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DALE V. BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL: NEW JERSEY’S ATTEMPT TO DEFINE PLACES OF PUBLIC ACCOMMODATION AND REMEDY THE "CANCER OF DISCRIMINATION"

Michelle L. Carusone

The Boy Scouts is as different from the facilities listed (as places of public accommodation) in Title II (of the 1964 Civil Rights Act) as dogs are from cats. Boy Scouts is a “public accommodation,” not simply because of its solicitation activities, but also because it maintains close relationships with federal and state governmental bodies and with other recognized public accommodations.

These contradictory statements reflect the conflict that has been well-visited in state and federal courts: the contention between an organization’s right to choose its members and an individual’s right to become a member of an organization. Entrenched in this issue is the tension between the organization’s freedom of expression, as some would argue that member selection is a form of expression, and the prospective member’s freedom of association. Courts’ interpretations of accommodation statutes have resulted in disparate rulings and conflicting treat-

5. See id. at 113 (recognizing the “fundamental tension” between the right of association and the quest for equality).
The varying results are dependent on a particular court's evaluation of what constitutes a "place of public accommodation" under the applicable state or federal statute. This issue was revisited in August 1999, when the Supreme Court of New Jersey interpreted the New Jersey Law Against Discrimination (LAD) to include the Boy Scouts as a place of public accommodation in *Dale v. Boy Scouts of America and Monmouth Council, Boy Scouts of America.* The court held that the designation of the organization as a place of public accommodation prevented the Boy Scouts from denying membership to homosexual individuals.

This Comment examines the Supreme Court of New Jersey's treatment of the Boy Scouts of America under its public accommodation statute in relation to preceding decisions. First, this Comment considers the language of the applicable public accommodation statute in these cases and the legislative intent supporting it. Then, this Comment contemplates the impact the construction of the statute had on its interpretation. Finally, this Comment argues that the disparity among the decisions dealing with public accommodation statutes thwarts the goal of


7. See Lisa Gabrielle Lerman & Annette K. Sanderson, Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Laws,* 7 N.Y.U. REV. L. & SOC. CHANGE 215, 217 (1978) (defining public accommodation as "a term of art which was developed by the drafters of discrimination laws to refer to places other than schools, work places, and homes").

8. See id. at 217.

The scope of traditional public accommodations laws is defined by a narrow concept of what places would be open to the public, based on the common law obligation of innkeepers and "common carriers" to admit all travelers. The current view is so much broader, however, that the use of the word "accommodations" is a misnomer; any establishment which offers goods and services of any kind to the public may now be covered. The modern concept is limited to coverage of establishments which operate from a particular place, but the laws could be expanded to include services which are performed at the home or office of the buyer, or goods which are sold in the street.


11. See id. at 1230. A public accommodation may not deny any person "accommodations, advantages, facilities, and privileges;" N.J. STAT. ANN. § 10:5-4, and the *Dale II* court found that membership fell into this enumeration of benefits. See *Dale II*, 734 A.2d at 1230.
ending discrimination, and that only more uniformity between statutes will further the goal of eradicating invidious discrimination.\footnote{12}

I. FROM HOTELS TO MEMBERSHIP ORGANIZATIONS: THE EVOLUTION OF PUBLIC ACCOMMODATION STATUTES

Legal scholars generally state that public accommodation statutes stem from the common law duty of innkeepers and common carriers to refrain from discriminating as they offered their services to the general public.\footnote{13} Congress passed the first Civil Rights Act in 1866, which defined who were citizens of the United States, and provided all citizens with the right to contract, sue, inherit, and deal in real and personal property without regard to race or color.\footnote{14} Courts interpreted the 1866 Act to apply to pri-
vate as well as to public acts. 15 Although the Act did not expressly exempt private organizations from its coverage, courts have found an implied exemption of private organizations in the 1866 Act 16 since passage of the Civil Rights Act of 1964. 17

