *Id.* at 1215-16 (quoting *United States Power-Squadron v. State Human Rights Appeals Board*, 452 N.E.2d 1199, 1204 (N.Y. 1983)). Applying this rule to the facts of the present case, the *Dale* court noted that the “large membership”—over four million boys in 1992—of the BSA “undercut[] its claim to selective membership.” *Id.* at 1215. Indeed, the organization does not require that its members belong to certain religions or have certain morals. *See id.* at 1216. The court also rejected the BSA’s claim that it was “distinctly private” because of greater selectivity with regard to adult members. *See id.* Accordingly, “Boy Scouts is not ‘distinctly private’ because it is not selective in its membership.” *Id.* at 1217.

191. *Id.* at 1213. The BSA maintained that it is an “‘educational facility operated or maintained by a bona fide religious or sectarian institution.’” *Id.* at 1217 (quoting N.J. STAT. ANN. § 10:5-51). The *Dale* court quickly dismissed this claim by turning to the language of the BSA Bylaws and Scout Handbook. *See id.* There, the BSA promulgates the ideas that “no member shall be required ‘to take part in or observe a religious ceremony distinctly unique’ to a church or other religious organization” and that “religious instruction is better reserved for ‘the home’” than it is for the organization. *Id.* (quoting BOY SCOUTS OF AMERICA BYLAWS). These principles led the court to conclude that nothing about the BSA would classify as sectarian or religious. *See id.* at 1217.

192. *See id.* at 59. *In loco parentis* (“[I]n the place of a parent . . . with a parent’s rights, duties, responsibilities”) occurs when a “person undertakes care and control of another in absence of such supervision by latter’s natural parents and in absence of formal legal approval.” BLACK’S LAW DICTIONARY 787 (6th ed. 1990) (citing *Griego v. Hogan*, 377 P.2d 953, 955-56 (N.M. 1963)). In this regard, the BSA argued that the act of forcing it to admit

However, the *Dale* court dismissed these arguments¹⁹³ and held that the BSA "is a 'place of public accommodation' and is not exempt from the LAD under any of the statute's exceptions."¹⁹⁴ Finally, the court was required to determine whether enforcement of LAD violated the BSA's First Amendment rights of freedom of intimate association, freedom of expressive association, and freedom of speech.¹⁹⁵ The court concluded that the reinstatement of Dale did not infringe upon the BSA's First Amendment rights.¹⁹⁶ It follows that the BSA, while prohibited by the state of New Jersey from discriminating on the basis of sexual preference, will still be able to advance the purposes of scouting.

B. California and the Curran and Randall Decisions

In *Curran*¹⁹⁷ and its companion case, *Randall*,¹⁹⁸ the Supreme Court of California set forth to answer two questions. First, does the BSA fall within the relatively narrow confines of its public accommodation statute, the Unruh Civil Rights Act ("Unruh")?¹⁹⁹ Then, if the BSA is covered under Unruh as a "business establishment," does enforcement of the statute violate the BSA or its members' First and Fourteenth Amendment rights to association?²⁰⁰

The facts of *Randall*, the companion case to *Curran*, are as follows: Michael and William Randall, twin nine-year-old brothers, were

Dale as an adult member hindered "the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control." *Dale*, 734 A.2d 1196, 1217 (quoting N.J. STAT. ANN. § 10:5-51 n.13) (emphasis added). Precedent indicated that *in loco parentis* was available only for those who act "function as a parent." *Id.* The *Dale* court declined to categorize the BSA as such because adult members of the Scouts do not have "the 'responsibility to maintain, rear and educate'" the scouts, as do their parents. *Id.* (quoting *Miller v. Miller*, 478 A.2d 351, 355 (N.J. 1984)) (suggesting that characteristics of the *in loco parentis* relationship include the "responsibility to maintain, rear and educate the child.").

193. For purposes of brevity and focus, the exception arguments are not discussed within the text of this Comment. For a summation of each argument before the court, see *supra* notes 190-92.

