

Hastening the *Kulturkampf*: *Boy Scouts of America v. Dale* and the Politics of American Masculinity

Marc R. Poirier*

I.	INTRODUCTION	271
II.	THE CASE OF THE MISSING ANTIGAY POLICY, OR, HOW THE BOY SCOUTS OF AMERICA CAME OUT AND ACQUIRED A NEW IDENTITY	277
III.	THE BOY SCOUTS OF AMERICA, MASCULINITY AND HOMOSEXUALITY: SEPARATING THE GUYS FROM THE GAYS	303
IV.	THE ONGOING DEBATE ON THE BSA POLICY: HASTENING THE <i>KULTURKAMPF</i>	318

I. INTRODUCTION

In only a certain sense have the Boy Scouts of America (BSA) prevailed in their fight to exclude gay men from leadership positions. To be sure, *Boy Scouts of America v. Dale*¹ does establish a First Amendment right to “expressive association” strong enough to defeat civil rights laws addressed to private organizations. But whatever the contours of this doctrine—whether it will ultimately be extended to all private associations or given impact only where associations concerned with moral education are concerned²—the BSA and those conservative

* Professor of Law, Seton Hall University School of Law. Versions of this paper were given at the Cornell Law and Feminism Workshop, at a Seton Hall Public Forum, at the LatCrit VII Conference, at a Law and Society Conference, and at the Conference on Assimilation & Resistance: Emerging Issues in Law and Sexuality, at Seattle University. Linda Fisher, Tristin Green, Andrew Koppelman, and Solangel Maldonado read the draft and provided valuable comments. The author thanks research assistants Obie English, Seth Gerson, Melissa Kanbayashi, Rebecca Miller, Rita Mungiolli, Susan Swatski, and especially Mark Dann, an Eagle Scout whose intimate knowledge of the Boy Scouts of America was invaluable to this project. The author was a Life Scout in Durham, North Carolina.

1. 530 U.S. 640 (2000).

2. Important post-*Dale* cases on expressive association include *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198 (1st Cir. 2002) (Massachusetts gun control statute does not impermissibly infringe on First Amendment associational right of gun owners); *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435 (3d Cir. 2000) (fraternity chapter was not engaging in activities protected as expressive association and thus could be disciplined by university); *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 220 F. Supp. 2d 1054,

1066-67 (D. Az. 2002) (sexual activity at club is not expressive conduct and cannot claim First Amendment protection as expressive association); *Boy Scouts of America v. Wyman*, 213 F. Supp. 2d 159 (D. Conn. 2002) (state may exclude the BSA from a statewide state employees combined-giving mechanism without infringing on BSA's right of expressive association, where exclusion is based on discrimination against employees, as opposed to adult leaders); *Boy Scouts of America, South Florida v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (county board of education may not exclude BSA from school facilities altogether, although they could terminate special agreement based on antidiscrimination policy); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001), *vacated and remanded*, 53 Fed. Appx. 740 (6th Cir. 2002) (no right of expressive association based on religion of doctor that would allow doctor's office to bypass local antidiscrimination ordinance); *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. App. 2002) (city may enforce antidiscrimination policy against BSA by removing special subsidy without improperly impinging on right of expressive association); *Okwedy v. Molinari*, 150 F. Supp. 2d 508 (E.D. N.Y. 2001) (public official may criticize religious group's antigay billboard without infringing on First Amendment rights, including right of expressive association) *Boy Scouts of America v. District of Columbia Commission on Human Rights*, 809 A.2d 1192 (D.C. 2002) (antidiscrimination ordinance may not be applied to BSA exclusion of gay men); *Chicago Area Council of the Boy Scouts of America v. City of Chicago Commission on Human Relations*, 748 N.E.2d 759 (Ill. App. Ct. 2001) (interpreting BSA's right of expressive association to apply only to "expressive" positions in which role model activities are at issue, and remanding for findings about whether the antigay exclusion policy in fact extended to "nonexpressive" positions with the BSA); *Donaldson v. Farrakhan*, 762 N.E.2d 835 (Mass. 2002) (city antidiscrimination ordinance must yield to religious group's desire to have a separate public meeting for men only, based on right of expressive association); *Gorman v. St. Raphael's Academy*, 2002 R.I. Super. LEXIS 141 (R.I. Super. 2002) (private high school's hair length regulation not related to school's mission; right of expressive association does not apply); *Central Texas Nudists v. County of Travis*, 2000 WL 1784344 (Tex. App. 2000) (nude recreational and social activities at public park are not within right of expressive association); and *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655, 672 (Wash. 2002) (Madsen, J., concurring) (exclusion of women from fraternal organization not related to any expressive purpose).

Important post-*Dale* commentary includes Larry Catá Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in Southworth and Boy Scouts of America and European Alternatives*, 36 TULSA L.J. 117 (2000); David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619 (2001); Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821 (2002); Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001); Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 585 (2001); Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161 (2001); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000); Daniel A. Farber, *Speaking in the First Person Plural: Expressive Association and the First Amendment*, 85 MINN. L. REV. 1483 (2001); Taylor Flynn, *Don't Ask Us to Explain Ourselves, Don't Tell Us What to Do: The Boy Scouts' Exclusion of Gay Members and the Necessity of Independent Judicial Review*, 12 STAN. L. & POL'Y REV. 87 (2001); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591 (2001) [hereinafter Hunter, *Accommodating the Public Sphere*]; Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000) [hereinafter Hunter, *Expressive Identity*]; Darrin Lenard Hutchinson, *"Closet Case:" Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81 (2001); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001); Steffen N.

religious forces that aligned with them during the *Dale* and *Curran v. Mount Diablo Council of the Boy Scouts of America*³ litigation have not necessarily won the larger fight over the respectability of homosexuality in our society and in particular over whether openly gay men should be allowed to serve as role models for youths and children.

This Article argues that the way in which *Dale* was resolved, together with the status of the BSA in the United States, have combined to form a particularly effective system for keeping alive the underlying controversy about youth education, masculinity and homosexuality. Two elements of the structure of the *Dale* controversy are particularly important. Considerable explicitness about excluding gays was required for the BSA to prevail on a First Amendment theory.⁴ Moreover, the BSA is visible and pervasive in many, though not all, corners of American life,⁵ and is something of a cultural symbol of an American

Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639 (2001); Nancy J. Knauer, "Simply So Different." *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997 (2000-2001) [hereinafter Knauer, "Simply So Different"]; Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401 (2000) [hereinafter Knauer, *Homosexuality as Contagion*]; Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819 (2002); Arthur S. Leonard, *Boy Scouts of America v. Dale: The "Gay Rights Activist" as Constitutional Pariah*, 12 STAN. L. & POL'Y REV. 27 (2001); James P. Madigan, *Questioning the Coercive Effect of Self-Identifying Speech*, 87 IOWA L. REV. 75 (2001); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 530-38 (2002); David McGowan, *Making Sense of Dale*, 18 CONST. COMM. 121 (2001); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1919-39 (2001); Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669 (2001); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1156-63 (2002); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001); and Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71 (2001).

3. 952 P.2d 218 (Cal. 1998). *Curran* was a case similar to *Dale*. See *id.* at 237 n.18. Again it involved a challenge based on state antidiscrimination law to the BSA's exclusion of an adult volunteer who, as a youth, had risen to the level of Eagle Scout and who, as an adult, had been exposed as openly gay through a newspaper article about another area of his life. *Id.* at 220-21. The *Curran* litigation began in 1981. *Id.* at 222. It was decided at the state supreme court level against Curran on the determination that the BSA was not a public establishment and therefore was not subject to the state antidiscrimination law. *Id.* at 239.

4. As discussed in Part II *infra*, the BSA's antigay policy was undoubtedly a silent, *sub rosa* policy until it was forced into the open by challenges to it. That Part also discusses how the BSA's changing membership base and the emergence of a "Culture War" over gender, sexuality, and family affected its position in the controversy.

5. Lest there be any doubt about the extensiveness of the BSA, the most recent available information puts the membership of traditional Scouting programs at 3,325,504 boys and youth, and 1,216,230 adults, as of December 31, 2001. BSA, Factsheet: BSA at a Glance, available at <http://www.scouting.org/factsheets/02-501.html>. Since its incorporation in the United States in 1910, more than one hundred million youths have passed through the BSA. *Id.* *Dale* states that the organization comprises some five million youths and adult members. *Dale v. Boy Scouts of*

way of turning boys into men.⁶ So, during and since *Curran* and *Dale*, a debate has simmered on, both within the BSA and among local funding organizations, public schools and other organizations that sponsor troops and provide facilities for meetings or other activities, and, of course, among parents deciding whether to enroll their sons or volunteer their own time. The issue has taken up the time of Congress, the courts, the American Medical Association, and the management of major corporations.⁷ Precisely because the BSA is so pervasive a cultural vehicle of American training of boys to be men, the new visibility of the BSA's antigay policy⁸ forces a myriad of personal and local decisions.⁹

Am., 734 A.2d 1196, 1200 (N.J. 1999). The number of youths involved is considerably lower, however, if one eliminates the participation in Learning for Life, a separately organized program for school systems. Learning for Life is not visibly identified with the BSA and does not have a gay exclusion policy. See discussion *infra* notes 100-109. The numbers in various briefs and opinions are also based on data from briefs that are several years outdated, and BSA membership has been shrinking.

6. Indeed, the BSA is a whole-hearted purveyor of gender construction, producing and reproducing patterns of male gendered expectations, behaviors and roles in its activities, as well as in its publications and narratives. "In American cultural geography, the BSA occupies the intersection of childhood, citizenship, and masculinity; it is unique in its symbolic status as a proxy for good citizenship." Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 1599. Accord, Carpenter, *supra* note 2, at 1535 ("The BSA is unquestionably an important organization in American history and culture, having been a rite of passage for generations of maturing boys."). See generally JAY MECHLING, ON MY HONOR: BOY SCOUTS AND THE MAKING OF AMERICAN YOUTH (2001); GEORGE L. MOSSE, THE IMAGE OF MAN: THE CREATION OF MODERN MASCULINITY 135-36 (1996).

7. The contours of this ongoing societal debate are examined further in Part IV *infra*.

8. The phrase "antigay policy" is more neutral and less scientific-sounding than "homophobia." In this Article I seek to avoid the term "homophobia," except where another author uses it. Despite its increasingly widespread use, I have come to view it as misleading. It covers a variety of attitudes and behaviors. In contrast to standard phobias, which are based in fear and which are often curable by relatively brief clinical interventions, so-called "homophobia" seems to have a large component of rage and violence, and to be persistent in the face of clinical treatments for phobias. A recent study from the University of Arkansas, for example, found that "homophobia" originates in feelings of disgust, not fear, and argued that the behavior should not be pathologized and treated as a disease. Keith Taylor, *No Fear in 'Homophobia'? Researchers Say Anti-gay Prejudice Rooted in Disgust, 'Contamination' Concerns*, WASH. BLADE, June 28, 2002, at 1 (discussing new study by lead researcher Bunmi Olatunji, of the University of Arkansas-Fayetteville, released in early June 2002). Psychology professor Gregory Herek, an authority on sexual orientation matters at the University of California at Davis, agrees, pointing out that the word "homophobia," coined in the 1960s, has gained wide acceptance and is useful, but has problems because there is no scientific basis for the "phobia" suffix. *Id.* at 25. Despite its scientific ring, "homophobia" is a broad-brush term meaning only one kind or another of antipathy to gays/lesbians and to homosexuality. Herek suggests substituting "sexual prejudice." *Id.* One important recent book-length examination of the psychological formation of prejudices discerns three basic patterns, which happen to correspond to racism, sexism and anti-Semitism. The author then argues that homophobia can partake of any or all three types. ELISABETH YOUNG-BRUEHL, THE ANATOMY OF PREJUDICES (1996). In short, the phenomenon is not well sorted out.

In addition to fear and disgust, Andrew Koppelman argues, "some opponents of gay rights are thoughtful and decent people whose opinions are the products of reasoned reflection."

These essentially local sites of contest are also a place where change can begin. Indeed, because gender is performed, produced, and reproduced in individual interactions,¹⁰ the local and personal level is where change must ultimately occur, if a change mandated via larger normative structures within our society, such as statutory or case law, is to take hold.

This Article argues that, in context, the *Dale* case is not just about the right of private organizations to constitute themselves, or the rights of gay men to participate as volunteers or employees in the BSA program where state or local laws prohibit discrimination on the basis of sexual orientation. When *Dale*, the circumstances of its arising, and the ongoing debate about the BSA policy are analyzed in terms of gender theory,¹¹ it becomes clear that the whole process of fighting about the BSA antigay exclusion brings a public debate about masculinity and homosexuality further into the open. This forces literally millions of people to deal with an often confusing and upsetting issue in their everyday lives. The

Andrew Koppelman, *Why Gay Legal History Matters* (reviewing WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999)), 113 HARV. L. REV. 2035, 2050 (2000). Koppelman argues that this front of opposition to homosexual conduct reflects traditional Christian and Jewish teachings “that long antedate the twentieth-century hysteria that Eskridge documents so well.” *Id.* (He might have included Muslim teachings as well.) Toni Massaro makes a related point. Toni M. Massaro, *History Unbecoming, Becoming History Review of WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999), 98 MICH. L. REV. 1564, 1585 (2000) (“While some versions of antigay animus likely do merit treatment as a psychiatric disorder, it is doubtful that all do.”). Elsewhere, Koppelman has expended considerable energy answering these rational antigay arguments rationally, as it were, on their own terms. *See, e.g.*, ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 79-93 (2002). Whether this kind of discourse in fact is capable of changing the minds of those deeply persuaded of the unnaturalness or immorality of homosexuality is open to question. I do agree that arguments made rationally and in terms of longstanding religious traditions must be responded to respectfully, even if this discourse does not get at the more shadowy roots of prejudice.

On the other hand, to scream that condemnation of antigay positions necessarily reflects antireligious prejudice (as does, *e.g.*, Michael Paulsen, *supra* note 2, at 1917 (stating that Justice Steven’s dissent in *Dale* is “stunningly bigoted”)) is inappropriate and unhelpful. One centrally problematic aspect of the societal debate around homosexuality is how to have a public discourse that, while often motivated by deep-seated concerns that are articulated in religious systems, occurs and is reproduced elsewhere in civil society, in social relations and institutions outside of church, synagogue, mosque, etc. Whether or not the Boy Scouts of America is a public accommodation, *see* discussion *infra* note 18, it is decidedly not a church. The fact that some positions on homosexuality derive from sincerely held religious beliefs does not automatically give them First Amendment claims nor the moral high ground.

9. The pervasiveness of the ongoing debate and the reasons it is so significant as an opportunity for local resistance are discussed in Part IV *infra*.

10. *See* Parts III and IV *infra*.

11. The gender theoretical dimensions of the argument about gay men as role models for boys are discussed generally and in the context of the BSA in Part III *infra*.

aftermath of *Dale* has an unusual potential to change the terms in which Americans deal with the male gender and its heteronormativity.¹²

Herein lies the deeper political significance of *Dale*. Precisely because of the litigation, members of the larger communities in which the BSA functions can no longer ignore the routine exclusion of gays that forms part of the basis of the BSA's approach to the construction and performance of male gender identity. That exclusion is no longer being accomplished silently. Consequently, it is not so easily naturalized or normalized.¹³ Instead, what the BSA does to keep masculinity normatively heterosexual is exposed as ongoing policy and practice of the organization and its members. And once the antigay exclusion becomes an evident series of policy decisions and practices, the BSA, its volunteers, funding organizations, chartering sponsors—whether public, religious or private—and, most importantly, its participating families, all have a self-evident choice. They must all come to grips with their own complicity in the practice of excluding and silencing gay men as role models, and with the possibility that they could choose some alternative form of social education for their boys. As a result of the BSA gay exclusion litigation, even with the result in *Dale* and in part because of it, it becomes much easier for the average citizen to notice how masculinity is constructed around the exclusion of sissies and the heteronorming of role models, and to consider that we might choose to do otherwise. This is deessentializing gender at its best.

Part II of this Article discusses the BSA's gay exclusion litigation, in particular *Dale*, focusing on the issue of the missing (or silent) antigay policy. It also discusses the way in which the BSA's eventual articulation of the antigay policy in response to litigation coincides with the emergence of a Traditional Family Values coalition opposed to gay rights in American society at large and in the BSA in particular. It situates this struggle as part of a contemporary "Culture War" or *Kulturkampf* over gender, sexuality, and family, and identifies the particular role of gay visibility as a battleground.

Part III presents some basic concepts of gender theory, in particular the idea of the social construction of a strictly heteronormative

12. Heteronormativity is the idea that in America masculinity entails heterosexual orientation as normal and natural, and homosexual sexual orientation as deviant. See, e.g., Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANT: QUEER POLITICS AND SOCIAL THEORY* xxi (Michael Warner ed., 1993). Heteronormativity is explored further in Part III *infra*, as part of the Article's discussion of gender theory.

13. The concept of naturalizing gender so as to disguise its social construction is discussed in Part III *infra*.

masculinity, and then applies these concepts to the BSA's basic project of turning boys into men.

Part IV explores the many private and political levels at which the conflict over the BSA's antigay policy has continued since *Dale*, and contrasts the conflict to another case about gay exclusion and masculinity, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,¹⁴ which presents a very different aftermath. Part IV also invokes a Foucauldian-feminist theory of power relations to explore why ongoing debate at this basic, individual and local level of society offers the possibility for transformation of masculine heteronormativity.

II. THE CASE OF THE MISSING ANTIGAY POLICY, OR, HOW THE BOY SCOUTS OF AMERICA CAME OUT AND ACQUIRED A NEW IDENTITY

The thesis of this Part is that the BSA's antigay exclusion policy was not missing or nonexistent, but only unspoken. The policy was forced to be voiced not only by the *Curran* and *Dale* litigation, but more broadly by the development of a cogent gay identity-based social movement, which in turn stimulated a traditional family values countermovement. The BSA was forced to recognize its increasing reliance on traditional churches for the core of its membership, and hence of its ideology.¹⁵ Thus, the BSA has been dragged into a contemporary *Kulturkampf* on gender, sexuality, and family.

With the Supreme Court's 5-4 opinion in *Dale*, the BSA's right to exclude homosexuals as leaders has become secure.¹⁶ No longer can state or local antidiscrimination laws be used to assert a gay man's (or lesbian's)¹⁷ right to participate as a BSA adult leader¹⁸ regardless of sexual

14. 483 U.S. 522 (1987).

15. See *infra* notes 78-92 and accompanying text.

16. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000).

17. The BSA policy is against homosexuals in positions of leadership, and so appears on its face to exclude lesbians as well as gay men. There is no reported litigation concerning the exclusion of lesbians nor are there newspaper accounts of disputes involving lesbians that did not reach the level of litigation. The target of the policy appears to be gay men.

Women have generally been allowed to take leadership positions in the BSA since 1988, and participated as den mothers in Cub Scouting much earlier. Young women 14 and older may also join the Venturing program, as of 1998. BSA, Factsheet: BSA at a Glance, available at <http://www.scouting.org/factsheets/02-501.html>; see also <http://www.scouting.org/venturing/index.html>. There are reported court decisions both around the exclusion of girls as youth members and women as leaders, though in the reported decisions the plaintiff girls and women were unsuccessful. See, e.g., *Mankes v. Boy Scouts of Am.*, 137 F.R.D. 409, 411-12 (S.D. Fla. 1991); *Quinnipiac Council, Boy Scouts of Am. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987); *Yeaw v. Boy Scouts of Am.*, 64 Cal. Rptr. 2d 85, 88-89 (1997); *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465 (Or. 1976). Even so, the BSA gradually opened its doors to women up to a certain level in its leadership hierarchy.

orientation.¹⁹ The BSA has established its superior right to “expressive association” under the First Amendment—it may define itself through

This Article’s discussions of the interests of gay men and lesbians should be read to include bisexual and transgendered persons. How the BSA defines homosexuality, in terms of conduct/status/desire/self-nomination, is a subtlety of gender theory that seems beyond its current explicit antigay policy, though the inclusion of the modifiers “known” and “avowed” in various statements of the policy seems to indicate that visibility of non-heterosexual sexuality is a key concern. See, e.g., Hunter, *Expressive Identity*, *supra* note 2; Knauer, “*Simply So Different*,” *supra* note 2; Knauer, *Homosexuality as Contagion*, *supra* note 2; Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485 (1998).

18. The BSA is divided into the participating youth, that is, the boys and young men (and in the Venturing program, women as well) who participate in the BSA’s various programs, from ages eight to twenty, and adult leaders who supervise the youth activities. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1200-01 (N.J. 1999) (describing structure of programs at the time of the litigation). See <http://www.scouting.org/factsheets/01-501.html> (describing structure of programs as of August 2002; some reorganization has occurred so that opinions and briefs in *Dale* are outdated, although not in respects relevant to the outcome of the case). The antigay exclusion policy elaborated by the BSA over the ten year course of the *Dale* litigation settled on a formulation that clearly excludes adults.

19. Until the *Dale* case, such assertions of civil rights based in public accommodations laws were in any event unsuccessful against the BSA. Prior courts had typically held that the BSA was not a place of public accommodation, or a business enterprise, or whatever key term was used for the jurisdiction’s antidiscrimination ordinances. See, e.g., *Curran v. Mt. Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 236 (Cal. 1998) (gay man); *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 261, 266 (Cal. 1998) (atheist boys); *Yeaw*, 64 Cal. Rptr. 2d at 88-89 (girl); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385, 406 (Kan. 1995) (atheist adult leader); *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1275 (7th Cir. 1993) (atheist boy); *Mankes*, 137 F.R.D. at 411-12 (girl); *Schwenk*, 551 P.2d 465 (girl). But see *Quinnipiac*, 528 A.2d at 358-60 (BSA is not excluded from effect of public accommodations law; however, refusal of proffer of services as a female scoutmaster is not a denial of an accommodation). *Quinnipiac* is often mis-cited on this point. See, e.g., *Dale*, 530 U.S. at 657 n.3. But cf. *Isbister v. Boys Club of Santa Cruz, Inc.*, 707 P.2d 212, 217 (Cal. 1985) (Boys Club subject to antidiscrimination law because it operated a recreational facility). *Isbister* is distinguished by *Curran*, 952 P.2d at 236, because membership in the BSA does not amount to admission to a recreational facility. The New Jersey Supreme Court in *Dale* found the BSA to be a place of public accommodation within the meaning of the state’s Law Against Discrimination. 734 A.2d at 1207-13. As a matter of state law, this conclusion was not reviewable by the United States Supreme Court, and the BSA relied on First Amendment defenses instead. The state supreme court holding was in accord with New Jersey’s very broad interpretation of public accommodations in the context of its Law Against Discrimination. E.g., *Frank v. Ivy Club*, 576 A.2d 241 (N.J. 1990); *Nat’l Org. of Women v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. 1974); *Fraser v. Robin Dee Day Camp*, 210 A.2d 208 (N.J. 1965). The United States Supreme Court described New Jersey’s interpretation of its public accommodations law as “extremely broad.” *Dale*, 530 U.S. at 657. In *Dale* the Court does not overrule the New Jersey Supreme Court on state law, of course; it instead balances away the state law protection.