The 1964 Civil Rights Act prohibited discrimination and segregation on the basis of race, color, religion, or national origin in any place of public accommodation. 18 The 1964 Civil Rights Act’s definition of a public accommodation includes “[e]stablishments affecting interstate commerce or supported in their activities by State action” 19 and other specifically enumerated facilities, including inns, hotels, restaurants, cafeterias, theaters, and gas stations. 20

Since 1865, most states have also promulgated public accommodation statutes in some form. 21 None of these statutes is identical in coverage, but among them are prohibitions of discrimination on the basis of race,
national origin, religion, sex, disability, sexual orientation, marital status, or a combination thereof. Further, most state statutes, along with the Civil Rights Act of 1964, exempt private clubs from their scope. Organizations, including swimming clubs, day camps, and membership associations, often raise the private club exemption as a defense in lawsuits, forcing courts to determine whether those establishments are indeed pri-


23. See Koppen, supra note 15, at 649 n.44 (noting that, as of 1993, approximately 30 state statutes specifically exempted private clubs). These states include: Arizona, the District of Columbia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virgin Islands, Washington, West Virginia, and Wisconsin. See id.; see also supra note 22 (listing the relevant state statutes). Further, California courts have implied that the California Unruh Act exempts private clubs. See Curran v. Mount Diablo Council of the Boy Scouts of Am., 195 Cal. Rptr. 325, 334-35 (Cal. Ct. App. 1983) (Curran I) (citing CAL. CIV. CODE §§ 51-51.5); see also infra Part I.B.2 (detailing the progression of the Curran case through the Supreme Court of California).
These cases have not conceived a bright-line test to define whether an organization is private; they have only provided factors to consider, such as the size of the organization, and its membership selection process.

A. The Boy Scouts of America's Standards

The Boy Scouts of America (Boy Scouts or BSA) is a congressionally chartered corporation with approximately four million boys and more than one million adults among its members. The Boy Scouts recruit members through national television, radio, and magazine campaigns, and local membership drives, including “School Nights,” which are held at school facilities and are organized in conjunction with schools across the nation. National, regional, and local entities manage the organization, with the National Council as the highest governing body. The National Council oversees regional committees that preside over area committees, which the BSA further divides into over 400 local councils nationwide, comprised of district committees. The BSA grants unit charters to individual sponsors within the districts, and units are grouped according to age level of the members. Individual sponsors are gener-


25. See Dale II, 734 A.2d at 1213-17 (considering the solicitation of a broad membership base in relation to an organization's selectivity, and an organization's failure to limit its membership as relevant criteria for determining whether the organization is “distinctly private” under the LAD). The court, however, refrained from stating that there are established criteria for such a determination. See id.; cf. Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1276 (7th Cir. 1993) (citing United States v. Landsdowne Swim Club, 713 F. Supp. 785, 796-97 (E.D. Pa. 1989) as providing the factors involved in considering the private club exemption under Title II). These factors are: “(1) the genuine selectivity of the group; (2) the membership's control over the operations of the establishment; (3) the history of the organization; (4) the use of facilities by nonmembers; (5) the club's purpose; (6) whether the club advertises for members; and (7) whether the club is non-profit or for profit.” Id.


28. See Dale II, 734 A.2d at 1200-01.

29. See id. at 1201.

30. See id.

31. See id.
ally existing organizations such as religious, civic, or educational groups, including schools, local governmental entities such as law enforcement agencies, fire departments, city governments, and the military.\footnote{See id.}

The Boy Scouts sell books, uniforms, badges, and camping equipment, among other scouting materials, referring to such sales as "supply operations."\footnote{See Welsh v. Boy Scouts of Am., 787 F. Supp. 1511, 1518 (N.D. Ill. 1992).} Some Councils also receive a portion of their operating funds from the United Way.\footnote{See id. at 1518, 1520.}

In 1978, the BSA prepared a position paper stating that an avowed homosexual may be neither a volunteer scout leader nor a registered unit member, but it never distributed the paper.\footnote{See id. at 1518.} The BSA wrote additional statements in 1991 and 1993 expressing similar positions after cases in several states charged the BSA with discriminating against members because of their sexual orientation.\footnote{See Dale If, 734 A.2d at 1205 n.4.}

