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Rachel A. Van Cleave

Golden Gate University School of Law, rvanleave@ggu.edu

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ARTICLES

ADVANCING TOLERANCE AND EQUALITY USING STATE CONSTITUTIONS: ARE THE BOY SCOUTS PREPARED?*

Rachel A. Van Cleave**

*Fear leads to anger,
anger leads to hate, and
hate leads to suffering.*

Yoda, in STAR WARS EPISODE I:
THE PHANTOM MENACE (LUCASFILM LTD. 1999)

I. INTRODUCTION: INTOLERANCE AND STATE CONSTITUTIONS

Intolerance remains a significant problem in the United States. The recent shooting spree at a Jewish Community Center in Los Angeles illustrates the persistent historical menace of religious intolerance.¹ The violent murder of James Byrd, Jr. in Jasper, Texas exemplifies racial intolerance even years after desegregation.² In

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** Associate Professor, Texas Tech University School of Law. B.A. Stanford University, 1986; J.D. University of California, Hastings College of the Law, 1989; J.S.M. Stanford Law School, 1994. I am indebted to Alison G. Myhra, Joseph Schottland, and Linda S. Eckols for serving as sounding boards and for reviewing drafts, and to my research assistants Jack W. Hill and Juan Carlos Rodriguez. I dedicate this paper to Natasha Van Cleave-Schottland with the hope that she and her generation will see the end of intolerance.

1. See Ed Vulliamy, *US Nazis Find Their Latest Hero*, THE OBSERVER, Aug. 15, 1999, at 20. In June of 1999 in Sacramento, California, three synagogues were the targets of arson that caused over one million dollars in damage. See *Preachers of Hate Must Be Condemned*, S.F. CHRON., July 10, 1999, at A20. Certainly, such intolerance does not always result in violence. See, e.g., *Gulfport, Mississippi: Family Suing School After Its Board Banned 15-Year-Old Jewish Student from Wearing Star of David Necklace* (National Public Radio broadcast, Aug. 19, 1999).

2. See Stephen F. Holder, *Texas Man's Slaying Was a Hate Crime, NAACP Says*,

Laramie, Wyoming, Matthew Shepard's brutal murder highlights the threat of violence prompted by sexual orientation intolerance.³ The criminal justice system has responded to these types of hate-motivated crimes with punishment enhancements in the hopes of deterring violent intolerance.⁴ Recognizing that hateful speech, short of violence, can have harmful psychological effects particularly on younger victims, many schools have adopted hate speech regulations to ensure that all students are able to "participate equally in the learning process."⁵ The above examples focus on the person who has behaved violently or hatefully. In addition, there have been attempts to ease the suffering of victims and their families

ATLANTA J. & CONST., July 30, 1999, at 9A (describing the death of an African-American man who "was dragged to death behind a pickup truck"); see also *Taking on Hate Crime*, S.F. CHRON., Aug. 18, 1999, at A20 [hereinafter *Hate Crime*].

3. See Bob Hohler, *A Legacy of Friends and Tolerance; Death in Wyoming Stirrs Clinton Plea*, BOSTON GLOBE, Oct. 13, 1998, at A3; *Slain Wyoming Student Remembered for a Trusting Nature*, BOSTON GLOBE, Oct. 17, 1998, at A16. Earlier this summer, in Redding, California, a shooting caused the death of two gay men in their shared home. See *Hate Crime*, supra note 2. Often hate crimes involve more than one type of victim. For example, the suspect charged in the shooting spree at the Jewish Community Center confessed to killing a Filipino postal worker. See Vulliamy, supra note 1. Another example of such multiple hate crimes is the three-day shooting spree in Indiana and Illinois, which targeted African-Americans, Jews, and Asians. See *Hate in America: Four Notable Cases*, COURIER J. (Louisville, Ky.), Aug. 8, 1999, at 17A. For additional descriptions of bias-motivated crimes, see BUREAU OF JUSTICE ASSISTANCE, *A POLICYMAKER'S GUIDE TO HATE CRIMES 1-2, 14-15* (1997).

4. See, e.g., 18 U.S.C. § 245(b)(2) (1994); FLA. STAT. ANN. § 775.085 (West 1999); TEX. CODE CRIM. P. ANN. art. 42.014 (West 1999); see also Bruce Tomaso, *Gore Speaks out for Stiffer Hate-Crime Law: VP Tells Urban League Conference Such Offenses "Fundamentally Different"*, DALLAS MORNING NEWS, Aug. 10, 1999, at 15A (urging passage of federal hate crimes law that passed the Senate but stalled in the House); Anti-Defamation League, *1999 Hate Crimes Laws* (visited Sept. 30, 1999) <http://www.adl.org/99hatecrime/text_legis.html> (proposing a model statute). Interestingly, only four months after Matthew Shepard's murder, the Wyoming legislature failed to pass a hate crime law. See *Hate Crimes Legislation Is Defeated in Wyoming*, HOUS. CHRON., Feb. 4, 1999, at A9.

5. Alison G. Myhra, *The Hate Speech Conundrum and the Public Schools*, 68 N.D. L. REV. 71, 74 (1992); see also Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439 (calling segregation a "demeaning, caste-creating practice"). For additional discussions of campus speech codes, see Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 947-56 (1996) (setting out a "fundamental standard" as an alternative to a "speech code"). But see Elena Kagan, *When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints*, 29 U.C. DAVIS L. REV. 957, 957-58 (1996) (arguing that the "fundamental standard" is in fact a speech code); John T. Shapiro, Note, *The Call For Campus Conduct Policies: Censorship or Constitutionally Permissible Limitations on Speech*, 75 MINN. L. REV. 201, 205 (1990) (suggesting that anti-harassment policies could address the problem of hate speech on campuses).

and friends. After high school students in Maine drowned a gay classmate, a teacher attempted to organize an all-day "Symposium on Violence," at which representatives of various groups were to speak on issues of tolerance with small groups of students.⁶ Elton John performed a benefit concert, which he dedicated to Matthew Shepard, the victims at Columbine High School, and other victims of hate.⁷ Finally, some states have sought to teach tolerance.⁸

The above attempts to deter violent intolerance also seek to ensure equality.⁹ Some people find difference threatening.¹⁰ Such individuals might think, even unconsciously, "if the law protects the

6. See *Solnitz v. Maine Sch. Admin. Dist.*, 495 A.2d 812, 815, 818 (Me. 1985) (upholding the denial of an injunctive order that would have permitted the symposium to be held after the Board of Directors of the School Administration District No. 59 voted to cancel it). Ironically, an attempt to promote tolerance was thwarted by intolerance. In *Solnitz*, it seems that the symposium was canceled because a homosexual would have been a speaker along with other speakers and discussion leaders representing minority groups. See *id.* at 815.

7. See Kevin McCullen, *Elton John Sings Against Hate: Wyoming Concert Dedicated to Shepard, Columbine Victims*, ROCKY MTN. NEWS (Denver, Colo.), June 2, 1999, at 8A. For other examples of communities attempting to address forms of intolerance, see Merle English, *Healing Divisiveness with Prayer, Saint Martin de Porres*, NEWSDAY, June 1, 1999, at A5 (two thousand members of the Broad Channel community met for a day of workshops and prayer after a float in a Labor Day parade portrayed, among other things, the dragging death of a black man); Mary Evertz, *Internet Quilters Piece Together Memorial to Hate Crime Victim*, PLAIN DEALER (Cleveland, Ohio), June 29, 1999, at 6A (describing a quilt memorial to James Byrd, Jr.); Karen R. Long, *Cleveland Heights Athletes Promote Rally for Racial Harmony*, PLAIN DEALER (Cleveland, Ohio), Aug. 12, 1999, at 15A (describing a "Walk Against Hate Parade" scheduled at the same time as a Ku Klux Klan rally in downtown Cleveland).

8. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 42-43 (describing education initiatives in South Carolina, Pennsylvania, and New Jersey); Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 85-92 (1994) (describing numerous programs designed to teach tolerance for sexual orientation differences); 66 HARV. EDUC. REV. 173 (1996) (devoting the entire issue to the role of educators regarding the issue of sexual orientation). Such educational efforts may require adding to Yoda's formula, "ignorance leads to fear."

9. See generally 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 (1997) (discussing the similarities between the struggle for equality by religious groups and by homosexuals, as well as the current clash between the two groups); Bobbi Bernstein, Note, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause*, 47 STAN. L. REV. 269 (1995).

10. See Michael Kramer, *Time to Fight Haters — We Don't Need to Be Victims of Our Constitutional Rights*, DAILY NEWS (New York, N.Y.), Aug. 15, 1999, at 43 ("People hate difference, a reality that reflects learned behavior."); Rosemary N. Tomani, *Anger Spawns Hatred on the Road to Rage*, BUFF. NEWS, June 6, 1999, at H2 (stating that the violence involved in the Littleton shootings was caused by anger and hatred).

rights of those who are different as it protects me, I might be adversely affected.” For example, a common argument against same-gender marriage is that it would have a negative effect on the heterosexual marriage, thus taking something away from opposite-gender marriages.¹¹ It may be that this fear, however, which can lead to hate and intolerance, can be overcome by individuals and with small steps.¹² That is, as people get to know individuals whom they perceive as different, people will usually become at least tolerant, perhaps less fearful and less angry, and maybe even accepting.¹³ The question then becomes what role the law might play, other than to punish the manifestations of hatred, to promote tolerance when success may well depend upon individuals having personal “contact experiences”¹⁴ with people whom such individuals perceive as different. Should the law be used to force such contact experiences? More concretely, should courts employ public accommodation laws and constitutional protections of equality and privacy in a way that might require intolerant people or organizations to include persons perceived as different? One concern with using the law in this way is that people, or groups of people who are consequently forced into relationships with individuals they

11. See Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353, 355–56 (1999) (identifying this argument and characterizing the tension as “[s]ame-gender marriage [being] about people searching for integrated identities and others jealously and fearfully guarding their own” (citing Richard D. Mohr, *The Stakes in the Gay Marriage Wars*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 105, 106–07 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997))).

