

# Boy Scouts and Non-Believers: The Constitutionality of Preventing Discrimination

## I. INTRODUCTION

[T]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among “religions”—to encompass intolerance of the disbeliever and the uncertain.<sup>1</sup>

The Supreme Court has long held that the First Amendment requires the government to uphold the principle of freedom of religion by not discriminating among religions or between religion and non-religion.<sup>2</sup> Congress adopted this policy of non-discrimination on the basis of religion for public accommodations when it passed Title II of the Civil Rights Act of 1964.<sup>3</sup> Now, the Boy Scouts of America (“Boy Scouts”) contend that the First Amendment guarantee of freedom of association makes the Boy Scouts constitutionally immune from the Title II ban on discrimination against atheists, agnostics, and other religious non-believers. This Note will argue, however, that the First Amendment does not forbid the application of civil rights statutes to the Boy Scouts, a group that many experts—including United States Supreme Court Justice Sandra Day O'Connor<sup>4</sup>—believed was immune from

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<sup>1</sup> *Wallace v. Jaffree*, 472 U.S. 38, 52–54 (1985).

<sup>2</sup> *See Zorach v. Clauson*, 343 U.S. 306, 319–20 (1952) (Black, J., dissenting) and *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968).

<sup>3</sup> 42 U.S.C. § 2000a(a)–(b)(3) (1988).

<sup>4</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring). Justice O'Connor noted in dicta in her concurrence, which no other justice joined, that the training of survival skills and participation in community service could become expressive when intended to develop morals or patriotism and cited the Boy Scout Handbook as an example. The court in *Welsh* dismissed the Boy Scouts' reliance on

such civil rights laws. In addition, this Note will show that public policy supports application of Title II to the Boy Scouts.

In *Welsh v. Boy Scouts of America*,<sup>5</sup> the Boy Scouts sought to exclude a boy who did not believe in God from membership in their organization. *Welsh* is the first case in which the Boy Scouts challenged application of federal civil rights laws. Using the *Welsh* case as a factual framework, this Note will discuss the fundamentals of freedom of association and analyze the associational interests of the Boy Scouts to show that applying Title II and similar state laws to the Boy Scouts does not violate the First Amendment. Because *Welsh* was brought under Title II, that statute will be the main focus of discussion, although the analysis applies equally to similar state statutes. Finally, an analysis of the public policy reasons for applying civil rights statutes to the Boy Scouts will show that such religious discrimination must not be tolerated.

### A. *Facts of Welsh*

Mark Welsh was seven years old when he received a flyer soliciting members for a local Tiger Cub Boy Scout troop. When Mark attended the recruitment meeting for the Tiger Cubs with his father, Elliot Welsh, he discovered that the Scouts required both Mark and his father to sign an application form that "recognized a duty to God" and included an oath that the signers would do their "duty to God."<sup>6</sup> Mark and his father did not adhere to any organized religion and did not believe in God, so they decided that they could not sign such an application.<sup>7</sup> They did not classify themselves as either atheist or agnostic.<sup>8</sup> The Boy Scouts refused to let Mark join the Tiger Cub troop because of his and his father's refusals to acknowledge any belief in a Supreme Being.<sup>9</sup> The plaintiffs sued under Title II of the Civil Rights Act of 1964,<sup>10</sup> which prohibits discrimination on the basis of religion in a place of public accommodation.

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O'Connor's dictum that some scouting activities "might become expressive" as insufficient for concluding that as a matter of law scouting activities *are* expressive. *See Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1431 n.27 (N.D. Ill. 1990).

<sup>5</sup> 742 F. Supp. 1413 (N.D. Ill. 1990).

<sup>6</sup> *Id.* at 1418. The Boy Scout oath reads: "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." WILLIAM HILLCOURT, *THE OFFICIAL BOY SCOUT HANDBOOK*, 27 (1982).

<sup>7</sup> *Welsh*, 742 F. Supp. at 1417.

<sup>8</sup> *Id.* at 1417 n.3.

<sup>9</sup> *Id.* at 1417-18.

<sup>10</sup> 42 U.S.C. § 2000a(a)-(b)(3) (1988).