The purpose of the Boy Scouts is found in its mission statement: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential."\footnote{Dale H, 734 A.2d at 1202 (quoting the BSA's mission statement).} The values espoused by the BSA are also apparent in its Boy

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Scout Oath and Scout Law.\textsuperscript{38} The Boy Scouts asserted in their briefs to the New Jersey Supreme Court that the language "morally straight" and "clean" in the Boy Scout Oath and Scout Law, respectively, exemplify the BSA's rejection of homosexuality.\textsuperscript{39} The BSA does not espouse any particular religion or set of moral beliefs, and the scoutmasters' training manual states that religious instruction is the responsibility of the home and church.\textsuperscript{40} Further, the BSA encourages its scoutmasters to refrain from discussing sexual topics.\textsuperscript{41}

B. Case Law Interpreting Public Accommodation Statutes

1. Interpreting the Law, Not Expanding It: The Story of Mark Welsh

In 1989, seven-year-old Mark Welsh received a flyer at school inviting first-grade boys to attend a recruitment meeting for The Tiger Cubs, a division of the BSA, held at a nearby school.\textsuperscript{42} Mark and his father, Elliott Welsh, learned that the application to become a Tiger Cub included a provision that required the applicant to "recognize an obliga-

\textsuperscript{38} See id. (setting forth the Boy Scout Oath and the Boy Scout Law). 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." Id. (internal quotations omitted). Excerpts from the Boy Scout Law provide:

A Scout is FRIENDLY. A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs that are different from his own.

A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean."

Id. (emphasis in original).

\textsuperscript{39} See id. at 1202-03.

\textsuperscript{40} See id. at 1203.

\textsuperscript{41} See id. (quoting the Boy Scout Handbook). The Boy Scout Handbook contains a subchapter called "Sexual Responsibility," which states that "[f]or the followers of most religions, sex should take place only between married couples," and the BSA "believes that boys should learn about sex and family life from their parents, consistent with their spiritual beliefs." Id. (internal references and quotations omitted).

\textsuperscript{42} See Welsh v. Boy Scouts of Am., 742 F. Supp. 1413, 1417, 1438, App. A (N.D. Ill. 1990) (Welsh I) (describing the Tiger Cubs as a division of the Boy Scouts of America for boys who are seven years old, or in the first grade, and their adult partner). An adult partner participates with the Tiger Cub in virtually all group activities. See id. An adult partner may be a parent, an aunt or uncle, a grandparent, an older sibling, or a neighbor who is 18 years of age or older. See id. Appendix A of the court's decision in Welsh I also notes that adult partners must host one or two group activities over the course of the year, but that the activity "may not necessarily be held in the home; it may be at a park, fire station, airport, ball game, etc." Id.
tion to God' and to take an oath to do one's 'duty to God.'” Although both Mark and Elliott were atheists, Elliott returned the application and fees with a notation that he could not adhere to the BSA’s Declaration of Religious Principle (the Declaration). A BSA official later returned this application to him with a letter indicating that the BSA could not accept applications unless the applicant agreed to the Declaration. After inquiring with the BSA headquarters, Elliott received a reply that affirmed the necessity of agreeing to the Declaration in order to become a Tiger Cub.

Elliott and Mark then brought suit against the Boy Scouts on March 21, 1990, alleging that their exclusion from the BSA violated Title II of the Civil Rights Act of 1964. The plaintiffs sought an injunction pre-

43. Id. at 1417-18. This provision is taken from the BSA’s Declaration of Religious Principles. See id.
44. See id. at 1418.
45. See id.
46. See id. The letter from Harold Sokolsky, Assistant to the Chief Scout Executive, stated:

Our membership requirements which were established at our inception in 1910 have been in effect since then, and we are determined to maintain our position. Adult leaders are required to sign our declaration of religious principle, and youth members must subscribe to the Cub Scout Promise or Boy Scout Oath which includes “duty to God.”

While not intending to define what constitutes belief in God, we do reaffirm our religious principle. You have a valid point that we do not explain this qualification in our recruiting material and we are now studying ways to inform potential members of this fact.