12. See Eskridge, *supra* note 9, at 2473 (“Equality comes on little cat’s feet and not in a single leap or bound.”).

13. See, e.g., GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 278–81 (1954) (proposing the “intergroup contact theory”). For application of this theory specifically to prejudice on the basis of sexual orientation, see Bernstein, *supra* note 9, at 271 (discussing Gregory M. Herek & Eric K. Glunt, *Interpersonal Contact and Heterosexuals’ Attitudes Toward Gay Men: Results from a National Survey*, 30 J. SEX RES. 239 (1993)). Bernstein also discusses a personal case study addressing this theory. See *id.* at 272–74; see also Gregory M. Herek & John P. Capitanio, *Some of My Best Friends: Intergroup Contact, Concealable Stigma, and Heterosexuals’ Attitudes Toward Gay Men and Lesbians*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 412 (1996). Ideally, such experiences would result in acceptance, thus going beyond mere tolerance. See, e.g., Doris Y. Morrow, *Letter to the Editor*, LUBBOCK AVALANCHE J., Aug. 18, 1999, at 7A (writer, responding to an editorial entitled “Ban Gay Boy Scouts,” discusses how she came to “love, appreciate and respect” gays after learning of her son’s homosexuality).

14. See Bernstein, *supra* note 9, at 272 (discussing Herek & Glunt’s three hypotheses). Bernstein also recounts examples of how members of Parents, Families and Friends of Lesbian and Gays (“PFFLAG”) changed their perspective on gays and lesbians after learning that someone close to them was homosexual. See *id.* at 275.

perceive as different, may become even more angry and full of hate.¹⁵ Thus, a backlash could result, eliminating, or at least limiting, any initial advances in equality. On the other hand, the law's approval or allowance of such exclusion may lead individuals in the groups to conclude that they are justified in excluding those people they perceive as different and perhaps even justified in their hatred of people who are different.¹⁶

Two state courts recently confronted these types of issues in the context of the Boy Scouts of America's (BSA) exclusion of homosexuals.¹⁷ The supreme courts of New Jersey and California reached opposite conclusions on the issue of whether the BSA may exclude homosexuals from membership.¹⁸ Both cases involved the statutory interpretation question of whether the Boy Scouts constitute a "business establishment" under the California statute,¹⁹ or a "public accommodation" under the New Jersey statute.²⁰ The New Jersey court held that the BSA was subject to the state statute as a public accommodation, and therefore could not exclude on the basis of sexual orientation.²¹ The court further determined that subjecting BSA to the state anti-discrimination statute would not violate its members' freedom of association rights under the United States Constitution.²² By contrast, the California court held that the Unruh Civil Rights Act did not apply to the BSA, finding that it is not a business establishment, and thus the court did not address

15. See ALLPORT, *supra* note 13, at 469 (citing as a frequently voiced view that "you cannot legislate against prejudice"). The legislative approach could "engender a contempt for law and a disregard for it" first, because people are unlikely to comply with such laws and second, because people consider such legislation to interfere too much with their "right to hate whom they choose." *Id.* at 470.

16. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (citing the lower court decision in the Kansas case, which, in discussing the negative effects of segregation stated, "The impact is greater when [segregation] has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [minority] group."); see also ALLPORT, *supra* note 13, at 469 (concluding that "we can be entirely sure that discriminative laws increase prejudice"); Eskridge, *supra* note 9, at 2415 ("[I]n situations of direct clash [of rights] the state typically cannot remain neutral . . .").

17. See *Curran v. Mount Diablo Council*, 952 P.2d 218 (Cal. 1998); *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999).

18. See *Dale*, 734 A.2d at 1218; *Curran*, 952 P.2d at 238.

19. See CAL. CIV. CODE § 51 (West 1999). This section is also known as the Unruh Civil Rights Act. See *id.*

20. See N.J. STAT. ANN. § 10:5-1 to -42 (West 1999). This section is also known as the Law Against Discrimination. See *id.*

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

22. See *id.* at 1222.

the constitutional issue.²³

While neither opinion discussed issues of state constitutional law, this Article examines the possibilities of using state constitutional law to promote tolerance in society. Such an inquiry is relevant because, unlike decisions by the United States Supreme Court, decisions by state courts do not apply to the entire nation, thus allowing state courts the opportunity "to face closer to home some fundamental values that the public has become accustomed to hav[ing] decided for them by the faraway oracles in the marble temple."²⁴ This aspect may begin to address the possibility that tolerance can be advanced on smaller scales. Additionally, independent analysis of state constitutions by the state courts may serve as laboratories for experimentation.²⁵ States might employ a variety of approaches, perhaps moving away from the traditional dichotomies²⁶ employed by the United States Supreme Court and provide a fresh perspective on these issues. Furthermore, in terms of creating a theory of interpretation, the context involved in cases similar to *Dale* and *Curran* allows courts to eschew typical independent interpretations of state constitutions that place great reliance on

23. See *Curran*, 952 P.2d at 238. Other courts have also considered whether the BSA falls within anti-discrimination statutes when the BSA denies membership to girls or women. See, e.g., *Yeaw v. Boy Scouts of Am.*, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997) (holding that the BSA is not a "business establishment" pursuant to the Unruh Civil Rights Act), *review dismissed*, 960 P.2d 509 (Cal. 1998) (pending decision in *Curran*); *Quinnipac Council, Boy Scouts of Am. v. Commission on Human Rights & Opportunities*, 528 A.2d 352, 357 (Conn. 1987) (BSA is not subject to state public accommodation law). For an example when BSA has denied membership or promotion to atheists, see *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1269 (7th Cir. 1993) (finding the BSA is not a place of public accommodation for purposes of the Civil Rights Act of 1964); *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 261, 262 (Cal. 1998) (finding the BSA is not subject to state civil rights statute.); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385 (Kan. 1995); see also *Review & Outlook: Scouts' Honor*, WALL ST. J., Aug. 6, 1999, at W11 (labeling the above challenges as attacks by "the Three G's: girls, gays and the godless").

24. Justice Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379, 395 (1980); see also Sanford Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 51, 59-63 (Bradley D. McGraw ed., 1985).

25. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., concurring).

26. See Martha Minow, *Speaking and Writing Against Hate*, 11 CARDOZO L. REV. 1393, 1397 (1990) (suggesting "that we cannot assume that we know what to call things, and point[ing] to the phrase 'hate speech,' as a name that already decides how to characterize, analyze, and treat the incidents" and further discussing the need to "dislodge the basic assumption that analysis depends on a series of either/or choices, founded on binary concepts" in the context of free speech claims).

how the language of the state constitution differs from the federal counterpart.²⁷ The context of such cases allows courts to instead examine a variety of sources focusing on how to combat bias and prejudice as well as the particular problems confronting homosexuals, especially gay youths, who are the victims of intolerance.²⁸

Among the issues of state constitutional law, this Article will examine the rights of privacy, freedom of association, equal protection, as well as the requirement of state action in the context of cases like *Dale* and *Curran*. In addition, the Author suggests possible methods for reconciling rights that conflict as a result of independent state constitutional interpretation. Part II discusses the *Dale* and *Curran* cases.²⁹ Next, Part III summarizes current analysis of these constitutional issues by the United States Supreme Court,³⁰ and examines the extent to which state courts have employed independent interpretations of their constitutions.³¹ Finally, Part IV discusses a variety of sources relevant to the conflict of rights involved and urges courts to look to such sources as part of their independent analysis in an effort to eschew the traditional dichotomies.³²

27. See, e.g., *State v. Hunt*, 450 A.2d 952, 965-67 (N.J. 1982) (Handler, J., concurring) (listing seven criteria the court should use in applying a state constitution to protect individual rights). Most of these factors require a finding of a unique aspect of the state constitution, such as its text or history, or of the state itself, such as its traditions or matters of particular local concern. See *id.* But see Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998) (questioning the value of searching for a distinct state identity).

28. See Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1160 (1993) (criticizing the "doctrine of unique state sources" and urging state courts to consider instead "the widest possible [range of] sources" to promote national constitutional discourse). This approach is perhaps analogous to that used by the United States Supreme Court in *Brown v. Board of Education*, in which the Court did not limit itself to the "tangible factors" tending to show equalization of white and black schools, and instead considered "the effect of segregation itself on public education." 347 U.S. at 492.

29. See *infra* Part II.

30. The reader might ask, why discuss the Federal Constitution in an article on state constitutional law? The area of state constitutional law is essentially a type of comparative law study, involving comparisons between state and federal jurisprudence, as well as comparisons among state interpretations. For this reason, analysis of federal interpretation is necessary to illustrate the extent to which state interpretation is independent.

31. See *infra* Part III.

32. See *infra* Part IV.

II. THE DALE AND CURRAN CASES

Dale and *Curran* contained similar facts. Both involved plaintiffs who had participated in the Boy Scouts for a significant period of time (*Dale* for ten years and *Curran* for four years), both plaintiffs had received numerous awards and honors as scouts, and both declared their homosexuality outside of any Boy Scouts function or context.³³ BSA, however, had accepted *Dale's* application to be an Assistant Scoutmaster before he had declared his homosexuality, while *Curran* had applied to attend a BSA National Jamboree after he was featured in a newspaper series on gay teenagers.³⁴ *Dale's* membership was revoked, and *Curran's* application was denied.³⁵ Both plaintiffs alleged that BSA violated state statutory discrimination laws, thus both courts had to determine whether such statutes applied to BSA.³⁶ Finally, the anti-discrimination statutes in both states prohibit discrimination on the basis of sexual orientation.³⁷

In *Dale*, the New Jersey Supreme Court relied on the policy behind the Law Against Discrimination as well as a legislative mandate to interpret the statute broadly to determine that the law applied to the BSA.³⁸ The statute itself states that "[d]iscrimination threatens not only the rights and proper privileges of the inhabitants of the state but menaces the institutions and foundation of a free democratic State."³⁹ In addition, the statute specifically states that it is to be "liberally construed."⁴⁰ Against this statutory

33. See *Curran*, 952 P.2d at 220; *Dale*, 734 A.2d at 1204-05.

34. See *Curran*, 952 P.2d at 221; *Dale*, 734 A.2d at 1204.

35. See *Curran*, 952 P.2d at 221; *Dale*, 734 A.2d at 1204-05. The facts in *Curran* on this point are a little more complicated. After *Curran* had been featured in a newspaper article on gay teenagers, the Executive Director of the Mt. Diablo Council determined that *Curran* was no longer active in the program. See *Curran*, 952 P.2d at 221. Later, *Curran* submitted his application to attend the Jamboree and was told that he was no longer registered as an active member and was therefore ineligible to attend. See *id.* When *Curran* stated that he would apply to be an active adult member, the director told him that BSA would not be able to accept such an application from him. See *id.*

36. See *Curran*, 952 P.2d at 222; *Dale*, 734 A.2d at 1205.

37. See CAL. CIV. CODE § 51 (protecting against discrimination on the basis of sexual orientation by judicial fiat); N.J. STAT. ANN. 10:5-4 ("All persons shall have the opportunity . . . to obtain all the accommodations . . . without discrimination because of . . . affectional or sexual orientation . . ."). See, e.g., *In re Cox*, 474 P.2d 992, 999 (Cal. 1970) (concluding that a business owner may not arbitrarily exclude); *Stoumen v. Reilly*, 234 P.2d 969, 971 (Cal. 1951) (in dictum) (finding a restaurant owner may not exclude homosexuals without showing good cause).