194. See *Dale*, 734 A.2d at 1218.

195. See *id.* at 1219-29.

196. See *id.* at 1229. The First Amendment issues considered by the *Dale* court extend beyond the limited focus of this Comment. With that in mind, First Amendment analysis is triggered by public accommodation analysis. See *id.* at 1219. For a brief discussion of the BSA's First Amendment rights as discussed by the appellate court, see *supra* text accompanying notes 143-54.

197. *Curran v. Mount Diablo Council*, 952 P.2d 218 (Cal. 1998) (*Curran II*).

198. *Curran v. Mount Diablo Council*, 952 P.2d 218, 219 (Cal. 1998) (*Curran II*); *Randall v. Orange County Council*, 952 P.2d 261 (Cal. 1998).

199. See *Curran*, 952 P.2d at 219.

200. See *id.*

prohibited from advancing as members of the BSA because they refused to affirm their belief in God.²⁰¹ Specifically, a requirement of advancement to the “Bear” rank is that scouts must “[p]ractice [their] religion as [they] are taught in [their] home[s], church[es], synagogue[s], mosque[s] or other religious communit[ies].”²⁰² When the Randall boys indicated that they would be unable to fulfill this requirement, the Orange County Council posited that the boys could not “participate at all as Cub Scouts if they do not believe in God.”²⁰³ Later, the boys’ mother filed a complaint alleging that her sons “were denied equal access to an organization covered by the [Unruh] Act because they had no religious beliefs.”²⁰⁴

In its analysis of *Curran* and *Randall* the Supreme Court of California first addressed the language of Unruh.²⁰⁵ Unruh provides, in pertinent part:

“All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”²⁰⁶ Unruh, enacted in 1959, focuses on the language of “all business establishments of every kind whatsoever.”²⁰⁷ The court noted that this term is to be as broadly construed as “reasonably possible.”²⁰⁸ Further, the court, not unlike the Seventh Circuit, recognized that most other jurisdictions concluded that the BSA was not a place of public accommodation.²⁰⁹

The court then looked to precedent in its own jurisdiction. *Curran* argued that precedent demonstrated that the BSA “must be considered

201. See *Randall*, 952 P.2d at 262.

202. *Id.* at 263.

203. *Id.*

204. *Id.*

205. See *Curran*, 952 P.2d at 235–36; *Randall*, 952 P.2d at 265–66.

206. CAL. CIV. CODE § 51 (West 1999).

207. *Curran*, 952 P.2d at 235–36.

208. *Id.* at 236 (quoting *Burks v. Poppy Constr. Co.*, 370 P.2d 313, 316 (Cal. 1962)). This “broad” reading of the term “business establishment” resulted in entities such as condominium associations falling within the purview of Unruh. See *id.* (citing *O’Connor v. Village Green Owners Ass’n*, 662 P.2d 427, 430–31 (Cal. 1983)). The court justified this on the grounds that “non-profit entities” that “serve the business or economic interests of its owners or members” are similar to “for profit commercial enterprise.” *Id.* Accordingly, nonprofit entities also qualify as “business establishments.” *Id.*

209. See *id.* at 236–37.

a business establishment for purposes of the Unruh Civil Rights Act.²¹⁰ The court disagreed and distinguished the four cases that Curran relied upon.

First, the court distinguished the BSA from the nonprofit condominium owners' association in *O'Connor* when it reasoned that while both groups are "nonprofit entities," the "formation and activities" of the BSA are "unrelated to the promotion or advancement of the economic or business interests of its members."²¹¹

Then, as to the boys' club in *Ibister*, the court suggested that it was necessary to examine the membership policies of an organization to determine whether each was the equivalent of a "place of public accommodation or amusement."²¹² Notably, the boys' club represented a "place of public amusement" in that it held itself open to a large portion of the public and offered admission to a recreational facility.²¹³ Boy Scouts, on the other hand, "meet regularly in small groups (often in private homes)" to practice and study moral and ethical principles advanced by the BSA.²¹⁴

Finally, Curran argued that the business activities of the BSA, often conducted with nonmembers, were enough to bring the group within the reach of Unruh following the reasoning in *Warfield v. Peninsula Golf & Country Club*.²¹⁵ The Supreme Court of California, in *Warfield*,²¹⁶ provided that an organization that conducted regular business transactions with nonmembers, regardless of whether its facilities were "open to the public" or whether it was selective in choosing its members, must be considered a business establishment.²¹⁷ The BSA's