Regardless of the legal technicalities, the BSA is certainly public in the sense that its images and funds hold a special place in contemporary American culture. See *Carpenter*, *supra* note 2, at 1535 (explaining the position of the New Jersey Supreme Court on public accommodations as motivated by a desire to insure access to organizations that are important centers of norm formation). Jay Mechling, not a lawyer but a sociologist who has studied the Boy Scouts for decades, opines that “[t]he Boy Scouts’ claim to being a private organization faces some

membership restrictions. However, in achieving this victory the organization now clearly and explicitly stands for the proposition that homosexual activity is immoral and that open homosexuals are inappropriate role models for the boys and male youth whom the BSA serves.

This policy was not always so clearly stated. The BSA antigay exclusion policy, like gays themselves, seems to have been invisible for decades within the organization. In litigation, the BSA was hard-pressed to come up with any open examples of its antigay policy articulated prior to the *Curran* and *Dale* lawsuits, which began in 1981 and 1992, respectively.²⁰

As of the time of the *Dale* litigation, there was not and never had been any mention of homosexuality in the BSA mission statement, the federal charter, the Scout Oath, the Scout Law, the Boy Scout Handbook, or the Scoutmaster Handbook.²¹ The earliest BSA public statements on the issue date from 1991-1993.²² One earlier internal statement arose in

reasonable skepticism.” MECHLING, *supra* note 6, at 208. Others agree. *See, e.g.,* Dorf, *supra* note 2, at 2185-86 (describing how the Boy Scouts, although non-commercial, are a very public institution and, through their practices, contribute to constituting our public life); Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 1599 (indicating the BSA produces citizenship); Leonard, *supra* note 2, at 30-32 (stressing the essentially public nature of BSA).

20. Dale, who had been an Eagle Scout and was an Assistant Scoutmaster, was expelled in July 1990, after a newspaper article identified him as gay. He brought suit in 1992. *See Dale*, 530 U.S. at 644-45. Curran, who had been an Eagle Scout, sought a position as an assistant scoutmaster in 1980, and was told he was not acceptable because he had been identified as gay in a newspaper article. *Curran*, 952 P.2d at 219-12. Curran brought suit in 1981. *Id.* at 222.

21. *Dale*, 530 U.S. at 665-77 (Stevens, J., dissenting). Justice Stevens specifically and repeatedly stressed that at the time of Dale's expulsion, no standard forbidding membership to homosexuals had been publicly expressed. *See id.* at 665, 673, 674, 676.

22. Memoranda issued in February and June 1991 contained a BSA national office position statement on homosexuals in the Boy Scouts. *See id.* at 674 (Stevens, J., dissenting). They were written by public relations staff and given to council executives to help them address possible public controversy generated by the *Curran* trial. *Id.* (Stevens, J., dissenting). The 1991 policy did invoke the “clean” and “morally straight” language of the Scout Oath and Scout Law, as well as the undesirable role model rationale. *Id.* at 652; *id.* at 673-77 (Stevens, J., dissenting). Ironically, some troops and volunteer leaders in California were shocked to learn via these memoranda of the gay exclusion policy, and protested in 1992. *See* Dan Turner, *Boy Scout Defies National Policy on Gays*, S.F. CHRON., Feb. 5, 1992, at A15 (San Jose Boy Scout troop passes resolution saying that sexuality is a private issue and that homosexuality is not immoral); Laura Myers, *Scout Troop in San Jose Threatened with Ouster for Welcoming Gays*, SAN DIEGO UNION-TRIB., Feb. 5, 1992, at A3. This internal opposition generated further, clarifying memoranda in 1992 and 1993. *See Dale*, 530 U.S. at 652. It also generated publicity over subsequent expulsions. *See, e.g.,* Tony Perry, *Landmark Case Pits Gay Officer Against Boy Scouts*, L.A. TIMES, Jan. 11, 1993, at A3 (openly gay police officer spoke out at a community meeting about a rash of gay bashings and was immediately dismissed from his post with Explorers; subsequently the San Diego Police Department severed ties with the BSA and activists demanded review of BSA use of city property). Justice Stevens pointed out that the 1993 articulation of the policy abandoned the attempt to link it to the wording of the Scout Oath and

1978.²³ In *Curran* there was a third piece of evidence: 1983 testimony of the national director of public relations.²⁴ As Daniel Farber summarized it, “much of the evidence of the organization’s view of homosexuality derived from the litigation positions taken by its leadership and, more strikingly yet, in an internal memo to the leadership. Whether a majority of the members shared these beliefs is unknown.”²⁵ I shall call this the case of the missing antigay policy.

It was not until February 2002, more than twenty years after the *Curran* litigation began and more than a year and a half after its Supreme Court victory in *Dale*, that the BSA finally and once and for all promulgated the official version of its gay exclusion policy.²⁶ This

Scout Law, and based the policy simply on “expectations that Scouting families have had for the organization” and the role model argument. *Dale*, 530 U.S. at 675.

23. The litigation unearthed a 1978 memorandum (actually two, from February and March, 1978), constituting a policy statement from the President and Chief Scout Executive to the BSA Executive Committee, on the subject of homosexual volunteer leaders. *Dale*, 530 U.S. at 672. Justice Stevens described the 1978 policy, which was never circulated, as “in effect, a secret Boy Scouts policy.” *Id.* There was no mention in the memorandum of a historic practice. The policy states that “[w]e do not believe that homosexuality and leadership in Scouting are appropriate,” *id.* at 652, but it does not invoke either the family value issue or the role model issue on which the BSA subsequently relied. It also states that if there were an applicable antidiscrimination law the BSA would have to obey it. *See id.* at 672 (Stevens, J., dissenting). Presumably the organization caught the sense of the times, that gays might demand access to the BSA as they had to other sacred and secular institutions. *See, e.g., Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974) (finding gay student organization has right to hold social functions); *Fricke v. Lynch*, 491 F. Supp. 381 (D. R.I. 1980) (right to bring same sex partner to prom); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (same sex marriage); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (same sex marriage); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (same sex marriage); *see also Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (insisting that government show rational nexus between discharge for immoral conduct and requirements of job). *See generally* WILLIAM N. ESKRIDGE, JR., & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 880-96 (1997) (civil service employment).

24. The BSA’s national director of public relations testified in 1983 that “it has been understood clearly since the incorporation of the Boy Scouts early in this century that homosexual conduct is immoral and inconsistent with the Scout Oath. . . . [and that] from the early 1900s . . . it would have been clearly understood that homosexual conduct was considered immoral (and illegal).” *Curran*, 952 P.2d at 226 n.8. A similar statement was made at the time of the filing of the *Dale* case, although it did not become part of the evidence in the case. *See* Tracy Schroth, *Scouts Charged with Bias Against Gays*, N.J. L. J., Aug. 3, 1992 (spokesman for the Boy Scouts said that “[f]or 82 years, the Boy Scouts of America have reflected the expectations of mainstream American families. We do not believe that persons living a homosexual lifestyle reflect the expectations that families have for the Boy Scouts.”).

25. Farber, *supra* note 2, at 1495 (footnote omitted). Moreover, as Justice Stevens put it in his dissent, “BSA’s broad religious tolerance combined with its declaration that sexual matters are not its ‘proper area’ render its views on the issue equivocal at best and incoherent at worst.” *Dale*, 530 U.S. at 676.

26. Boy Scouts of America, Resolution of February 6, 2002, *reproduced in* app. 1 *infra*. *See also Boy Scouts Issue Resolution Affirming Gay Exclusion*, WASH. [D.C.] BLADE, Feb. 15, 2002, at 14. The full Resolution and an accompanying press release are reproduced in Appendix 1 to this article.

Resolution is couched as a reaffirmation of the BSA's traditional standards of leadership.²⁷ The Resolution states in pertinent part:

WHEREAS the national officers agree that "conduct of both Scouts and Scouters must be in compliance with the Scout Oath and Law" and that "membership is contingent upon one's willingness to accept the values and standards espoused by the Boy Scouts of America," and
 WHEREAS, the national officers further agree that homosexual conduct is inconsistent with the traditional values espoused in the Scout Oath and Law and that an avowed homosexual could not serve as a role model for the values of the Oath and Law, and
 WHEREAS the national officers reaffirm that, as a national organization whose very reason for existence is to instill and reinforce values in youth, BSA's values cannot be subject to "local option" choices, but must be the same in every unit.²⁸

The Resolution thus grounds the BSA's antigay exclusion policy on two different though related arguments: compliance with the Scout Oath ("morally straight")²⁹ and Law ("clean"),³⁰ and unacceptability of an "avowed homosexual" as a role model.³¹ It equates, or at least conflates, "homosexual conduct" with being an "avowed homosexual."³² It asserts that no "local option" is available on this issue, a point that many liberal and urban scout councils had been urging.³³ Another of the "Whereas" clauses in the Resolution links the definition of good character to duty to

27. BSA, Press Release, Feb. 6, 2002, *reproduced in app. 1 infra*. Boy Scouts of America, Resolution of Feb. 6, 2002, *reproduced in app. 1 infra*.

28. BSA, Resolution of Feb. 6, 2002, *reproduced in app. 1 infra*.

29. The Scout Oath provides:

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

Dale, 530 U.S. at 649.

30. The Scout Law provides: "A Scout is: Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean and Reverent." *Id.* at 649.

31. One 2001 decision has interpreted the BSA policy to apply only to those adults who serve as role models for youth. *Chicago Area Council of BSA v. City of Chicago Comm'n on Human Relations*, 748 N.E.2d 759 (Ill. App. Ct. 2001). It would seem that the BSA's alternative ground, exclusion of "avowed homosexuals" as not "clean" and not "morally straight," addresses visibility *per se*, not visibility as a role model. The Connecticut Commission on Human Rights and Opportunities made a similar distinction between lawful BSA exclusion of gay men and/or avowed homosexuals as adult leaders and unlawful BSA exclusion of gay employees. *Boy Scouts of Am. v. Wyman*, 213 F. Supp. 2d 159, 165 (D. Conn. 2002) (describing November 15, 2000, declaratory ruling interpreting the scope of Connecticut's anti-discrimination statutes).

32. BSA, Resolution of Feb. 6, 2002, *reproduced in app. 1 infra*.

33. *Id.*

God that goes beyond a mere ideal and is held as an obligation, and describes the BSA as providing faith-based values.³⁴ Whether the policy bars gay scouts as well as gay adults is less clear.³⁵

In searching for earlier evidence of the missing antigay policy, one should not overlook the litigation positions taken in *Roberts v. United States Jaycees*³⁶ and *Board of Directors of Rotary International v. Rotary Club of Duarte*.³⁷ These cases, both involving the exclusion of women from service organizations, developed the current constitutional approach to the conflict between antidiscrimination laws and membership exclusions. The BSA filed amicus briefs in both cases, which were argued in the mid-1980s.³⁸ The reason for BSA participation in these cases is clear. In that time frame, the BSA saw its membership exclusion policies being attacked on three fronts—what came to be known as the “three G’s:” girls, gays, and the godless.³⁹ The BSA’s participation in these other membership exclusion cases was thus intended to cover them in the longer run. Of course, the BSA’s gay exclusion policy was specifically on the organization’s collective mind, as the *Curran* lawsuit was already underway at the time of the *Roberts* amicus brief.

Evidently, the possible impact of the *Roberts* decision on the BSA’s membership policy was on the mind of the Justices during oral argument.⁴⁰ Justice O’Connor’s concurrence in *Roberts* reserved the

34. See BSA, Resolution of Feb. 6, 2002, reproduced in app. 1, *infra*, no. 5.

WHEREAS the national officers agree with the report that “duty to God is not a mere ideal for those choosing to associate with the Boy Scouts of America; it is an obligation” which has defined good character for youth of Scouting age throughout Scouting’s 92 year history and that the Boy Scouts of America has made a commitment “to provide faith-based values to its constituency in a respectful manner.”

Id.

35. See *id.* On the one hand, the Resolution requires “Scouts and Scouters” alike to comply with the Scout Oath and Scout Law. *Id.* But it is “homosexual conduct” that violates the Oath and Law, and boys below a certain age are not likely to engage in it, or at least not as likely as adults. *Id.* It is being an “avowed homosexual” that makes one an unsuitable role model. How often are boys and youths “avowed homosexuals?” To be sure, this may be a more frequent occurrence than once upon a time. Also, the “role model” role is typically thought of as carried out by the adult leadership, not other youths.

36. 468 U.S. 609 (1984).

37. 481 U.S. 537 (1987). There is a third case in this line, *New York State Club Ass’n v. City of New York*, 487 U.S. 1 (1988), in which the BSA did not file a separate amicus brief.

38. Brief of Amici Curiae Boy Scouts of America, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-7240); Brief of Amici Curiae Boy Scouts of America, Bd. of Dir. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (No. 86-421).

39. MECHLING, *supra* note 6, at xviii.

40. See Brody, *supra* note 2, at 848, 848 n.89 (discussing Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1899 (1984)).

possibility that an organization set up for expressive purposes might deserve more deference as to the exclusion than a commercial organization such as the Jaycees.⁴¹ O'Connor specifically sketched out an organization whose purpose of moral education was accomplished through activities in the outdoors.⁴² O'Connor did not mention the BSA by name, but it is beyond any doubt whom she had in mind. In *Dale* the majority returned to O'Connor's concurrence in *Roberts* to support its holding.⁴³

As Dale Carpenter points out, the BSA also engaged in “dogged public defense[s], beginning in litigation battles in the early 1980s, of its associational right to exclude gays.”⁴⁴ These actions also constitute evidence of a present, but unspoken, antigay policy.

Plaintiffs in the various BSA exclusion suits nevertheless insisted that the BSA had no explicit policy. Therefore, considerable attention was directed, especially in *Dale*, to the question of whether the BSA gay exclusion policy was developed only *post hoc* to justify the BSA's specific actions in rejecting prospective members or expelling active members whose sexual orientation became public.⁴⁵ Was the BSA in fact making up an expressive association policy after the fact to defend in court its personnel decision expelling Dale and Curran? If the members of the association—Eagle Scouts, adult volunteers and staff—were not aware of any antigay exclusion policy, then how could the BSA claim a First Amendment right to protect the expression of such a policy?

On this point, the Supreme Court majority makes short shrift, apparently holding that if an organization's leadership says that a particular message is part of its expressive purpose, the Court will not inquire deeply into the correctness or bona fides of the content of the

41. See *Roberts*, 468 U.S. at 631-39 (O'Connor, J., concurring).

42. See *id.* at 636 n* (O'Connor, J., concurring) (“Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.”).

43. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649-50 (2000) (noting that the Scouts seek to instill values in young people by having its adult leaders spend time with them, “instructing and engaging them in activities like camping, archery, and fishing” and specifically quoting O'Connor's footnote from her *Roberts* concurrence). More generally, O'Connor's concurrence distinguished between expressive associations and commercial associations. “There is little doubt that a majority of the Court [in *Dale*] is now following Justice O'Connor's approach in delineating associational freedom.” Carpenter, *supra* note 2, at 1570. *Accord*, *Dorf*, *supra* note 2, at 2169 (“*Boy Scouts* is of a piece with Justice O'Connor's earlier claim that an association ceases to be protected as such by engaging in commercial activity.”).

44. Carpenter, *supra* note 2, at 1538 (discussing the recognition in *Dale* of the BSA's litigation positions as expressions of its antigay exclusion policy).

45. See *Dale*, 530 U.S. at 671-78 (Stevens, J., dissenting).

claimed assertion.⁴⁶ Such an approach does seem consistent with another recent Supreme Court opinion, *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*, in which the organizers of a St. Patrick's Day parade were allowed, on First Amendment grounds, to exclude an openly gay group contrary to the requirement of a local antidiscrimination law.⁴⁷ The *Dale* Court's easy acceptance of a defendant's definition of its expressive purpose certainly seems to leave a wide latitude for organizations to define *post hoc* whatever expressive purpose suits it at the moment of litigation.⁴⁸ Moreover, it seems odd to deem irrelevant what the members of an expressive association themselves understand the organization to be about. The policy of *post hoc* deference seems, moreover, in tension with other areas of the law where the Court expresses hostility to *post hoc* rationalization and expects contemporaneous explanations and policies to be much more reliable.⁴⁹ And in other areas of antidiscrimination law, business justifications have often been

46. *Id.* at 656 ("The fact that the organization does not trumpet its views from the rooftops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.").

47. 515 U.S. 557, 558-62 (1995) (deferring to organizers of a St. Patrick's Day parade to articulate the expressive content of the parade by excluding a separate, visible gay and lesbian contingent).

48. The St. Patrick's Day Parade at issue in *Hurley* could be contrasted to the BSA's ongoing operations. A parade is much more clearly an expressive activity in the traditional sense of public forum and public debate than is a tissue of weekly meetings, camping trips, civic activities and honorific rituals. *See Hurley*, 515 U.S. at 568-70 (a parade is typically an inherently expressive undertaking). Moreover, a single annual parade in a single location is much more likely to be focused by its organizers on specific content. *Dale*, 530 U.S. at 696 (Stevens, J., dissenting) ("*Hurley* involved the parade organizers' claim to determine the content of the message they wish to give at a particular time and place."). A specific St. Patrick's Day parade is actually quite a contrast with a far-flung network of loosely parallel local activities, for various ages of youth, sponsored by a variety of local organizations. Also, in my view the Supreme Court in *Hurley* is already pushing the concept of expressive activity by analogizing the parade organizers to a composer composing a musical work. *See* 515 U.S. at 574. The *Hurley* composer analogy mixes apples and oranges. In composing there is nothing at stake like the perpetuation of disfavored social categories through the control of public space. We need a better theory of a non-governmental public sphere in which identity-related appearance and activity is protected, a matter beyond the scope of this article. *See generally* Hunter, *Accommodating the Public Sphere*, *supra* note 2.

Daniel Farber observes that "the Court may be using religious organizations" as a model for other expressive organizations. Farber, *supra* note 2, at 1502. Religious organizations often receive great deference when their disputes over central church matters find their way to court. *Id.* at 1502-03; *see* Chemerinsky & Fisk, *supra* note 2, at 610-11 (exploring deference to religious organizations and arguing that this deferential approach is inappropriate for the BSA). Indeed, the D.C. Circuit recently cited *Dale* as requiring great deference to an educational institution's claim that it was a religious institution. *Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1344 (D.C. Cir. 2002).

49. *See, e.g.*, *Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

construed extremely narrowly, in contrast to the Court's apparent willingness to allow broad and *post hoc* assertions of expressive association.⁵⁰ Justice Stevens' dissenting opinion in *Dale* explored all of these problems with the majority's approach,⁵¹ and the *Dale* decision has already received criticism for its laissez faire approach to expressive association.⁵² A full examination of this aspect of the *Dale* decision, however, is beyond the scope of this paper.

A more honest explanation as to the missing antigay policy, though perhaps not one the Court or litigants would have wanted to broach, is that the BSA undoubtedly did have an antigay policy, but it never had to make it explicit. The testimony of the national director of public relations in *Curran* was accurate: keeping avowed homosexual men out was what people expected of the BSA.⁵³ Imagine some volunteer writing the national headquarters in 1955 or 1920 and asking whether it was allowed to have an openly gay assistant scoutmaster. Assuming that the person who opened the letter did not die from shock, the response surely would have been swift and harsh. And one imagines that the person who had the temerity to ask would himself (no women back then!) have also come under suspicion as being soft. In other words, the case of the missing antigay policy is easy to solve. *The policy was never missing. It just was never spoken out loud.* For, until the emergence of the gay rights movement in the 1970s,⁵⁴ there was no need for the BSA to do so. The 1993 version of the BSA antigay exclusion policy, roughly paraphrased as "[t]his is what people expect; homosexuals are not acceptable as role models for boys," would have been not only comprehensible, but almost universally accepted as an articulation of an unwritten understanding in, say, 1955.⁵⁵

50. For example, EEOC regulations state that as to sex the *bona fide* occupation qualification exception is to be interpreted narrowly. 29 C.F.R. § 1604.2(a) (2002).

51. Justice Stevens ultimately concluded that the "Boy Scouts of America is simply silent on homosexuality." *Dale*, 530 U.S. at 684.

52. See Chemerinsky & Fisk, *supra* note 2; Farber, *supra* note 2, at 1496-97; Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 1603-04; Koppelman, *supra* note 2. But see Epstein, *supra* note 2, at 120 (arguing that the application of expressive association doctrine is too narrow, both because no inquiry should be made into sincerity or motive and because the doctrine should apply to both commercial and expressive organizations without distinction). Koppelman also argues that another First Amendment doctrine, the prohibition on coerced symbolic speech, has been drastically expanded by the *Boy Scouts* case. Koppelman, *supra* note 2.

53. 952 P.2d at 226 n.8.

54. See, e.g., ESKRIDGE, *supra* note 8, on how pre-1970s gay activism led to the 1970s emergence of a visible movement.

55. For an excellent presentation of this world view, extending it back at least to the 1920s, see Knauer, *Homosexuality as Contagion*, *supra* note 2. See also the discussion of Culture War, *infra* notes 134-168.

Even once the BSA was up against the gay exclusion litigation, it did not jump to make its position clear. There is “reason to suspect that the organization’s real motivation was to avoid the issue as much as possible because of internal divisions.”⁵⁶ As for the “morally straight” and “clean” precepts within the Scout Oath and Scout Law, reading an antigay policy into them is to be sure not a “traditional interpretation” that the BSA had ever had to make explicit.⁵⁷ That reading is, rather, an interpretation brought to bear for the occasion, after the bringing into question of an understanding of the gay exclusion that once had been so widespread societally as to need no explanation. The interpretation is, nevertheless, consonant with a longstanding American antipathy to homosexuals and homosexual conduct.⁵⁸

David McGowan argues that “the message the Scouts defended was a political compromise among sponsors of Boy Scout troops, who appear to disagree about homosexuality.”⁵⁹ Apparently, “homosexuality threatened to fragment the Scouts as an organization precisely because Scouting’s sponsors [did] not agree on what message to send on the subject.”⁶⁰ Thus, “the Scouts’ litigation position defended silence on the topic of homosexuality, and indeed on matters of sexuality in general, while claiming a penumbral right of disassociation [from gays] based on the speech clause.”⁶¹ The BSA characterized themselves as “practicing benign neutrality in the culture wars,”⁶² even as they sought to solidify their authority to exclude gays. McGowan sees the Supreme Court as

56. Farber, *supra* note 2, at 1495 (discussing McGowan, *supra* note 2).

57. Carpenter, *supra* note 2, at 1545.

58. *See id.*; *see also* Knauer, *Homosexuality as Contagion*, *supra* note 2. Even the Supreme Court majority allowed that “the terms ‘morally straight’ and ‘clean’ are by no means self-defining. Different people would attribute to those terms very different meanings.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000). The dissent finds that “neither one of these principles . . . says the slightest thing about homosexuality.” *Id.* at 668 (Stevens, J., dissenting). *See* Carpenter, *supra* note 2, at 1545 (arguing that the BSA must be permitted to defend its traditional interpretation of these words in the culture wars).

Chemerinsky & Fisk argue that “morally straight” could not have been understood to address homosexuality at the time the Scout Oath was written, as “straight” had not yet taken on the sense of heterosexual. Chemerinsky & Fisk, *supra* note 2, at 600 & n.30. The argument proves too much. Whatever the Scout Oath may have been understood to mean in the first part of the twentieth century, the relevant question is how the BSA’s current members have understood it in light of the BSA’s practices that put it in context. The meaning of words changes over time, and there is no reason to treat the Scout Oath as a document so authoritative that it must be interpreted under the tenets of original intent. What is called for is a dynamic textual interpretation.