38. See *Dale*, 734 A.2d at 1208.

39. N.J. STAT. ANN. § 10:5-3.

40. *Id.*

backdrop, as well as case law precedent, the court interpreted the term "place of accommodation" in a way that did not require an organization to have a fixed structural facility.⁴¹ The court also held that the BSA is a place of "public accommodation" based on the following factors: BSA engages in broad public solicitation for members, it maintains close relationships with the government and other public accommodations, and it is similar to other recognized public accommodations.⁴²

Since the court held that the public accommodation statute applied to the BSA, it had to address the constitutional defense raised by the BSA.⁴³ The BSA argued that the First Amendment freedom of association protected its members from application of the Law Against Discrimination.⁴⁴ The court relied on United States Supreme Court precedent in its analysis of the two strands of associational rights.⁴⁵ First is the "intimate association" strand, which stems from the Court's rulings in *Roberts v. United States Jaycees*⁴⁶ and *Board of Directors of Rotary International v. Rotary Club of Duarte*.⁴⁷ The Jaycees and Rotary International, both private clubs, denied regular membership to women.⁴⁸ The clubs challenged state public accommodation laws forcing them to admit women, and argued that such application would violate the other members' First Amendment freedom of association right.⁴⁹ The United States Supreme Court recognized the importance of relationships that "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."⁵⁰ Thus, the Court focused on factors such as smallness, selectivity, and seclusion from others as the attributes that "reflect the considerations that have led to an understanding of freedom of association as an intrinsic

41. See *Dale*, 734 A.2d at 1210. But see *Welsh*, 993 F.2d at 1269 (holding that Congress did not intend 42 U.S.C. § 2000a(b) "to include membership organizations that do not maintain a close connection to a structural facility").

42. See *Dale*, 734 A.2d at 1210-13.

43. See *id.* at 1219.

44. See *id.*

45. See *id.*

46. 468 U.S. 609 (1984).

47. 481 U.S. 537 (1987).

48. See *Rotary Int'l*, 481 U.S. at 541; *Roberts*, 468 U.S. at 613.

49. See *Rotary Int'l*, 481 U.S. at 543; *Roberts*, 468 U.S. at 616-17.

50. *Roberts*, 468 U.S. at 619-20.

element of personal liberty."⁵¹ In both *Roberts* and *Rotary International*, the Court concluded that neither club satisfied the factors to show that the relationships among its members were "the kind of intimate or private relation that warrants constitutional protection."⁵² The New Jersey Supreme Court found that the Boy Scouts were comparable to the Jaycees and Rotary International.⁵³ Since troop sizes vary from fifteen to thirty boys plus adult members, the court held that the smallness factor was not present.⁵⁴ As to selectivity, the court found that "any boy between the ages of eleven and seventeen can join," and similar to the facts in *Rotary International*, the BSA "actively [sought] to interest as many boys as possible."⁵⁵ In addition, the court focused on the Boy Scouts' "commitment to ensur[ing] that its membership is 'representative of all of the population.'"⁵⁶ The court concluded that the nature of the relationship involved in a troop is not the type of intimate and private relationship which the First Amendment protects.⁵⁷

As to the second strand of freedom of association, the court analyzed whether forcing the Boy Scouts not to discriminate in their membership on the basis of sexual orientation would infringe on "expressive association" rights.⁵⁸ The court looked to United States Supreme Court precedent that has explained that the Constitution protects expressive association to allow individuals to combine their efforts to pursue other rights guaranteed by the First Amendment.⁵⁹ The Court also stated that while "[f]reedom of association . . . plainly presupposes a freedom *not* to associate⁶⁰ . . . [t]he right to associate for expressive purposes is not, however, absolute."⁶¹ Rather, the Supreme Court, in both *Roberts* and *Rotary International*, critically examined the expressive purpose asserted by the clubs.⁶² In *Roberts*, the Court rejected the argument that

51. *Id.* at 620.

52. *Rotary Int'l*, 481 U.S. at 546; *see also Roberts*, 468 U.S. at 620.

53. *See Dale*, 734 A.2d at 1220-21.

54. *See id.* at 1221.

55. *Id.*

56. *Id.* at 1222.

57. *See id.*

58. *See id.* at 1222-28 (discussing "expressive association" rights).

59. *See Dale*, 734 A.2d at 1222 (citing *Roberts*, 468 U.S. at 622).

60. *Roberts*, 468 U.S. at 623 (emphasis added) (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977)).

61. *Id.*

62. *Rotary Int'l*, 481 U.S. at 548-49 (discussing the purpose of Rotary Clubs); *Roberts*, 468 U.S. at 622-23 (discussing the purpose of BSA).

forcing the Jaycees to grant women regular membership would alter or affect any speech based on the mere fact that under membership rules women are not allowed to vote.⁶³

Similarly in *Dale*, the court critically examined the expressive association asserted by the Boy Scouts.⁶⁴ The Boy Scouts claimed that its Law and Oath express its members' views on homosexuality.⁶⁵ They pointed to the fact that the Boy Scout Law requires members to be "clean."⁶⁶ In addition, in the Boy Scout Oath each scout promises to "keep . . . morally straight."⁶⁷ The court concluded that these words "do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral."⁶⁸ In fact, in its discussion of the facts of the case, the court pointed out that the *Scoutmaster Handbook* instructs the leaders to refrain from discussing sex at all, stating that "boys should learn about sex and family life from their parents, consistent with their spiritual beliefs."⁶⁹ The New Jersey court concluded that "Boy Scout members do not associate to share the view that homosexuality is immoral," and therefore "Dale's expulsion constituted discrimination based solely on his status as an openly gay man."⁷⁰ In addition, the court distinguished the facts involved in *Dale* from those in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.⁷¹ In *Hurley*, the United States Supreme Court held that forcing private parade organizers to include a contingency of gay, lesbian and bisexual descendants of Irish immigrants would "essentially requir[e] [the organizers] to alter the expressive content of their parade."⁷² Notably, the Supreme Court was less scrutinizing of any message of

63. See *Roberts*, 468 U.S. at 628. However, Justice O'Connor suggested an alternative method of analysis in her concurring opinion. She asserted that state regulations be subject to rationality review when the organization affected is a commercial association. See *id.* at 635 (O'Connor, J., concurring). Furthermore, associations should be treated as commercial if its activities are not "predominantly of the type protected by the First Amendment." *Id.* (O'Connor, J., concurring).

64. See *Dale*, 734 A.2d at 1222-28.

65. See *id.* at 1223.

66. *Id.* at 1224. It also requires them to be "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, . . . and reverent." *Id.* at 1223.

67. *Id.* at 1202. The entire Oath is: "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." *Id.*

68. *Dale*, 734 A.2d at 1224.

69. *Id.* at 1203 (quoting the *Boy Scout Handbook*).

70. *Id.* at 1225.

71. 515 U.S. 557 (1995).

72. *Id.* at 572-73.

the parade than it had been of the asserted expressive association asserted by the private clubs in *Roberts* and *Rotary International*.⁷³ In fact, the state court, in *Hurley*, had found "that it was impossible to detect an expressive purpose in the parade."⁷⁴ Nonetheless, the Supreme Court found that the very nature of a parade indicates that the marchers "are making some sort of collective point, not just to each other but to bystanders along the way."⁷⁵ By contrast, the BSA could not show that membership or leadership in the BSA constitutes "a form of 'pure speech' akin to a parade."⁷⁶ Thus, the New Jersey Supreme Court relied on the distinction in *Hurley* that the nature of the conduct of the group was in fact expressive, while the same could not be said of the BSA or leadership in the BSA.⁷⁷

The California Supreme Court in *Curran* held that the BSA is not subject to the Unruh Civil Rights Act,⁷⁸ which applies to "all business establishments of every kind whatsoever."⁷⁹ In contrast to the statutory analysis by the New Jersey court, the *Curran* court employed an unclear and somewhat tortuous consideration of the statute's meaning.⁸⁰ The California court examined the legislative amendments to the statute in an attempt to establish the legislative intent.⁸¹ As originally enacted, the law applied to "places of public accommodation or amusement" and listed ten specific examples.⁸² In 1959, however, the legislature changed the statute to its current language. The court explained that this amendment was in

73. *See id.* at 568-72 (discussing the First Amendment protection given to the message, or "collective point," that is made by a parade). *But cf. Rotary Int'l*, 481 U.S. at 545-47 (holding that the club's "association" did not warrant constitutional protection); *Roberts*, 468 U.S. at 623-29 (noting acceptable limitations on a groups' rights to expressive association when there is a "legitimate" state purpose at issue).

74. *Hurley*, 515 U.S. at 564 (discussing the findings and conclusions of the Supreme Judicial Court of Massachusetts).

75. *Id.* at 568.

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

77. *See id.*

78. CAL. CIV. CODE § 51.

79. *Id.*

80. *See generally Curran*, 952 P.2d 218. In a concurring opinion, Justice Mosk indicates that the majority's analysis is flawed. *See id.* at 252 ("The majority, however, do not engage in identical analysis [to Mosk's] — or, despite their many pages, in any substantial analysis as an alternative."). Mosk agreed with the result — Unruh does not apply to the BSA — but urged the court to overrule *Isbister v. Boys' Club of Santa Cruz*, 707 P.2d 212 (Cal. 1985), and articulate a clear standard for the term "business establishment." *See id.* (Mosk, J., concurring).