Id. at 1418 n.7.
47. See id. at 1418; see also 42 U.S.C. § 2000a(a)-(b). The statute mandates that:

(a) Equal access
All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain,
vent the BSA from prohibiting persons who do not believe in God from joining, and they sought admission of Mark as a Tiger Cub with Elliott as his adult partner. The United States District Court for the Northern District of Illinois refused to grant both the BSA's motion to dismiss and the plaintiff's ensuing motion for summary judgment. The same court later held that the Boy Scouts is not a place of public accommodation within the meaning of Title II and entered judgment in favor of the BSA. The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision, and held that the BSA was not a public accommodation under Title II, and even if it were, the private club exception to Title II would apply to the BSA.

As part of its analysis, the district court examined the legislative history of Title II. The court concluded that Congress intended the word "place" to have its ordinary meaning. The court stated that the legislative history of the Act "has been described as 'inconclusive' and 'obscure,'" and made several points to illustrate its conclusion.

First, the original Senate bill banned discrimination with respect to membership in labor unions and professional, business, or trade associations and organizations; however, the House bill, which was the version

or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Id. 48. See Welsh I, 742 F. Supp. at 1418.
49. See id. at 1413.
52. See Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1278 (7th Cir. 1993) (Welsh IV).
53. See Welsh III, 787 F. Supp. at 1534-37 (cautioning that the words of a statute themselves reflect congressional intent and "that presumption is rebutted only in the rare circumstance in which the legislative history clearly reflects a purpose contrary to the ordinary meaning of the words used").
54. See id. at 1534.
55. Id. (citing Miller v. Amusement Enters., Inc., 394 F.2d 342, 349 (5th Cir. 1968) (en banc), but stating that the history provided "clues" that Congress did not intend "places" to include membership organizations that lacked a tangible place or facility).
enacted, lacked such a ban.\textsuperscript{56} Second, senators who spoke in favor of the bill emphasized its limited scope when testifying.\textsuperscript{57} For example, Senator Humphrey testified that Congress drafted the bill to reach only the most egregious discrimination, not that arising from personal or private relationships.\textsuperscript{58} Third, members of Congress only referred to the enumerated establishments in the bill.\textsuperscript{59} They did not insinuate that other establishments or organizations might fall within the scope of Title II.\textsuperscript{60} Fourth, lawmakers discussed the fundamental right to travel between states and the importance of fostering interstate commerce in conjunction with the Act.\textsuperscript{61} Finally, those who opposed the bill argued that it constituted a violation of the Fifth Amendment of the Constitution\textsuperscript{62} because they perceived it as intruding upon the property rights of business owners.\textsuperscript{63}

Based on the examination of the testimony before Congress, the district court concluded that it should not construe Title II broadly,\textsuperscript{64} despite the fact that previous cases held that the judiciary should liberally construe Title II because of its remedial aim.\textsuperscript{65} The plaintiffs claimed that the BSA was a "place of entertainment," and was covered, therefore, by Title II.\textsuperscript{66} The district court, however, understood the precedent to mean that it should interpret "place of entertainment" according to its generally accepted meaning.\textsuperscript{67} The court recognized that an establishment might be a place of entertainment even though it was not specifically mentioned in Title II.\textsuperscript{68} Nevertheless, the court stated that to extend the

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\item See id. at 1534.
\item See id. at 1534-35.
\item See id. Senator Humphrey testified, "This is a bill of limitation and restraint . . . . Title II, like the bill as a whole, is designed to reach the most significant manifestations of discrimination. It is carefully drafted and moderate in nature. There is no desire to regulate truly personal or private relationships." Id.
\item See id. at 1535.
\item See id. Representative Senner remarked that "Title II is moderate legislation. It invades no man's privacy and compels no personal or confidential relationships. It deals only with places which have traditionally held out services and facilities to the general public." Id.
\item See id. at 1535-36.
\item U.S. Const. amend. V.
\item See Welsh III, 787 F. Supp. at 1537.
\item See id. (citing Miller v. Amusement Enters., Inc., 394 F.2d 342, 349 (5th Cir. 1968)).
\item Id. at 1537-38.
\item See id.
\item See id. (citing Miller, 394 F.2d at 350). The court quoted Miller's holding:
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definition of place to include organizations without a physical situs would contravene the plain meaning and common understanding of “place of entertainment.” Because the issue at bar was not access to a physical place, but access to an organization, the court concluded that the Boy Scouts was not a “place of public accommodation” under Title II. The Seventh Circuit affirmed this ruling, emphasizing the importance of considering the plain meaning of the statute and the role of the courts to interpret statutes, not expand them.