The Boy Scouts filed a motion to dismiss for failure to state a claim, which the district court denied.<sup>11</sup> The Welshes then sought summary judgment, which the court also denied.<sup>12</sup> The case went to trial in June 1991, and in March 1992, the court decided that Title II did not apply to the Boy Scouts because they were not a "place" as required by the statute.<sup>13</sup>

### B. *Issues Presented by Welsh*

This difficult case presents two overarching issues. The threshold question is whether Title II even applies to the Boy Scouts. The Boy Scouts must be a "public accommodation" for the civil rights statute to bar discrimination because the First Amendment guarantee of freedom of association prevents the government from interfering in the membership decisions of a private group. Federal courts have never dealt with this question before *Welsh*, and state courts (applying state public accommodations laws, which may contain broader or narrower definitions of applicable groups) have disagreed.<sup>14</sup>

Second, if the Boy Scouts are found to be a public accommodation within the meaning of Title II, a constitutional issue arises. The question then becomes whether the application of Title II to the Boy Scouts to force the Boy Scouts to accept a non-believer as a member violates the Boy Scouts' freedom of association, which is guaranteed by the First and Fourteenth Amendments. This Note will discuss why Title II should apply to the Boy Scouts,<sup>15</sup> but

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<sup>11</sup> *Welsh*, 742 F. Supp. at 1416.

<sup>12</sup> *Welsh v. Boy Scouts of Am.*, 787 F. Supp. 1511, 1513 (N.D. Ill. 1992).

<sup>13</sup> *Id.* at 1538.

<sup>14</sup> Compare *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465 (Or. 1976) with *Curran v. Mt. Diablo Council of the Boy Scouts*, 195 Cal. Rptr. 325 (Ct. App. 1983).

<sup>15</sup> See *infra* Part III.C. and accompanying text for policy reasons Title II should apply to the Boy Scouts. Judge Rovner's opinion in *Welsh* held that Title II did not apply to the Boy Scouts because the organization was not a place within the "place of public accommodation" language of Title II. 787 F. Supp. 1511 (N.D. Ill. 1992). The court found that the Boy Scouts were "a membership organization" whose benefits flow primarily, if not exclusively, from the interpersonal associations among its members rather than from a tangible facility or "source of entertainment" which has moved in interstate commerce. *Id.* at 1539-40. From this, the court concluded that the Boy Scouts did not fall into the "place of entertainment" classification or any other classification that would constitute a "place of public accommodation" as required by Title II. *Id.*

The court gave the word "place" its literal meaning of a physical place, rather than the more expansive meaning other courts have advocated. See *National Organization for Women, Essex County Chapter v. Little League Baseball*, 318 A.2d 33, 37-38 (N.J. Super. Ct. App. Div. 1974) ("place," a term of convenience, not limitation, and should be read expansively given the remedial objectives of civil rights statutes. The wording of the New Jersey statute at issue was nearly identical to the wording of Title II.); see also *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474 (E.D. La. 1974) (public accommodation

because the *Welsh* case is used merely as factual background to address a constitutional issue, the Note will not focus on the intricacies of the statutory analysis. Instead, this Note addresses the constitutional question of whether application of civil rights laws to the Boy Scouts violates the First and Fourteenth Amendment guarantees.

## II. BASICS OF FREEDOM OF ASSOCIATION

“Freedom of association,” as analyzed by the Supreme Court in the leading cases of *Roberts v. U.S. Jaycees*<sup>16</sup> and *Board of Directors of Rotary International v. Rotary Club of Duarte*,<sup>17</sup> includes two distinct interests: intimate association and expressive association.

### A. Associational Interests

“Intimate association” is generally thought of as a liberty guaranteed by the due process clause of the Fourteenth Amendment.<sup>18</sup> It includes highly personal relationships such as those between family members, and little state interference is tolerated.<sup>19</sup>

The *Roberts* majority named several factors to be considered in determining whether an organization is an intimate association. Included were the group’s size, selectivity in membership, seclusion from others, congeniality, purpose, and policy.<sup>20</sup>

“Expressive association” is the right to come together as a group to exercise First Amendment rights such as speaking or worshipping. In addition, the Court has held that expressive association includes the right to associate with others to pursue a wide variety of political, social, cultural, educational, economic, and religious goals.<sup>21</sup> Whether or not a group engages in expressive activity is primarily a factual inquiry, and the right is not absolute. The

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provisions cover establishments which provide a form of participatory entertainment) and *Miller v. Amusement Enters.*, 394 F.2d 342 (5th Cir. 1968) (Civil Rights Act of 1964 is to be liberally construed and broadly read).

Other courts have applied state civil rights statutes to force the Scouts to include atheists. See *Atheist Scouts Win Reinstatement, Pack Can't Exclude Twins for Not Saying 'God'*, *Court Rules*, ARIZONA REPUBLIC, May 9, 1992, at A4.

The *Welsh* opinion did not address the constitutional issues raised in this Note.

<sup>16</sup> 468 U.S. 609 (1984).

<sup>17</sup> 481 U.S. 537 (1987).

<sup>18</sup> See generally Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). Cf. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–86 (1977) and *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977).

<sup>19</sup> *Roberts*, 468 U.S. at 618–19.

<sup>20</sup> *Id.* at 620.