81. *See id.*

82. *See id.*

response to appellate court opinions that held that the statute did not apply to a private cemetery, a dentist's office and to a private school.⁸³ Further, the court stated that the legislature "undertook . . . to revise and expand the scope of the then-existing version of section 51."⁸⁴ Despite acknowledgment of the legislative goal to broaden the application of Unruh, the court in *Curran* concluded that the Act does not apply to the BSA.⁸⁵ The court struggled to distinguish the Boy Scouts from the Boys' Club, to which the court had applied the Unruh Civil Rights Act.⁸⁶ In *Isbister v. Boys' Club of Santa Cruz*,⁸⁷ the California Supreme Court relied on the legislature's intent to expand the scope of Unruh to hold that the Act applied to the membership policies of a charitable organization "if the entity's attributes and activities demonstrate that it is the functional equivalent of a classic 'place[] of public accommodation or amusement."⁸⁸ Thus the court in *Isbister* essentially relied on the statutory language of Unruh before its amendment in 1959.⁸⁹ The majority in *Curran* endorsed this legislative intent analysis, but concluded that the Boy Scouts differ from the Boys' Club.⁹⁰ Interestingly, the court did not consider relevant to its legislative intent analysis the fact that attempts by some legislators to specifically exempt the Boy Scouts from the Unruh Act failed passage in committee,⁹¹ even though such attempts were in direct response to the

83. See *id.* (citing *Reed v. Hollywood Prof'l School*, 338 P.2d 633 (Cal. Ct. App. 1959); *Coleman v. Middlestaff*, 305 P.2d 1020 (Cal. Ct. App. 1957); *Long v. Mountain View Cemetery Ass'n*, 278 P.2d 945 (Cal. Ct. App. 1955)).

84. *Curran*, 952 P.2d at 229

85. See *id.* at 239.

86. See *id.* at 232-33 (emphasizing the narrow scope of the *Isbister* holding). Justice Mosk also criticizes the majority for doing "little more than attempt[ing] to distinguish *Isbister*." *Id.* at 252 (Mosk, J., concurring) (emphasis added).

87. 707 P.2d 212 (Cal. 1985).

88. *Curran*, 952 P.2d at 236 (quoting *Isbister*, 707 P.2d at 216 (alteration in original)).

89. See *id.* at 249-50 (Mosk, J., concurring) (criticizing the *Isbister* majority for applying language in the original version of the Unruh Act rather than the current version).

90. See *id.* at 238.

91. See *id.* at 228 n.12 ("[T]he Legislature's failure to enact the proposed bills . . . cannot properly be viewed as a legislative resolution of the issue now before us."). In addition, a further attempt to exempt the Boy Scouts was made after the California Supreme Court's decision; this too failed in committee. See S.B. 1910, 1997-98 Reg. Sess. (Cal.) The proposed amendment stated "business establishment' . . . does not include any voluntary association or not-for-profit organization if the primary activities of the association or organization are programs for minors." *Id.* These exempt associations and organizations include, but are not limited to, the Boy Scouts of America. See *id.*

decision from the lower court.⁹²

The court also justified its holding on the grounds that the BSA is a "charitable, expressive, and social organization . . . whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members."⁹³ Since the Boys' Club is also non-profit and a social organization, the expressive nature of the Boy Scouts seemed to be of greater significance to the court.⁹⁴ In fact, the court elaborates on the "expressive" aspect of the Boy Scouts based on the court's conclusion that its "primary function is the inculcation of values in its youth members."⁹⁵ The court's reliance on the BSA's expressive aspect is very similar to the analysis used to determine whether subjecting the entity to the statute would violate the First Amendment protection of freedom of association.⁹⁶ Thus, the court seemed to consider the first amendment defense within the question of whether the BSA constitutes a business establishment, and relied on any expressive aspect to support the holding that the BSA is not a business establishment.⁹⁷

The methods of analysis used by the courts in both *Curran* and *Dale* reflect the traditional public/private dichotomy involved in the interpretation of public accommodation statutes regarding their scope as well as in the context of evaluating the constitutional defense of freedom of association.⁹⁸ The following section summarizes the traditional analyses in the context of several constitutional issues and suggests how state courts might employ their own constitutions to develop new theories of interpretation that break away from the binary⁹⁹ method of analysis.

92. See *Curran v. Mount Diablo Council*, 195 Cal. Rptr. 325 (Cal. Ct. App. 1983) (holding that *Curran* had stated a cause of action under Unruh), *aff'd*, 952 P.2d 218 (Cal. 1998).

93. *Curran*, 952 P.2d at 236.

94. See *id.*

95. *Id.* at 238.

96. See *supra* notes 44-57 and accompanying text.

97. In fact, concurring Justice Kennard focused on this constitutional question so as to avoid any detailed analysis of the application of the statute. See *Curran*, 952 P.2d at 254-56 (Kennard, J., concurring).

98. See generally *Curran*, 952 P.2d 218 (interpreting the Unruh Civil Rights Act to find that BSA is not a "business establishment" under the Act). *But cf. Dale*, 734 A.2d 1196 (interpreting New Jersey's Law Against Discrimination to find that BSA is a "place of public accommodation").

99. See Minow, *supra* note 26, at 1397; Myhra, *supra* note 5, at 79-80 & n.39 (arguing that an "expansive view of the people who potentially may suffer injury [from hateful speech is] indispensable in considering how to respond to hate incidents").

III. STATE CONSTITUTIONAL LAW ISSUES

Both California and New Jersey have well developed histories of interpreting and applying their state constitutions independently of United States Supreme Court interpretations of the federal Constitution.¹⁰⁰ Nonetheless, neither the *Curran* nor *Dale* courts discussed state constitutional law issues.¹⁰¹ There may be several reasons for this. The parties may not have raised state constitutional law issues;¹⁰² perhaps because both states have anti-discrimination statutory provisions that prohibit discrimination on the basis of sexual orientation.¹⁰³ The lawyers representing Dale and Curran may have decided that it was unnecessary to raise an equal protection claim. As to the constitutional defense of freedom of association raised by the BSA,¹⁰⁴ the lawyers may have thought that the precedent of the United States Supreme Court adequately protected their rights and that the New Jersey Constitution would not have provided any greater protections. In addition, when a state court relies on its state constitution, the court often, but certainly not always,¹⁰⁵ interprets the document in a way that is more protective of rights. Since the New Jersey court found that application of its Law Against Discrimination did not violate the rights of the BSA, it limited its analysis to the federal Constitution;

100. See generally Wesley L. Lane, *Celebrating the 50th Anniversary of the New Jersey Constitution, The 1947 Constitution: A Retrospective*, 7 SETON HALL CONST. L.J. 817 (1997); Stewart G. Pollock, *Celebrating Fifty Years of Judicial Reform Under the 1947 New Jersey Constitution*, 29 RUTGERS L.J. 6735 (1998); *California Constitutional Symposium*, 17 HASTINGS CONST. L.Q. 1 (1989); Jeffrey White, Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 740 (1976) (describing the California Supreme Court as "the birthplace of th[e] new judicial independence").

101. See *Curran*, 952 P.2d at 219. Though the court never reached the constitutional issues, they questioned whether application of the Unruh Civil Rights Act would violate BSA's rights "under the First and Fourteenth Amendments of the federal constitution." *Id.* (emphasis added). The *Dale* court also framed the issue around BSA's First Amendment rights under the federal constitution. See *Dale*, 734 A.2d at 1200.

102. See *State v. Lowry*, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., concurring) (warning that "[a]ny defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution . . . should be guilty of legal malpractice," yet criticizing the majority opinion's reliance on the state constitution to reject United States Supreme Court's precedent); Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 224 (1998) (explaining the importance of raising state constitutional claims).

103. See CAL. CIV. CODE § 51; N.J. STAT. ANN. § 10:5-1 to -49.

104. See *Dale*, 734 A.2d at 1219-28.

105. See, e.g., *State v. Smith*, 725 P.2d 894, 895 (Or. 1986) (holding that the Oregon Constitution does not require *Miranda*-type warnings).

the court was not looking to broaden rights, and thus an analysis of the state constitution was not necessary.¹⁰⁶ This section briefly explains the jurisprudence of constitutional issues involved under both state and federal constitutions.

A. Equal Protection

There are several methods of analysis by which courts may extend equal protection rights to homosexuals.¹⁰⁷ The main avenues are for a court to determine that homosexuals are a "suspect class" or that a fundamental right is at stake.¹⁰⁸ Under either type of analysis, the court then subjects the law or form of discrimination to strict scrutiny.¹⁰⁹ "Strict scrutiny is virtually always fatal to the challenged law."¹¹⁰ Alternatively, a court would simply examine the statute applying a rational basis test to any non-suspect classification.¹¹¹ In contrast to the typical result when the court applies strict scrutiny, "[t]he rational basis test is enormously deferential to the government and only rarely have laws been declared unconstitutional [under] this level of review."¹¹² The following examples reflect each of these approaches.

The United States Supreme Court recently found protection against unequal treatment for homosexuals in a limited context. In *Romer v. Evans*,¹¹³ the Court found that a voter-initiated amendment to the Colorado Constitution (Amendment 2), which repealed state laws prohibiting discrimination on the basis of homosexuality, was unconstitutional.¹¹⁴ The Court's finding that the

106. See Van Cleave, *supra* note 102, at 209-14 (discussing certain methods of state constitutional interpretation that are susceptible to the criticism of being "result-oriented").

107. For a more detailed discussion of equality for homosexuals, see Eskridge, *supra* note 9; Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

108. See Halley, *supra* note 107, at 920-21 (discussing treating homosexuals as a "suspect class"); see also Bernstein, *supra* note 9, at 269 (noting the strengths and weaknesses of "suspect class" and fundamental right arguments).

109. See generally Bernstein, *supra* note 9, at 269. Because courts have generally rejected the "suspect class" analysis with respect to sexual orientation, Bernstein argues that claiming denial of a fundamental interest under the Equal Protection clause would provide the same heightened judicial scrutiny. See *id.*

110. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 529 (1997).

111. See Bernstein, *supra* note 9, at 293.

112. CHERMERINSKY, *supra* note 110, at 530.

113. 517 U.S. 620 (1996).