210. *Id.* at 235. Curran contended that the Boy Scouts were indistinguishable from organizations in the following cases: *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 796-98 (Cal. 1995) (holding that club with golf course and buildings subject to Unruh); *Burks*, 370 P.2d at 319 (holding that real estate developers sale of homes came under Unruh); *O'Connor*, 662 P.2d at 430-31 (holding that "age-restriction" policy of condominium development owned and enforced by the owners of the condo units was a "business establishment" under Unruh); *Ibister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 204, 212 (Cal. 1985) (holding that local boys' club was a "business establishment" under Unruh").

211. *Id.* at 236.

212. *Id.* (quoting *Ibister*, 707 P.2d at 217).

213. *Id.*

214. *Id.*

215. See *id.* at 237. *Warfield v. Peninsula Golf and Country Club*, 896 P. 2d 776 (Cal. 1995).

216. 896 P.2d 776.

217. *Curran*, 952 P.2d at 237-38 (citing 896 P.2d 776). The club in *Warfield* allowed nonmembers to pay to use its dining facilities and other services. See *Curran*, 952 P.2d at 237-38 (citing *Warfield*, 896 P.2d at 792).

business activities²¹⁸ are not similar, however. Rather, the BSA does not allow nonmembers access to its “core functions.”²¹⁹ By restricting public access to core functions and by keeping its sales and marketing activities separate from these core functions, the BSA remains, in the eyes of California lawmakers, distinctly outside the realm of “business establishments.”²²⁰ This difference separates the BSA from such “business establishments” or “places of amusement” like the country club in *Warfield*.²²¹

In California, therefore, the BSA does not fit into the category of “all business establishments of every kind whatsoever.”²²² The Supreme Court of California, once it made this determination, did not find it necessary to address the BSA’s First Amendment freedom of association argument.²²³

V. STANDARDS OF STATUTORY CONSTRUCTION

The Supreme Court provided that only in the context of “denial of access to public facilities” should Title II be interpreted broadly.²²⁴ The purpose of Title II, the Court reiterated in *Daniel*, was “to remove the daily affront and humiliation involved in discriminatory *denials of access to facilities* ostensibly open to the general public.”²²⁵ Accordingly, any public accommodation issue would require a broad reading of Title II. However, the Seventh Circuit was unwilling in *Welsh* to expand the reaches of Title II’s definition of “place of public accommodation” to

218. The “corporate” side of the BSA has “8,000 employees nation-wide . . . maintains leaseholds, [and] owns properties.” *Seabourn v. Coronado Area Council*, 891 P.2d 385, 394 (Kan. 1995). The business activities include scout shops, a marketing division that sells magazines like *Boy’s Life Magazine*, and various other “profit ventures.” *Id.* at 394–95.

219. *Curran*, 952 P.2d at 238. The “basic activities or services” of the BSA include meetings, hikes, national gatherings such as the “national jamboree,” or training. *Id.* The *Curran* court refers to these as “core functions” of the BSA. *Id.*

220. *See id.*

221. *Id.* at 237; *see Warfield*, 896 P.2d at 792.

222. *Curran*, 952 P.2d at 239 (quoting CAL. CIV. CODE §51).

223. *See id.*

224. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1270 (7th Cir. 1993) (citing *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969)). As to the scope of Title II, the court provided that the “plain language of the statute expresses congressional intent.” *Id.* (citing *Ardestani v. INS*, 502 U.S. 129, 135 (1991)). That is, no evidence exists of “contrary legislative intent.” *Id.* Accordingly, the interpretation of Title II is not one of the “rare and exceptional circumstances” when the Court will detour outside of the language of the statute for congressional intent. *Id.* (quoting *Ardestani*, 502 U.S. at 135).