59. McGowan, *supra* note 2, at 124.

60. *Id.* at 154. He continues, “one might infer that the Scouts had as many worries from internal disagreements on the [gay] issue as from social condemnation.” *Id.*

61. *Id.* at 131.

62. *Id.* at 154.

basically sympathetic to the dilemma of the BSA.⁶³ In his view this explains the shift in doctrinal focus from expressive association as protective of members (*Roberts*) to protective of whatever views the management of the organization wished to express (*Dale*).⁶⁴ Indeed, Madhavi Sunder describes *Dale* as “an all-out rescue mission to protect the association’s meaning” in the face of “increasing dissent and expressive conflict within [the] association.”⁶⁵ Whether one ought to develop a clear constitutional principle out of a desire to facilitate the organizational difficulties of large associations is more doubtful.⁶⁶

63. *Id.* at 131-32, 161.

64. *Id.* *Accord*, Chemerinsky & Fisk, *supra* note 2, at 601; Sunder, *supra* note 2, at 523. Farber calls this a shift from the protection of associating to the protection of associations. *See supra* note 2, at 1485.

65. Sunder, *supra* note 2, at 523. Richard Epstein is equally candid, indeed blunt, about the Scouts’ policies. “Consistent with the demands of its broad membership base, the Boy Scouts’ general philosophy is a model of diffidence, evasion, and restraint. It contains a broad list of general nostrums that right-thinking people would find hard to deny (and, all too often, hard to keep).” Epstein, *supra* note 2, at 127. Epstein argues that “the Scouts’ bland declarations [do not] represent a lack of understanding, conviction, or foresight. Rather, they represent the kind of studied compromise that a large and successful organization must make to stave off schism or disintegration.” *Id.* at 128. “This same equivocal attitude carries over to the issue of homosexuality.” *Id.* at 129.

66. Drawing on Epstein’s vocabulary, the BSA positions on a number of the relevant issues could be described as diffident, evasive, broad, general, wimpy, sappy, bland, compromised, and equivocal. *See* Epstein, *supra* note 2. Shadowy messages like these seem a far cry from the paradigmatic individual speech on a political issue, or even from the group political efforts protected in the original freedom of association cases from the 1950s. *See, e.g.*, *N.A.A.C.P. v. Button*, 371 U.S. 415, 431 (1963); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Indeed, *Jaycees* identified the right to expressive association as a “right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The notion that a large membership organization can be excused from governmental regulation of membership policies even if its expression is diffident, evasive, and so on, entirely undermines the “expressive” component of “expressive association.”

Following through on his approach, Epstein argues precisely this point, that there should be no distinction among the associational rights of organizations depending on what they are seeking to express. He rejects the distinction between commercial and expressive organizations. Instead, for Epstein, content is irrelevant, and free association is paramount. (The fight here is about freedom to refuse association, of course, but it amounts to the same thing.) Unless there is a problem of monopoly, so that the spurned would-be member cannot find another similar association, the state has no business regulating exclusion as a matter of antidiscrimination law at all, in Epstein’s view. Epstein, *supra* note 2, at 132-43. One could disagree with Epstein’s approach on many counts, e.g., the adoption of a monopoly criterion for antidiscrimination laws, to the exclusion of any moral constraints; the failure to account for the costs of widespread exclusion and stigma that may not be remediable through the private tort system or other collective action; and what appears to be an assumption from clouduckooland, that associations and individuals started out on an equal footing, with equal resources and an option of exit for free association elsewhere, ignoring the historical fact that non-whites, women and what might have been called sodomites in the old days hardly faced a level playing field. I just do not see how a First Amendment constitutional right of association can be based on keeping members in the dark

Nevertheless, Epstein, McGowan, Sunder and others are certainly right about the dilemma in which the BSA found itself. At this juncture, William Eskridge's recent attempt to summarize and apply social movement theory to identity-based social movements is helpful.⁶⁷ As part of his description of the "life cycle"⁶⁸ of an identity-based social movement (Eskridge acronymizes this to IBSM), Eskridge argues that once a vanguard of the minority becomes "socially visible and normatively threatening"⁶⁹ society can move to a phase of "culture clash[, where] the politics of recognition meets a counter-politics of preservation."⁷⁰ For example, as the civil rights movement gained success, "[s]outherners viewed their disapproval of 'mixing' the races as a normative . . . mandate" for any individual who respected Southern tradition.⁷¹ The women's movement generated the anti-ERA and pro-life countermovements, in which Eskridge perceives the status quo reconceptualized by traditionalists in identity-based terms.⁷² As for the gay rights movement of the 1970s, Eskridge discerns a "traditional family values (TFV) countermovement," based in Christian fundamentalism.⁷³ Eskridge locates the emergence of this TFV countermovement in California in 1975-1976, with the Briggs initiative, an unsuccessful attempt to reinstate California's sodomy law and eliminate homosexuals from schools;⁷⁴ in Dade County, Florida in 1977 with Anita Bryant's successful "Save the Children" campaign to override Dade County's early antidiscrimination ordinance protecting gay people; and in the District of Columbia in 1981, when Jerry Falwell's Moral Majority persuaded Congress to override the District of Columbia's repeal of its sodomy and adultery laws.⁷⁵

as to what an organization expresses. Epstein's argument is ultimately better thought of as an argument about the general legitimate scope of governmental power and not about the First Amendment at all.

67. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

68. *Id.* at 467.

69. *Id.* at 468.

70. *Id.* at 471 (initial capitals omitted).

71. *Id.* Eskridge could equally well have discussed the politics of Boston's poor Irish, which in the 1970s produced a virulent racism linked to an identity, in another, localized counter civil-rights movement. See, e.g., Delia O'Hara, *End of the Line: South Boston's Pride, Prejudices*, CHI. SUN-TIMES, Dec. 19, 1999, at 21.

72. See Eskridge, *supra* note 67, at 472.

73. *Id.* at 473.

74. *Id.* at 474. Eskridge sets the date at 1975-76, although the final Briggs Initiative vote came in 1978.

75. See Eskridge, *supra* note 67, at 473-74. See generally ESKRIDGE, *supra* note 8; JOHN GALLAGHER & CHRIS BULL, PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND

This is exactly the time frame in which the BSA's exclusionary membership policies were first challenged in court by all three of the Gs⁷⁶—and in which the BSA first internally articulated an antigay policy in 1978. Indeed, the pattern considered above, in which the BSA's silence on gays was gradually forced to be replaced by open hostility, closely mirrors the broader social patterns that Eskridge says IBSMs will produce. As McGowan speculates (acknowledging that his idea came from Eskridge), “[p]erhaps the Scouts have not been concerned about openly gay men in the past because gay men historically have not been open about their sexual orientation.”⁷⁷ The two movements, in their mutual increasing visibility, reinforced one another.⁷⁸

The traditional family values that the BSA has now invoked to justify its exclusion of gays were not fashioned out of whole cloth, however. The BSA drew on preexisting social institutions and practices to construct and justify its eventual traditionalism, just as the TFV movement Eskridge described has drawn on traditional religious fundamentalism and preexisting hostile accounts of homosexuality to fashion a contemporary identity-based countermovement. In particular, religion has always been a tenet of Scouting, and churches have always been a principal source of local BSA charters.⁷⁹ Indeed, the first BSA

THE POLITICS OF THE 1990s (1996); DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* (1998).

76. Girls and gays are two obvious IBSMs, and so, too, I suppose are atheists. For a helpful account of attempts by atheists to gain admission to the BSA and an analysis of why the BSA had to resist, see MECHLING, *supra* note 6, at 35-47 (chapter entitled *The “Problem” of God in the Boy Scouts*). The BSA-atheist exclusion cases are: *Randall v. Orange County Council, Boy Scouts of America*, 952 P.2d 261 (Cal. 1998); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 891 P.2d 385 (Kan. 1995); and *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993). New atheist exclusion controversies are underway. Dean E. Murphy, *Eagle Scout Faces Official Challenge Over His Lack of Faith*, N.Y. TIMES, Nov. 3, 2002, §1 at 20; Nancy Bartley, *Girl Scouts Building a Future Based on Flexibility, Inclusion*, SEATTLE TIMES, Feb. 25, 2003, (appeal of atheist exclusion from BSA pending); *Autonomy Lets Scouts Set Policies: Fund Ties: The Inland Empire Council Refuses Government Money So It Has Independence*. THE PRESS-ENTERPRISE (Riverside, Cal.), Jan. 30, 2003, at B1 (discussing ACLU suit in Southern California concerning BSA exclusion of atheist).

77. McGowan, *supra* note 2, at 147 n.81.

78. Ironically, it may well have been the post-World War II campaign against gays by the military and the government that in the United States provoked the beginnings of a political solidarity among gays and the emergence in the 1960s of an identity-based gay rights movement. ESKRIDGE, *supra* note 8, at 4. *But cf.* Knauer, *Homosexuality as Contagion*, *supra* note 2, at 404 (exploring well-entrenched and conflicting cultural camps a generation earlier, at the time of the British and American obscenity prosecutions of RADCLYFFE HALL, *THE WELL OF LONELINESS* (1928)).

79. About sixty-five percent of Scout troops are sponsored by religious organizations. Laurie Goodstein, *Jewish Group Recommends Cutting Ties to Boy Scouts*, N.Y. TIMES, Jan. 10, 2001, at A12.

church council was formed by the Mormon church,⁸⁰ and over the decades the Church of Jesus Christ of Latter-Day Saints (LDS) decided to base its entire boys' youth program in the BSA⁸¹—an act of faith in the BSA organization, as it were. Nowadays, Mormon troops incorporate considerable LDS-specific religious rituals into their Scout ceremonies.⁸² More than 400,000 Mormon boys participate in church-sponsored troops.⁸³ This represents some thirteen percent of the BSA's total troop membership.⁸⁴ Catholicism has also thrived in its relationship with the BSA. The most recent BSA fact sheet on Catholicism shows some 350,000 scouts in troops chartered through Catholic churches, and another 350,000 Catholic boys in troops of other types.⁸⁵ Catholic youth, 700,000 strong, represent altogether perhaps one-fifth of the BSA's entire youth membership.⁸⁶ Together, Catholics in the church-sponsored troops and Mormons total perhaps twenty-five percent of the youth membership.⁸⁷ Furthermore, both churches are highly centralized⁸⁸ and have generally taken conservative, negative positions on homosexuality.⁸⁹

80. See MECHLING, *supra* note 6, at 36.

81. The Mormon Church is the second largest sponsor of Scout troops, after public schools. *Id.* at 293 n.4.

82. See McGowan, *supra* note 2, at 152 n.92 (discussing the amicus brief submitted, *inter alia*, by the Church of Jesus Christ of Latter Day Saints, 2000 WL 235234, at *22).

83. David France, *Scouts Divided*, NEWSWEEK, Aug. 6, 2001, at 44.

84. See *id.*

85. Boy Scouts of America, *Fact Sheet: Scouting for Catholic Youth*, at <http://www.scouting.org/factsheets/02-377.html>.

86. For all that, some of my Catholic colleagues have recalled little or no presence of the BSA in their childhoods or in their primarily Catholic neighborhoods. Interview with Ed Hartnett (re Irish and Italian Catholic neighborhood in Jersey City, New Jersey); interview with Solangel Maldonado (re Dominican neighborhood in Manhattan, New York). Another colleague, who is not Catholic, grew up in a black neighborhood of modest means in Newark, N.J., and also barely encountered Scouting in his childhood. Interview with Bernard Freamon. I have learned from these conversations and others like them that in some localities, ethnic groups and religious backgrounds, participation in Scouting is high and in others it is non-existent. It is risky to overgeneralize.

87. There is some confusion about numbers, which may be attributable to changes over periods of a decade, and may also in part be attributable to whether one counts total troops or total participating churches, and whether one counts Catholic youth participating in BSA but not through Church-sponsored troops. The two churches together supported more than one quarter of all troops in 1991. Michael deCourcy Hinds, *Boy Scouts Try to Keep Identity as Outsiders* *Knock*, N.Y. TIMES, June 23, 1991, at A1.

88. As a New York Times article suggested, although public schools sponsor more troops they do not speak with the unified voice of the Mormon and Catholic churches. See *id.*

89. The Catholic church views homosexuality as an intrinsic moral disorder, and requires the homosexual to remain celibate. Although it does not view homosexuality *per se* as sinful, so long as celibacy is maintained, the Catholic church opposed any loosening of the BSA policy in its amicus brief in the *Dale* cases. Given the recent horrifying spate of revelations about abuse of children and young men and women by Catholic clergy over the past decades, and the tendency of some spokespersons within the Church to link this to the presence of gay clergy, it is most

LDS and the Catholic Church, along with the Lutheran Church-Missouri Synod, the National Council of Young Israel, and a scouting organization within the United Methodist Church, all supported the BSA in an amicus brief in *Dale*.⁹⁰ Also, the record is clear that the Mormons were prepared to abandon the BSA altogether if the BSA yielded to the demands for tolerance of open homosexuals.⁹¹ The Catholic Church appears to have taken the same position, albeit more discreetly.⁹² Some other conservative religious denominations with less sizeable followings would likely have followed suit.⁹³

unlikely that the Church will relax its opposition to open homosexuals as role models for youth. The Church tends to see all homosexuals as sharing a tendency to have illicit sex. In contrast to this view, the U.S. Conference of Catholic Bishops released a pastoral letter, *Always Our Children: A Pastoral Message to Parents of Homosexual Children and Suggestions for Pastoral Ministers*, Sept. 30, 1997 (stressing acceptance of homosexual persons with respect, compassion and sensitivity, and counseling parents and priests on how to respond to a homosexual child). See Press Release, *Bishops Urge Parents of Homosexuals to Accept Their Children, Themselves, Church Teaching on Human Dignity*, available at <http://www.nccbuscc.org/comm/archives/97-208.htm>.

The Church of Jesus Christ of Latter-day Saints has a similar position. President Gordon B. Hinckley, who speaks with the authority of the Church, stated the Church opinion on “so-called gays and lesbians:”

[W]e love them as sons and daughters of God. They may have certain inclinations which are powerful and which may be difficult to control. . . . If they do not act upon these inclinations, then they can go forward as do all other members of the Church. If they violate the law of chastity and the moral standards of the Church, then they are subject to the discipline of the Church, just as others are.

Statement of Gordon B. Hinckley, *ENSIGN*, Nov. 1998, at 71, reproduced at <http://www.mormon.org/question/faq/category/answer/0,9777,1601-1-60-1,00.html>. See also Laura Douglas-Brown, *Mormons Take Leading Role Against Gay Rights, Winter Olympic ‘Hosts’ Have Been Key Force in Fighting Gay Marriage, Supporting Boy Scouts’ Gay Ban*, *WASH. (D.C.) BLADE*, Feb. 14, 2002, at 9; Katherine Roisman, *Mormon Family Values*, *NATION*, Feb. 25, 2002, reproduced at <http://www.scoutingforall.org/aaic/2002022505.shtml> (describing the difficulties of an LDS family one of whose sons came out as gay at the age of thirteen).

90. Brief of Amicus Curiae National Catholic Committee on Scouting et al., in Support of Petitioners, *Boy Scouts of America v. Dale*, (2000) (No. 99-699), available at 2000 WL 235234.

91. See *id.* at 25; France, *supra* note 83. A Mormon leader who sat on the BSA executive board testified to the same effect in the *Curran* trial in 1990. Hinds, *supra* note 87.

92. For example, in the 1990 testimony in the *Curran* case, a member of the National Catholic Committee on Scouting said admitting homosexuals would make the group seriously consider breaking away. See Hinds, *supra* note 87.

93. The religious organizations’ antigay brief claimed to be backed by 1.2 million scouts, but McGowan points out that of this number some 424,000 Methodists are also claimed by a more moderate Methodist faction that submitted a different amicus brief on the other side. See McGowan, *supra* note 2, at 158 n.100. McGowan also points out, adding up the numbers, that close to 2.7 million youth members are unaccounted for in the amicus briefs. See *id.* Nevertheless, if the 1.2 million did not walk, but stayed, they could be expected to control the organization’s viewpoint on the matter, even though not an absolute majority, as they were and are well-organized and have considerable intensity about their view on the matter.

In terms of Eskridge's analysis, by the 1970s the bedrock of the BSA was precisely the constituency that contemporaneously was forming the TFV counteridentity movement in response to the gay rights movement. This was quite a change, as early Scouting in the United States had explicitly "rejected self-description as a Christian organization."⁹⁴ There are other indicia of a shift in the BSA's ethos, in particular the movement of the national headquarters from New York City, first to New Brunswick, New Jersey, and then to Irving, Texas.⁹⁵ Symbolically and probably demographically as well, the BSA moved away from its diverse immigrant roots towards a solid base in conservative Christianity. As Mechling puts it, "An organization that originally aspired to reach urban, working-class, and immigrant kids had become by 1960 predominantly white and middle-class."⁹⁶ The BSA leadership also came to consist of a self-perpetuating band of largely ex-military men, religious conservatives who might be expected to be unfriendly to gays as comrades and role models, and perhaps to women as comrades and role models as well.⁹⁷ These men were not elected by or otherwise directly responsible to the corps of volunteers and youth.⁹⁸ It is no wonder, then, that as a matter of ideology and of the BSA's own identity, when push came to shove it would eventually articulate its long-held antigay position rather than repudiate it. After all, by the effect of its own decades-long self-definition, the BSA's membership did not include any of the three Gs who constituted some of the key IBSMs of the second half of the twentieth century.⁹⁹ And the BSA was hardly at the forefront of some of the IBSMs opposed by the TFV coalition. Also, as a practical matter, and regardless of the ideological predilections of its leaders, given the relative importance of various constituencies within the BSA by 1980 or so, preferring to shore up an antigay policy might well

94. Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 1596-97 (discussing WILLIAM D. MURRAY, *THE HISTORY OF THE BOY SCOUTS OF AMERICA* (1937)).

95. *Id.* at 1596; *see also* MECHLING, *supra* note 6, at 46-47.

96. MECHLING, *supra* note 6, at 43. Hunter also comments on the idea that the primary goal of the early BSA was assimilation. Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 1596-97 (discussing MURRAY, *supra* note 94).

97. In addition to specifically discussing the influence of the Catholic and Mormon churches on the BSA, Mechling discusses generally "the increasing influence of the religious right in the national offices." MECHLING, *supra* note 6, at 219. Mechling describes the national leadership as religious conservatives who see themselves as important troops in the culture wars. *See id.* at 47. He suggests that they are more religious than the founders, and than the founders would have wanted. *See id.* at 219.

98. *See* Chemerinsky & Fisk, *supra* note 2, at 612.

99. The Scouts' position vis-à-vis race is more complicated. *See* Hunter, *Accommodating the Public Sphere*, *supra* note 2, at 1597-98.

have been the only sensible business decision. The BSA could not afford to do otherwise. It risked losing perhaps half of its membership.

Interestingly, the BSA began a different program altogether in 1991, the “Learning for Life” program.¹⁰⁰ Learning for Life is a wholly-owned subsidiary of the BSA offered optionally through local councils.¹⁰¹ The Learning for Life program also offers youth education services.¹⁰² It seems targeted towards the needs of at-risk youth in large school systems, often in inner cities.¹⁰³ Learning for Life does not exclude girls and it does not exclude gays.¹⁰⁴ This program has grown phenomenally, and presently accounts for one-third of the overall BSA organization’s revenues, if one combines the numbers of the programs.¹⁰⁵ In a liberal area like New York City, the numbers are revealing. In early 2001, there were “about 30,000 youths participating in traditional Boy Scout and Cub Scout programs, 7000 in the various Explorers programs, and 86,000 in a Learning for Life program in a city or parochial school.”¹⁰⁶ Whatever the BSA may have thought it was doing when it first began

100. *Boy Scouts to Allow Homosexuals in New Program*, N.Y. TIMES, Aug. 14, 1991, at A10 (Learning for Life as a direct BSA reaction to the challenges by gay rights groups and the United Way in the San Francisco Bay area; Learning for Life is a wholly-owned subsidiary of the BSA); David Rice, *BSA [“]National Membership/Participation Report” for February 2001, Membership Continues on Downward Trend* (April 16, 2001), available at <http://www.scoutingforall.org/aaic/041702.shtml> (analyzing BSA annual national membership report, RS0582, dated March 2, 1991); *Scouts Threaten to Drop Troop Over Gay Policy*, N.Y. TIMES, Feb. 6, 1992, at C11 (Learning for Life started by BSA after United Way threatened to withdraw support).

101. See Rice, *supra* note 100.

102. See <http://www.learning-for-life.org> (last visited Feb. 26, 2003).

103. Learning for Life, *Strategic Plan 2002-2005, Outreach*, available at <http://www.learning-for-life.org> (last visited Feb. 26, 2003).

104. Anemona Hartocollis, *Levy Limits Scout Events in the Schools: Says Bias Against Gays Violates Board Policy*, N.Y. TIMES, Dec. 2, 2000, at B1 (New York City Schools Chancellor Harold Levy said that the Learning for Life program in the New York City public schools is not discriminatory, in contrast to the Boy Scouts proper); Rice, *supra* note 100 (as to gays); *Scouts Threaten to Drop Troop Over Gay Policy*, *supra* note 100 (as to gays, girls, and atheists). Indeed, some large clients like New York City and San Francisco would not contract with Learning for Life if it discriminated against gays.

105. As of December 31, 2001, Learning for Life provided services to 1,697,701 youths. Learning for Life 2001 Annual Report, Participation Report, available at <http://www.learning-for-life.org/lfl/about/99-316-2001/08.html>. Another account gives a figure of 837,407 students participating in Learning for Life nationwide as of December 31, 1995. *Learning for Life in Marin*, available at <http://www.boyscouts-marin.org/programs/learning.htm>. A BSA spokesman is quoted as saying in 1991 that “the number of youth being reached by all of BSA’s programs, including Venturers and Learning for Life, is more than 6 million.” Sealey, *infra* note 266 (quoting Gregg Shields, BSA spokesman). Given that the membership number in all the BSA programs is 3.3 million, that would put Learning for Life at some 2.7 million. This figure seems improbably large.

106. Eric Lipton, *Local Scouting Board, Calling Gay Ban “Stupid,” Urges End to National Policy*, N.Y. TIMES, Feb. 27, 2001, at B3.

Learning for Life, what it has developed is in fact a brilliant product differentiation scheme.¹⁰⁷ It markets the BSA as boys only, no gays, to traditional types, and Learning for Life as more flexible, open ended, and tolerant, to large school systems and the inner city. Thus, it can sell youth education services to both ends of the cultural and political spectrum.

The BSA may be having a hard time maintaining the product differentiation, however, to the extent that Learning for Life becomes identified with the BSA. Information about Learning for Life was becoming more available on the BSA Web site in early 2002. However, there is currently virtually no mention of Learning for Life on the BSA Web site, nor is there any reference to the relationship to the BSA on the Learning for Life Web site.¹⁰⁸ Discussions of Learning for Life do appear in the Web sites of some local Boy Scout councils offering the service¹⁰⁹ and in some newspaper accounts.¹¹⁰ One has to wonder if the BSA wasn't running into a problem. If Learning for Life were too closely identified publicly with the BSA, might it not trigger the ire of those opposed to the BSA antigay exclusion policy? Indeed, might not some of the clients of Learning for Life be tempted to reject its services because it was owned and controlled by an organization with an antigay exclusion policy, even though that policy did not carry through to Learning for Life?¹¹¹ From the opposite end of the political spectrum, might not the BSA's TFV supporters be disturbed that the BSA would offer educational services that did not adhere to the line about homosexuality as immoral or at least as a bad role model for youth?