2. California Allows the BSA to Discriminate

California also interpreted its public accommodation statute as applied to the Boy Scouts in Curran v. Mount Diablo Council of the Boy Scouts of America. Although the facts of Curran are very similar to those of Dale, the California Supreme Court found that the Boy Scouts did not fall under the California Act.

The plaintiff, Timothy Curran, was a highly decorated youth scout. As an adult, however, he was denied membership as an active member because, just before he applied, a newspaper series chronicled Curran’s experience as a gay teenager in the San Francisco Bay Area. After unsuccessfully appealing to the BSA, Curran filed an action against the Mount Diablo Council of the Boy Scouts, alleging that the BSA’s denial

“Although we recognize that ejusdem generis is an old and accepted rule of statutory construction, we do not believe that it compels us to accord words and phrases embodied in the statute a definition or interpretation different from their common and ordinary meaning; or that the rule requires us to interpret the statute in such a narrow fashion as to defeat what we conceive to be its obvious and dominating general purpose.”

Id.

69. See id. at 1538-39.

70. See id. at 1541. A membership organization that neither operates out of nor furnishes access to a fixed location is not a public accommodation under Title II. See id. Therefore, the BSA and the Boy Scout Council are neither a “place of entertainment” nor a “place of accommodation” under Title II because they lack the requisite connection to a fixed location. See id.

71. See Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1278 (7th Cir. 1993) (Welsh IV). The Court of Appeals further held that, even if the BSA was a public accommodation, it would fall under the private club exemption to Title II. See id. The Court conducted an analysis of the Landsdowne Swim Club factors, and found that the BSA is selective because it requires boys to conform to the values espoused by its Oath. See id. at 1276-77; see also supra note 25 (outlining the Landsdowne Swim Club factors).

72. 952 P.2d 218 (Cal. 1998) (Curran II).

73. See id. at 220.

74. See id. (stating that Curran received numerous scouting honors, among them attaining the rank of Eagle Scout and being selected to participate in a troop leadership development program run by the BSA).

75. See id. at 221-22. The article did not mention the BSA. See id.
of his application violated the Unruh Civil Rights Act.\textsuperscript{76}

The Supreme Court of California disagreed with the lower court's conclusion that the BSA was a business establishment under the Unruh Act.\textsuperscript{77} The California legislature enacted the Unruh Civil Rights Act in response to several court decisions that found that the 1897 statute did not apply to denial of accommodations in certain businesses.\textsuperscript{78} Thus, the court first considered the history of the Act, highlighting the 1897 public accommodation statute that granted the right to "full and equal accommodations, advantages, facilities and privileges' [in a number of specifically designated enterprises, as well as in] 'all other places of public accommodation or amusement.'\textsuperscript{79} Next, the Curran court compared three previous cases involving the identification of business establishments to articulate the criteria for evaluating whether an organization is a business establishment.\textsuperscript{80}