114. See *id.* at 636.

amendment violated the Equal Protection Clause of the Fourteenth Amendment was not based on a determination that homosexuals constitute a suspect class,¹¹⁵ but on the grounds that Amendment 2 imposed a “disability on a single named group” and lacked a “rational relationship to legitimate state interests.”¹¹⁶ Thus, the Court applied a rational basis test and found that Amendment 2 failed.¹¹⁷ While the Colorado Supreme Court ultimately reached the same result, it did so by holding that the fundamental right to participate equally in the political process required application of strict scrutiny.¹¹⁸ Of course, the Colorado court considered only the Federal Constitution because Amendment 2 was itself part of the state constitution.¹¹⁹ Neither approach taken by the Colorado and United States Supreme Courts involved treating homosexuals as a suspect class. Justice Brennan, however, has written that “homosexuals constitute a significant and insular minority of this country’s population.”¹²⁰ In his opinion dissenting from a denial of

115. One commentator has argued that gay rights might be better furthered in federal courts if equal protection claims are based on fundamental rights rather than suspect classification in order to “suppl[y] the courts with a route to heightened scrutiny.” Bernstein, *supra* note 9, at 293.

116. *Romer*, 517 U.S. at 632.

117. *See id.* This approach is in contrast to that used by the Court 10 years earlier in *Bowers v. Hardwick*, 478 U.S. 186 (1986), where the Court upheld a criminal sodomy law. In *Bowers*, the Court applied a Due Process analysis and found that no fundamental liberty was involved because a right to engage in consensual sodomy is not “deeply rooted in this Nation’s history and tradition,” nor is it “implicit in the concept of ordered liberty.” *Bowers*, 478 U.S. at 194 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), and *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)); *see also* Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1745–47 (1993) (examining the conduct/status dichotomy); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805 (1993).

118. *See Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993), *aff’d*, 517 U.S. 620 (1996).

119. Typically, states that employ the voter initiative method of constitutional change have rather narrow bases for invalidating such amendments. For example, in California, a court may invalidate a voter-initiated constitutional change if the amendment encompasses more than a “single subject” or if it constitutes a constitutional revision rather than an amendment. *See Rachel A. Van Cleave, A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 HASTINGS CONST. L.Q. 95, 129–30 (1993). The California Supreme Court has applied both of these limitations sparingly, invalidating few voter-initiated constitutional changes. *See id.*

120. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari); *see also Watkins v. United States Army*, 875 F.2d 699, 719 (9th Cir. 1989) (stating that “because homosexuals have historically been subject to invidious discrimination, laws which burden homosexuals as a class should be

certiorari in *Rowland v. Mad River Local School District*,¹²¹ Justice Brennan pointed to the fact that "the immediate and severe opprobrium often manifested against homosexuals . . . [makes] members of this group particularly powerless to pursue their rights openly in the political arena."¹²² This analysis, however, has not yet been adopted by the United States Supreme Court. Both the Supreme Court and Brennan focus on the either/or question of whether homosexuals constitute a protected or suspect class, and neither address the question of when the state may and may not treat certain groups of individuals differently from other groups.¹²³

State courts have also fallen prey to this dichotomous reasoning. In interpreting their own constitutions, state courts have held that equal protection provisions extend to homosexuals, albeit in a sometimes circuitous fashion. For example, in *Baehr v. Lewin*,¹²⁴ the Hawaii Supreme Court held that sex is a "suspect category" under the Hawaii Constitution, based on the fact that the state constitution, in contrast to the Federal Constitution, expressly includes "sex" in its equal rights provision.¹²⁵ The court thus held that the state marriage statute, which limited the granting of marriage licenses to opposite-sex couples, must be subjected to strict scrutiny.¹²⁶ Although in *Baehr* the classification was subject to strict scrutiny, the discrimination was based on "sex" rather than sexual orientation,¹²⁷ thus somewhat limiting the potential for relying on this case in other contexts relating to equal protection rights for homosexuals. By contrast, in *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*,¹²⁸ the California Supreme Court reaffirmed that its state equal protection provision protects

subjected to heightened scrutiny under the equal protection clause" and thus distinguishing the court's Equal Protection analysis from the Due Process analysis used in *Bowers*).

121. 470 U.S. 1009 (1985).

122. *Id.* at 1014.

123. *See id.* at 1009.

124. 852 P.2d 44 (Haw. 1993).

125. *See id.* at 60, 67. The court, however, expressly stated that its "holding in this regard is not . . . [t]hat Appellants are a suspect class." *Id.* at 67 n.33 (distinguishing its opinion from the dissent). Nonetheless, the opinion represents greater protection for homosexuals than afforded under the federal Constitution.

126. *See id.* at 67. The court reversed the lower court's dismissal of the plaintiff's complaint and remanded. *See id.* at 68. For a description of subsequent proceedings, see Eckols, *supra* note 11, at 387-88.

127. *See Baehr*, 852 P.2d at 60.

128. 595 P.2d 592 (Cal. 1979).

against discrimination on the basis of sexual orientation.¹²⁹ Application of strict scrutiny, however, depends on a finding of a suspect classification. In *Hinman v. Department of Personnel Administration*,¹³⁰ the court held that a denial of dental benefits to unmarried partners of homosexual state employees did not establish any classification and thus did not violate the equal protection clause of the California Constitution.¹³¹ Therefore, in California, while the state equal protection clause protects against discrimination on the basis of sexual orientation, such discrimination is not subject to strict scrutiny, but rather a less demanding form of review, unless there is a specific classification singling out homosexuals.¹³²

State courts have an opportunity to examine whether their constitutions protect against discrimination on the basis of sexual orientation. Similar to the analysis used by Justice Brennan in *Rowland*, state courts might be able to point to the fact that in 1997, 13.94% of bias-motivated offenses were based on the victim's sexual orientation.¹³³ This statistic would imply that homosexuals are an "insular minority" requiring state constitutional protection. While the federal courts might be hostile to such arguments,¹³⁴ state courts might be more receptive. Aside from looking to statistics and other sources, a state court might rely on the language of its state constitution as a basis for concluding that homosexuals constitute an "insular minority." For example, in *Commonwealth v. Wasson*,¹³⁵ the Kentucky Supreme Court struck down a criminal sodomy law in part because the law violated the state constitution's equal protection provision.¹³⁶ The court relied on the more expan-

129. See *id.* at 597 ("[T]his general constitutional principle [that the state equal protection clause forbids the state from "arbitrarily discriminating against any class of individuals in employment decisions"] applies to homosexuals as well as to all other members of our polity.").

130. 213 Cal. Rptr. 410 (Cal. Ct. App. 1985).

131. See *id.* at 416.

132. Cf. *Gryczan v. Montana*, 942 P.2d 112, 126-27 (Mont. 1997) (Turnage, C.J., dissenting) (arguing that rather than strike the criminal sodomy law on the grounds that it violates the right to privacy, the court should have relied on equal protection analysis and found that the classification had no rational basis, even though the statute specifically singled out sexual intercourse between two persons of the same sex).

133. See U.S. DEPT OF JUSTICE, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS 60-61 (1997).

134. See Bernstein, *supra* note 9, at 278; Thomas B. Stoddard, *Lesbian and Gay Rights Litigation Before a Hostile Federal Judiciary: Extracting Benefit from Peril*, 27 HARV. C.R.-C.L. L. REV. 555, 558 (1992).

135. 842 S.W.2d 487 (Ky. 1992).

136. See *id.* at 500.

sive language of the state provision,¹³⁷ as compared to the federal counterpart,¹³⁸ and concluded that “[a]ll are entitled to equal treatment, unless there is a substantial governmental interest, a rational basis, for different treatment.”¹³⁹ The court went on to critically examine the justifications for the separate classification and rejected them as “simply outrageous.”¹⁴⁰ Thus, although the court employed language indicating that it was using a rational basis test,¹⁴¹ it actually scrutinized the governmental purpose carefully. In *Wasson*, the court appeared to be less concerned with the traditional dichotomy of whether or not a suspect class was before them, than with the legitimacy of the governmental interests used to justify treating anyone differently. The *Wasson* court’s discussion of the right to privacy, discussed below, represents an even better example of moving away from either/or questions and how to consider a variety of sources.

B. Privacy

Another avenue for advancing homosexual rights has been reliance on a right of privacy in order to defeat state laws criminalizing sodomy.¹⁴² In *Bowers v. Hardwick*,¹⁴³ the Supreme Court did not discuss a right to privacy, but folded this claim into its discussion of the due process argument.¹⁴⁴ Like the United

137. “All men, when they form a social compact, are equal,” and “absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority.” KY. CONST. §§ 2–3; see also John Devlin, *Constructing an Alternative to “State Action” as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 839–41 (1990) (discussing state equality provisions in the context of analyzing whether state action is required under state constitutions). See generally Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985) (discussing the variety of language used in state constitutions to secure equality).

138. “[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

139. *Wasson*, 842 S.W.2d at 500.

140. *Id.* at 501.

141. See *id.* at 500.

142. For further discussion of this issue, see Ron Buckmire, *Narrative and Jurisprudence in State Courts: The Example of Constitutional Challenges to Sex Conduct Regulation*, 60 ALB. L. REV. 1633 (1997); Nan Feyler, *The Use of the State Constitutional Right to Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. REV. L. & SOC. CHANGE 973 (1986).

143. 478 U.S. 186 (1986).

144. See *id.* at 191–92. In contrast to the majority’s focus on whether there is a right to engage in homosexual sodomy, the dissent stated that the real issue in the case is about “the right to be let alone.” *Id.* at 199 (Blackmun, J., dissenting) (quoting

States Constitution, the Kentucky Constitution does not contain an express right of privacy. Nonetheless, the court in *Wasson* determined that the state constitution protects such a right.¹⁴⁵ In support of its conclusion, the court relied in part on a theory typical of independent interpretation.¹⁴⁶ The court looked to the history of the Kentucky Constitution, as well as to the text of the constitution, which differed from the United States Constitution, to support a right of privacy violated by the state sodomy law violated.¹⁴⁷ The court employed another of Justice Handler's criterion in examining the debates surrounding the Kentucky Constitution to find that it "express[es] protection of individual liberties significantly greater than the selective list of rights addressed by the Federal Bill of Rights."¹⁴⁸ The court, however, supplemented this traditional method of state constitutional analysis with citations to non-legal sources such as John Stuart Mill, a nineteenth century economist and philosopher.¹⁴⁹ In fact, *Wasson* is cited by commentator Kahn as an example of a state court relying on more than simply the uniqueness of the state or the state constitution.¹⁵⁰

Aside from analysis of the right of privacy in the specific context of litigation,¹⁵¹ this Article queries whether it might be possible for state courts to consider other aspects of privacy impacted by allowing the Boy Scouts to exclude individuals on the basis of sexual orientation. For example, masked by the legal facts set out in the opinion of *Bowers*, is the story told by Michael Hardwick in which he recounts the events leading up to his arrest for violation of the

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

145. *Wasson*, 842 S.W.2d at 492.