<sup>21</sup> *Id.* at 622.

government may impinge on the right of expressive association if it uses the least restrictive means to serve a compelling government interest.<sup>22</sup> In *Roberts*, the Court designated the state's interest in eliminating gender discrimination as compelling.<sup>23</sup> This compelling government interest was expanded to a state interest in eliminating "invidious discrimination" in *New York State Club Association v. City of New York*.<sup>24</sup>

### B. *The Leading Cases: Roberts and Rotary*

The Supreme Court's decisions in *Roberts* and *Rotary* are the leading cases dealing with the freedom of association rights of organizations. Because the Boy Scouts are a non-profit membership organization, as were the Jaycees and the Rotarians, the analysis contained in these two cases is based on facts similar to the situation presented in *Welsh*.

In *Roberts*, the Court held that Minnesota's application of its Human Rights Act to compel the Jaycees to admit women as regular members did not violate the members' freedom of intimate or expressive association.<sup>25</sup> Justice Brennan, writing for the majority, said that the local Jaycees chapters did not present an instance of constitutionally protected intimate association because each chapter was a large and generally unselective group. He emphasized that the chapter meetings often included non-members of both sexes.<sup>26</sup>

The opinion went on to discuss the Jaycees' claim based on the group's freedom of expressive association. Justice Brennan acknowledged that government compulsion to accept unwanted members interfered with this right, but said that such government-imposed burdens were permissible if they met the familiar "strict scrutiny" test (a compelling government interest served by the least restrictive means) employed in a wide variety of First Amendment contexts.<sup>27</sup> "Infringements on that right [of association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less

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<sup>22</sup> *Id.* at 623.

<sup>23</sup> *Id.* at 624.

<sup>24</sup> 487 U.S. 1, 14 n.5 (1988) (citing Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987)). This case involved a consortium of clubs suing to have a New York City anti-discrimination ordinance overturned. The clubs selected members on many bases such as gender, race, religion, or ethnicity. *Id.* at 3, 8-10.

<sup>25</sup> *Roberts*, 468 U.S. at 623.

<sup>26</sup> *Id.* at 610.

<sup>27</sup> See, e.g., Buckley v. Valeo, 424 U.S. 1, 25 (1976); Brown v. Socialist Workers, 459 U.S. 87, 91-92 (1982).

restrictive of associational freedoms.”<sup>28</sup> The unusual part of the *Roberts* decision is that the state was able to meet its burden of proof.<sup>29</sup>

The Court characterized the state’s interest in “eradicating discrimination against its female citizens” as compelling.<sup>30</sup> The opinion also described the anti-discrimination statute as the “least restrictive means” for accomplishing the state’s ends because it imposed no serious burdens on the organization’s abilities to express its views.<sup>31</sup> The Court rejected the argument that the admission of women as voting members would change the Jaycees “philosophical cast” because such a view was based on “unsupported generalizations” and “sexual stereotyping.”<sup>32</sup>

There were no dissents in *Roberts*, but Justice O’Connor took issue with the majority’s analysis in a concurring opinion. She stated that groups, such as the Jaycees, who engage primarily in commercial activities receive only minimal First Amendment protection, while groups that engage in expressive activities receive stronger First Amendment protection that would exclude the application of civil rights statutes.<sup>33</sup> As an example of a group engaging in expressive association, she cited the Boy Scouts.<sup>34</sup>

The Supreme Court fleshed out the standards for determining a membership organization’s associational rights in *Rotary*. There the Court held that the application of California’s Unruh Civil Rights Act to force Rotary clubs to admit women did not violate club members’ freedom of intimate or expressive association.<sup>35</sup> While the primary purpose of the Jaycees is to promote the business training and skills of its members, the main goals of Rotary clubs are to promote humanitarian service, high vocational ethical standards, and world peace.<sup>36</sup> This value-oriented ethic is similar to the avowed purposes of the Boy Scouts—to teach morals and good citizenship.<sup>37</sup>

Justice Powell, writing for the Court, explained that the Rotary club did not involve intimate association because of the potentially large size of local

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<sup>28</sup> *Roberts*, 468 U.S. at 623.

<sup>29</sup> See Douglas O. Linder, Comment, *Freedom of Association After Roberts v. U.S. Jaycees*, 82 MICH. L. REV. 1878 (1984). Strict scrutiny is often difficult for states to satisfy because states have to prove that their interests are compelling instead of merely reasonable. In essence, the state interests must outweigh the individual interests at stake in strict scrutiny cases.

<sup>30</sup> *Roberts*, 468 U.S. at 623.

<sup>31</sup> *Id.* at 626.

<sup>32</sup> *Id.* at 628.

<sup>33</sup> *Id.* at 634 (O’Connor, J., concurring).

<sup>34</sup> *Id.* at 636.

<sup>35</sup> Board of Directors of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987).

<sup>36</sup> *Id.* at 548.