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\item See id. at 222; see also CAL. CIV. CODE § 51 (West 1982 & Supp. 2000). The Act reads in part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." \textit{Id.}
\item See Curran II, 952 P.2d 218; see also Curran v. Mount Diablo Council of the Boy Scouts, 195 Cal. Rptr. 325, 337 (Cal. Ct. App. 1983) (\textit{Curran I}) (including the BSA under the scope of the Unruh Act because of its public nature). The court found that the Unruh Act targets the discrimination that the BSA conducted. \textit{See id.} It stated that the BSA was included in the class of organizations that the California Legislature intended to include in the Unruh Act: "all commercial and noncommercial entities open to and serving the general public." \textit{Id.} at 338. In addition, the court of appeals stated that precedent from the Supreme Court of California supported the conclusion that California's Unruh Act "prohibits arbitrary discrimination against homosexuals." \textit{Id.} at 338-39. The court then determined that the BSA's charter did not authorize discrimination against homosexuals by the organization, and that there was, therefore, no violation of the Supremacy Clause of the United States Constitution, article VI, clause 2, and also no conflict between the Unruh Act and the BSA's charter. \textit{See id.} at 339.
\item See Curran II, 952 P.2d at 229. The original form of the statute mandated that: "All citizens within the jurisdiction of this State, no matter what their race, color, religion, ancestry, or national origin, are entitled to the full and equal admittance, accommodations, advantages, facilities, membership, and privileges in, or accorded by, all public or private groups, organizations, associations, business establishments, school and public facilities; to purchase real property; and to obtain the services of any professional person, group, or association." \textit{Id.} (emphasis added by the court). The Unruh Act, CAL. CIVIL CODE § 51, enacted in 1959, granted entitlement to "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (emphasis added). \textit{See also supra} note 76 (providing the full text of the act).
\item Curran II, 952 P.2d at 229 (citing Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 783-84 (Cal. 1995)).
\item See id. at 230 (considering Ibister v. Boys' Club of Santa Cruz, Inc., 707 P.2d 212 (Cal. 1985); O'Connor v. Village Green Owners Ass'n., 662 P.2d 427 (Cal. 1983); and
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In deciding that the BSA was not a business establishment, the court rested on a few guiding principles. \(^{81}\) First, it quoted a prior decision maintaining that, traditionally, courts have not applied public accommodation statutes to private organizations' membership policies. \(^{82}\) Second, the court inferred that the California legislature’s failure to enact the more expansive version of the Unruh Act meant that it intended to preclude private organizations from coverage by the Act. \(^{83}\) Finally, although in past decisions the court emphasized that it must interpret the language in the Act as broadly as reasonably possible, \(^{84}\) none of those cases involved the membership decisions of an organization like the Boy Scouts, which the court described as a charitable, expressive, and social organization, with purposes unrelated to advancing its members' economic or business interest. \(^{85}\) With these considerations in mind, the Supreme Court of California held that the Boy Scouts were not a business establishment and therefore not subject to California’s public accommodation statute. \(^{86}\)

3. In Kansas, Lack of “Business Purpose” Allows the BSA to Discriminate

Kansas dealt with its public accommodation statute in regards to the BSA in \textit{Seabourn v. Coronado Area Council, Boy Scouts of America}. \(^{87}\) The Supreme Court of Kansas found that the BSA was not a public accommodation under the Kansas Act Against Discrimination. \(^{88}\) The BSA

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Burks v. Poppy Constr. Co., 370 P.2d 313 (Cal. 1962). \textit{Ibister} reviewed the origin and legislative history of the Unruh Civil Rights Act and determined that the legislature intended the Act to “cover at least all of the places of public accommodation or amusement that had been subject to the California public accommodation statute that preceded the [Unruh] Act.” \textit{Curran II}, 952 P.2d at 232 (considering \textit{Ibister}'s treatment of the Unruh Act). Notably, while \textit{Ibister} found the Boys Club to be a place of public amusement because it was a recreational facility where the public could drop-in and participate in activities, the \textit{Ibister} court distinguished the Boy Scouts as an organization that does not have such a primary function. See \textit{id.}

\(^{81}\) See \textit{id.} at 233-36.

\(^{82}\) See \textit{id.} at 233 (citing \textit{Warfield}, 896 P.2d at 789).

\(^{83}\) See \textit{id.}

\(^{84}\) See \textit{Curran II}, 952 P.2d at 236 (citing \textit{Burks}, 370 P.2d at 313).

\(^{85}\) See \textit{id.} (holding that the BSA cannot reasonably constitute a “business establishment” in light of its overall purpose and function).