146. *See id.* at 492-99.

147. *See id.*

148. *Id.* at 494.

149. *See id.* at 496 (citing *Commonwealth v. Campbell*, 117 S.W. 383, 386 (Ky. 1909) (quoting at length John Stuart Mill's ON LIBERTY)).

150. *See Kahn, supra* note 28, at 1153 n.25.

151. Other examples of state courts relying on their state constitution to overturn sodomy laws include *Gryczan v. State*, 942 P.2d 112, 121-22 (Mont. 1997) (relying on an express provision protecting the right to privacy in Declaration of Rights in Montana's constitution to subject the statute to strict scrutiny) and *Campbell v. Sundquist*, 926 S.W.2d 250, 260-61 (Tenn. Ct. App. 1996) (finding the Homosexual Practices Act unconstitutional based on state's constitution). The right of privacy also arose in the context of same-gender marriage. The Hawaii Supreme Court rejected the argument using an analysis similar to the United States Supreme Court in *Bowers*: The right to a same-sex marriage is not "implicit in the concept of ordered liberty." *Baehr*, 852 P.2d at 57; *see also Eckols, supra* note 11, at 383-93 (describing considerations of the right to privacy and same-gender marriage by other state courts).

sodomy law, and reveals a specific effort by the officer involved¹⁵² to “search out and expose homosexuals.”¹⁵³ Similarly, the facts in *Wasson* illustrate how the mere existence of the law against sodomy prompted the police to orchestrate an undercover operation¹⁵⁴ for the purpose of “lur[ing] homosexuals into violations of law.”¹⁵⁵ In addition to how this reflects on law enforcement and allocation of resources,¹⁵⁶ this type of activity also raises concerns about the pursuit of individuals based on sexual orientation, which is very similar to the witch hunts that have followed the military’s “Don’t Ask, Don’t Tell, Don’t Pursue” policy regarding homosexuals.¹⁵⁷

The Web site for Servicemembers Legal Defense Network (SLDN) documents numerous invasions of privacy in furtherance of an attempt to ferret out homosexuals in the military.¹⁵⁸ In addition to invasions of privacy, service members who have complained about harassment they have suffered have themselves been the focus of investigations.¹⁵⁹ Rather than “live[] in constant fear of being ‘found out’” many qualified service members have resigned.¹⁶⁰

152. See PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 392–97 (1988).

153. Eskridge, *supra* note 9, at 2425 (describing efforts by state and federal governments in the 1950s to regulate homosexual activity and referring to *Bowers* as the last in line of court decisions criminalizing defendants for their deviant sexual activity).

154. See *Wasson*, 842 S.W.2d at 488.

155. Eskridge, *supra* note 9, at 2425.

156. See Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 *THE ANNALS* 157 (1967), reprinted in *THE CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 165 (Sanford H. Kadish & Stephen J. Schulhofer eds., 6th ed. 1995) (“To obtain evidence, [of consensual homosexual conduct] police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution.”); see also *Bielicki v. Superior Court*, 371 P.2d 288, 289 (Cal. 1962) (describing how a police officer used a pipe running through the ceiling to observe homosexual conduct inside a fully-enclosed stall of a pay toilet).

157. See Servicemembers Legal Defense Network, *Conduct Unbecoming: The Fifth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue”* (Mar. 15, 1999) <<http://www.sldn.org/reports/fifth/>> [hereinafter *Conduct Unbecoming*].

158. See Servicemembers Legal Defense Network, *The Sole National Legal Aid and Watchdog Organization That Assists Servicemembers Hurt By the Don’t Ask, Don’t Tell, Don’t Pursue Policy* (last modified Aug. 31, 1999) <<http://www.sldn.org>> (describing, for example, how a Navy psychiatrist turned in a corporeal after he asked a question about homosexuality, and how a Cadet’s diary and three years worth of e-mail messages were seized to support allegations that she was a lesbian).

159. See *id.* (noting that a private was accused of being a lesbian after reporting that she was nearly raped).

160. Jill Szymanski, *A Disservice to Those Serving Honorably*, *SAN DIEGO UNION-TRIB.*, Mar. 19, 1999, at B-11. In 1998, 414 people were dismissed from the Air Force due to their homosexuality. See *Air Force Witch Hunt*, *ST. LOUIS POST-DISPATCH*, Feb. 4,

based on equal protection or right of privacy grounds. State action involves "the essential dichotomy . . . between deprivation by the State, subject to [constitutional] scrutiny under its provisions, and private conduct . . . against which the Fourteenth Amendment offers no shield."¹⁶⁵ Thus, the binary of private action/state action is entrenched in the traditional analysis of the state action requirement. A number of state courts have determined that their state constitutions do not require the analysis used by the United States Supreme Court and have thus applied state constitutional provisions to entities that the United States Supreme Court would exempt.¹⁶⁶ The principal methods used by state courts are those listed in Justice Handler's opinion in *State v. Hunt*.¹⁶⁷ For example, in finding that the equal protection clause of the California Constitution applied to the Pacific Telephone and Telegraph Company (PT&T), the California Supreme Court relied on the textual differences between the state provision and the parallel federal provision.¹⁶⁸ Specifically, the court concluded that the California Constitution "contains no such explicit 'state action' requirement."¹⁶⁹ Despite the lack of an express state action requirement, the court fell into the trap of binary analysis and simply expanded the definition of state action.¹⁷⁰ The court concluded that the state equal protection provision applied to PT&T based on the company's status as "a privately owned public utility, which enjoys a state-protected monopoly or quasi-monopoly."¹⁷¹ In a later case, the California Supreme Court, employing the same dichotomy, determined that the state constitutional right of privacy "creates a right of action against private as well as government entities."¹⁷² Again, using traditional methods of state constitutional interpretation, the court relied first on the fact that the California Constitution contains an express right of privacy,¹⁷³ and second on the arguments

165. CHEMERINSKY, *supra* note 110, at 387 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974)).

166. See *infra* notes 168-81.

167. 450 A.2d 952, 965-67 (N.J. 1982); see also *supra* note 27.

168. See *Gay Law Students*, 595 P.2d at 598.

169. *Id.* at 598. The California provision states, "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." CAL. CONST. art. I, § 7(a). By contrast, the federal provision declares, "Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.

170. See *Gay Law Students*, 595 P.2d at 599.

171. *Id.* at 598-99.

172. *Hill v. NCAA*, 865 P.2d 633, 644 (Cal. 1994).

173. "All people are by nature free and independent and have inalienable rights.

This Article does not contend that the Boy Scouts are engaging in tactics similar to those used by the military to find and dismiss homosexuals. It is nonetheless important to raise the point that if the law allows BSA to exclude homosexuals, a possibility exists that the BSA or its members will attempt to actively identify homosexuals and to use ways that may impact on the privacy rights of such individuals. Dale's and Curran's statements revealing their homosexuality were both published in newspapers.¹⁶¹ Chuck Merino, founder and former leader of a Boy Scout Explorer Troop, however, was dismissed by the Boy Scouts after he spoke at a community meeting and revealed his homosexuality.¹⁶² One commentator noted, "How word of Merino's low-key comment got to the Scouting hierarchy is unclear. But without so much as questioning him, the Scouts sent a letter to Merino immediately banning him from any role with the Explorers."¹⁶³ Consistent with the approach that courts should consider a variety of sources in deciding how to interpret state constitutions, it is important for courts to understand the potential impact of a decision involving the exclusion of homosexuals. This is especially true where permission to exclude may encourage infringements on individual privacy similar to the effect the military's policy on gays has had.¹⁶⁴

C. State Action

The doctrine of state action provides a major hurdle to raising state constitutional claims against BSA's exclusion of homosexuals

1999, at B6. In 1997, SLDN documented 563 violations of the "Don't Ask, Don't Tell" policy. See Andrew Sullivan, *Don't Ask, Don't Tell' Policy Showing Grim Results*, HOUS. CHRON., Apr. 20, 1998, at A19. SLDN also documented over 400 incidents of anti-gay harassment in 1998, an increase of 120% over the prior year. See *Conduct Unbecoming*, supra note 157.

161. See *Curran*, 952 P.2d at 220-21; *Dale*, 734 A.2d at 1204-05.

162. Merino's story is recounted in 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, 101 n.274 (1995).

163. *Id.* (citing Tony Perry, *Landmark Case Pits Gay Officer Against Boy Scouts*, L.A. TIMES, Jan. 11, 1993, at A24).

164. A possible rejoinder to this statement is that courts should consider that a prohibition on exclusion may discourage the beneficial activity of forming Boy Scout groups. However, such an argument lacks any support, unlike the support provided by the effect of the "Don't Ask, Don't Tell" policy. Analogously, the court's holding in *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805) (Livingston, J., dissenting), reproduced in JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 20-24 (3d ed. 1993), did not discourage people from hunting foxes as predicted by the dissent.

contained in the ballot pamphlet of the election in which the amendment was approved.¹⁷⁴ While the court held that the right of privacy did not include a state action requirement, the court nonetheless recognized and perpetuated the dichotomy, but determined that the unique aspects of the California Constitution dictated a different result as to privacy rights.¹⁷⁵

Similarly, the New Jersey Supreme Court has held that its state constitution is not limited to federal precedent.¹⁷⁶ In *New Jersey v. Schmid*,¹⁷⁷ the court concluded that the state constitutional protection of free speech does not require "state action" such that a private university could not prohibit the distribution of political leaflets on its grounds.¹⁷⁸ Initially, the method of analysis was typical. The court relied on the more expansive language in the state constitution,¹⁷⁹ and on the fact that this provision was modeled on other state constitutions, to determine that the state action requirement was less restrictive than under the Federal Constitution.¹⁸⁰ However, the court in *Schmid* then set out a standard that moved away from the customary binary analysis and instead set out factors by which the court could balance the competing interests of free speech and private property rights.¹⁸¹ Thus, while the New

Among these [is] . . . privacy." CAL. CONST. art. I, § 1.