<sup>37</sup> *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1417 (N.D. Ill. 1990).

clubs, the high turnover rate among club members, and the regular participation of "strangers" in club activities.<sup>38</sup> The Court emphasized that the question of whether a group qualifies for associational protections is an objective, factual inquiry.<sup>39</sup>

The application of the Unruh Act to Rotarians was also held to impose little or no burden on the expressive activities of the club and any slight burden was justified by the state's compelling interest in eliminating discrimination. The Rotarians generally express positions on issues affecting businesses and communities. Because opinions on these issues are unrelated to gender, the Court held that the admission of women would not unduly burden the Rotarians' expression because it would have no real effect on that expression.<sup>40</sup>

### III. THE ASSOCIATIONAL INTERESTS OF THE BOY SCOUTS

#### A. *The Boy Scouts as an Intimate Association*

An analysis of the factors developed by the Supreme Court in *Roberts* and *Rotary* shows that the Boy Scouts are not constitutionally protected as an intimate association.

The Boy Scouts argued in the *Welsh* trial that the Boy Scouts were an intimate association because Boy Scouts usually meet as "dens," groups consisting of about six to eight boys.<sup>41</sup> However, the Boy Scouts failed to address the factors of selectivity and seclusion of the group which were crucial to the Court's analyses in both of the leading cases. The Boy Scouts are a non-selective organization, open to all boys of a certain age group and grade who are willing to subscribe to the Boy Scouts' oath.<sup>42</sup> Because the Boy Scouts require nothing of applicants beyond the proper age and willingness to sign the oath, the Boy Scouts are even less selective than the Rotarians, who require business or professional leadership for membership.<sup>43</sup> Because the Supreme Court held that the Rotarians were not a selective organization,<sup>44</sup> it is unlikely that the Court would find the Boy Scouts to be a selective club. Because selectivity is one of the most important elements in the Court's intimate

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<sup>38</sup> *Rotary*, 481 U.S. at 547-48.

<sup>39</sup> *Id.* at 547 n.6.

<sup>40</sup> *Id.* at 548-49.

<sup>41</sup> Defendant's Post-Trial Brief at 21.

<sup>42</sup> *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1425 (N.D. Ill. 1990); *see also* *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474, 485 (E.D. La. 1974) (Youth football league that accepted all applications from whites was not selective.).

<sup>43</sup> *See Rotary*, 481 U.S. at 540-41.

<sup>44</sup> *Id.* at 546-47.

association analysis, it is likely that a non-selective group such as the Boy Scouts would fail as an intimate association.<sup>45</sup>

Beyond selectivity, the cases require courts to consider the group's seclusion from others, size, purpose, and congeniality.<sup>46</sup> While the den is a small group, it is not secluded from outsiders. Parents, who are non-members of the Boy Scouts, are encouraged to attend the meetings.<sup>47</sup> The Boy Scouts, or its sponsoring organizations, also conduct significant amounts of recruiting for members in public schools and receive a great deal of funding from the public through organizations such as United Way.<sup>48</sup> Also, dens are not the only groups in which Boy Scouts interact as Scouts. Monthly "pack" meetings (often nearly 100 boys) and less frequent jamborees (sometimes involving thousands of Scouts) involve many dens working together. The Boy Scouts as a whole has more than 4 million members,<sup>49</sup> hardly a small, intimate association.

In addition, the formation of the dens themselves is a random activity, not one based on "personal affinity" or "congeniality."<sup>50</sup> While the members of a den may become close friends, dens are not formed based on prior friendships. They are formed based on proximity (either in a neighborhood, school, or church) and random assignments.<sup>51</sup> The heart of the intimate relationships, such as marriage and childbearing, that the Court has recognized as constitutionally protected is that personal affinity has *caused* those protected relationships to form.<sup>52</sup> The relationships that the Court has protected were not formed because of proximity or randomness, like the Boy Scouts, but because of deeply personal feelings. Because the Boy Scouts meet none of the Supreme

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<sup>45</sup> Some commentators have argued that the Court's decision in *Rotary* "clos[ed] the 'intimate association' door" on most non-familial groups. See Robert N. Johnson, Note, Board of Directors of Rotary International v. Rotary Club of Duarte: *Redefining Associational Rights*, 1988 B.Y.U. L. REV. 141, 152.

<sup>46</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984).

<sup>47</sup> Plaintiff's Post-Trial Brief at 12.

<sup>48</sup> *Id.* at 15-16.

<sup>49</sup> *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1430 (N.D. Ill. 1990).

<sup>50</sup> See *supra* note 47, at 20.

<sup>51</sup> *Id.* This evidence was not contradicted by the defendant in *Welsh* and was confirmed by a telephone conversation on February 4, 1992 with Mr. Matthew Ackerman, field director of the Central Ohio Council of the Boy Scouts of America, headquartered in Dublin, Ohio. Mr. Ackerman said that den formation was based on geography and neighborhoods. Dens are now also divided by grade level. The sponsoring organization (often a church or school) enters into an agreement with the Boy Scouts to provide the scout program and adult leadership. The sponsoring organizations also recruit members, often through fliers in public schools, as in *Welsh*.