225. *Id.* (quoting *Daniel*, 395 U.S. at 307-08 (quoting H.R. REP. NO. 914, R. 13.1, at 18)).

generally include “membership organizations.”²²⁶ The Seventh Circuit’s narrow interpretation of Title II flies in the face of precedent, which suggests that statutory construction of Title II should be broadly construed.²²⁷ Nonetheless, the *Welsh* decision provides a basis for comparing the decisions of the Supreme Court of New Jersey in *Dale* and the Supreme Court of California in *Curran* and *Randall*.²²⁸ These decisions were rendered in the aftermath of *Welsh*, which is the fundamental example of what is wrong with public accommodation law today.²²⁹

To illustrate, Justice Cummings’s dissent in *Welsh* describes the majority’s interpretation of Title II as “a stingy and narrow reading” that leaves the BSA in a position to discriminate at will.²³⁰ The Supreme Court of California imparted a similar reading of California’s Unruh Civil Rights Act in *Curran*.²³¹ Despite the differences in the language used to refer to places of public accommodation, California’s Unruh Act, like Title II in *Welsh*, is narrowly construed.²³²

To illustrate, California adopted the Unruh Civil Rights Act of 1959 to combat the “rather restrictive” interpretations of its old public accommodation statute.²³³ Unruh now contains the broadly worded category of “all business establishments whatsoever.”²³⁴ California precedent indicated that the term must be construed “in the broadest sense reasonably possible.”²³⁵ The *Ibister* decision again expanded the reach of the statute such that it would apply to any organization (“even a charitable organization that lacks a significant business-related purpose”) if the organization’s attributes and activities make it a “functional equivalent of a classic ‘place of public accommodation or

226. *Id.*

227. See Edward Bigham, Note, *Civil Rights—Seventh Circuit Permits Boy Scouts Of America To Exclude Atheist—Welsh v. Boy Scouts of America*, 67 TEMP. L. REV. 1334 (1994).

228. *Welsh*, 993 F.2d 1270; *Dale*, 734 A.2d 1196; *Curran*, 952 P.2d 218, 238–39 (Cal. 1998) (*Curran* II); *Randall*, 952 P.2d 261, 266 (Cal. 1998).

229. *Welsh*, 993 F.2d at 267; *Dale*, 734 A.2d 1196; *Curran* 952 P.2d at 239-39; *Randall*, 952 P.2d at 266.

230. 993 F.2d 1267, 1279 (Cummings, J., dissenting). Cummings agreed with the majority’s conclusion that the BSA was free to discriminate on the grounds of religious principles, but disagreed as to how that result should be obtained. *Id.* at 1278–84.

231. See 952 P.2d at 237, n.18 (*Curran* II).

232. *Welsh*, 993 F.2d at 1270.

233. *Curran*, 952 P.2d at 237, n.17.

234. *Id.* at 235–36 (quoting CAL. CIV. CODE §51).

235. *Id.* (quoting *Burks v. Poppy Constr. Co.*, 370 P.2d 313, 316 (Cal. 1962)).

amusement.”²³⁶ On the basis of this idea, the Supreme Court of California, no doubt taking its cue from the Seventh Circuit in *Welsh*, looked to other jurisdictions for authority.²³⁷ The court was in error when it strayed from California law. Unlike the Seventh Circuit, which looked to states with similar statutory language to help it justify its interpretation of Title II, the Supreme Court of California was limited to the terms of the Unruh act (“all business establishments of all kinds whatsoever”) that are unique to California.²³⁸ As such, the court in *Curran* erred when it turned to other jurisdictions.

It follows that, rather than determining if the organization fell within the broad rubric of a “business establishment of all kinds,” the court examined the BSA in light of a “functional equivalent of a classic ‘place of public accommodation or amusement,’” a much narrower standard.²³⁹—and, at that, a much more restrictive standard than the legislators sought when they adopted Unruh in 1959.²⁴⁰ Once again, in *Curran* the BSA was not classified as a place of public accommodation because it is not tied to a building or physical structure.²⁴¹

The *Dale* court refused to follow the lead of the Seventh Circuit.²⁴² Instead, the court stuck to familiar precedent, that of *Little League*,²⁴³ and the reasoning that the term “place,” as used by LAD, is “a term of convenience, not of limitation.”²⁴⁴ Looking to *Little League*, the court had this to say about its decision to apply LAD to a municipally owned Little League:

The “place” of public accommodation in the case of Little

236. *Id.* (quoting *Ibister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212, 217–18 (Cal. 1985)).