174. See *Hill*, 865 P.2d at 648-49.

175. See *id.* at 656-57. The Texas Supreme Court employed a similar method of analysis, but had a different result in *Republican Party v. Dietz*, 940 S.W.2d 86 (Tex. 1997), where the court held that conduct by the Republican Party of Texas (RPT) did not amount to state action. See *id.* at 92. Specifically, the court held that when RPT denied the Log Cabin Republicans of Texas (LCR), who support equal rights for gay and lesbian individuals, a booth at the Republican Convention, no constitutional violation occurred because the RPT is not a state actor. See *id.* at 92-93. The Texas Supreme Court examined the text and history of the Texas Constitution, which protected only against state actors. See *id.* at 91. The court further held that no state action was involved in this case after considering federal precedent. See *id.* at 92. But see *id.* at 95 (Spector, J., concurring) (pointing out that the majority failed to recognize the reasons for the federal state action requirement, namely the concerns "of federalism and separation of powers within the federal government" and suggesting that those issues may not be present in the context of a state constitutional protection).

176. See *New Jersey v. Schmid*, 423 A.2d 615, 629-30 (N.J. 1980).

177. 423 A.2d 615 (N.J. 1980).

178. See *id.* at 633.

179. Compare N.J. CONST. art. I, para. 6 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."), with U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

180. See *Schmid*, 423 A.2d at 627-28.

181. See *id.* at 630. The considerations listed by the court are:

Jersey court used a typical method of examining its constitution, it sought to expound a theory of state action in the context of free speech that avoided the traditional dichotomies.

The state action requirement in the context of a constitutional challenge to the BSA's exclusion of homosexuals can work to give the BSA an automatic advantage, even though such a case would involve a clash of constitutional norms.¹⁸² Where an individual claims an equal protection or right of privacy violation, both of which are constitutionally protected,¹⁸³ and the BSA responds with a constitutional defense of freedom of association, the traditionally narrow view of state action would likely result in an explicit holding that no state actor has infringed on the individual's right to equal protection or privacy, and an implicit finding that to hold otherwise would impinge on the constitutional rights of BSA members, which would involve the state. That is, forcing BSA not to discriminate against homosexuals would violate its members' rights of freedom of association, and no one would doubt that state action was present. Yet this requirement is not present when the law allows BSA to exclude such individuals. Thus, the doctrine of state action fails to take into account any possibility that the state has acted when it "render[s] one group triumphant."¹⁸⁴ My point in

(1) the nature, purposes, and primary use of such private property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.

Id. The court applied this standard in an effort to "continue to explore the extent of our State Constitutional right of free speech." *New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 771 (N.J. 1994).

182. See Eskridge, *supra* note 9, at 2415.

183. However, Erwin Chemerinsky points out that "[i]n a sense, to speak of private parties infringing constitutional rights begs the critical question of whether such rights exist against private infringements." CHEMERINSKY, *supra* note 110, at 389 n.17. Chemerinsky also comments in the text of his book: "The point here is that these are values widely accepted as important throughout society and the state action doctrine means that the Constitution does not limit their private infringement." *Id.*

184. Eskridge, *supra* note 9, at 2415 n.16 (discussing in the context of conflicts between religious and gay groups, criticizing the approach that requires one group to win while the other loses and suggesting that "courts can create structures and procedures of cooperation that are law-sustaining"); see also Julian N. Eule, as completed by Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1545 (1998) ("[S]ome form of state action is nearly always present."); Harold W. Horowitz & Kenneth L. Karst, *Reitman v. Mulky: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 55 ("[T]he state can be said to authorize all conduct that it does not prohibit . . ."); Lawrence, *supra* note 5, at 445 ("Although the origin of state action is textual, counter-

criticizing the state action requirement is not to advocate for its abolition,¹⁸⁵ but rather to suggest that state courts might rely on other sources to define the parameters of state action,¹⁸⁶ in an effort to escape the “traditional, bipolar conceptualization”¹⁸⁷ of the public/private distinction.¹⁸⁸ Commentator John Devlin has proposed a theory for state constitutions that largely eschews the public/private dichotomy.¹⁸⁹ Devlin’s proposal carves out “zones of personal autonomy” that are to remain free from applications of constitutional guarantees.¹⁹⁰ This proposal would allow broader application of constitutional norms than the traditional state action requirement. However, even Devlin’s proposal suffers from the defect of creating another dichotomy. His proposal specifies that state courts, in expanding the application of constitutional rights, should limit such expansions “only [to] the most important and fundamental state constitutional rights,” and further that courts should bind private actors if rights “are violated in some important respect.”¹⁹¹ While the second half of this limitation would have to be determined in the context of the facts of the case, the first aspect, focusing on fundamental rights, would require courts to establish a hierarchy of rights, which could well depend upon how the court defines the right. In *Bowers*, for example, the United States Supreme Court simply framed the right as the right to engage in homosexual sodomy to avoid a serious analysis of the privacy concerns in-

vailing values of privacy, freedom of association, and free speech all have been used to justify the rule’s exculpation of private racism.”)

185. See Eule, *supra* note 184, at 1544–45. As the title suggests, the author urges caution regarding the emerging trend of imposing constitutional norms on private individuals and entities. See *id.* at 1537.

186. See Devlin, *supra* note 137, at 885–86 (proposing the following factors for an alternative approach: that state constitutional rights be imposed on private actors only to the extent such actors are “wielding impersonal power,” that “only the most important and fundamental state constitutional rights” be so imposed, and that state courts balance the competing interests rather than view the plaintiff’s rights “in a vacuum”).

187. Myhra, *supra* note 5, at 80 n.39.

188. For additional criticisms of the public/private debate, see Charles L. Black, Jr., *The Supreme Court, 1966 Term — Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 95 (1967) (describing state action jurisprudence as a “conceptual disaster area”); Harold W. Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957) (suggesting the futility of a meaningful distinction between private and state action); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351 (1982).

189. See Devlin, *supra* note 137, at 884.

190. *Id.* at 885.

191. *Id.*

volved.¹⁹² The third factor in Devlin's proposal involves a balancing of the competing rights.¹⁹³ This aspect of the proposal would require courts to focus on the "underlying issue" involved in such cases.¹⁹⁴ Part IV of this Article suggests additional types of information state courts might consider when balancing the competing rights.

IV. CONCLUSION: SOURCES TO SUPPORT DEPARTURES FROM THE TRADITIONAL DICHOTOMIES

The discussion in this Article has revolved around the notion that independent interpretation of state constitutions offers an opportunity for state courts to avoid the narrowing effect that traditional either/or choices have on analyses of competing claims. In addition, this Article has suggested at several points that state courts might give greater legitimacy to their new and fresh theories by looking to sources beyond the different textual or historical aspects of their constitutions, or other examples of state uniqueness. In the context of BSA's exclusion of homosexuals and the competing claims involved, state courts should consider the developments in the theory of "intergroup contact,"¹⁹⁵ which suggests a possibility for reducing prejudice. In addition, courts should generally consider the unique concerns confronting homosexuals and gay youth in particular.

Justice Handler's concurring opinion in *Dale* reflects refreshing sensitivity to some of the issues specific to homosexuals. First, he recognized the "confluence of status and expression when both relate to the speaker's sexual orientation."¹⁹⁶ He cited law review articles that argue when homosexuals "come out" they do more than simply speak, they also reveal their identity.¹⁹⁷ Justice Han-

192. See *Bowers*, 478 U.S. at 190.

193. See Devlin, *supra* note 137, at 886.

194. Lawrence, *supra* note 5, at 446 (referring to Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 306 (1989)).

195. ALLPORT, *supra* note 13, at 281.

196. *Dale*, 734 A.2d at 1238 (Handler, J., concurring); see also Eckols, *supra* note 11, at 379-82 (discussing homosexual identity in the context of same-sex marriage).

197. See *Dale*, 734 A.2d at 1238 (Handler, J., concurring) (citing Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 468 (1998) ("Self-realization . . . is what speech (including expressive activity) makes possible."); Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993) ("Self-identifying speech does not merely reflect or communicate one's identity; it is a major factor in

dlar even quoted the ACT UP slogan, "I am out, therefore I am."¹⁹⁸ In addition, Justice Handler considered social science sources to dismiss, as based on groundless stereotypes, BSA's assertions that exclusion of homosexuals was consistent with its purpose of encouraging the moral development of its members¹⁹⁹ and to counter the myth that homosexuals are more likely to molest children.²⁰⁰ In addition to dismissing the stereotypes raised by BSA, Justice Handler used these sources to bolster the New Jersey Legislature's strong interest in prohibiting sexual orientation discrimination.²⁰¹

Because both James Dale and Timony Curran were young adults when the BSA excluded them upon their "coming out," I urge state courts to consider the following issues confronting gay youth. Gay youth represent about 28% of the dropout rate in public schools.²⁰² About one-third of the nearly 5000 annual suicides by adolescents are committed by young gays and lesbians.²⁰³ In one study, 40% of the 221 gay youth questioned reported having attempted suicide at least once.²⁰⁴ Attempts to account for these statistics suggest that "societal condemnation of homosexuality [means that] growing up gay or lesbian often has a negative impact on one's psychological development. [M]any gay and lesbian youth . . . experience adolescence characterized by isolation, fear, and emotional distress."²⁰⁵ In fact, it was at a conference at Rutgers Uni-

constructing identity.")).

198. *Id.*

199. See *id.* at 1242 (citing Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & SEXUALITY 133, 134 (1991) (relying on social science data to debunk "longstanding cultural myths and stereotypes that depict lesbians and gay men as immoral, criminal, sick, and drastically different from what most members of society would consider 'normal'")).

200. See *id.* at 1243 (citing Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 44 (1994) (stating that most child abusers are heterosexuals); David Newton, *Homosexual Behavior and Child Molestation: A Review of the Evidence*, 13 ADOLESCENCE 29 (1978)).

201. See *id.* at 1239.

202. See Armstrong, *supra* note 8, at 77.

203. See *id.* at 75 (citing Andrew Kurtzman, *Gay Teens Harassed in New York Schools: Advocates Say Homophobia Is the Last Form of Intolerance Allowed to Flourish*, ATLANTA J. & CONST., May 5, 1992, at D6); Scott L. Hershberger et al., *Predictors of Suicide Attempts Among Gay, Lesbian, and Bisexual Youth*, 12 J. ADOLESCENT RES. 477, 477 (1997).