107. Daniel Farber talks about the difficulty of product differentiation in a large organization. See *supra* note 2, at 1506. However, the BSA seems to have managed to do it.

108. A search of the BSA Web site on February 26, 2003, revealed three cursory acknowledgements that Learning for Life is a BSA program and one reference in an annual report to Congress. A search of the Learning for Life Web site showed no acknowledgements of relation to the BSA.

109. *E.g.*, *Learning for Life in Marin*, *supra* note 105.

110. *Boy Scouts to Allow Homosexuals in New Program*, *supra* note 100; Hartocollis, *supra* note 104; Lipton, *supra* note 106; Thomas J. Lueck, *Scout Councils Urged to Defy Policy on Gays*, N.Y. TIMES, Sept. 28, 2000, at B1 (spokesperson for Scout New York area council discusses nondiscriminatory policies of Learning for Life in response to school district challenges to BSA policy); *Scouts Threaten to Drop Troop Over Gay Policy*, *supra* note 100.

111. Scouting for All, an organization born of opposition to the BSA antigay exclusion policy, asks this question. In an analysis of BSA membership trends, its Vice-President writes, "fundes are now asking, 'How can the BSA discriminate against homosexuals in one part of their program saying they are morally inferior and excluding them, then include them in their Learning for Life program?' The BSA is currently speaking out of both sides of their [sic] mouth." Rice, *supra* note 100.

Meanwhile, back on the TFV front, the BSA proper is now billing itself as a “faith-based”¹¹² organization that teaches “traditional family values.”¹¹³ “Faith-based” is a current conservative buzzword, as evidenced for example by the political pressure for the federal government to fund “faith-based” charities, such as the Salvation Army, which has its own gay exclusion policy.¹¹⁴ Post-*Dale*, the BSA has started a new internal publication, entitled *In Support of Values*, to be distributed to adult leaders; some half-dozen issues of *In Support of Values* are available on the BSA Web site.¹¹⁵ The masthead describes the publication as “a communications tool for volunteers and professionals in the Scouting family.”¹¹⁶ Ostensibly, *In Support of Values* is there to help them with their organizational public relations, but of course the publication also helps the BSA with its internal public relations. A significant amount of the overall content has been devoted to *Dale* and to justifying the gay exclusion policy.¹¹⁷ Discussions of the religious morality that is

112. BSA, Resolution of February 6, 2002, reproduced in app. 1 *infra*, Boy Scouts of America, 2000 Annual Report, 1998-2002 Strategic Plan, at <http://www.scouting.org/media/reports/2000/05.html> (last visited Feb. 4, 2003).

113. Kate Zernike, *Scouts' Successful Ban on Gays Is Followed by Loss in Support*, N.Y. TIMES, Aug. 29, 2000, at A1 (quoting Gregg Shields, a national spokesman for the BSA). *Nota bene*: the Zernike article contains several factual inaccuracies, which were corrected subsequent to the publication of the article itself, in the internet version.

114. See, e.g., Brody, *supra* note 2, at 896-900 (discussing federal faith-based charity proposals); Laurie Goodstein, *Group Sues Christian Program at Iowa Prison*, N.Y. TIMES, Feb. 13, 2003, at A39 (lawsuit challenging faith-based program in federal prison); Laurie Goodstein, *The Nation; A President Puts His Faith in Providence*, N.Y. TIMES, Feb. 9, 2003, § 4 (Week in Review), at 4 (describing President George W. Bush's invocation of faith as basis for social policy); George W. Bush, *State of the Union; President's State of the Union message to Congress and the Nation*, N.Y. TIMES, Jan. 29, 2003, at A12 (urging Congress to enact President's proposal for federal support of faith-based social services). See generally Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SURVEY AM. L. 33 (2000); Lewis D. Solomon & Matthew J. Vlissides, Jr., *Faith-Based Charities and the Quest to Solve America's Social Ills: A Legal and Policy Analysis*, 10 CORNELL J. L. & PUB. POL'Y 265 (2001).

115. In addition to the numbered and dated issues there are undated “research” issues. These are available on the BSA Web site, at <http://www.scouting.org/media/values/newsletter/index.html>.

116. See *id.*

117. E.g., *The Bedrock of Scouting Values*, 1 IN SUPPORT OF VALUES, November 2000, at <http://www.scouting.org/media/values/newsletter/0011/bedrock.html>; Gary Turbak, *Boy Scouts: Beacon for Men in the Making*, 1 IN SUPPORT OF VALUES, June/July 2001, at <http://www.scouting.org/media/values/newsletter/0102/point32.html>; *Points to Make About Scouting's Volunteer Leadership Policy*, 1 IN SUPPORT OF VALUES, Research Edition, February 2001 (detailed justification of the gay exclusion policy), at <http://www.scouting.org/media/values/newsletter/0106/beacon.html>; Timothy P. Smith, *Is Political Correctness Worth Cost to Youth?*, 1 IN SUPPORT OF VALUES, November 2000, at <http://www.scouting.org/media/values/newsletter/0011/pcyouth.html>; *Points to Make in Support of Values*, In Support of Values, at <http://scouting.org/media/values/points.html>. The redesigned BSA Web site also contains three “Position Statements” on

taught by the Scouting experience appear regularly.¹¹⁸ Indeed, *In Support of Values* published a letter from the National Commander of the Salvation Army specifically supporting the BSA gay exclusion policy.¹¹⁹ The publication has also included an article from James A. Tamaya, Bishop of the Diocese of Laredo¹²⁰ and an endorsement from Patrick Flores, the Archbishop of the Diocese of San Antonio.¹²¹ The good Bishop of Laredo intones the importance of the BSA in maintaining good Catholic family values.¹²² Not coincidentally, the BSA is in the middle of a five-year membership campaign addressed to the Latino/a population in the United States.¹²³ Also, not coincidentally, Latino/a are projected to become the largest nonwhite population by 2004, and they are considerably younger than other segments of the population.¹²⁴ When it selected a hundred millionth Scout to honor, the BSA chose a Latino boy, Mario Castro, from a Latino troop in Brooklyn, New York.¹²⁵ Clearly the BSA is making a pitch for new, conservative, Catholic Latino/a membership and support.¹²⁶

various aspects of the controversy over homosexuality. <http://www.scouting.org/media/positions/index.html>.

118. See, e.g., *Faces of the Future, Connecting Youth with Communities and Families*, 1 IN SUPPORT OF VALUES, Fall 2001, at <http://www.scouting.org/media/values/newsletter/0110/faces.html> (last visited Feb. 4, 2003) (discussion of role of “faith traditions” in BSA); Turbak, *supra* note 117 (“Scouting relies on traditional, proven, basic values that remain the same from generation to generation: Belief in God. Respect for Others. Honesty. Patriotism.”).

119. *A Letter from the Salvation Army*, 1 IN SUPPORT OF VALUES, Jan. 2001, at <http://www.scouting.org/media/values/newsletter/0101/salvationarmy.html> (last visited Feb. 4, 2003).

120. *Scouting: A “Compass” for the Journey of Life*, 1 IN SUPPORT OF VALUES, Nov. 2000, at <http://www.scouting.org/media/values/newsletter/0011/compass.html> (last visited Feb. 4, 2003). The article concludes with the BSA slogan for its Hispanic membership campaign, “¡Scouting! Vale La Pena.”

121. See *¡Scouting! Vale la Pena (It’s Worth the Effort) for Hispanic American Families*, 1 IN SUPPORT OF VALUES, Oct. 2000, at <http://www.scouting.org/media/values/newsletter/0010/hispanic/html> (last visited Feb. 4, 2003). The slogan is “¡Scouting! Vale la Pena (It’s Worth the Effort) for Hispanic American Families.”

122. The national leadership also introduced a new Family Life merit badge that is required for Eagle Scout. See MECHLING, *supra* note 6, at 101.

123. *Supra* note 121. (The author prefers the term “Latino/a”; the BSA uses “Hispanic.”)

124. See *id.* The BSA is quite explicit about the demographics. *Id.* Perhaps the article should have been subtitled “In Support of New Membership.”

125. See *Boy Scouts of America Welcomes Its 100 Millionth Member Since Its Establishment 90 Years Ago*, Boy Scouts of America Press Release, available at <http://www.scouting.org/media/press/000404/index.html> (last visited Feb. 4, 2003). Castro is identified in this press release as an immigrant from Mexico, and his troop is identified as sponsored by St. Michael’s Roman Catholic Church in Brooklyn. This particular web document is also available in Spanish.

126. See Boy Scouts of America, *2000 Annual Report, The Year in Review*, at <http://www.scouting.org/media/reports/2000/03.html> (last visited Feb. 4, 2003) (“Scouting’s coordinated effort to reach out to more urban and rural young people focused on the Hispanic market in 2000. New Hispanic marketing materials and training aids were developed along with

While the BSA has won in the courts, it has by no means won the larger fight over the role of homosexuality in youth education. The increasing salience of the gay rights movement from the 1970s on has led to legal challenges to any number of the elements of society's subordination and silencing of gays. It has further forced into the open the prior tacit disapproval of gays, as well as an increasingly vituperative articulation of the traditional values of core constituencies opposing gay rights. More importantly, perhaps, "[m]erely by existing openly, gays are changing social mores, perhaps irreversibly."¹²⁷ Oftentimes, the key struggles in contemporary gay issues are not occurring in the courts, but in shifts in popular culture.¹²⁸ These indicate increasing support of at least some issues dear to gay activists, such as protection from employment discrimination, repeal of sodomy laws on privacy grounds, corporate acceptance (if not legal recognition) of same sex couples, and some public acknowledgment of same sex parents.¹²⁹ Indeed, one author has recently argued that the problematic decision of *Bowers v. Hardwick*,¹³⁰ which refused to extend the federal constitutional right of privacy to same sex sexual activity even in the home, is being undermined by increasing social recognition of family-like activities by same sex couples.¹³¹

a number of bilingual publications designed to make the Scouting program more accessible to Hispanic youth and their families.”).

127. Koppelman, *Why Gay Legal History Matters*, *supra* note 8, at 2058.

128. The importance to gay rights struggles of addressing popular cultural understandings of homosexuality is addressed in Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 513-14, 524-25 n.65 (1992) (discussion of “pre-understandings,” relying on Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2123-24 (1991)).

129. See generally David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223 (2002) (comparing legal and political constraints with cultural and commercial acceptance); ALAN YANG, FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY (1999).

130. 478 U.S. 186 (1986).

131. See Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled Bowers v. Hardwick, Even Though Romer v. Evans Didn't*, 49 DUKE L.J. 1559 (2000). Michaelson's intriguing argument is that the kind of right to privacy at stake in *Hardwick* evolved from traditional protection of family relations, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965), and that the increasingly widespread cultural recognition of family-like behavior in same sex couples undermines the ability to maintain a legal distinction between protected sexual activities for committed opposite sex couples and same sex sexual activity for committed same sex couples acting within a quasi-family context. Michaelson, *supra*, at 1589-1606; see also Vasquez v. Hawthorne, 33 P.3d 735 (Wash. 2001) (holding that Washington State's doctrine of meretricious relationships could apply to same sex couple and remanding for determination of whether it did apply under the facts). Michaelson's analysis seems to be an application of Fajer's theory. Fajer, *supra* note 128.

In *Dale*, the BSA prevailed only by asserting openly their policy of exclusion of gays from leadership positions. However, the explicitness required to prevail on a First Amendment theory makes the BSA antigay policy and the BSA itself the subject of ongoing public debate. Advocates of a robust First Amendment should be pleased. The debate simmers on, both within the BSA and among funding organizations, organizations that sponsor troops and provide facilities for meetings or other activities, and of course among parents deciding whether to enroll their sons or volunteer their own time. Concerned parties taking both positions have brought the issue to national and local politicians. Simply by virtue of being so clearly identified with its position on gays, the BSA has been transformed and its stature as an institution arguably lessened. It has been swept up in the general American *Kulturkampf* over homosexuality. As Jeffrey Mechling puts it, *Dale* “plunged the [BSA] even deeper into what scholars and journalists have come to call the culture wars between those arguing for moral absolutes and traditional values . . . and those arguing for a more pluralistic approach to morality and understandings of truth.”¹³² Madhavi Sunder calls *Dale* “a flashpoint case in the nation’s so called ‘culture wars.’”¹³³ Let us briefly explore this idea.

The term *Kulturkampf*, or *culture war*, was given prominence in the legal discussion of homosexuality by Justice Scalia in the opening sentence of his histrionic dissent in *Romer v. Evans*.¹³⁴ Ironically, the term was first used to describe Kaiser Wilhelm’s 19th century campaign against the secular power of the Catholic Church,¹³⁵ whereas from the 1990s on *Kulturkampf* and *culture war* have been used in American political discourse to describe a set of conservative, often right-wing attitudes towards family and sexuality issues, positions often championed by the Catholic Church.¹³⁶ It was to this current usage among

132. MECHLING, *supra* note 6, at xix, 209.

133. Sunder, *supra* note 2, at 523. *Cf.* Hutchinson, *supra* note 2, at 125-26 (discussing gay *Kulturkampf*); Knauer, “*Simply So Different*”, *supra* note 2 (placing the significance of Dale’s visibility as a gay man in the context of a Culture War over gender and homosexuality); Michaelson, *supra* note 131, at 1608-18 (discussing contemporary gay *Kulturkampf*).

134. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

135. See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2318-19 (1997); William N. Eskridge, Jr., *A Jurisprudence of “Coming Out.” Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2413-14 (1997).

136. See, e.g., Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345 (1997); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991); Douglas W. Kmiec, *America’s “Culture War”—The Sinister Denial of Virtue and the Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183 (1993).

conservatives that Scalia referred in *Romer*.¹³⁷ In the wider American culture, “culture wars” means something like unrestrained political and cultural combat motivated by moral righteousness, with the understanding that something vital for the survival of society is at stake. James Hunter’s germinal book *Culture Wars*,¹³⁸ for example, describes American society as split by a great divide.¹³⁹ On one side are the orthodox (Catholic, Protestant, or Jewish) and on the other side are the progressives (Catholic, Protestant, Jewish, and secular humanist).¹⁴⁰ From the orthodox point of view, as Hunter describes it, there simply are moral absolutes on a whole range of issues, beginning with the roles of men and women in the family, the proper use of sexuality for procreation (with concomitant bottom-line positions on the immorality of homosexuality and abortion), and the centrality of religion to public as well as private life.¹⁴¹ From these tenets flow positions on education, the media, the role of the arts, pornography, and a panoply of legal issues.¹⁴² By contrast, the progressives emphasize tolerance, openness to change (especially with regard to family roles, gendered work roles and sexuality) and a respect for individual choice that can accommodate a plurality of moral visions.¹⁴³ While the progressives believe that their open-minded tolerance should be sufficient to accommodate various orthodox communities within it, this is not so from the orthodox standpoint.¹⁴⁴ Progressive tolerance is viewed as repressive of the orthodox vision of humanity, as its shallow permissiveness is seen to support disorder and immorality, undermine orthodox communities, and

137. William Eskridge has politely criticized Justice Scalia for using the word *Kulturkampf* in *Romer* “out of context.” William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 VAND. L. REV. 419, 420 (1997). In part, he means that Scalia’s usage is not historically accurate. More generally, Eskridge would like to reserve the word *Kulturkampf* for the extreme development of a prejudice campaign in which the state’s resources are mobilized to “erase a nomic minority.” William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 IND. L.J. 1085, 1125 (1999). The term “nomic” in this quote refers to Robert Cover’s idea that religious communities develop their own *nomos*, or integrated ethical and moral system. See generally Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983-1984). Eskridge has developed an important theory of the repression of social movements that uses *Kulturkampf* in this carefully restricted sense of state coordinated massive repression. E.g., William N. Eskridge, Jr., *Channelling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

138. HUNTER, *supra* note 136.

139. *Id.* at 42-46.

140. *Id.* at 39-48.

141. *Id.* at 44, 176-96.

142. *Id.* at 197-271.

143. *Id.* at 43-46.

144. *Id.* at 149.

weaken the overall social fabric.¹⁴⁵ In Hunter's account, the two sides really are irreconcilable.¹⁴⁶ It is a dark vision, but one that sheds light on the rhetoric of civil war, exorcism, and public enemies that informs public debate on these issues.

In two recent articles, Nancy Knauer provides another useful account of the conservative world view of homosexuality, placing it in historical context of a culture war, and then addressing the specific issue of visibility of openly gay/avowed homosexual members of the BSA. In *Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts*,¹⁴⁷ she argues that there are two competing models of homosexuality in contemporary Western culture. These she calls "contagion" and "identity."¹⁴⁸ This polarity is not, however, a recent development springing from the gay rights movement of the 1970s or after, but "a long-standing battle for ontological hegemony."¹⁴⁹ Knauer identifies the 1928 controversy over Radclyffe Hall's lesbian novel, *The Well of Loneliness*, as both "a water shed in the development of lesbian identity" and "a water shed in the evolution of anti-gay rhetoric."¹⁵⁰ A 1928 editorial attacking Hall's novel set out six maxims about homosexuality.¹⁵¹ Knauer demonstrates how, some seventy-five years later, these six maxims continue to frame the conservative understanding of homosexuality.¹⁵²

Knauer's analysis sheds light on two crucial elements of the BSA controversy. For conservatives, in light of maxims three and six, "the 'avowed homosexual' has become the contested text. The openly gay individual by her very being expresses a very dangerous idea, namely

145. *Id.* at 151-52.

146. *Id.* at 143-56.

147. Knauer, *Homosexuality as Contagion*, *supra* note 2.

148. *Id.* at 401.

149. *Id.* at 404.

150. *Id.* at 405.

151. *Id.* at 432-38 (discussing James Douglas, *A Book That Must Be Suppressed*, [London] SUNDAY EXPRESS, Aug. 19, 1928 (editorial)). The maxims state:

1. Homosexuality is freely chosen;
2. Homosexuals prey on innocent victims, including children;
3. Homosexuals have no shame and flaunt their depravity in public;
4. The demands of homosexuals extend to more than tolerance;
5. This is a battle to the end for the future of society;
6. Any public image of homosexuality that is not negative is dangerous and contagious, as is the mere presence of an openly gay individual.

Id. at 406-07 (paraphrased).

152. Knauer primarily examines in some detail the work of the Family Research Council (FRC), a pro-family organization with a long history of anti-gay activism. *Id.* at 456-98. For a specific description of FRC, see *id.* at 456 n.319.

that homosexuality can exist without shame.”¹⁵³ In the contagion model, “an individual who does not express shame over her sexual orientation is thereby promoting homosexuality. In the words of Justice Stevens in his dissent in *Dale*, this reasoning means that ‘homosexuals are simply so different from the rest of society that their presence alone’ constitutes a form of speech.”¹⁵⁴ For those supportive of gays, I might add, the BSA’s silence on official policy made it possible to read the BSA as neutral or allowing a local option until they began having to defend their exclusions of gay men. One might think of the 1991 and 1993 policy statements as an “avowed antigay policy.”¹⁵⁵ Once articulated, the antigay exclusion policy also became a contested text. Moreover, neither “text” could have become contested without the visible presence in society of the other.

Knauer’s account helps to explain further why tolerance may be unavailable as a mutually acceptable solution. “Under the reasoning of the contagion model, there is no neutral ground—tolerating an openly gay employee or openly gay member is tantamount to championing homosexuality.”¹⁵⁶ “In the midst of a ‘Culture War,’ it is not possible for an openly gay person simply to be neutral, because the absence of condemnation signifies approval and hence, promotion of homosexuality.”¹⁵⁷ On the other hand, “in instances where the state ostensibly shies away from any mention of homosexuality . . . the state in effect champions heterosexuality.”¹⁵⁸ Moreover, although Knauer does not say so explicitly, supporters of acceptance of gays in society will view state tolerance of discrimination in employment, housing and adoption policies, refusal to recognize relationships, maintenance of sodomy laws, and so on, as the articulation of a conservative world view. Whenever the state chooses between the two approaches—and it must do so on a whole range of issues—even if it does not censor the other altogether, it favors the one over the other.¹⁵⁹

In another article, *Simply So Different*,¹⁶⁰ Knauer examines the historical context of the BSA and notes:

153. *Id.* at 455.

154. *Id.* at 484. The reader should note that Justice Stevens was characterizing the majority’s (and BSA’s) position about harm being created by the mere presence of openly gay scoutmasters, and that Stevens disagreed with that characterization. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 696-97 (2000). Knauer in fact disagrees with Stevens. Knauer, “*Simply So Different*”, *supra* note 2.

155. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 673-76 (2000) (Stevens, J., dissenting).

156. Knauer, *Homosexuality as Contagion*, *supra* note 2, at 455.

157. *Id.* at 484.

158. *Id.* at 497.

159. *See id.* at 496.

160. Knauer, “*Simply So Different*”, *supra* note 2.

[N]o matter how tempting it may be to fix the default setting at tolerance . . . the absence of an articulated prohibition against homosexuality on the part of an organization such as the Boy Scouts cannot realistically be interpreted as approval or tolerance. To argue otherwise ignores the decades of uniform condemnation of homosexuality that coincided with the formative years of the Boy Scouts and completely overlooks the continued public debate, often most spirited where children are involved, regarding the morality of homosexuality.¹⁶¹

Knauer also examines in detail the effects of individuals' breaking silence about homosexuality, especially of coming out. "In a society where the elemental ordering force is heterosexuality, the public avowal of a same-sex libidinal object choice carries significant disruptive force."¹⁶² Implicit in open conversation about one's homosexuality is the belief that homosexuality is not immoral.¹⁶³ Knauer summarizes, "Dale's avowal of his homosexuality would certainly disrupt the Boy Scouts' expressive message because every admission of non-normative sexuality is necessarily marked and remarkable. Not only does it break 'the representational contract,' but it risks being read as a solicitation or a point of contagion."¹⁶⁴ "Coming out, whether its ultimate goal is transformation or inclusion, is very consciously designed to encourage others to do the same. In this way, the public avowal of homosexuality is designed to have the very contagious effect that the pro-family groups fear."¹⁶⁵ Knauer then specifically locates the issue of the openly gay individual/avowed homosexual in the Culture War, exploring the pro-gay and pro-family takes on openly gay role models.¹⁶⁶

The analyses of Knauer and others, setting the *Dale* controversy in the context of the Culture War, are enormously helpful in describing what happened once the BSA was forced to articulate and defend its longstanding practice of excluding openly gay men. They help us to appreciate that there are two contesting visibilities in the scenario—the visibility of Dale and Curran (and many others) as openly gay adult Scouts; and the visibility of the BSA exclusion policy. Each of these two visibilities, in the eyes of the other camp, expresses a communal, moral position on homosexuality. Each communal, moral position is

161. *Id.* at 1020-21.

162. *Id.* at 1031 (footnote omitted).

163. *See id.* at 1031-32 (footnote omitted).

164. *Id.* at 1003-04 (footnote omitted) (quoting EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 56-57, 254 (1990)).

165. *Id.* at 1055 (footnote omitted).