237. *Id.* at 237, n.18. The court cited to *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1270 (7th Cir. 1993), *Seabourn v. Coronado Area Council*, 891 P.2d 385, 394 (Kan. 1995), *Scwenk v. Boy Scouts of Am.*, 551 P.2d 465 (Or. 1976), *Boy Scout of America v. Quinnipiac*, 527 A.2 352, and *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 275 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999). in its assessment of what other decisions other jurisdictions rendered.

238. *Id.* (quoting CAL. CIV. CODE §51). Of the cases that the court cites, all five involve statutes that contain the term “place of public accommodation” and none refer to “business establishments.” See *supra*, Part IV.

239. *Id.* at 236 (quoting *Ibister*, 707 P.2d 212, 219).

240. See *id.* at 237, n.17 (citing *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 784 (Cal. 1998)).

241. See *Curran*, 952 P.2d at 236–37.

242. See *Dale*, 734 A.2d at 1209.

243. *National Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974).

244. *Id.* at 37.

League is obviously the ball field at which tryouts are arranged, instructions given, practices held and games played. The statutory “accommodations, advantages, facilities and privileges” at the place of public accommodation, N.J.S.A. 10:5—12(f), is the entire agglomeration of the arrangements which Little League and its local chartered leagues make and the facilities they provide for the playing of baseball by the children.²⁴⁵

Furthermore, the Supreme Court of New Jersey, following this line of reasoning, reiterated that “‘place’ has been more than a fixed location since 1974.”²⁴⁶ This idea corresponds with the court’s statement in *Little League* that although most “places” of public accommodation are “fixed” sites like hotels and restaurants, some “places”—trains, for example—have a “moving situs.”²⁴⁷ This “term of convenience, not of limitation” rationale allowed the court to interpret the statute broadly rather than in the “restrictive” method seen in *Welsh* and *Curran*.

Hopefully, the *Dale* decision, with its well-reasoned interpretation of the meaning of “place,” will come to stand at the forefront of public accommodation case law. The reasoning of the Seventh Circuit in *Welsh*, while well-intended, ends up leaving the “Boy Scouts and other like organizations free to discriminate not just against atheists—or those whose beliefs arguably conflict with the group’s most central philosophy—but against anyone at all on sheer whim.”²⁴⁸ While this result can be attributed to the court’s narrow interpretation of the term “place,” one Justice suggested that it is difficult, if not impossible, to draft a statute without using the term “place.”²⁴⁹ If it is truly impossible to find alternative means of defining places of public accommodation, other measures are necessary to avoid undue discrimination. In the future, undecided states should look to New Jersey’s *Dale* for furtherance of the idea of the term “place” as a “term of convenience, not of limitation.”²⁵⁰

245. *Dale*, 734 A.2d at 1209 (quoting *Little League*, 318 A.2d at 37).

246. *Dale*, 734 A.2d at 1209.

247. 318 A.2d at 37.

248. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1279 (7th Cir. 1993) (Cummings, J., dissenting).

249. *See id.* at 1282 (Cummings, J., dissenting).

250. *National Org. for Women v. Little League Baseball, Inc.*, 317 A.2d. 33, 37 (N.J. Super. Ct. App. Div. 1974).

VI. CONCLUSION

Perhaps after twenty-three years of decisions, jurisdictions addressing the Boy Scouts of America and public accommodation questions will reach some consistent end. However, it appears that, given the differences in statutory language and inconsistent methods of statutory construction, no such end is in sight. Until then, the Boy Scouts of America, a large, incorporated, albeit non-profit organization, with members in all fifty states, will continue to be allowed to discriminate on the basis of sex, religion, or other grounds in the courts of California, Kansas, Oregon, and the Seventh Circuit. As for Carla Schwenk, Timothy Curran, twins Michael and William Randall, Bradford Seabourn, Mark Welsh, and countless others, the lesson is a simple one: unless you play by its rules, and believe in its principles, the Boy Scouts of America does not want you. This from an organization that prides itself on teaching boys to "have a keen respect for the basic rights of all people."²⁵¹

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251. *Fact Sheet: What Is Boy Scouting?*, *supra* note 40.

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