\(^{86}\) See \textit{id.} at 220. The court, however, did state that the Unruh Act is not the only legislative measure aimed at curbing discrimination on the basis of race. See \textit{id.} at 239. It therefore felt that the trial court’s fear that exempting the organization from status as a business establishment would permit the BSA to discriminate in such areas as race, would not come to fruition. See \textit{id.}

\(^{87}\) 891 P.2d 385 (Kan. 1995).

\(^{88}\) See \textit{id.} at 387; see also \textit{KAN. STAT. ANN.} § 44-1001 to -1019 (1993 & Supp. 1998).
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denied Bradford Seabourn’s registration to be an associate leader because he refused to affirm a belief in God. The court interpreted Kansas’ public accommodation statute by comparing several other cases involving the Boy Scouts, and concluded that the BSA did not fit the statute’s definition of a public accommodation. Giving great weight to the statute’s legislative intent, the court concluded that the organization itself needed to have a business purpose, not merely conduct business activity.


Although the Kansas and California courts found that the BSA was not a public accommodation, other state’s courts determined that their public accommodation statutes covered the BSA. The Supreme Court of Connecticut proclaimed that the Boy Scout Council was subject to public accommodation status despite the fact that it did not have a fixed situs in  

The Kansas statute states, in pertinent part:
The practice or policy of discrimination against individuals in employment relations, in relation to free and public accommodations, in housing by reason of race, religion, color, sex, disability, national origin or ancestry or in housing by reason of familial status is a matter of concern to the state, since such discrimination threatens not only the rights and privileges of the inhabitants of the state of Kansas but menaces the institutions and foundations of a free democratic state. It is hereby declared to be the policy of the state of Kansas to eliminate and prevent discrimination in all employment relations, to eliminate and prevent discrimination, segregation, or separation in all places of public accommodations covered by this act, and to eliminate and prevent discrimination, segregation or separation in housing.

KAN. STAT. ANN. § 44-1001. The statute also defines public accommodation:

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

Id. § 44-1002.

90. See id. at 406.
91. See id. at 403, 406.
The supreme court chose to read Connecticut's statute broadly, and elected to consider the legislative history of the statute.\textsuperscript{94}

The Supreme Court of Connecticut grounded its decision in the wording of the statute, and noted that the legislature did not link its definition of "place" with a site, but with an "establishment."\textsuperscript{95} The court also emphasized that the legislature had repeatedly amended Connecticut's public accommodation statute by expanding the categories of covered businesses and organizations and abandoning the "laundry list" of covered establishments in 1953.\textsuperscript{96} Further, the court noted that the legislature intended the statute to serve a remedial purpose, which is the compelling

\textsuperscript{94} See id. at 354 (quoting the statute in effect at the time of the decision, CONN. GEN. STAT. § 53-35(a) (Rev. to 1977)). The statute stated, in relevant part:

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

\textit{Id.} Connecticut's statute that is currently in effect states, in relevant part:

"Place of public accommodation, resort or amusement" means any establishment which caters or offers its services or facilities or goods to the general public, including, but not limited to, any commercial property or building lot, on which it is intended that a commercial building will be constructed or offered for sale or rent; . . . .

CONN. GEN. STAT. § 46a-63 (1999). Section 46a-64 states, in part:

It shall be a discriminatory practice in violation of this section: . . . To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of race, creed, color, national origin, ancestry, sex, marital status, age, lawful source of income, mental retardation, mental disability or physical disability, including, but not limited to, blindness or deafness of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons; . . . .

CONN. GEN. STAT. § 46a-64.

\textsuperscript{95} See Quinnipiac, 528 A.2d at 356-58 (emphasizing case law that has held that if the language of a statute is plain and unambiguous, the court need not look beyond the face of the statute). Despite this, the court found ambiguity in the Connecticut statute and found it proper to turn to the legislative history, the circumstances surrounding its enactment, and its intended purpose. See id.

\textsuperscript{96} See id. at 357.