166. *See id.* at 1049-69.

unacceptable to the other camp, and there is not room for both of them.¹⁶⁷ Tolerance is not available as a position. For the process of self-definition “is a communal activity for at least some people, and intolerance of unorthodox identities may be an indispensable component of this activity.”¹⁶⁸

The analyses presented to this point, although they go quite a long way in accounting for the BSA antigay exclusion litigation, are still lacking in an important respect. They do not yet explicitly link the struggle over open homosexuality to the issue of constructing a normatively heterosexual masculinity and at the same time maintaining that that masculinity is natural and normal. Nor do they specifically examine the role of the BSA in constructing a normatively heterosexual masculinity. It is to these gender issues that this Article now turns.

III. THE BOY SCOUTS OF AMERICA, MASCULINITY AND HOMOSEXUALITY: SEPARATING THE GUYS FROM THE GAYS

As Sylvia Law has written, “contemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning attached to gender.”¹⁶⁹ To appreciate the significance of dragging the BSA into the *Kulturkampf* openly, as *Dale* did, thus requires an excursion into gender theory and its application to the BSA.

I begin with the social construction of gender. It is a given that masculinity and femininity do not simply happen naturally in a society. Whatever innate biological impulse infants may have to sort human

167. The use of spatial and architectural metaphors to describe shared public views and processes seems common and perhaps unavoidable. (For one striking example, see Epstein, *supra* note 2, at 120 (in describing the conflict in *Dale*, writing that “constitutional acreage, like all territories, is a scarce resource that can accommodate only a finite number of discrete principles”). I have also quite naturally used a metaphor of spatial congestion (“there is not room for both”) to describe competing moral views. One could also examine “forum,” “arena,” “position,” “right wing” and “left wing,” and many other terms and metaphors that are used to describe both positions of physical bodies and political space. Such an exploration of spatial and architectural metaphors might well follow the lead sketched out in Steven Winter’s work for the role of metaphor in constructing categories of human thought. STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE AND MIND* (2001). I suspect such an exploration would be enormously helpful in illuminating the structure of conflicts around “moral commons” generally and in particular around the visibility of disfavored sexual behaviors and identities. See, e.g., John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265 (2001). It would explore the rhetorical underpinnings of the kind of “public privacy” that Nan Hunter wishes to explore. See Hunter, *Accommodating the Public Sphere*, *supra* note 2.

168. KOPPELMAN, *supra* note 8, at 46 (discussing Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989)).

169. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187.

beings out by gender, the categories are filled in by a multitude of social actions from the time we are very young. All the same, gender is often characterized as occurring naturally, even by those who are busy constructing it.¹⁷⁰ Part of the standard strategy for constructing gender identity appears to be to essentialize it, pretending that the process of social construction is not occurring in any important sense.¹⁷¹ This deception and self-deception is functional. A widespread expectation that gender is natural helps to insure the reproduction of socially constructed gender behaviors.¹⁷² This is partly because “natural” behaviors and characteristics are valorized at the expense of nonnatural behaviors and characteristics, which are stigmatized.¹⁷³ But it is also partly because the attribution of naturalness connotes inevitability.¹⁷⁴ Essentializing rhetoric encourages the individual to overlook or discount the norming processes, and keeps the gender construction process under wraps, almost invisible; as such, it is much harder to resist.¹⁷⁵

As feminist psychologist Sandra Bem has argued, naturalizing or essentializing is often a vital piece of the rhetoric that maintains the stability of socially reproduced gender roles.¹⁷⁶ Conversely, establishing in the popular mind that gender is primarily socially constructed would free up the process of the reproduction of gender roles and facilitate new

170. SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* 4 (1993).

171. Sandra Bem distinguishes three types of social behavior that create and maintain our current gender roles. *Id.* at 2-3. They are androcentrism, gender polarization, and biological essentialism. *Id.* Bem argues that as to the third lens, deessentializing gender is a crucial part of any feminist strategy to reduce the impact of gender roles on women. *See id.* at 33-34, 37-38. So long as we believe that gender is natural we will be unlikely to take any conscious role in trying to shift its contents. *See id.* at 29-33. Once we accept that gender construction is a social process that is, at least to some extent, within our control, we can take responsibility to try to adjust or soften gender roles. *See id.* at 33. For a general discussion of homeostatic processes in the maintenance of gender roles, see Marc R. Poirier, *Gender Stereotypes at Work*, 65 *BROOK. L. REV.* 1073 (1999).

172. *E.g.*, BEM, *supra* note 170, at 29-33.

173. *Id.* at 81 (deviation from gender scripts is defined as unnatural, immoral, biologically anomalous or psychologically pathological).

174. *Id.* at 151-52 (“preprogrammed societal ways of being and behaving seem so normal and natural that alternative ways of being and behaving rarely even come to mind”); *id.* at 165-67 (discussing “The Abhorrence of Homosexuality”).

175. *Cf.* Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 *U. PA. L. REV.* 1191 (1994) (exploring generally the possibility that rules developed to suit contingent circumstances might usefully portray themselves as based on universal and atemporal principles in order to secure better, unquestioning compliance).

176. See BEM, *supra* note 170, at 2-3, 6-38; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 *CAL. L. REV.* 3, 288-89 (1995) (discussing a Euro-American tradition of appeals to nature, normalcy and morality, and arguing that “[t]his essentialist claim . . . motivates a powerful sense of righteousness”).

possibilities.¹⁷⁷ It would make gender roles more flexible, at the very least. Deessentializing gender is an important part of the feminist agenda, in this view.

The implications for political resistance of deessentializing gender can be appreciated further when we understand the nature of gender as performance.¹⁷⁸ Judith Butler has argued that gender is not something we just are, but instead something we do, repeatedly, from one situation to the next.¹⁷⁹ Indeed, gender does not exist independently of our performances and of our records and interpretations of them. As with language, we engage in gender and reenact it at many moments every day.¹⁸⁰ The concept of gender performance does not mean that we are absolutely free to choose to be otherwise, for gender is prior to and constitutive of our individual essence.¹⁸¹ Nor does it mean that we are completely constrained.¹⁸² Yet because gender operates through the temporal process of reiteration of norms on a piecemeal and individual basis, it does not necessarily remain intact over time.¹⁸³ Just as a language drifts, both phonetically and semantically, so the contents of gender categories can shift.¹⁸⁴ The fact that each of us is engaged in many tiny performances that add up to gender means that it is possible to shift the contents of gender categories, although bit by bit and not always

177. See BEM, *supra* note 170; Poirier, *supra* note 171, at 1118; RIKI ANN WILCHINS, *Imaginary Bodies, Imagining Minds*, in READ MY LIPS 141-57 (1997) (arguing that transsexuality should be understood to allow a choice not between two genders but among malleable and variable conceptions of gender).

178. The term is introduced by JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) [hereinafter BUTLER, GENDER TROUBLE]. The idea is an extension of J.L. Austin's notion of performative speech acts. Butler means something different, the "reiterative power of discourse to produce the phenomena that it regulates and constrains." JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 2 (1993) [hereinafter BUTLER, BODIES THAT MATTER]. A helpful account of Butler's theory of performativity can be found in Jennifer Minear, Note, *Performance and Politics: An Argument for Expanded First Amendment Protection of Homosexual Expression*, 10 CORNELL J.L. & PUB. POL'Y 601, 623-25 (2001).

179. BUTLER, GENDER TROUBLE, *supra* note 178, at 24-25.

180. Socially sanctioned forms of address or behavior both put us in our place and make us feel at home. Lisa Disch, *Judith Butler and the Politics of the Performative*, 27 POL. THEORY 545, 546 (1999) (discussing JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE I (1997)). They both constitute our agency and foreclose radical autonomy at the same time. *Id.* (discussing JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE, *supra*, at 26).

181. *Id.* at 549.

182. *Id.*

183. See *id.* at 550 (discussing BUTLER, BODIES THAT MATTER, *supra* note 178, at 10, 244-45, 265 n.34).

184. See *id.* at 550 (discussing BUTLER, BODIES THAT MATTER, *supra* note 178, at 220-21); Poirier, *supra* note 171. On slippage generally, see Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 996-98 (1991).

predictably.¹⁸⁵ The possibility of shifting the elements of gender categories is made much more visible, and hence much more likely, when gender norms are exposed as entrenched conventions repeated over and over again. This is the political significance of deessentializing gender by understanding it as performative. As Lisa Disch puts it, the politics of the performative is a politics of insurrection.¹⁸⁶

The argument plays out the same way with regard specifically to heteronormativity—society's insistence that as part of gender, sexual orientation must be heterosexual. Part of the characteristic argument about heterosexuality is that it is normal and natural, in contrast to homosexuality, which is characterized as deviant or abnormal.¹⁸⁷ To make heterosexuality appear normal and natural, homosexuality in general must be demonized or condemned; and individual homosexuals who might provide positive counter-exemplars must be banished, dishonored or at least marginalized.¹⁸⁸ Individual visibility of honorable gays and lesbians challenges the social process of reproducing heteronormativity by providing exemplars of gays who are good citizens.

Yet, at the same time, too frequent and too visible a process of banishing the gay as the nonmale, in order to establish heterosexuality as the norm, might raise red flags about social construction. Thus, one could well argue, the process of establishing the heteronormativity of gender depends on a delicate balance in which the process of devalorizing homosexuality and making gays and lesbians invisible must itself be kept quiet, made unproblematic, inevitable, normal and natural. The BSA's longtime policy of being silent about its antigay exclusion makes perfect sense, given this kind of model of masculine heteronormativity.

Michael Kimmel's important essay *Masculinity as Homophobia*¹⁸⁹ develops the argument about masculinity and heteronormativity. He

185. See Disch, *supra* note 180, at 550 (discussing BUTLER, BODIES THAT MATTER, *supra* note 178, at 220 and Judith Butler, *For a Careful Reading*, in FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE 137 (Seyla Benhabib et al. eds., 1995)).

186. See Disch, *supra* note 180, at 547.

187. See BEM, *supra* note 170, at 165-67.

188. *Id.*

189. Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity*, in THEORIZING MASCULINITIES (M. Brod & M. Kaufman eds., 1994), reprinted in MEN AND POWER 105 (Joseph A. Kuypers ed., 1999). A similar argument is ably presented within the legal academic literature in ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 153-76 (1996). See also BEM, *supra* note 170, at 149-51, 165-67; CHRISTOPHER KILMARTIN, THE MASCULINE SELF (2d ed. 2000); Law, *supra* note 169; MECHLING, *supra* note 6, at 195-99.

Kimmel's ideas grow out of a feminist Freudianism developed by Nancy Chodorow and Dorothy Dinerstein, among others. NANCY CHODOROW, THE REPRODUCTION OF MOTHERING

begins with the notion that manhood is not an essence, but is socially constructed.¹⁹⁰ Masculinity is, in Kimmel's account, fragile and oppositional.¹⁹¹ Though it means different things at different times, "[w]e come to know what it means to be a man in our culture by setting our definitions in opposition to a set of 'others'—racial minorities, sexual minorities and, above all, women."¹⁹² Kimmel identifies an image of "hegemonic masculinity,"¹⁹³ which is above all defined by being not like a woman.¹⁹⁴ Although Kimmel does not use the term *gegenidentität*—which means identity based on being opposite to (German *gegen*) something else¹⁹⁵—that is what he is talking about.

Applying a Freudian model of the desperate need of the little boy to separate from his mother, Kimmel argues that failure to pull away completely will lead to the boy's identification by others as "a wimp, a Mama's boy, a sissy."¹⁹⁶ Kimmel further states:

The drive to repudiate the mother as the indication of the acquisition of masculine gender identity has three consequences for the young boy. First, he pushes away his real mother, and with her the traits of nurturance, compassion and tenderness she may have embodied. Second, he suppresses those traits in himself because they will reveal his incomplete separation from mother. His life becomes a lifelong project to demonstrate that he possesses none of his mother's traits. Masculine identity is born in the renunciation of the feminine, not in the direct affirmation of the masculine, which leaves masculine gender identity tenuous and fragile.

Third, as if to demonstrate the accomplishment of these first two tasks, the boy also learns to devalue all women in his society as the living embodiments of those traits in himself he has learned to despise.¹⁹⁷

(1978); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1977). These authorities argue, in somewhat different ways, that the issue of a male infant's early childhood experience and his need to separate from or react against the ever-present and seemingly all-powerful mother is at the root of contemporary western masculine gender characteristics, and distinguishes them from female gender characteristics. See CHODOROW, *supra*, at 173-90; DINNERSTEIN, *supra*, at 175. The theories of Chodorow and Dinnerstein and their followers suggest that one way to address the traditional definition of masculine identity as against sissies and women may be to change the practices of early child rearing, by including men systematically in child-rearing duties. See CHODOROW, *supra*, at 173-90; DINNERSTEIN, *supra*, at 175.

190. See Kimmel, *supra* note 189, at 106.

191. *Id.*

192. *Id.*

193. *Id.* at 111 (quoting ERVING GOFFMAN, *STIGMA* 128 (1963)).

194. See *id.* at 112.

195. John Stoltenberg, *How Power Makes Men: The Grammar of Gender Identity*, in *MEN AND POWER*, *supra* note 189, 35 at 39-40 (the category "men" is functionally a *gegenidentität*).

196. Kimmel, *supra* note 189, at 113.

197. *Id.* at 114.

Putting together the notions of social construction and masculine *gegenidentität*, Kimmel argues that men are under the constant scrutiny of other men, who evaluate their performance, looking for signs of manhood on the one hand and of renunciation of the feminine on the other.¹⁹⁸ Kimmel argues that the “first pair of male eyes before whom [a boy] tries to prove himself” are his father’s, but that:

other men’s eyes will join them—the eyes of role models such as teachers, coaches, bosses or media heroes; the eyes of his peers, his friends and workmates; and the eyes of millions of other men, living and dead, from whose constant scrutiny of his performance he will never be free.¹⁹⁹

Dare we add scoutmasters and fellow scouts to this list?²⁰⁰

Although Kimmel describes his basic thesis in the phrase “masculinity as homophobia,”²⁰¹ we should be careful as to what he means by the word homophobia.²⁰²

Homophobia is more than the irrational fear of gay men, more than the fear that we might be perceived as gay. “The word ‘faggot’ has nothing to do with homosexual experience or even with fears of homosexuals,” writes David Leverenz. “It comes out of the depths of manhood: a label of ultimate contempt for anyone who seems sissy, untough, uncool.” Homophobia is the fear that other men will unmask us, emasculate us, reveal to us and the world that we do not measure up, that we are not real men.²⁰³

Kimmel’s conception of the governing fear that shapes masculinity is thus broader than a fear of homosexuality. “The fear of being seen as a

198. See *id.* at 115-16.

199. *Id.* at 117. Indeed, Kimmel connects this notion of presence before others to a conception of power as deriving from relationships. *Id.* at 125 (citing HANNAH ARENDT, ON REVOLUTION 44 (1963)). Kimmel could have gone on. *E.g.*, HANNAH ARENDT, THE HUMAN CONDITION (1958) (importance to citizenship and identity of acting in the presence of others); KOPPELMAN, *supra* note 8, at 46 (self-definition is a communal activity for at least some people); Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721 (1996) (explicating Michel Foucault’s concept of power). Interestingly, even in the title of Marc Fajer’s important article, behavior constituting gay identity presents precisely this issue of presence before others. See Fajer, *supra* note 128. Fajer does not ask whether a real man can eat quiche, but whether *two* real men can eat quiche *together*. If there are two men, each would see the other, and each would interpret and police the other’s gender behavior. See *id.*

200. See, *e.g.*, MECHLING, *supra* note 6, at 25 (discussing the socializing role of sex talk among boys at a Boy Scout camp); *id.* at 164-65 (discussing sex education between older and younger scouts).

201. Kimmel, *supra* note 189, at 116.

202. See discussion of “homophobia” *supra* note 8.

203. Kimmel, *supra* note 189, at 118 (quoting David Leverenz, *Manhood, Humiliation and Public Life: Some Stories*, SOUTHWEST REV. 71 (Fall 1986) (citation omitted)).

sissy dominates the cultural definitions of manhood.”²⁰⁴ Kimmel goes on about how the surest way to cause fights among boys is to ask which one is a sissy.²⁰⁵ I stress the point because of the way the issue is presented in the BSA youth education scenario. While peer adults might indeed be frightened of or averse to the presence of openly gay adult leaders, many of the youth below a certain age might not have quite the same reaction or understanding. But they *will* be afraid of sissies.²⁰⁶

Ultimately, Kimmel explores possible reactions to a contemporary crisis in American masculinity. One possibility is to reinforce the exclusion of the feminized other.

Others still rehearse the politics of exclusion, as if by clearing away the playing field of secure gender identity of any that we deem less than manly—women, gay men, non-native-born men, men of colour—middle-class, straight, white men can regroup their sense of themselves without those haunting fears and that deep shame that they are unmanly and will be exposed by other men. This is the manhood of racism, of sexism and of homophobia.²⁰⁷

The BSA gay exclusion policy (like the ban on gays in the military, which Kimmel explicitly mentions) is precisely this kind of retrenchment around an exclusionary masculinity.²⁰⁸

204. Kimmel, *supra* note 189, at 118; *accord*, BEM, *supra* note 170, at 150-51, 165-67. Kimmel is appropriately careful in his phrasing of this point, stressing that “[g]ay men have historically *played the role of* the consummate sissy in the American popular mind because homosexuality is seen as an inversion of normal gender development.” Kimmel, *supra* note 189, at 121 (emphasis added).

205. *See id.* at 118-19 (discussing ANTHONY ROTUNDO, AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION OF THE MODERN ERA (1993)); Stoltenberg, *supra* note 195, at 41 (“Calling someone a wuss or a wimp or a fairy or a girlie functions as slang and slander in a syntax where ‘men’-ness is never a settled matter; qualification for membership in the category ‘men’ is constantly contestable.”).

206. *See* Valdes, *supra* note 171, at 100 (discussing the BSA’s emphasis on the social/public manifestations of masculinity, manifesting the conflation of sissies and gay men).

207. Kimmel, *supra* note 189, at 126.

208. A number of scholars of color have criticized the account of masculinity given by gender theorists such as Bem and Kimmel, for falsely universalizing what is in fact inevitably a culturally specific, i.e., white, set of gender norms and practices. *See, e.g.*, ALFREDO MIRANDÉ, HOMBRES Y MACHOS: MASCULINITY AND LATINO CULTURE 9 (1997) (traditional definitions are not universal and “reflect a very limited and culturally specific conception of masculinity”); *id.* at 14, 28, 98-99 (critiquing Bem Sex Role Inventory as based on Anglo models and containing a distinct ethnic and class bias); *id.* at 119 (arguing that the New Men’s Studies is “really the study of white men”); *id.* at 120 (critiquing Kimmel’s work for absence of Chicano/Latino men); RAFAEL L. RAMÍREZ, WHAT IT MEANS TO BE A MAN: REFLECTIONS ON PUERTO RICAN MASCULINITY 23 (Rosa E. Casper trans., 1999) (1993) (studies of masculinity show ethnocentric and class bias). This mistaken universalization obscures differences in the way masculinity is constructed. It also obscures differences in the way homosexuality is constructed. *See, e.g.*, Darren Lenard Hutchinson, “*Claiming*” and “*Speaking*” *Who We Are: Black Gays and Lesbians, Racial Politics, and the Million Man March*, in BLACK MEN ON RACE, GENDER AND SEXUALITY:

A CRITICAL READER 28, 29 (Devon W. Carbado ed., 1999) ("The homophobic barriers confronting blacks are not the same as the homophobic barriers confronting whites; homophobia is perpetuated and experienced in racially specific ways."); RAMÍREZ, *supra*, at 29-31 (stressing variability in the construction of homosexuality in different cultures).

This erroneous universalization can be significant. Once one enters into a more specific examination of culturally specific practices around homosexuality, for example, it becomes apparent that the construction of homosexuality within communities of color is often as white. See, e.g., Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights: The Deployment of Race/Sexual Orientation Analogies in the Debates about the "Don't Ask, Don't Tell" Policy*, in BLACK MEN ON RACE, GENDER AND SEXUALITY, *supra*, at 283-84; bell hooks, *Homophobia in Black Communities*, in BELL HOOKS, TALKING BACK 120, 124 (1989); Hutchinson, *supra*, at 29-30. Gays and lesbians of color are thus rendered isolated or invisible in the GLBT community because of their race, and within their community of color because of their openness about sexual preference. See, e.g., Harlon L. Dalton, *Pull Together as the Community*, in BLACK MEN ON RACE, GENDER AND SEXUALITY, *supra*, at 121 (black gays are typically asked to give race priority over sexual identity); hooks, *supra*, at 125; Hutchinson, *supra*, at 40 (discussing a "hegemonic construction of blackness that excludes black gays and lesbians from the realm of black existence. . ."); Dwight A. McBride, *Can the Queen Speak? Racial Essentialism, Sexuality, and the Problem of Authority*, in BLACK MEN ON RACE, GENDER AND SEXUALITY, *supra*, at 255-57 (most usages of black community do not include lesbians and gay men); MIRANDÉ, *supra*, at 132 (noting the absence of a Latino gay male voice).

These arguments deserve more attention than I can afford them here. Nevertheless, after due reflection I feel I can proceed with my argument. It seems fairly clear that the opposition between true masculinity and the "other," whether women or gay men, does persist across the cultural divides articulated in these critiques of scholars of color. See, e.g., DAVID T. ABALOS, THE LATINO MALE: A RADICAL REDEFINITION 11-12 (2002) (describing opposition between real men on the one hand and women and homosexuals on the other); Devon Carbado, *Epilogue: Straight Out of the Closet: Men, Feminism, and Male Heterosexual Privilege*, in BLACK MEN ON RACE, GENDER AND SEXUALITY, *supra*, at 431 (discussing heterosexual privilege among Black men); PHILLIP BRIAN HARPER, ARE WE NOT MEN?: MASCULINE ANXIETY AND THE PROBLEM OF AFRICAN-AMERICAN IDENTITY 50-51 (1996) (discussing how homosexuality became the signifier of failed manhood in the Black Arts movement); MIRANDÉ, *supra*, at 17 (discussing opposition between masculine and feminine in childhood play); *id.* at 124 (discerning sadism towards women and threats of sodomy towards men at the core of the working class folklore of machismo); *id.* at 138-39 (noting opposition of active/passive in construction of homosexuality); RAMÍREZ, *supra*, at 27-28 (noting basic opposition of masculine and feminine); *id.* at 69 (competition between men takes the form of making the other less manly or not a man at all); *id.* at 92-93 (noting opposition of real man and homosexual and discussing "the constant show of masculinity in every aspect of our everyday life"); *id.* at 101 (noting opposition between masculine and non-masculine within *el ambiente*, the world of the homosexual); Ilán Stavans, *The Latin Phallus*, in MUY MACHO: LATINO MEN CONFRONT THEIR MANHOOD 143, 152-54 (Ray González ed., 1996) (discussing childhood opposition between boys and girls, and describing how deviations from the masculine norm like obesity and limping are characterized as feminine characteristics).

In other words, some process of *gegenidentität* does seem to occur in the relevant subcultures' construction of masculinity, with women, effeminate men and gay men stigmatized as the other. Thus, my basic argument holds true: the BSA's articulation of its antigay exclusion facilitates local political resistance to a traditional construction of masculinity by deessentializing gender.