204. See Hershberger et al., *supra* note 203, at 481, 492.

205. Arnold H. Grossman & Matthew S. Kerner, *Self-Esteem and Supportiveness as Predictors of Emotional Distress in Gay Male and Lesbian Youth*, 35 J. HOMOSEXUALITY 25, 35 (1998); see also Ken Corbett, *Cross-Gendered Identifications and Homosexual*

versity addressing “the unique problems faced by homosexual teenagers struggling to come to terms with their sexual orientation, including an alarmingly high incidence of suicide attempts,” that James Dale spoke of his own experiences as a gay youth.²⁰⁶ The leading stressors accounting for these statistics have been identified as the “awareness of [homosexual youth of] their homoerotic attractions,” the “disclosure of [their] sexual orientation” to others, especially where they have experienced rejection following such disclosure, and the “victimization provoked by their sexual orientation.”²⁰⁷ Thus, homosexual youth, overall, are in great distress. A critical aspect of this distress may be the extent to which homosexual teenagers are supported, or at least not excluded, by those groups or individuals whom the teenager considers important to his or her life.²⁰⁸ Courts considering whether to allow an entity like BSA to exclude homosexuals should take into account the findings of studies such as these,²⁰⁹ much the same way the Supreme

Boyhood: Toward a More Complex Theory of Gender, 68 AM. J. ORTHOPSYCHIATRY 352, 353 (1998) (describing the developmental problems boys may face due to the traditional fixed definition of gender by noting that “boys are made anxious when characterized as feminine, or when they feel themselves to be outside the bounds of traditional masculinity”).

206. *Dale*, 734 A.2d at 1239 n.4 (Handler, J., concurring). From this conference an interview with Dale was published in a newspaper that made its way to BSA authorities. *See id.*

207. Hershberger et al., *supra* note 203, at 479–80. 17% of the 221 homosexual youths questioned reported that they had been physically assaulted and 80% had been the victims of verbal insults. *See id.* at 480–81.

208. While the Grossman & Kerner study indicates that supportiveness can be considered an unimportant factor, the authors call for further research on this issue, with specific focus on the “type of support, e.g., emotional, social, and from designated people, e.g., parents, friends, [and] teachers.” Grossman & Kerner, *supra* note 205, at 37.

209. Somewhat ironically, it seems that the Boy Scout philosophy embodied in the Scout Oath and Law helped to equip James Dale with the resilience necessary to overcome the struggles listed above. He stated,

I believed that the Scout Oath stood for my commitment to live an honorable life, to set high standards for myself, and to do my best to serve others. In my more than twelve years as a member of BSA, I strove never to do anything inconsistent with the values embodied in the Scout Oath As I grew . . . older, my commitment to Scouting deepened. Scouting . . . taught me how to deal with the ethical choices I encountered as a teenager.

Dale, 734 A.2d at 1226–27; *see also* David Rakoff, *The Way We Live Now: 8-22-99; Questions for James Dale: Camping Lessons*, N.Y. TIMES, Aug. 22, 1999, § 6 (Magazine), at 17 (Dale stated: “I was always picked on a lot in school, but the Boy Scouts was a community that accepted me, welcomed me, gave me positive reinforcement.”); Szymanski, *supra* note 160, at B-11. In discussing her decision to resign from the Navy due to her sexual orientation, the author states, “I held the Navy’s Core Values of honor, courage and commitment dear to my heart — and still do. The Navy taught me that

Court examined the impact of segregated education in *Brown v. Board of Education*.²¹⁰

In addition to the issues facing homosexual youth, state courts should also consult studies regarding the theory of "intergroup contact."²¹¹ Subsequent studies have summarized Allport's theory as a prediction that intergroup contact will "lead to reduced intergroup prejudice if . . . the contact situation meets four conditions: (1) equal status between the groups in the situation, (2) common goals [among those in the group], (3) no competition between groups, and (4) authority sanction for the contact."²¹² The basic idea is that if individuals from different racial groups interact within the above parameters, prejudice will be reduced, both within the contact group as well as with other people the individuals come into contact with later on. While a number of studies conclude that Allport's theory is not supported by sufficient empirical evidence,²¹³ others suggest that these studies are faulty.²¹⁴ However, certain types of intergroup contact provide significant support for the theory.²¹⁵ Additional studies also indicate support for the theory, with some refinements,²¹⁶ especially where sexual orientation differences displace racial differences.²¹⁷ Herek and Capitano

courage that gives us the moral and mental strength to do what is right, even in the face of adversity." *Id.*

210. *Brown*, 347 U.S. at 493-94.

211. Originally espoused by Gordon W. Allport, in his book *THE NATURE OF PREJUDICE*, *supra* note 13, at 281.

212. Thomas F. Pettigrew, *Generalized Intergroup Contact Effects on Prejudice*, 23 *PERSONALITY & SOC. PSYCHOL. BULL.* 173, 173 (1997); see also Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 *ANN. REV. PSYCHOL.* 65, 66-67 (1998) [hereinafter Pettigrew, *Intergroup Contact Theory*] (elaborating on each of the four requirements); Christopher B. Smith, *Back to the Future: The Intergroup Contact Hypothesis Revisited*, 64 *SOC. INQUIRY* 438, 438 (1994) (discussing the four requirements set forth by Allport).

213. See Donna M. Desforges et al., *Effects of Structured Cooperative Contact on Changing Negative Attitudes Toward Stigmatized Social Groups*, 60 *J. PERSONALITY & SOC. PSYCHOL.* 531, 531-32 (1991) (citing studies indicating how narrow the parameters of Allport's theory are); Adalberto Aguirre, Jr. & Manuel Barajas, *Intimate Social Contact, Cultural Proximity, and Prejudice Toward Mexican-Origin Persons: A Modified Application of Contact Theory 4-5* (1999) (unpublished manuscript, on file with the *Stetson Law Review*) (citing studies that show that contact does not overcome prejudice based on status differences).

214. See Smith, *supra* note 212, at 440-42.

215. See Pettigrew, *Intergroup Contact Theory*, *supra* note 212, at 67-68 (citing, for example, studies of the Merchant Marines after desegregation and studies comparing desegregated public housing with segregated public housing).

216. See Smith, *supra* note 212, at 453.

217. See Herek & Capitanio, *supra* note 13, at 422.

concluded that “[h]eterosexuals who had experienced interpersonal contact with gay men or lesbians expressed significantly more favorable general attitudes toward gay people than heterosexuals without contact.”²¹⁸ They surmise that the results of their study, compared to results of studies of interracial contact, indicate more positive attitudes due to the fact that homosexuality is often a concealable stigma.²¹⁹ The significance of the concealable stigma means that a heterosexual who is friends with a homosexual has probably “directly discussed homosexuality . . . and consequently has acquired greater insight and empathy for their situation.”²²⁰ By contrast, “a White person can have a Black friend but never discuss issues related to race in any depth [Thus, the White person] might still retain negative stereotypes and attitudes toward African Americans as a group.”²²¹ Apart from the likelihood that the heterosexual will discuss homosexuality with the gay friend (after all, Boy Scouts are not to discuss within their groups any issues relating to sex) the fact that the stigma is concealed means that the homosexual “is evaluated on the basis of factors apart from her or his stigmatized status.”²²² Essentially, this indicates that if prejudice and intolerance are based, in large part, on ignorance and fear,²²³ where otherwise intolerant, or less tolerant, people get to know a member of a stigmatized group in a context where the stigma does not create barriers,²²⁴ upon learning of the stigma, such individuals are likely to reevaluate their prior attitudes about, in this case, homosexuals. Thus, while the social science evidence regarding the accuracy of the intergroup contact theory may be

218. *Id.* at 420.

219. *See id.* at 422.

220. *Id.*

221. *Id.*

222. *Id.* at 412. The concealable status factor may also address another criticism of Allport's theory. One parameter is that equal status exists within the context of the intergroup contact; however, some commentators have argued that this is impossible with a situation where there is no equal status. *See Pettigrew, Intergroup Contact Theory, supra* note 212, at 66. If the stigma is concealable, there is a greater likelihood that the individuals in the group situation are equal both coming into and within the situation.

223. *See supra* notes 8, 10.

224. *See Herek & Capitanio, supra* note 13, at 412.

When majority group members interact with someone who has a readily apparent stigma, they are likely from the outset to encode information about that person in terms of her or his minority status. Their preexisting attitudes and beliefs about the stigmatized group are likely to influence their evaluations of the individual exemplar. . . .

Id.

inconclusive when the stigma is race, the fact that homosexuals can conceal their identity demonstrates that where heterosexuals have close contact with homosexuals who are "passing"²²⁵ and the other parameters of Allport's prediction are present, such contact results in significantly positive attitudes about homosexuals, as compared to the attitudes of heterosexuals who have not had such contact.

Such consideration can aid state courts in their efforts to give meaning to their state's constitutional provisions, beyond an examination of only the text, history or other unique factors, as Paul Kahn urges.²²⁶ It is interesting that Justice Handler first specifically articulated the unique factors a state court should consider in interpreting its state constitution,²²⁷ and his opinion in *Dale* serves as a prime example, in this Article, of the relevance and importance of courts looking to a variety of sources when resolving these types of conflicts. My proposal is simply that state courts put this idea together with the objective of abandoning the traditional dichotomies and replacing them with a balancing that considers the potential impact of the result as well as the significance of the interests at stake which do not fit into one of the traditional either/or categories. Study of such opposites only serves to stifle and narrow analysis rather than to advance it.

225. However, concealing one's sexual orientation is not without its costs. James Dale stated that "he lived a double life, while in high school, pretending to be straight while attending military academy . . . [and he looked for] a community that would take him in and provide him with a support network and friends." *Dale*, 734 A.2d at 1239-40 (Handler, J., concurring); see also Robert Lisyte, *A Major League Player's Life of Isolation and Subterfuge*, N.Y. TIMES, Sept. 16, 1999, at D9 (describing how Billy Bean's efforts to conceal his homosexuality resulted in "a great deal of guilt and self-hate").

226. See *supra* note 28.

227. See *supra* note 27.