<sup>52</sup> See *supra* note 14.



Court's analytical requirements for intimate association, the Boy Scouts' claim to be an intimate association will fail.

### B. *Boy Scouts as an Expressive Association*

To promote through organization and cooperation with other agencies the ability of boys to do things for themselves and others, to train them in scout craft, and to teach them patriotism, courage, self-reliance and kindred virtues using methods now in common use by the Boy Scouts.<sup>53</sup>

This statement of purpose from the Boy Scout charter shows that Boy Scouts engage in expressive activities, such as teaching patriotism and courage. Glaringly absent, however, is any mention of "religion" or "duty to God" in this purpose statement, which was approved by Congress when it chartered the Boy Scouts.<sup>54</sup> This weighs against the Boy Scouts' strenuous arguments that one of its primary purposes is to promote religious ideas for young boys.

If expressing and promoting the idea that a religious duty to God is essential to the development of young boys is indeed central to the Boy Scouts' mission, then an argument can be made that forcing the Boy Scouts to admit non-believers would eliminate the group's ability to promulgate such a message.<sup>55</sup> Such an action would be similar to forcing the Catholic church to accept atheists or Jews or Baptists into its ranks. However, both common sense and legal analysis tell us that the Boy Scouts are a far cry from the Catholic church. The common sense differences will shed light on the fundamental flaw in the legal argument.

First, the Boy Scouts are not a religious club whose primary activities are to conduct church services, bible studies, or the like. The group's primary activities include camping, knot-tying, hiking, learning first aid, and perfecting many other outdoor skills.<sup>56</sup>

Second, there is little actual religious activity required to occur in Scout troops. The Boy Scouts do not define God, and tell Scout leaders that religious activities are the business of the Scouts' parents and clergy.<sup>57</sup> Scouts are

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<sup>53</sup> See *supra* note 47, at 13 (quoting the Boy Scout Charter).

<sup>54</sup> 36 U.S.C. §§ 21-29 (1916).

<sup>55</sup> This argument is undercut by the fact that the 1.2 million-member Explorer branch of scouting, which includes both young men and women from ages 14 to 20, does not require its members to take an oath with a "duty to God" element. If religion was indeed central to Scouting's mission, it is difficult to see why an entire branch is exempt from this central tenet of the organization. See William A. Henry III, *Tying the Boy Scouts in Knots*, TIME, July 1, 1991, at 65.

<sup>56</sup> See HILLCOURT, *supra* note 6, at 60-210.

<sup>57</sup> *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1426 (N.D. Ill. 1990).

encouraged to pursue religious ends outside of the Boy Scout program.<sup>58</sup> The Boy Scout Handbook defines the “duty to God” element of the oath this way: “Your parents and religious leaders teach you to know and love God, and the ways in which you can serve Him. By following these teachings in your daily life, you do your duty to God as a Scout.”<sup>59</sup> This duty to God requires no activity as a Scout troop or as a Scout.

Also, the Boy Scouts do not require anyone to participate in any religious activity.<sup>60</sup> The religious content of the activities in individual dens varies widely and closed units, which are restricted to members of one religion, are permissible.<sup>61</sup> Throughout its briefs in *Welsh*, the Boy Scouts characterize the proposed application of Title II as an action that would “make God optional” in the Scouts,<sup>62</sup> but God is already optional under the Boy Scouts’ own rules.

Perhaps most striking is the Boy Scouts’ policy that adherents of any religion, from Baptist to Zen, are tolerated within the organization.<sup>63</sup> Indeed, the Boy Scout Handbook, in defining the section of the Boy Scout Law entitled “A Scout is Reverent,” says “It is our duty to respect others whose religion may differ from ours, even though we do not agree with them.”<sup>64</sup> This tolerance was a weighty indication to the *Welsh* court that the Boy Scouts were not an expressive association that was formed to propagate religious views. “In light of the Boy Scouts’ apparent tolerance for an innumerable variety of religious beliefs, it is difficult to understand how the organization could—even if it so desired—present a unified expression on positions concerning religion.”<sup>65</sup> Far from being a group that emphasizes and requires religion, these factors would cause the Boy Scouts to appear to be a secular organization in the eyes of most people.

This common sense view is incorporated into the legal flaws that destroy the arguments of the Boy Scouts. From both a common sense view and a legal perspective, a strong argument may be made that requiring the Boy Scouts to admit atheists, agnostics, or non-believers in God would impose an extremely minute or even non-existent burden on the group’s expressive association. Because the Boy Scouts currently do not require religious participation, it would seem to be a simple matter to allow a member who does not believe in God to sit out during any religious activities.