There is another, parallel concern about overgeneralization. We ought to be suspicious about how much one can generalize about the cultural significance of the Boy Scouts in different cultures and times and places. If gender performance is essentially local, as I argue, so too must be the cultural meaning of participation in the BSA programs. To address this issue, I have

Cultural historian George L. Mosse comes at the same argument about masculine oppositional identity from the other side, by providing a history of the stereotypes that have been depicted as opposite to ideal masculinity. His is in a sense a history of the *gegen* in *gegenidentität*. Mosse writes from the premise that social practices have historical origins. The cultural images and behaviors we pass on from one individual to the next, from one generation to the next, have not been with us from time immemorial.²⁰⁹ In addition to studying the processes of gender formation in the individual and the ways in which the social construction of gender occurs, we can add another, longitudinal dimension of study: the historical study of shifts in the contents of gender categories. In this vein, Mosse's book-length study *The Image of Man*²¹⁰ traces the emergence in the eighteenth century of a male stereotype that became normative and that continues to prevail today.²¹¹ The book focuses on European cultural history, but it is still instructive as to the origins of the modern American masculine stereotype. Insofar as "[c]oncern with the social function of masculinity was a strong motivating force in setting up the Scouts,"²¹² Mosse's history can also shed light on the BSA's cultural origins and on the deeper roots of its antigay policy.

Mosse notes throughout his work the importance of negative stereotypes "of men who not only failed to measure up to the ideal but who in body and soul were its foil, projecting the exact opposite of true masculinity."²¹³ These groups include Jews,²¹⁴ blacks,²¹⁵ and effeminate men.²¹⁶ As gay men and lesbians became more visible at the end of the nineteenth century, they became included as a separate negative stereotype for masculinity.²¹⁷ Gypsies, vagrants, criminals and the insane

revised the article, including qualifications and, where possible, such local information as I could find about the cultural specificity of the meaning of the BSA, in order to at least remind the reader to keep in mind the ultimate importance of local encounters with the BSA around masculinity.

209. MOSSE, *supra* note 6, at 135-36.

210. *Id.*

211. *See id.* at 4.

212. *Id.* at 136.

213. *Id.* at 6.

214. *See id.* at 6, 57-66, 151-53.

215. *See id.* at 6. Lord Baden-Powell, founder of the Boy Scouts, in his own time was deeply involved in ascertaining and protecting the masculine stereotype from a variety of threats. In that vein, he wrote that Africans may be our brothers, but that they are not men. *See id.* at 15 n.13.

216. *See id.* at 9, 67-70, 83.

217. *See id.* at 13, 67-70, 85-94, 149-51. Mosse's accounts of effeminacy and of homosexuality in various historical periods from the Enlightenment to the present do not always

provided other negative stereotypes.²¹⁸ Mosse thus provides a historical perspective on the importance to the BSA of distancing its operations from effeminacy and homosexuality, even in the pre-1970s periods when the topic would not likely have been a matter of open discussion.²¹⁹ Mosse also examines the importance of militarism and of team sports in constructing the modern image of masculinity,²²⁰ providing a historical background for these aspects of the BSA's basic program as well.²²¹

Mosse's historical long view leads up to a description of the last thirty years or so—the period during which the BSA has been more openly confronted and beleaguered by visible homosexuality. In post World War II Europe, “the existence of homosexuality continued to reinforce the self-confidence of so-called normal men and thus to strengthen the masculine stereotype in which they found refuge.”²²² Mosse noted:

During the 1970s and 1980s a gay subculture established itself that affected the dominant normative culture and interacted with and reinforced the youth culture that we have discussed. . . . Moreover, by the 1980s a canon of gay literature was in the making, much of it so-called “coming-out” stories—making one's gayness public—which was readily available throughout Europe. This was no longer a love that dared not speak its name; newspapers covered almost all aspects of gay life and, above all, advertisements used obviously gay figures to market men's fashions.

. . . .

These cultural changes at the new fin de siècle constituted an unprecedented menace to the masculine stereotype, and seemed to threaten its erosion over a period of time.²²³

Mosse's longer-term historical view sets out the background for the analysis of masculinity Kimmel provides, for the analysis of the traditional family values countermovement Eskridge describes, and for

draw a sharp line between them. But I suspect he is reflecting the vacillation in his historical sources on these topics.

218. See *id.* at 71-73.

219. See discussion in Part II *supra*.

220. See MOSSE, *supra* note 6, at 40-46. See discussion of antigay exclusion by the U.S. Olympics Committee in Part IV *infra*.

221. Mosse specifically points out that Baden-Powell “applied lessons he had learned in the Boer War to making men out of boys.” *Id.* at 135. Scouts were trained to follow orders in wartime. There also has been a rhetoric of chivalry in the Scouting movement since its inception. Mechling also discusses the militarism in the early British scouting movement. See MECHLING, *supra* note 6, at 126. It became more problematic in America. See *id.* at 126-28.

222. MOSSE, *supra* note 6 at 188.

223. *Id.* at 189.

my own application of both these analyses to the emergence from the shadows of the BSA gay exclusion policy.

The issue of masculinity was at the heart of the BSA from its founding. As explored by Jeffrey Hantover, the period from 1880 to World War I was one in which opportunities for the development and expression of a traditional masculinity were being limited by widespread social changes.²²⁴ The causes included urbanization, the increased emphasis on the connection between mother and son due to changes in family size and structure (including absence of servants), the absence of fathers from the home, the expansion of the public high school, the increasing sedentariness and feminization of many jobs, and the development of a new age category of adolescence marked by dependency and inactivity.²²⁵ Hantover argues that “[t]he Boy Scouts of America responded explicitly to adult sex-role concerns. It provided concerned men the opportunity to support ‘an organized effort to make big men of little boys . . . to aid in the development of that master creation, high principled, clean and clear thinking, independent manhood.’”²²⁶ A large part of the early appeal of Scouting, Hantover thus argues, was “that the Scouting movement provided adult men, denied by their occupations, an opportunity to validate the traditional image of masculinity.”²²⁷ “Scouting assuaged adult masculine anxiety not only by training boys in the masculine virtues. The movement provided adult men a sphere of masculine validation.”²²⁸

224. See Jeffrey P. Hantover, *The Boy Scouts and the Validation of Masculinity*, 34 J. SOC. ISSUES 184 (1978).

225. See *id.* at 186-89.

226. *Id.* at 189 (quoting T.W. Burgess, *Making Men of Them*, 59 GOOD HOUSEKEEPING MAG. 3-12 (1914)).

227. *Id.* at 184. Hantover elaborates a theoretical argument about the need for sites for the performance of masculinity, setting up his argument that the early BSA provided just such a site. He states:

Masculinity is a cultural construct and adult men need the opportunity to perform normatively appropriate male behaviors. Masculinity is not affirmed once and for all by somatic change; physical development is but a means for the performance of culturally ascribed behaviors. American masculinity is continually affirmed through ongoing action. What acts a man performs and how well he does them truly make a male a man.

. . . .

Masculine anxiety can arise when adult men know the script and wish to perform according to cultural directions but are denied the opportunity to act: The fault lies in social structuring of opportunities and not in individual capabilities and motivations.

Id. at 185.

228. *Id.* at 191.

The exclusion of women, of the feminine and of the sissy make their appearance as part of this dynamic. As to youth, Hantover explains:

Scouting's program and structure would counter the forces of feminization and maintain traditional manhood. . . . [B]oys were sexually segregated in a primary group under the leadership of an adult male. . . . By nature boys would form gangs, and the Boy Scouts turned the gang into a Scout patrol. The gang bred virility, did not tolerate sissies, and would make a boy good but not a goody-goody; in short, he would 'be a real boy, not too much like his sister.'²²⁹

As for scoutmasters, as the BSA itself wrote, "Scouting wanted 'REAL, live men—red blooded and righthearted men—BIG men'; 'No Miss Nancy need apply.'"²³⁰ The rhetoric in the early writings that Hantover relies on is remarkable. "No Miss Nancy need apply" seems, in fact, tantamount to an early statement of the BSA's antigay exclusion policy for scoutmasters. It confirms the argument that the antigay exclusion was well-established but rarely expressed. The juxtaposition of the promise to "make a boy . . . 'a real boy'" and portraying Scoutmasters as "REAL . . . men" are succinct expressions of the paradox of essentializing gender, as discussed above. Masculinity is real, normal, and natural, because it is made that way.²³¹

The examination of masculinity and gay exclusion in the specific context of the BSA is admirably carried forward to the present day in Jay Mechling's recent ethnography of a Boy Scout camp, *On My Honor: Boy Scouts and the Making of American Youth*.²³² Mechling is a folklorist and anthropologist who spent some twenty years observing a Boy Scout camp in the California Sierra Nevada.²³³ He presents his findings largely as a composite, fictionalized account of a two week camp, but with more theoretical observations interspersed.²³⁴ Mechling also includes three "excursuses," one of which addresses specifically the BSA's exclusion of girls and gays.²³⁵ His book was ready for publication, fortuitously, the year after *Dale*.

Mechling sets the stage perfectly in his introduction.

229. *Id.* at 189 (quoting J.A. PUFFER, *THE BOY AND HIS GANG* 157 (1912)). "Gang" as used here surely did not have its current negative implications of lawlessness and violence.

230. *Id.* at 191 (quoting Boy Scouts of America, *The Scoutmaster and His Troop* (n.d.)).

231. Also, depending on how far one wants to push the symbolism of the rhetoric, the emphasis on "BIG men" in the BSA text about scoutmasters, along with the capitalization of "REAL" and "BIG," are interesting markers of a link between size (of what?) and the masculinity that the BSA views itself as being able to provide.

232. MECHLING, *supra* note 6, at xxiv.

233. *Id.*

234. *Id.* at xxv.

235. *Id.* at 207.

The Boy Scouts of America . . . was founded in 1910, largely in response to the 1890s crisis of masculinity, and ninety years later the Boy Scouts continues to be enmeshed in debates over the appropriate meanings for manhood. . . . [T]he Boy Scouts in the first few years of the twenty-first century must be understood, at least in part, as a nineteenth-century solution to the cultural trauma experienced as a result of the twentieth century's assault on traditional understandings of what it means to be a boy and a man.²³⁶

Like Kimmel, Mechling argues that masculinity is socially constructed and that it is fragile, in contrast to femininity.²³⁷ Mechling posits that “[t]he social construction of masculinity is high on the agenda of a Boy Scout camp.”²³⁸ Mechling describes various camp rituals and behaviors in terms of the opportunities they provide for the adolescent scouts to display to themselves and others that they are men.²³⁹ He asserts that “[h]omophobia, the fear of and hatred toward homosexuals, is a central theme at camp.”²⁴⁰ As a result, “[h]omophobic taunts play a crucial role in [the] social construction of masculinity” at a Boy Scout camp.²⁴¹ As Mechling explains, “[p]art of the performance of a heterosexual male identity is the put-down of the feminine—the feminine in women and the feminine in men. . . . Misogyny . . . and homophobia work together in this economy of the social construction of male heterosexuality.”²⁴² Although “[h]omosexual or homoerotic feelings are central to both competition and cooperation within male groups,”²⁴³ the more threatening aspects can, indeed must, be managed through an

236. *Id.* at xvii. *See id.* at 218-20 (discussing the English and American origins of Scouting in a crisis of masculinity). Authorities on gender and sexual orientation agree. Francisco Valdes, for example, writes that the BSA is “an organization formed purposefully to buttress the traditional sex-based gender profile of male youths.” Valdes, *supra* note 171, at 100 (footnote omitted).

237. *See* MECHLING, *supra* note 6, at 195-99.

238. *Id.* at 25. Elsewhere he says that “[o]ne of the main ‘projects’ . . . of the Boy Scout camp is the creation of the heterosexual male.” *Id.* at 195.

239. *See id.* at 78-79; *id.* at 226-27 (describing the variety of camp behaviors that are about socializing boys to be men).

240. *Id.* at 25 (referring the reader to a definition of homophobia by Gregory K. Lehne, *Homophobia Among Men: Supporting and Defining the Male Role, in* MEN'S LIVES 381 (Michael S. Kimmel & Michael A. Messner eds., 2d ed., rev. ed. 1992)).

241. MECHLING, *supra* note 6, at 26.

242. *Id.* *See id.* at 199. Mechling goes on to argue that male friendship becomes problematic as boys reach sexual maturity, and that homophobic insults between friends help young men to define their feelings of closeness as normally heterosexual. *See id.* at 26-27. When youths are together in a total environment like a Boy Scout camp, the problem of heterosexual male friendship is intensified, and insults are among the rituals that assure the youths that their friendships are not sexual in nature. *See id.* at 27.

243. *Id.* at 182.

“expressive culture [of] scorn for homosexuality.”²⁴⁴ Homophobia is not limited to the youths themselves, it is an integral part of the process of making boys into men. Thus, for example, Mechling describes a conversation with a skilled scoutmaster who distinguishes between a “wimp,” whose behavior can improve, and a “sissy,” who doesn’t want to change, and whom the scoutmaster does not want around.²⁴⁵ The word “sissy” has quite a resonance.²⁴⁶

Given all of this, Mechling asserts that:

The presence of young men who understand their sexual orientation as homosexual . . . *would* be disturbing to other boys, given the present social construction of the masculine culture of a Boy Scout troop, just as the presence of openly homosexual men in the military will be threatening to men who consider themselves exclusively heterosexual. The presence of a known homosexual or bisexual male in these settings threatens to *feminize* the heterosexual males. The male gaze, traditionally leveled at women, now finds a new target and feminizes the target.²⁴⁷

To return to the historic sequence of events, Mechling argues that:

when sexual orientation became a kind of cultural difference after the Stonewall Riot of 1969 and the emergence of a gay rights movement, the threat of homosexuality to the fragile construction of heterosexuality meant that the Boy Scouts could not be tolerant of this difference; too much was at stake.²⁴⁸

Generally, Mechling contends that in the various exclusion suits by the three Gs, “at stake was the model of boyhood, and presumably the model of adult masculinity the organization saw at the center of its mission.”²⁴⁹

244. *Id.*

245. *Id.* at 103.

246. Humorist David Sedaris provides another example of the pervasive cultural opposition between the boy sissy and the properly masculine Boy Scout. In an autobiographical essay, he describes the travails of his fifth-grade self working with a sadistic speech therapist. Gradually it dawns on Sedaris that his is not the only lisp she is working over. *All* the sissies in the fifth grade are being forced into therapy with her. As part of a riff on how fifth grade boys conceal being gay, Sedaris describes gay boys hiding the latest issue of *Cosmopolitan* under a *Boy’s Life*, the Boy Scout magazine. DAVID SEDARIS, *Go Carolina*, in *ME TALK PRETTY ONE DAY* 3, 10 (2000).

247. MECHLING, *supra* note 6, at 224.

248. *Id.* at 225.

249. *Id.* at xviii. It is just a bit off base to describe the BSA’s antigay exclusion as fundamentally about an “indoctrinat[ion of] children with the message that a certain group (or a certain group’s behavior) is unacceptable.” *E.g.*, Neil Troum, *Expressive Association as the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 CREIGHTON L. REV. 641, 688 (2002). Nor is the policy just about “educating children.” *Id.* at 690. Although the exclusion is about indoctrination and education, the issue is specifically masculinity.

Although Mechling goes on to analyze the BSA's defense as to the asserted immorality of homosexuality, it is clear that Mechling views the central issue as a cultural challenge to a particular construction of masculinity.²⁵⁰ Mechling points out that the BSA's position about religious morality is conflicted, as they had traditionally been nonsectarian and ecumenical.²⁵¹ Yet, after the gay issue emerged, the BSA became more focused and univocal. Thus, for example, it punished the Unitarian Universalist Church for its pro-gay stance by canceling the religious medals previously available, and Mechling speculates (correctly) that punishment for other pro-gay religious denominations may not be far behind.²⁵²

Ultimately Mechling recommends that the type of role model available to boys and youths should be changed to be, not so much more gay, but more flexible and androgynous.²⁵³ All the same he concludes that adolescent boys still need a same-sex organization.²⁵⁴ He also advocates that in this difficult matter of gay exclusion individual troops

Chemerinsky & Fisk make a similar error of omission, arguing that the BSA is "about service to the community, leadership, self-reliance, and the appreciation of nature." Chemerinsky & Fisk, *supra* note 2, at 600. They too have omitted any specific reference to masculinity, which, if they had included it, would make the function of the antigay policy clear.

250. See MECHLING, *supra* note 6, at 219-21, 226-28.

251. See *id.* at 42.

252. See *id.* at 211-12. Mechling's account of the changes in the BSA confirms the argument made in Part II that the BSA became entangled with the Traditional Family Values countermovement described by Eskridge.

253. See *id.* at 231-32. His argument that gay men can serve as role models for boys is based on the view that gay men are often manly. Apparently, sissies continue to be a big problem.

254. See *id.* at 232-33. In a similar vein, Chemerinsky & Fisk think a gender-based membership exclusion by the BSA would be sustained in court, because "same sex experiences offer valuable developmental opportunities for children." Chemerinsky & Fisk, *supra* note 2, at 609. Dorf sees the BSA exclusion of girls as easier to justify than the exclusion of gays because the former exclusion still allows girls access to roughly equal, if separate, organizations, while the exclusion of gays expresses subordination. See Dorf, *supra* note 2, at 2186. These assertions, made without an explicit consideration of the underlying structures and processes of gender, worry me. If these authors were to examine the issues of gender construction that are put in play by the choice of whether to separate or mix the genders during the tender, formative years, they might have to work harder to reach their conclusions. I do agree that the issue of segregating girls and boys is different than the issue of excluding openly gay men from a youth organization that works exclusively with boys, and that bluntly applying the same legal doctrines from equal protection law, antidiscrimination law, and now expressive association law, is likely to lead to a wholly unsatisfactory approach. To be sure, some experts do identify deep-seated behavioral differences between boys and girls that may commend same-sex gender segregation at least some of the time. See, e.g., ELEANOR E. MACCOBY, *THE TWO SEXES: GROWING UP APART, COMING TOGETHER* (1998). So the argument is not impossible, but it requires attention to details about gender.

should make their own decisions rather than be dictated to by national policy.²⁵⁵

This section has shown how the theory of masculinity as *gegendidentität* can be brought to bear on the activities of the BSA, both historically and in contemporary America. It sheds some light on the processes and function of constructing masculinity by excluding sissies and thus openly gay men. The next Part explores the pervasive and ongoing controversy over the BSA antigay exclusion, and links it to another aspect of gender theory that has just been explored, the notion of performance. Because gender roles are performed, gender is local, personal, and incessantly reiterated. Thus gender roles and the processes of gender construction are susceptible to incremental change.

IV. THE ONGOING DEBATE ON THE BSA POLICY: HASTENING THE *KULTURKAMPF*

Without a doubt, public debate over the BSA's antigay policy is still occurring, both within and without Scouting itself. As Evelyn Brody puts it, "the dispute has now shifted to private and political arenas."²⁵⁶ Art Leonard calls this aftermath "Round Two."²⁵⁷ A number of scholarly and popular articles have compiled accounts of the many fronts on which the BSA culture wars continue.²⁵⁸ A visit to the BSA Web site²⁵⁹ and to the Web site of the breakaway group Scouting for All will confirm the vitality of the struggle.²⁶⁰ As one legal activist stated, "We've never seen this kind of opposition to anti-gay discrimination from such a diverse array of people[.]"²⁶¹ This section first explores the dimensions of the Round II struggle, and then puts it in the context of a theory of gender politics around masculinity that is relational, personal and above all grass-roots in nature.

The BSA has traditionally delivered a service: the education of male youth that turns boys into men. It has done so at the doorstep of families all over the country. Now that its gay exclusion policy has been

255. See MECHLING, *supra* note 6, at 233.

256. Brody, *supra* note 2, at 855.

257. Leonard, *supra* note 2, at 34.

258. See, e.g., Brody, *supra* note 2, at 855-56; France, *supra* note 83; Hutchinson, *supra* note 2, at 146 n.331; Leonard, *supra* note 2, at 31-32, 34 & n.42; Sunder, *supra* note 2, at 544-48.

259. See <http://www.scouting.org>.

260. <http://www.scoutingforall.org>.

261. Lambda Legal Def. & Educ. Fund, *Supreme Court Ruling Yields Unexpected Lesson for Boy Scouts of America*, News Release, June 21, 2001, available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=849> (quoting Kevin M. Cathcart, Lambda Legal Defense and Education Fund Executive Director).

so boldly stated and reaffirmed, the service it provides cannot comfortably be viewed in ignorance, and the underlying issues about masculinity and homosexuality are harder to avoid. Nowadays, the BSA potentially delivers controversy along with its youth services. But it is not just about more “public debate, even rancorous debate, on a subject as morally incendiary as homosexuality. . . .”²⁶² The nature of the BSA brings the conflict down to the level where gender lives and dies. It is precisely because “the Scouts are a decentralized group that expresses messages locally”²⁶³ that the controversy effectively percolates down to this level.

The gay exclusion policy continues to be a source of strain and dissent internally within Scouting. Volunteers and paid staffers are occasionally dismissed as a result of the policy.²⁶⁴ The *In Support of Values* publication obviously has as one function marshalling the faithful within the BSA organization. Local scout leaders and sometimes troops have sought to discuss, dissent or break away from the BSA, with varying results.²⁶⁵ More liberal urban Scouting councils have sought

262. Michaelson, *supra* note 131, at 1609.

263. McGowan, *supra* note 2, at 172.

264. See, e.g., Peter Y. Hong, *Ranking Boy Scout Official Is Fired After Saying He Is Gay*, L.A. TIMES, Nov. 6, 2000, at A8; *Scout Groups Rejected After Fighting Gay Policy*, N.Y. TIMES, Jan. 28, 2001, at A16.

265. See, e.g., *Boston Policy Falls Flat*, THE ADVOCATE, Sept. 11, 2001, at 14 (Boston’s Minuteman Council refuses to hire New Hampshire man because his membership had been revoked by the national council because he was gay); Jan Cienski, *Policy Defies Boy Scouts’ Ban on Gays: Don’t Ask, Don’t Tell*, NAT’L POST, Aug. 7, 2001, at A9 (Boston’s Minuteman Council adopts a don’t ask, don’t tell policy); Gwen Florio, *Some Eagle Scouts Turn in Their Badges to Protest Ban on Gays*, CHI. TRIB., Aug 6, 2000, (Family) at 1; France, *supra* note 83 (some troops are simply quietly adopting nondiscrimination policies); Lipton, *supra* note 106 (New York City School Board); Rice, *supra* note 100 (denial of charters to several United Churches of Christ, and denial of right to teach about Unitarian/Universalist beliefs on homosexuality in earning that denomination’s “Religion in Life” award); Robert L. Smith, *Scouts—Gays Controversy Hits Here; Rally Called as Troop Quits Church, Charity Rethinks Funding*, [CLEVELAND] PLAIN DEALER, Aug. 24, 2001, at A1; Renee Tawa, *On Their Honor, They Will Try to Bend the Scout Law*, L.A. TIMES, Aug. 31, 2000, at E1 (discussing Eagle Scouts turning in their badges).

Dan Farber explains the difficulties faced by any such breakaway organization in terms of its competition with the BSA, which has a larger and therefore better network of members and facilities. Farber, *supra* note 2, at 1504-05. It also seems plausible that continued use of words like “scouting” or of BSA-like uniforms could eventually lead to trademark actions. Indeed, Congress long ago granted the BSA intellectual property rights over some of its trademarks. See, e.g., 36 U.S.C. § 27 (Act incorporating the BSA, adopted on Jan. 5, 1905) (recodified at 36 U.S.C. § 30905). In general, it would be a mistake to think that membership in the BSA is fungible with membership in, say, 4-H clubs, as Richard Epstein apparently contends. See Epstein, *supra* note 2, at 121. For one thing, no other organization has quite the same cultural meaning. For example, the 1991 Congress consisted of 66 Senators and 205 Congressmen who were former Boy Scouts. France, *supra* note 83. Generally, no other organization has quite the same cultural meaning. Just as important, the BSA is often a personal and family tradition. An individual like Dale or Curran may invest his entire youth with the organization before coming to

palavers with the national organization, so far unsuccessfully.²⁶⁶ In July 2001, the European Scouting Council rejected the BSA gay exclusion policy through the adoption of a gay-tolerance resolution, although it was not adopted unanimously.²⁶⁷ Additionally, the World Organization of the Scout Movement (WOSM) presented a letter to WOSM officials from France and Germany stating that the exclusion is a violation of the WOSM mandatory requirements.²⁶⁸ Recently, the Boston Minuteman Council established a diversity awareness award badge, based on its locally articulated nondiscrimination policy, which includes sexual orientation as a protected classification.²⁶⁹

National-level organizations and figures have been drawn into the controversy on all sides. There was, of course, the Supreme Court decision, as well as decisions of state courts at an earlier phase of the controversy.²⁷⁰ President Clinton encouraged the BSA to reconsider their policy.²⁷¹ Then-Governor George W. Bush, a former cub scout, made the BSA policy a campaign issue;²⁷² as President, George W. Bush has been a

terms with his own homosexuality, and that personal history and context is not something he can take with him when he chooses to exit. As Madhavi Sunder writes, “[t]he Boy Scouts has a monopoly over its members’ hearts and minds. Individuals who grow up in the Scouts may not find the same sense of community in another association.” Sunder, *supra* note 2, at 538 n.238.

266. See France, *supra* note 83 (representatives of nine of the largest metropolitan scouting councils sought the right to establish their own membership policies at a meeting of national BSA leaders in July 1991); Lipton, *supra* note 106 (efforts of Boy Scout councils in New York City, Rhode Island, and California); *Scout Groups Rejected After Fighting Gay Policy*, N.Y. TIMES, Jan. 28, 2001, A16 (BSA expels seven Cub Scout troops in Oak Park, Ill., that opposed antigay ban); Geraldine Sealey, *Rancor in the Troops? Year After Landmark Ruling, Boy Scouts Embroiled in Culture War*, abcnews.com, June 20, 2001, available at <http://www.abcnews.go.com/sections/us/DailyNews/scouts010620.html> (the nine councils asking the national office for a more open policy councils included New York, Philadelphia, Boston, Chicago and Los Angeles). The February 2002 Resolution is apparently the product of the task force established as a result of the July 1991 meeting. Its condemnation of “local option” on the antigay exclusion augurs ill for this type of negotiation.

267. See Scouting for All, Press Release, *European Scouts Do Accept Gays*, July 20, 2001, at <http://www.scoutingforall.org/aaic/082901.shtml> (last visited Feb. 4, 2003).

268. See Peter Cassels, *World Scouting Group May Condemn Its U.S. Brethren for Stance Against Gay Men*, BAY WINDOWS, at <http://www.scoutingforall.org/articles/100101.shtml> (last visited Feb. 4, 2003).

269. See Ken Maguire, Associated Press, *Boy Scouts Ruffle Feathers with Award*, June 11, 2002, at <http://www.scoutingforall.org/articles/2002070802.shtml> (last visited Feb. 4, 2003).

270. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (reversing *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999)); *Curran v. Mt. Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998).

271. See Chris Bull, *Triumphs, Trials and Errors: President Clinton Talks About His Successes, Battles and Hopes*, ADVOCATE, Nov. 7, 2000, at 30.

272. See David M. Bresnahan, *Bush Defends Boy Scout: ‘Troubled’ by Clinton-Gore Probe, Urges ‘Respect’ for Besieged Group*, WorldNet.Daily.com, Sept. 1, 2000, available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=13206.

visible supporter.²⁷³ Congress passed a largely symbolic act requiring public schools to give the BSA access to facilities wherever a public forum has been created.²⁷⁴ On the other side, the American Medical Association (AMA) enacted a resolution in June 2001 urging youth organizations that excluded homosexuals as role models to reconsider.²⁷⁵ The BSA was not mentioned by name but it is the only such major youth organization in the country.²⁷⁶ Some major corporations have announced that they will cease contributing to the BSA,²⁷⁷ and Steven Spielberg stepped down as a member of the BSA advisory board after ten years.²⁷⁸ California judges may be barred from participating in the BSA.²⁷⁹ The Communications Workers of America, a prominent progressive union, discontinued its Scouting program.²⁸⁰ Major churches that operate through national coordination have taken positions on both sides, with Reform Judaism expressing one of the best-known examples of a condemnation of the BSA policy²⁸¹ and the Mormon and Catholic

273. See Jan Cienski, *Support for Scouts Follows Party Lines: Opposing Views of Steven Spielberg and George W. Bush Highlight Divide over Rule in: Homosexuals Barred*, NAT'L POST, Apr. 18, 2001, at A11.

274. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9525. The vote in the Senate was 51-49, suggesting how divisive the issue is. See France, *supra* note 83.

275. See *id.*; Sealey, *supra* note 266. The AMA was concerned that stigmatizing homosexuality can lead to major depression and suicide among youth. Victoria Stagg Elliott, *AMA Recognizes Bullying as Public Health Problem: Abuse of Children by Other Children May Contribute to Violent Behavior, Addiction, Criminal Activity and Other Ills of Society*, amednews.com, July 16, 2001, available at http://www.ama-assn.org/sci-pubs/amnews/pick_01/hlsa07079.htm.

276. See Elliott, *supra* note 275.

277. See France, *supra* note 83 (Levi Strauss, Wells Fargo, Fleet Bank, CVS); Grant Williams, *Divided in Support of Scouts: United Ways Struggle to Balance Donors' Interests in Bias Debate*, CHRON. PHILANTHROPY, Apr. 19, 2001, reprinted in <http://www.scoutingforall.org/aaic/041901.shtml> (Pitney Bowes); Zernike, *supra* note 113 (Chase Manhattan Bank, Textron Inc.). See also David Robinson, *HSBC Bank Ends Lease for Boy Scout Troop*, BUFF. NEWS, Mar. 13, 2002, at B4 (local branch of bank announces decision to end lease of office to Boy Scout troop). Some funding cutoffs occurred ten years ago. Harre W. Demoro, *B of A, Wells Fargo Stop Donations to Boy Scouts*, S.F. CHRON., June 2, 1992, at A16 (Bank of America and Wells Fargo Bank will no longer donate funds to BSA); Scott Maier, *Seafirst Cuts off Scouts for Homosexual Ban*, SEATTLE POST-INTELLIGENCER, July 13, 1992, at B1 (Seafirst Bank). Some supporters have augmented funding to offset the effects of cutoffs. See France, *supra* note 83.

278. Cienski, *supra* note 273; France, *supra* note 83; Josh Grossberg, *Spielberg: I'm No Boy Scout*, eonline, Apr. 17, 2001, at <http://www.eonline.com/News/Items/0,1,8127,00.html> (last visited Feb. 4, 2003).

279. Adam Liptak, *California May Bar Judges from Joining the Boy Scouts*, N.Y. TIMES, Dec. 21, 2002, at A14.

280. See France, *supra* note 83; Rhonda Smith, *Labor Union Cuts Ties to Boy Scouts*, WASH. (D.C.) BLADE, Apr. 27, 2001, at 16.

281. See Goodstein, *supra* note 79. See also Friends General Conference of the Religious Society of Friends, *Minute on Scouting from FGC's Central Committee Minutes*, November 2000, at <http://www.fgcquaker.org/library/fgc-news/scoutingminute.html> (last visited Feb. 4,

churches the clearest examples of support.²⁸² The Salvation Army has weighed into this dispute as well.²⁸³

The most interesting level of the post-*Dale* activity to me is local and, most importantly, personal. Individual parents must confront the implications of their membership decisions, provoking what could be thought of as a household-by-household reflection on the antigay exclusion.²⁸⁴ What is good for their sons, how do they want to volunteer? The calculus can be complex. It may depend on whether a parent is making an initial decision or considering removing boys from scouting after they have set down roots in a particular pack or troop. A parent who disapproves of the BSA policy may, nevertheless, identify other mitigating factors weighing in favor of participation. Among these are: a local council's formal expression of dismay over the national policy; gay male role models may be available elsewhere in children's lives; simply explaining the issue to more mature boys may undermine the effectiveness of a heterosexuals-only role model policy.²⁸⁵ Similar complexities and possibilities for reform and/or subversion may be available for adult volunteers. And, to be sure, other alternatives for youth education do exist.²⁸⁶ Overall, one source reports, membership in the Cub Scouts and Boy Scouts had dropped 4.5% in the year from 2000

2003) (expressing disagreement with the BSA policy); Unitarian Universalist Association Board of Trustees[,] *B/L/G/T Resolution*, adopted June 1992, reviewed and adapted 1997 by Executive Vice President, available at <http://www.uua.org/obgltc/botres.html> (expressing disapproval of the BSA antigay exclusion policy, declaring that the Unitarian Universalist Association (UUA) is not and never has been a charter organization of the BSA, and resolving to express in various ways the conflict between the values of the UUA and the Boy Scouts); United Methodist Church General Board of Church and Society, Press Statement, June 28, 2000, *United Methodist General Board of Church and Society Decries Supreme Court Decision Allowing Discrimination by Boy Scouts of America*, available at <http://www.umc-gbcs.org/gbpr095.htm> (calling upon the BSA to discontinue its exclusion, which is against the Social Principles of the United Methodist Church; also pointing out that the General Conference is the only entity authorized to speak for the Church).

282. See *supra* text accompanying notes 79-93.

283. See *supra* note 119.

284. "[B]y enrolling their sons in the Scouts, where groups of ten to fifteen boys meet with their scoutmasters on a regular basis, parents are making a 'statement' that they believe these leaders are appropriate role models." Johnson, *supra* note 2, at 1664.

285. The experiences of Lisa Barsanti Hoyt were most helpful to me in formulating these factors. The local council at issue is in Montclair, N.J.

286. *Go Ahead, Buy the Cookies*, THE ADVOCATE, May 22, 2001, at 51 (excerpting antidiscrimination policies of the Girl Scouts of the USA, the Boys and Girls Clubs of America, the Camp Fire Boys and Girls, the National 4-H Council, and the YMCA Indian Guides; most explicitly include gays and lesbians, none exclude them). See David Crary, *Big Brothers Shrugs off Wrath as It Backs Gay Mentors*, STAR-LEDGER (Newark, N.J.), Aug. 16, 2002, at 4 (Big Brothers Big Sisters of America has told its 490 local affiliates to give gay and lesbian adults an equal opportunity to serve, despite criticism of conservative religious and family advocacy groups).

to 2001, with a drop of 7.8% in the Northeast.²⁸⁷ A BSA spokesman said that the loss was largely due to demographic factors such as the aging of the Baby Boomer's children.²⁸⁸

At the local level, public schools and other local governmental organizations²⁸⁹ that are essential to Scouting may feel themselves constrained to withhold contracts and special sponsorship arrangements from the BSA, either as a matter of conscience, or as a matter of law if public antidiscrimination policies apply to them.²⁹⁰ Because these institutions are so local, individuals can again have a chance directly to participate in the decisions. In religious denominations where individual churches call the shots, again a local dialogue with individual responsibility can ensue.²⁹¹ Local private institutions may also be

287. See France, *supra* note 83. Working from the same figures, Rice describes a decline in BSA membership alone of 3.6% nationally, and of 8.6% in the Northeast. Rice, *supra* note 100. For the Western Region the decline was 3.5% for all the traditional programs and 3.3% in Boy Scouts alone. *Id.* To be sure, as Rice points out these two regions also showed losses in membership in Learning for Life. *Id.*

288. See Sealey, *supra* note 266. Oddly, Girl Scout membership continues to climb, and is at a 20 year high. Lisa W. Foderaro, *Beyond Crafts and Cookies, Girl Scouts are Prospering*, N.Y. TIMES, Dec. 25, 2002, at A1.

289. Fire and police stations often are major sponsors of troops. See, e.g., Dale v. Boy Scouts of Am., 734 A.2d 1196, 1201, 1212 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000) (discussing sponsorship by police and fire departments).

290. See, e.g., France, *supra* note 83 (Tucson, Chicago, San Francisco, San Diego and San Jose have ended free use for Scout troop meetings in public parks, schools and other municipal sites, as have school districts in Dade County Fla., Illinois, Massachusetts and Minnesota); Hartocollis, *supra* note 104 (New York City Schools Chancellor bars public schools from sponsoring most activities of the BSA and announces a contract for camping services will not be renewed unless the policy on gays is changed); Hong, *supra* note 264 (discussing Chicago and San Francisco actions); *Iowa's 4-H Club Breaks Ties with Boy Scouts*, FRONT PAGE (Raleigh, N.C.), Nov. 24, 2000, at 7 (Iowa's 4-H clubs as part of the university system, which has a non-discrimination policy); Sealey, *supra* note 266 (Broward County and Eugene, Oregon); Sarah Tippet, *If Boy Scouts Can Bar Gays, L.A. City Council Can Dump Scouts: Unanimous Vote Cuts Ties with Organization over Policy Excluding Avowed Homosexuals*, STAR-LEDGER (Newark, N.J.), Nov. 29, 2000, at 11). Cf. Boy Scouts of Am. v. Till, 136 F. Supp. 2d 1295, 1311 (S.D. Fla. 2001) (prohibiting Broward County, Florida, from barring the Boy Scouts from its public school facilities altogether on account of the school district's antidiscrimination policy, but allowing it to revoke special arrangements with BSA).

291. See, e.g., Goodstein, *supra* note 79 (describing tension in synagogue with gay and lesbian members that also sponsors a Boy Scout troop); AP Newswire, *United Church of Christ at Dartmouth Evicts Boy Scouts Because of Policy on Homosexuals, Hanover, New Hampshire*, available at <http://www.premium1/fosters.com/2002/news/Mar02/08nh0308u.htm> (last visited Feb. 4, 2003) (UCC church on Dartmouth campus votes to exclude Boy Scout troop that had met there for sixty-five years; decision prompted by BSA Resolution of February 2002 and by expulsion of an openly gay assistant Scoutmaster who came out in print in response to the Dale decision).

involved in facilities decisions.²⁹² To be sure, these actions can express views in either direction.²⁹³

Funding is another focus of ongoing controversy that can have a personal and local dimension. Many individuals have decided either not to contribute to the BSA, or, on the contrary, to contribute more to make up for the loss in funds from other sources.²⁹⁴ United Way campaigns are a traditional source of contributions for many charitable organizations, including the BSA.²⁹⁵ They are organized locally.²⁹⁶ Once the *Dale* decision made it clear that the BSA could continue its exclusionary policy, a number of United Way organizations decided to exclude the BSA, and others received increased political pressure.²⁹⁷ In at least some

292. See Robinson, *supra* note 277 (Syracuse University refusal to lease stadium for Boy Scout dinner).

293. See Scott Rapp, *Cayuga County Pulls out of HSBC—Legislators Vote to Withdraw Millions from Bank to Protest Ouster of Boy Scouts*, SYRACUSE POST STANDARD, Mar. 27, 2002, at A1 (county decides to withdraw funds from local branch of bank to protest bank's decision not to renew office lease for Boy Scouts; a town and two local churches also decided to withdraw funds).

294. See, e.g., Carpenter, *supra* note 2, at 1561 n.217 (conflicting reports about whether the Scouts are on balance losing funding as a result of *Dale*; in any event, conflict among sources may have been the reason for BSA not publicly highlighting its antigay exclusion sources); Megan O'Matz, *Gay Ban Garners Scouts \$200,000*, (Miami-Dade) SUN-SENTINEL, Dec. 18, 2001, at B1 (couple donates \$200,000 to local BSA council in show of support for prohibition of gay leaders); Zernike, *supra* note 113.

295. In 1996, the United Way nationwide contributed \$83.7 million dollars to the BSA. Deborah Sharp, *Ruling Feeds Drive Against Scouts; Anti-discrimination Campaign Includes Protests Set for Today*, USA TODAY, Aug. 21, 2000, at A3; Maria Newman, *United Way to Continue Aid to Central Jersey Scouts*, N.Y. TIMES, Aug. 31, 2001, at B5. United Way funding accounted for about thirty-five percent of private Boy Scouts donations in 1996. Williams, *supra* note 277.

296. <http://national.unitedway.org/aboutuw/> (last visited Feb. 4, 2003). There are about 1400 local United Way chapters. Sharp, *supra* note 295.

297. A report from August 2000 said that "a few" United Way chapters had cut off funding. Sharp, *supra* note 295. Depending on the source, perhaps forty to fifty local United Way chapters have ceased funding BSA operations. See, e.g., France, *supra* note 83 (some forty-four chapters as of August, 2001); Peter Freiberg, *Rallies Target Boy Scouts Policy Banning Gays: Scouting For All Coordinates Demonstrations in Dozens of Cities Around the Country*, WASHINGTON (D.C.) BLADE, Aug. 24, 2001, at 27 (between thirty-five and forty-five United Ways have either cut off funds altogether or switched them to Learning for Life); Scouting for All, *List of United Ways That Have Withdrawn Their Funding of the BSA*, <http://www.scoutingforall.org/aaic/unitedway2.shtml> (last visited Feb. 4, 2003) (listing forty-nine United Way chapters); Sealey, *supra* note 266 ("dozens of United Way chapters are pulling the plug on donations to their local Scout troops."); Williams, *supra* note 277 (at least twenty-five have dropped BSA altogether, eight have limited to Learning for Life, and seven have altered pledge forms to allow donors to prohibit money from going to Scouts). Some United Way Chapters may have acted earlier. See, e.g., *Boy Scout Group Loses Fund Over Gay's Ouster*, ORLANDO SENTINEL, Dec. 18, 1993, at A16 (United Way of Greater New Haven ends its annual \$70,000 contribution to the BSA because of the antigay exclusion policy); Perry, *supra* note 22 (San Francisco Bay Area United Way cut off funding to BSA in 1992; San Diego United Way refused to do so in 1993). The New Haven cutoff may actually have occurred in 1995. Sharp, *supra* note 295.

cases, local United Way chapters have exacted nondiscrimination pledges from local Scout councils.²⁹⁸ In other localities, the United Way chapter is unequivocally supportive of the BSA.²⁹⁹ Some funders have increased donations to the BSA or earmarked their United Way donations specifically for the BSA.³⁰⁰ Whatever the result, this all provides more opportunities for local dialogue.

Other more fleeting opportunities to confront the issue also arise. What does a citizen do when confronted with an advertisement supporting the local BSA council in the weekly community newspaper? What does one do when the local Scout troop sets up a fundraising booth on the sidewalk in front of the local bank? Give, walk by, confront them? These small opportunities for dialogue and confrontation might all be called microinteractions.³⁰¹

I am led to see this aspect of the BSA gay exclusion controversy as so important by a theoretical predilection to see political resistance and social change, especially where gender is concerned, as ultimately local and personal. As Steven Winter writes in his perceptive discussion of Michel Foucault's theory of power:

Foucault makes a profound and important point when he insists that "power relations are rooted deep in the social nexus, not reconstituted 'above' society as a supplementary structure." The insight that power is a

298. France, *supra* note 83; Newman, *supra* note 295.

299. Paul Curtis, *United Way Continues Funding Boy Scouts[;] Local Opponents Reorganize Fight*, at <http://www.scoutingforall.org/articles/2002031803.shtml>; Williams, *supra* note 277.

300. See Sealey, *supra* note 266 (describing specifically earmarked gifts in Minneapolis and overall increases in local fundraising in Seattle and San Francisco).

301. I derive the term "microinteraction" from the term "microaggression," developed and used primarily to describe the subtle but pervasive small personal interactions that maintain racial subordination. See, e.g., Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 LA RAZA L.J. 237 (2001); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001); Charles H. Lawrence, *The Id, The Ego, and Equal Protection Doctrine: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317 (1987); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673 (1985); Chester M. Pierce, *Stress Analogs of Racism and Sexism: Terrorism, Torture and Disaster*, in MENTAL HEALTH, RACISM, AND SEXISM 277, 281-82 (Charles V. Willie et al. eds., 1995); Chester M. Pierce, *Psychiatric Problems of the Black Minority*, in 2 AMERICAN HANDBOOK OF PSYCHIATRY (Silvano Arieti ed., 2d ed. 1974). Similar microinteractions are crucial to the maintenance of gender subordination. See, e.g., VIRGINIA VALIAN, WHY SO SLOW?: THE ADVANCEMENT OF WOMEN (1998); STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); Fajer, *supra* note 128; Poirier, *supra* note 171; Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141 (1997); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996).

product of a system or network of social relations means that people at very different places in the social system may nevertheless be able to activate it.³⁰²

Winter summarizes:

Foucault's distinctive view of power [is] productive and dynamic. On this view, power is everywhere but not all-determining; it is omnipresent, but not omnipotent. It is everywhere because every individual is socially constructed by the processes of power. But it is not all-determining precisely because it is a process. As such, every individual is a necessary participant in its construction and perpetuation.³⁰³

The individual's participation in the dynamic processes of power is key. Often, this participation consists of performing a role. Winter in fact uses traditional gender roles and resistance to them as an example for his elucidation of Foucault's reconceptualization of power.³⁰⁴ Here he links directly into the notion of gender as performance, discussed earlier in this Article.³⁰⁵ There are various feedback mechanisms at work here: individuals' performances act on others and their actions and roles are in turn the result of prior actions or roles.³⁰⁶ The gender-stereotypical wife and mother does not invent the role, but learns it through interactions with her parents and others.³⁰⁷ Winter notes:

When a woman performs the traditional wife/mother role, she enacts the system of gender power and becomes a vehicle for the realization of all its consequences. Thus, to paraphrase Foucault, every actual wife/mother is an effect of the system of gender power, and at the same time, or precisely to the extent to which she is that effect, she is also the element of its articulation.³⁰⁸

At the same time, and for these very reasons, Winter continues,

[p]ower is always open to challenge and renegotiation. Because the role must be personified in each and every case, each enactment is also a potential reconstruction. . . . In the very necessity of its continued

302. Winter, *supra* note 199, at 741 (discussing Michel Foucault, *Afterword: The Subject and Power*, in HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 217 (2d ed., 1983)).

303. *Id.* at 800.

304. *Id.*

305. *See id.* at 806. Winter gives the example of gender-stereotypical roles like wife/mother, in which a pattern of conduct depends on imaginative enactments by actual subjects "under shifting and often challenging circumstances." *Id.*

306. *See* Poirier, *supra* note 171.