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<sup>58</sup> *Id.*

<sup>59</sup> HILLCOURT, *supra* note 6, at 28.

<sup>60</sup> *Id.*

<sup>61</sup> Plaintiff’s Reply Brief at 5.

<sup>62</sup> Defendant’s Post-Trial Brief at 15.

<sup>63</sup> *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1427 (N.D. Ill. 1990).

<sup>64</sup> HILLCOURT, *supra* note 6, at 41.

<sup>65</sup> *Welsh*, 742 F. Supp. at 1431 n.26.

The Boy Scouts argue, however, that the very presence of non-believers within the group would undermine the unity of the group and its commitment to religious values.<sup>66</sup> This argument smacks of the “women would change the beliefs of the group” and “women would interfere with male members’ fellowship” arguments that the Court forcefully rejected in *Roberts* and *Rotary*.<sup>67</sup> It transfers into the religious arena the “stereotyping” and “unsupported generalizations” that the Court called an inadequate basis for a burden argument.<sup>68</sup> In addition, witnesses testified at trial that atheist den members had not caused any problems within their groups.<sup>69</sup>

The Boy Scouts also argue that the admission of non-believers imposes a severe burden on the group because churches that are Scouting sponsors would disaffiliate from the Boy Scouts if these children were admitted.<sup>70</sup> While some Boy Scout dens are sponsored by church groups that may be inclined to disaffiliate from the organization if it were required to admit non-believers, the government action of applying Title II would by no means require such disaffiliation. Because Scouting accepts adherents of every religion that presupposes a Supreme Being, these church-sponsored troops undoubtedly already contain members whose beliefs differ from those of the sponsoring churches. In addition, all churches would not necessarily abandon the Boy Scouts if the organization accepted agnostics or atheists as members. Some churches may see such an action as an opportunity to evangelize, a Christian tradition, and possibly change the beliefs of children who enter the Boy Scouts.

The Boy Scouts’ argument is weak in yet another sense. Even if the Boy Scouts’ expressive activities were impinged upon, the government’s compelling interest in eliminating discrimination would be enough to justify such a burden. The governmental interest in preventing discrimination on the basis of religion or non-religion is nothing if not compelling. Discrimination against non-believers is just as much discrimination on the basis of religion (by favoring religion in general) as is the persecution of a minority religion by a majority one.<sup>71</sup> If anything, the governmental interest in preventing religious discrimination may be more compelling than its interest in preventing gender discrimination, which was held to be a compelling interest in *Rotary* and

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<sup>66</sup> Defendant’s Post Trial Brief at 15.

<sup>67</sup> Board of Directors of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 548–50 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627–28 (1984).

<sup>68</sup> *Roberts*, 468 U.S. at 628.

<sup>69</sup> Plaintiff’s Post-Trial Brief at 23.

<sup>70</sup> Defendant’s Post-Trial Brief at 19. According to the defendants, approximately 51 percent of Scouts are sponsored by church groups. *Id.* at 11.

<sup>71</sup> *Wallace v. Jaffree*, 472 U.S. 38, 52–54 (1985) (*see supra* note 1 and accompanying text for the quote); *see also Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968) and *Zorach v. Clauson*, 343 U.S. 306, 319–20 (1952).

*Roberts*. The free exercise clause, the establishment clause, and many free speech cases are based on the idea that every person should be free to believe as he or she wishes, without interference by the state. The civil rights statutes' inclusion of religion as an illegal basis for discrimination by "public accommodations" indicates the government's belief that interference by these organizations is not consistent with these guarantees.

In addition, civil rights statutes provide the least restrictive means of serving the government's compelling interest in eliminating religious discrimination. The statutes only apply to groups that are not primarily religious in character, thereby avoiding interference in the affairs of churches, bible groups, and other religious organizations. The statutes also only apply to public accommodations, not to purely private organizations. Finally, they only prohibit membership selection based on certain stereotypes and other criteria that Congress has determined are unacceptable. Even groups covered by such statutes are free to be as selective as they want in choosing their membership based on what Congress has determined to be proper criteria. In short, no intolerable burden is imposed and the government's compelling interest in preventing the evils of discrimination is served well by applying Title II in this case. Such an application therefore does not violate the First Amendment.

### *C. Public Policy Arguments for Applying Title II to the Boy Scouts*

Sound public policy, as well as First Amendment law, militates in favor of applying civil rights statutes to require the Boy Scouts to admit agnostics and atheists.

First, the Boy Scouts are a high-profile public organization that is congressionally chartered.<sup>72</sup> A congressional charter is basically a national corporate charter and is quite similar to the charters issued by states to private corporations. Congress's power to create such corporations comes from the necessary and proper clause and is incident to its commerce powers.<sup>73</sup> Congress has chartered many organizations, such as the American Red Cross, the Girl Scouts, the American Symphony Orchestra League, the U.S. Olympic Committee, Little League, and the Daughters of the American Revolution.<sup>74</sup> Most organizations incorporated by Congress, including the Boy Scouts, must file an annual report of their proceedings with Congress.<sup>75</sup>

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<sup>72</sup> 36 U.S.C.A. §§ 21-29 (West 1988). The Boy Scouts were originally chartered in 1916.

<sup>73</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>74</sup> For a complete list of congressionally chartered organizations, see 36 U.S.C.A. § 1101 (West 1991).

<sup>75</sup> 36 U.S.C.A. § 28 (West 1991).

Congressional charters by themselves do not turn the organization's actions into the actions of the state.<sup>76</sup> The charter simply creates a private corporation under federal law, and few corporations are given this distinct honor.<sup>77</sup> All corporations are chartered by a government, usually a state, but their actions do not thereby become those of the state, even if they are heavily regulated.<sup>78</sup> The other major elements of state action—government control and supervision or a symbiotic relationship—probably are not present here either. Beyond the receipt of the annual report from the Boy Scouts, Congress exercises no apparent supervision over the Boy Scouts.<sup>79</sup> Also, the Boy Scouts do not perform any traditional government functions.<sup>80</sup>

If the state were responsible for the actions of the Boy Scouts, plaintiffs could sue directly under the First and Fifth Amendments.<sup>81</sup> They would likely have a good case, because as the court in *Welsh* noted, the establishment clause of the First Amendment probably would make it impossible for Congress to charter an organization entitled to discriminate on the basis of religion.<sup>82</sup>

Even though a charter does not constitute government action and no other elements of state action are present here, Congress's power to incorporate entities is limited and rarely used. Because of the relative rarity of use, a charter indicates congressional approval and support of an organization special enough to receive such a charter. By allowing an organization with Congress's imprimatur to discriminate on the basis of religion implies government approval of such actions. This government sanction would undermine the government's credibility in the civil rights area and is contrary to the First Amendment policy of freedom to believe without government interference.<sup>83</sup>

The Boy Scouts argue, however, that the chartering language stating that the purposes of the organization are to be accomplished "using the methods which were in common use by the Boy Scouts on June 15, 1916"<sup>84</sup> indicates

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<sup>76</sup> *San Francisco Arts and Athletics v. U.S. Olympic Committee*, 483 U.S. 522, 543–44 (1987). The Court held that the U.S. Olympic Committee was not a governmental actor although it was congressionally chartered and dismissed a Fifth Amendment claim against the U.S.O.C.

<sup>77</sup> *Id.* at 542.

<sup>78</sup> *Id.* at 543–44; *see also* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

<sup>79</sup> *San Francisco Arts & Athletics*, 483 U.S. at 543–45, 545 n.27.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 542.

<sup>82</sup> *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1423–24 (N.D. Ill. 1990).

<sup>83</sup> *See* Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1064 (1990) (arguing that state encouragement, *e.g.*, granting charters, of private action that would be unconstitutional if undertaken by a state actor is unconstitutional state action).

<sup>84</sup> 36 U.S.C.A. § 23 (West 1988).

that Congress approved of its religious policies.<sup>85</sup> The Boy Scouts stated in 1911 that a duty to God was part of its creed.<sup>86</sup> However, there is no evidence that Congress knew of the Boy Scouts' policies when it incorporated the Boy Scouts.<sup>87</sup> Furthermore, the charter itself says that the Boy Scouts will "make and adopt by-laws, rules, and regulations not inconsistent with the laws of the United States of America, or any State thereof. . . ."<sup>88</sup> This charter provision could be read as requiring the Boy Scouts to comply with Title II, which is a federal law. Alternatively, Title II could be seen as overruling any implied congressional consent to exclusion of non-believers.

Second, the Boy Scouts have often attempted to exclude those who are different—particularly girls and homosexuals.<sup>89</sup> The organization has gone to court, at great expense, to prevent people belonging to these groups from joining the organization. In the case of Timothy Curran, who was expelled when the Boy Scouts discovered his homosexuality, the organization justified its actions on the ground that because he was homosexual, Curran would not be a good role model for young boys.<sup>90</sup> Based on stereotypes and fears, the Boy Scouts concluded that Curran would be a bad role model because of his status as a homosexual—not because of any moral defect or illegal conduct. In fact, Curran had attained the rank of Eagle Scout. This is precisely the kind of stereotyping that civil rights laws were designed to prevent, and such prejudice-based arguments pervade the Boy Scouts' position in this case.