307. Winter, *supra* note 199, at 809.

308. *Id.* (footnote omitted, referring to Michel Foucault, *Two Lectures*, in MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, 78, 97 (Colin Gordon ed. 1980)).

performance lies the possibility of power's disruption. . . . [T]he profound implication of [Foucault's] dynamic view of power is that the intention-forming subject does not 'own' his or her own power. What we refer to as 'power' is really the sum of an ongoing system of performances that include assertions of authority, resistance, and subsequent adjustments.³⁰⁹

Feminist theorist Ana María Alonso also carries this Foucauldian analysis forward into discussions of gender. She writes:

Rather than seeing rule as resting on interdictions, the exercise of power is viewed as productive—of meanings, truths, bodies, selves, in short, of forms of doing, knowing, and being. Meaning becomes located in discursive practices produced, contested, and transformed in sociohistorical action rather than in a *sui generis* scheme of timeless categories.

If hegemony, as Ernesto Laclau and Chantal Mouffe argue, is not "an external relation between preconstituted social agents, but the very process of discursive construction of those agents," then power is central to the production of social identities. Such a notion of hegemony allows the integration of dimensions of subjectivity such as gender and ethnicity into analyses of domination and subordination.³¹⁰

Alonso continues:

[I]f we view hegemony in historical and processual terms, then the attempt by dominant groups and classes to impose a "discursive regime" on the whole of society can be seen as subject to contestation and never fully achieved. Struggle becomes possible and spaces for counterdiscourses and for practices of resistance are opened up. . . . So-called prepolitical discourses of resistance, long dismissed as "lacking an ideology," can be interpreted in a new way once we recognize that rule is not simply effected through the formal apparatus of government and that the voices of protest need not be articulated in a "rational," post-Enlightenment idiom to be "political." Deploying discourses rich in bodily symbols, such forms of resistance often focus on the constitution of subjectivities, disputing and redefining the ways in which power is invested in social identities.³¹¹

The BSA controversy is a good example of what Alonso is talking about: it is all about redefining the way in which power is invested in social identities.

309. *Id.* at 810-11. That is, "[b]ecause the role must be acted out, it always provides the occasion for resistance." *Id.* at 810

310. Ana María Alonso, *Gender, Power, and Historical Memory: Discourses of Serrano Resistance*, in *FEMINISTS THEORIZE THE POLITICAL* 404, 404-05 (Judith Butler & Joan W. Scott eds., 1992) (footnote omitted) (referring to FOUCAULT, *supra* note 308, at 39, and Ernesto Laclau & Chantal Mouffe, "Recasting Marxism": *Hegemony and New Political Movements*, 12 *SOCIALIST REV.* 91 at 100 (1982)).

311. *Id.* at 405 (footnote omitted) (quoting FOUCAULT, *supra* note 308).

Gender is not reproduced by fiat from the Supreme Court or the AMA. It is reproduced because countless individuals engage in the practices of gender performance and thus reaffirm their own gender identity and reproduce that of the next generation. In the context of race, Charles Lawrence popularized the concept of microaggression, in which a small personal interaction is understood by the participants to have force in maintaining power relations and shaping identity.³¹² I have suggested that similar microinteractions create and maintain gender performance and gender-based power relations on a small and personal level.³¹³ It is the aggregate of these small, individual interactions that underpins and determines the larger structures and patterns of gender and power.

William Eskridge has also written usefully to this point, concerning Foucault and homosexuality:

[T]he critical developments [in the construction of homosexuality] have occurred outside the halls of government, and . . . the exercise of oppressive power against “sodomites,” and then “inverts,” and finally “real homosexuals” has not been the result of direct government action. “Power comes from below,” and not “from the top down,” said Foucault; the “relationships of force” that most profoundly affect our lives come not from the state, but from the “machinery of production, families, limited groups, and institutions.”³¹⁴

Thus, a Foucauldian-feminist analysis should inform our understanding of the continuing political struggles over the BSA’s gay exclusion policy. The exclusion, because it occurs locally and can be addressed locally,

312. See Lawrence, *supra* note 301.

313. See Poirier, *supra* note 171. The point has been explored usefully in some of the writing about homosexuality and visibility. See, e.g., Fajer, *supra* note 128; Yoshino, *Assimilationist Bias*, *supra* note 17; Yoshino, *supra* note 301.

314. William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Towards a Gaylegal Agenda*, 102 YALE L.J. 333, 383 (1992) (quoting MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I, AN INTRODUCTION*, 94 (1978)). While Eskridge is dead on in the assessment of the role of culture, one must proceed with caution in reading his analysis. His assessment of identity-based social movements probably overemphasizes the importance of established, top down organizations and fails to acknowledge the exclusionary and hegemonic effects that these change organizations themselves can impose. They could well be criticized for reproducing a white and middle-class account of homosexuals and what their interests are. See, e.g., Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001); Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites?” *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).

continues to be a site of local cultural expression of gender and a site where personal struggle can and must occur.

Eskridge also writes, “Historically, changes in cultural institutions and attitudes have preceded changes in laws and regulations of homosexual behavior, and the coercive power of culture has traditionally been much greater than the power of government over sexual behavior.”³¹⁵ This opposition of government and culture needs fine tuning. At the local level, the BSA controversy helps us see how they blend together. Some of the choices for local resistance here are political, although at the local level—insisting that school boards and municipalities honor their antidiscrimination policies, for example. Eskridge also underestimates the latent power of governmental legitimation as a part of culture, when he writes that “cultural power reaches everywhere all the time, while governmental power manifests itself episodically.”³¹⁶ In fact, government power is often effectively a part of culture even when not exercised. The cultural effects of unenforced sodomy laws are a prime example.

To say simply that a parent’s choice about the BSA is “making a statement”³¹⁷ is inadequate, as a matter of Foucauldian-feminist gender theory. It is not just a statement, it is a commitment to one course of the practices of masculinity or another. It is moreover a commitment which personally engages the whole family, be it a volunteer adult or a youth member of the BSA. It is a small action which, together with many other small actions, has consequences on a larger scale.³¹⁸ As it happens, the structure of the BSA is one of local level organizations that rely on countless individual decisions both for their volunteer base and for their membership. This means that there are countless opportunities post-*Dale* for individuals to realize that they are making choices about gender. To the extent that the BSA’s gay exclusion controversy has led them to be more aware of what they are doing and to see possibilities for doing things differently, change in these vast, diffuse social practices is made possible. It is precisely here that the BSA controversy shows its potential for transformation, because of the acute visibility of the gay exclusion

315. Eskridge, *supra* note 314, at 383.

316. *Id.*

317. Johnson, *supra* note 2, at 1664. See *supra* note 283 and accompanying text.

318. To be sure, because gender is performative, individual performance could be characterized as “statements,” and discursive “statements” can encourage or inhibit particular performances of gender. Indeed, one way of accounting for the controversy over the “openly gay”/“avowed homosexual” individual is to describe such a person as a text, with a battle over how to interpret it. See, e.g., Knauer, “*Simply So Different*,” *supra* note 2, at 455; Leonard, *supra* note 2, at 29-30. As Steven Winter points out, “Power is quite real as a social fact. It is real precisely to the extent that it is based on cultural meanings that people internalize and act on. To be more precise, power is an interpretive institution.” Winter, *supra* note 199, at 831.

policy, and because in many quarters the BSA is an important socializing force concerning adult masculinity.

Contrast another case about keeping masculinity clear of homosexuality, but one that has had nowhere near the same cultural and political ramifications. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,³¹⁹ the Supreme Court addressed a statute in which Congress had given the United States Olympic Committee (USOC) what amounted to an intellectual property right control over the use of the word "Olympics."³²⁰ The protection was stronger than standard trademark protection, a trademark protection on steroids, if you will, because a showing of confusion was not necessary and the standard defenses did not apply.³²¹ A 1981 movement, based in San Francisco, to begin a "Gay Olympics," ran afoul of this authority when the USOC nixed the gay group's chosen name. The San Francisco group's purposes were straightforward. As Judge Alex Kozinski observed in his dissent from denial of rehearing en banc before the Ninth Circuit, the Gay Olympics "were 'designed to combat homophobia and to work for the health and tolerance of gay and lesbian persons.'"³²² The sponsoring organization "sought to creat[e] a more realistic image of homosexual men and women . . . and to provid[e] more alternatives for homosexual men and women to move into the mainstreams of their respective societies."³²³ As Judge Kozinski observed, San Francisco Arts & Athletics, Inc. (SFAA) "wish[ed] to hold a public event to promote socio-political views some may find offensive."³²⁴

The USOC put a stop to it. Never mind that they allowed Special Olympics, Junior Olympics, Police Olympics, Canine Olympics, and many other "Olympics."³²⁵ Never mind that the Los Angeles phone book alone at the time listed more than 140 businesses beginning with the

319. 483 U.S. 522 (1987).

320. 36 U.S.C. § 220506 (2000) (originally codified at 36 U.S.C. § 380). This statute was part of the Amateur Athletics Act of 1978, but in fact the intellectual property protection of "Olympic" was much older. Trademark protection was obtained in 1896 when the modern Olympics began and statutory protection dated from 1950.

321. See *San Francisco Arts & Athletes, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535 (1987).

322. *Int'l Olympic Comm. v. San Francisco Arts & Athletes, Inc.*, 789 F.2d 1319, 1320 (9th Cir. 1996) (Kozinski, J., dissenting from denial of rehearing en banc). Justice Brennan's dissent referred to and agreed with Judge Kozinski's characterization. *SFAA*, 483 U.S. at 548, 569 (Brennan, J., dissenting).

323. *San Francisco Arts & Athletes, Inc.*, 789 F.2d at 1321 (internal quotes omitted).

324. *Id.* at 1325. See *San Francisco Arts & Athletes, Inc.*, 483 U.S. at 535 n.13 (quoting *San Francisco Arts & Athletes, Inc.* on its goals in creating the Gay Olympics).

325. *San Francisco Arts & Athletes, Inc.*, 789 F.2d at 1321.

word “Olympic.”³²⁶ “Gay Olympics” was unacceptable, no reasons given. Clearly the USOC believed the use of the word “Olympics” for a gay and lesbian sporting event would tarnish the image of the Olympic Games. In particular with regard to men, it might muddy the gender boundary that portrays gay men as weak and unmanly.³²⁷ Sports, like Scouting, is an area where masculinity is enshrined and performed.³²⁸ Judge Kozinski observed that “the USOC is using its control over the term Olympic to promote the very image of homosexuals that the SFAA seeks to combat.”³²⁹ As one contemporary commentator explained it, this was at bottom “a dispute over the representation of sexuality in the symbolic terrain of the sports world.”³³⁰ A feminist gender theorist might call the SFAA’s attempted rhetorical move a kind of insurrectionary counter-speech.³³¹ It relies on “the possibility of citing a term anew to break with its customary associations and challenge the relations of power they serve to naturalize.”³³²

There are a number of parallels between *SFAA*, *Dale* and *Curran*. Both the BSA and the USOC are cultural institutions of long standing, both are federally chartered,³³³ and indeed both have been given an intellectual property right over their name and symbols.³³⁴ *SFAA* and *Curran* are contemporaneous: both arose in California out of a reaction to gay visibility and to political strategies designed to increase that visibility beginning in the 1980s. In *SFAA*, the purpose for appropriating the name and structure of the Olympics was quite straightforward—to use it to make a rhetorical and cultural statement about gay men and

326. *Id.* at 1323 n.4.

327. See generally BRIAN PRONGER, *THE ARENA OF MASCULINITY: SPORTS, HOMOSEXUALITY, AND THE MEANING OF SEX* (1990).

328. To be sure, women are included in the Olympics, and lesbians were to be included in the Gay Olympics. So the question arises how the inclusion of open lesbians as athletes might threaten masculinity. Very briefly, I suggest that the openly lesbian athlete disrupts this picture and threatens masculinity by not being feminine enough. Her transgression is to blur the gender line. Primarily, perhaps, this occurs in terms of an open lesbian not being theoretically sexually available to a man, and also of not displaying womanly characteristics. Cf. KOPPELMAN, *supra* note 8 (acknowledging that his gender-based analysis of hostility to homosexuals focused on men and suggesting that the lesbian transgression is insurrection against the female role, whereas the male transgression is subversion of the male role).

329. *San Francisco Arts & Athletes, Inc.*, 789 F.2d at 1323.

330. JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 238 (1991).

331. See Disch, *supra* note 180, at 554-55.

332. *Id.* at 555.

333. 36 U.S.C. § 30901 (2000) (BSA) (previous legislation was codified at 36 U.S.C. §§ 21, 22); 36 U.S.C. § 220502 (U.S.O.C.) (previous legislation was codified at 36 U.S.C. § 371).

334. 36 U.S.C. § 30905 (2000) (BSA) (previous legislation codified at 36 U.S.C. § 27), 36 U.S.C. § 220506 (U.S.O.C.) (previous legislation codified at 36 U.S.C. § 380).

women in America. In *Dale and Curran*, although the two gay assistant scoutmasters who were plaintiffs got caught up in the *Kulturkampf* when their gay identities were published in newspaper accounts, gay rights organizations clearly saw the rhetorical implications of exclusion or acceptance of gay male leaders in Scouting. And last but not least, clearly there was an antigay motivation to the action of the USOC, just as there was to the BSA's gay exclusion.

But nothing like the BSA controversy developed after *SFAA*.³³⁵ In part, *SFAA* was decided as a pure matter of property doctrine.³³⁶ Whatever exclusionary motives may have existed based on animus to homosexuality were subsumed in the general property right to exclude. No explanation was necessary.³³⁷ In contrast, because the BSA sought to protect its policy through a First Amendment doctrine, it had to explain what its policy was, loud and clear.

A second important difference is that neither the USOC nor the incipient Gay Olympics had the kind of real and symbolic penetration into everyday life that the BSA does. Star athletes are, well, over there

335. It is hard to prove a negative. But, for example, the number and scope of amicus briefs was far smaller in the *SFAA* case. Subsequent immediate scholarly commentary was sparse, the best of it being Kelly Browne, Case Note, *A Sad Time for the Gay Olympics*, San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 107 S. Ct. 2971 (1987), 56 U. CIN. L. REV. 1487 (1988); Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131 (1989). Eventually, some important property theorists discussed the case's implications for the silencing of cultural dissent. See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1874-75 (1991); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1584-91 (1993) (using Lockean natural property rights theory to critique the case); Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 884-85 (1993). All of this amounts to not one-hundredth of the amount of attention paid to *Dale* and its aftermath.

336. As the Ninth Circuit said, "the word 'Olympic' and its associated symbols and slogans are essentially property. Such property rights can be protected without violating the First Amendment." *International Olympic Committee v. San Francisco Arts & Athletics*, 781 F.2d 733, 736-37 (1986), *aff'd*, 483 U.S. 522 (1987) (citing *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976) (shopping center owner's property right to exclude prevails over federal First Amendment right of union to picket)). This aspect of the case especially outraged Judge Kozinski. "To say that the word Olympic is property begs the question. What appellants challenge is the power of Congress to privatize the word Olympic . . ." *Int'l Olympic Comm. v. San Francisco Arts & Athletics, Inc.*, 789 F.2d 1319, 1321 (9th Cir. 1996) (Kozinski, J., dissenting from denial of rehearing en banc).

337. To be sure, there is often much more politically to an apparently neutral property right to exclude than meets the eye. See, e.g., Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719 (1996) (racial overtones to exclusion from beaches); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (the common law property right to exclude evolved in a conscious effort to restrict the expanding civil rights of free blacks).

somewhere, figuratively on Mount Olympus.³³⁸ The resolution of the controversy did not put very many people on the spot in terms of their own performance of masculinity in their everyday lives. The Gay Olympics did go on, as it happened, rechristened the Gay Games, and it has led a happy and increasingly successful life.³³⁹ But the aftermath of *SFAA* did not happen in the local school or church and was not funded by the local United Way.

In contrast, because of what the BSA is and what it now represents, the ramifications of its gay exclusion policy are much harder to avoid. The *Dale* and *Curran* litigation have put the spotlight on homosexual exclusion in what has been for nearly one hundred years an institution of American masculinity, making boys into men. The now openly articulated antigay policy makes it harder (not impossible, but harder) to avoid noticing that each individual chooses to participate in one version or another of what masculinity is and how it can be taught to the young. To put it in the lingo of gender theory, the continuing BSA controversy goes a long way towards deessentializing the heteronormative component of masculine gender construction. It brings home the fact that heteronormative masculinity is a local practice. Each of us can now see more clearly our many opportunities to take responsibility, one way or the other, for this practice of masculinity.

Some of my legal academic colleagues dismiss historical or theoretical scholarship unless it contains a practical recommendation, an answer to the question “What should be done?”³⁴⁰ As a parting statement, a poetic *envoi*, let me suggest that the major gay, lesbian, bisexual, and transgendered advocacy organizations, including those that participated in *Dale*, should not finesse the BSA exclusion issue at this time just

338. The next venue for summer Olympics actually *is* Greece. Official Site for the 2004 Olympics, available at <http://www.athens.olympic.org/page/default.asp?la=2&id=5> (last visited Feb. 4, 2003)

339. See generally <http://www.gaygames.com> (last visited Feb. 10, 2003). The most recent Gay Games took place from November 2-9, 2002 in Sydney, Australia. *Id.*

340. To some extent I view this as an example of the unfortunate obsession of legal thinking that Pierre Schlag has so aptly described. Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053 (1993) (arguing that legal academics are trained to think that their job is to solve legal puzzles, and to be either adjuncts to judicial decisionmakers or super-judicial actors themselves). While practical results are an important focus of legal academic writing, rushing too quickly to ask “What is to be done?” can thwart creative reexamination of a circumstance or problem and thus can perpetuate existing, unhelpful categories and approaches instead of nourishing the slow accretion of new solutions that may at first be unexpected, unpredictable, even unexplainable. Indeed, Foucault’s notion of the indeterminacy of resistance fits well with a critique of too quickly asking “What is to be done?” For an application of this approach to not solving problems in another arena, see Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

because it is mostly now local and grass roots in its conflicts. To be sure, the American Civil Liberties Union is pursuing a lawsuit against San Diego challenging a special land use deal with the BSA,³⁴¹ and the Human Rights Campaign assisted with lobbying on the symbolic legislation that went through Congress in 1991.³⁴² Then there is Scouting for All—not exactly a major group, but much more these days than the local group it once was. It seems to be holding down the fort, serving a major information clearinghouse and gadfly function. Many individuals, councils and organizations are still taking local actions, of course, but these may not always be coordinated or fully informed.

There are understandable incentives for the national advocacy organizations to let local disputes take their course. A hydra-headed, diffuse, locally fought issue is to some extent at odds with the structure of centralized, expert public interest groups, especially those attuned to litigation.³⁴³ The big gun shot in constitutional theory has already been fired in *Dale*, and it missed. As part of the *Kulturkampf* over homosexuality, the issue of the BSA and role models is far from over. This Article's analysis of the underlying issues of masculinity, and the way in which the BSA's dispute makes them come unusually close to home, suggests that advocates for gay and lesbian rights, and feminists as well, need to find ways to support this ongoing struggle. Where gender is concerned, the personal is political, and resistance is always possible even if its effects are always somewhat indeterminate. A grass roots movement like Scouting For All is still potent, and in fact is what resistance to the BSA policy has become. For the conflict is ongoing, by its very nature, and both information and plain old solidarity could go a long way to support local actors as they make their personal decisions and commitments and thus play out the *Kulturkampf*.

341. *Barnes-Wallace v. City of San Diego*, Civ. Case No. 00-1726 J (AJB). Information may be found in an ACLU press release, *San Diego's New Lease with Boy Scouts to Come Under Court Scrutiny in Discrimination Lawsuit* (May 23, 2002), available at <http://archive.aclu.org/news/2002/n052302c.html>.

342. See, e.g., HRC Battles Two Anti-Gay Amendments as Votes Near, May 22, 2001, available at <http://www.hrc.org/newsreleases/2001/010522helmshill.asp>.

343. Indeed, to some extent these organization may also get caught up in the quest for the magic bullet described by Schlag, *supra* note 340. This is not surprising, as the GLBT advocacy groups also comprise some of the best law school graduates, and they may well have been indoctrinated to think that anything other than the big solution is not worth the effort, especially given scarce resources.

APPENDIX I

Boy Scouts of America Resolution of February 6, 2002
and accompanying Press Release, *available at*
<http://www.scouting.org/media/press/020206/resolution.html>

1. WHEREAS, the Resolutions Committee of the Boy Scouts of America (on behalf of the Executive Board of the Boy Scouts of America) on June 1, 2001, assigned the Relationships Committee of the Boy Scouts of America with the [sic] responsibility for considering and making recommendations to the Executive Board with respect to various resolutions submitted by members of the National Council at the annual meeting concerning the appropriate flexibility to be employed by the Boy Scouts of America in establishing standards for leadership; and
2. WHEREAS, the Relationships Committee duly formed a Task Force on Resolutions, composed of a cross section of representatives, from the religious and civic chartered organizations and others represented in Scouting, to consider these resolutions and make recommendations to the Relationships Committee; and
3. WHEREAS, the Task Force has reported the results of its thoughtful and extensive deliberations to the Relationships Committee, which submitted the report to the Relationships/Marketing Group Committee, both of these committees having approved and adopted the Report of the Task Force on Resolutions as their own; and
4. WHEREAS, the national officers, having received and considered the Report, unanimously adopt the recommendations of the Report without reservation; and
5. WHEREAS, the national officers agree with the report that “duty to God is not a mere ideal for those choosing to associate with the Boy Scouts of America; it is an obligation” which has defined good character for youth of Scouting age throughout Scouting’s 92-year history and that the Boy Scouts of America has made a commitment “to provide faith-based values to its constituency in a respectful manner” and
6. WHEREAS, the national officers agree that “conduct of both Scouts and Scouters must be in compliance with the Scout Oath and Law” and that “membership is contingent upon one’s willingness to accept the values and standards espoused by the Boy Scouts of America,” and
7. WHEREAS, the national officers further agree that homosexual conduct is inconsistent with the traditional values espoused in the Scout Oath and Law and that an avowed homosexual cannot serve as a role model for the values of the Oath and Law; and

8. WHEREAS, the national officers reaffirm that, as a national organization whose very reason for existence is to instill and reinforce values in youth, BAS's values cannot be subject to local option choices, but must be the same in every unit, and;
9. WHEREAS, the Boy Scouts of America respects the right of persons and individuals to hold values and standards different than the Boy Scouts of America, the national officers also agree that Boy Scouts of America is entitled to expect that persons and organizations with different values and standards will nevertheless respect those of the Boy Scouts of America;
10. THEREFORE, the national officers recommend that the National Executive Board affirm that the Boy Scouts of America shall continue to follow its traditional values and standards of leadership.

BSA Board Affirms Traditional Leadership Standards
Press Release Feb. 2002, *available at* www.scouting.org

Irving, Texas—The National Executive Board of the Boy Scouts of America has reaffirmed its traditional leadership standards, as recommended by its appropriate committees.

The board received three resolutions suggesting changes in leadership standards in order to permit avowed homosexuals to serve as Boy Scout leaders. The board referred the resolutions to the appropriate committee, which formed a diverse task force composed of chartered organization representatives to consider the resolutions.

The BSA reaffirmed its view that an avowed homosexual cannot serve as a role model for the traditional moral values espoused in the Scout Oath and Law and that these values cannot be subject to local option choices.

In affirming its existing standards of leadership, the board also agreed that duty to God is not a mere ideal for those choosing to associate with the Boy Scouts of America; it is an obligation, which has defined good character throughout the BSA's 92-year history.

The board, the relationships committee, and the special task force are all comprised of volunteer members of the BSA.

The BSA is one of the largest youth-serving organizations in America, serving more than five million young people between 7 and 20 years of age.