Such discrimination is an affront to human dignity because it dehumanizes. By refusing to deal with an individual because of the individual's status, a group fails to recognize the person's individuality and humanity and thereby diminishes us all. In addition, such attitudes cannot fail to be lost on impressionable young boys. Societal disapproval of these exclusions is beginning to be voiced, as Levi Strauss, Wells Fargo Bank, BankAmerica, and a United Way chapter have cut off funding to the Boy Scouts because of their refusal to admit homosexuals.<sup>91</sup> These discriminatory values are directly contrary to the public policy expressed in the civil rights statutes, and government support or approval of such discriminatory policies is not

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<sup>85</sup> *Welsh*, 742 F. Supp. at 1423.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 36 U.S.C.A. § 22 (West 1991).

<sup>89</sup> See *Mankes v. Boy Scouts of Am.*, 137 F.R.D. 409 (S.D. Fla. 1991) (girl's suit to join the Boy Scouts dismissed on procedural grounds) and *Curran v. Mt. Diablo Council of the Boy Scouts of Am.*, 195 Cal. Rptr. 325 (Ct. App. 1983) (homosexual man stated claim under California's Unruh Civil Rights Act for illegal exclusion from the Boy Scouts).

<sup>90</sup> *Curran*, 195 Cal. Rptr. at 328.

<sup>91</sup> See *Boy Scouts Cut Off Over Ban on Gays*, BOSTON GLOBE, June 1, 1992, at 49.

constitutionally required and should not be tolerated if one ever hopes to see the day when the United States has no need for anti-discrimination laws.

A third public policy reason for allowing Title II to be applied to the Boy Scouts is that such an application does not impinge upon the Scouts' free exercise of religion under the First Amendment. The Boy Scouts argue that application of Title II would interfere with the Boy Scouts' free exercise rights by "prevent[ing] Scouts from joining together with others who, like themselves, believe in God in order to lead reverent lives in which a duty to God is acknowledged."<sup>92</sup> The court noted that the Boy Scouts do not engage in religious worship activities.<sup>93</sup> The court also noted that under the Supreme Court's recent decision in *Department of Human Resources of Oregon v. Smith*,<sup>94</sup> individuals may not be excused from a valid law of general application, such as Title II, on the basis of their religious beliefs.<sup>95</sup> If a compelling state interest may be served without compromising a group's free exercise of religion or other rights, public policy demands that appropriate action be taken.

#### IV. CONCLUSION

Applying Title II to the Boy Scouts of America to prevent the organization from excluding as members young boys who do not believe in God is consistent with the First Amendment. Under the Supreme Court's precedents, freedom of association may be burdened by the government if the burden is the least restrictive means to serve a compelling government interest. The admission of atheists presents a very slight burden to the Boy Scouts, and the government interest in eliminating discrimination is compelling. Since the statutes are the least burdensome means of preventing invidious discrimination, the First Amendment test is satisfied.

In addition, the sound public policies of avoiding the appearance or reality of government endorsement of discrimination and preventing the perpetuation of discriminatory values militate in favor of applying the civil rights statutes to prevent discrimination in this case.

The Boy Scouts of America, a congressionally chartered organization, is more than a private club that can discriminate as it pleases. The Boy Scouts are a public trust and a powerful symbol. This public status gives the group money, clout, and drawing power. But it also imposes responsibilities. High

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<sup>92</sup> *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1435 (N.D. Ill. 1990).

<sup>93</sup> *Id.*

<sup>94</sup> 494 U.S. 872, 876-82 (1990).

<sup>95</sup> *Welsh*, 742 F. Supp. at 1436.

among those responsibilities is to include all those who stand ready to: "Be Prepared."<sup>96</sup>

The *Welsh* court eloquently stated why a dispute that appears to be an intrusive burden on the Boy Scouts for the benefit of a relatively small group of agnostics and atheists is in reality a crucial battle in the war against discrimination.

The emotional nature of the desire on the part of some to avoid association with those who are different may merely illustrate better than any statute or legal opinion ever can the extent to which certain types of discrimination have become ingrained in our culture. Furthermore, it is in just these types of cases, where the discrimination is so ingrained, that the effective utilization of civil rights laws is most important. Cases involving allegations of racial and gender-based discrimination, while now commonplace, rarely provoke the expressed defense that such discrimination is justified. In contrast, religious discrimination—including discrimination against those who do not believe in God—remains openly defended by some in a way that most of our society no longer tolerates with respect to other forms of discrimination.<sup>97</sup>

If such discrimination is ever to be eliminated, it must be eradicated even from our most sacred institutions. By allowing it to continue, particularly under the aegis of government approval or acquiescence, is to allow intolerance to flourish.

*Lisa A. Hammond*

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<sup>96</sup> "Be Prepared" is the Boy Scout motto. HILLCOURT, *supra* note 6, at 42.

<sup>97</sup> *Welsh*, 742 F. Supp. at 1416 n.1.