\textsuperscript{97} See id.
interest of eliminating discriminatory public accommodation practices.\textsuperscript{98} From these findings, the court concluded that the Connecticut statute "now regulates the discriminatory conduct and not the discriminatory status of an enterprise which offers its services to the general public."\textsuperscript{99}

II. \textit{Dale as the Most Recent Interpretation of an Organization’s Ability to Discriminate in Its Membership Selection}

\textbf{A. The BSA Revokes James Dale’s Membership When It Discovers His Homosexual Orientation}

James Dale joined the Boy Scouts of America in 1978 at age eight as a Cub Scout.\textsuperscript{100} He was distinguished an “exemplary scout,” earning numerous badges and honors,\textsuperscript{101} including thirty merit badges, seven achievement awards, the “Arrow of Light Award,”\textsuperscript{102} and achievement of the rank of Eagle Scout, an honor bestowed upon only three percent of all Boy Scouts.\textsuperscript{103} He held several troop leadership positions, including Junior Assistant Scoutmaster, and he was active in the Order of the Arrow, which is an affiliated honor camping association.\textsuperscript{104} The BSA chose Dale for Vigil, the highest possible honor in the Order of the Arrow.\textsuperscript{105} Likewise, the BSA chose Dale to be a delegate at the 1985 National Boy Scout Jamboree, and he was selected to speak at Monmouth Council functions more than once.\textsuperscript{106} After his eighteenth birthday, in March of 1988, Dale applied for adult membership, which the BSA granted.\textsuperscript{107} He was then appointed the Assistant Scoutmaster of Troop 73 in Matawan, New Jersey,\textsuperscript{108} and held this position for approximately sixteen months.\textsuperscript{109}

Dale attended Rutgers University, and commenced his studies around
the same time he applied for adult membership with the Boy Scouts. While attending college, Dale first acknowledged to himself, and his friends and family, that he was gay. Dale joined the Rutgers University Lesbian/Gay Alliance and later became the organization’s co-president. In July 1990, Dale attended a seminar on the psychological and health needs of lesbian and gay teenagers. There, a New Jersey newspaper interviewed him and later published an article and photograph of him, identifying him as the co-president of the Rutgers association. Later that July, Dale received a letter from Monmouth Council Executive James W. Kay revoking his BSA membership.

The letter from Kay also granted Dale sixty days to request a review of his membership termination from the Monmouth Council Regional Review Committee. Dale drafted a letter to Kay and requested the reason for the decision to revoke his membership. Kay’s reply stated: “The grounds for this membership revocation are the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals.” Kay later revealed in deposition testimony that he had become aware that Dale was a homosexual through the article published in the Star Ledger in Newark.

Dale petitioned for review of his membership with the Northeast Regional Director, and requested a copy of the BSA’s leadership standards

110. See id.
111. See id.
112. See id.
113. See id.
114. See id. at 1204-05; Kinga Borondy, Seminar Addresses Needs of Homosexual Teens, STAR-LEDGER (Newark), July 8, 1990, §2, at 11 (cited in Dale II).

“After careful review, we have decided that your registration with the Boy Scouts of America should be revoked. We are therefore compelled to request that you sever any relations that you may have with the Boy Scouts of America. You should understand that BSA membership registration is a privilege and is not automatically granted to everyone who applies. We reserve the right to refuse registration whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth.”

Id.
116. See Dale II, 734 A.2d at 1205.
117. See id. The letter was sent on August 8, 1990. See id.
118. Dale I, 706 A.2d at 275.
119. See id.; supra note 114 and accompanying text (citing the newspaper article).
and permission to attend the review.120 While the Regional Review Committee acknowledged Dale’s request, it provided him with neither the BSA standards for leadership, nor a review date.121 Dale sent a second letter making his requests, and the Northeast Region Review Committee informed him in late November that it supported the decision of Monmouth Council to terminate his membership.122 Dale then had thirty days to seek review with the National Council Review Committee.123 Dale responded, through counsel, to the Chief Scout Executive of the BSA and requested both a rehearing and the opportunity to attend the review.124 The attorney for the BSA informed Dale that he would not be allowed to attend the review because “[the BSA] does not admit avowed homosexuals to membership in the organization so no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting.”125 The Regional Committee agreed to allow the National Council to review Dale’s membership status, but Dale elected to sue the Boy Scouts of America and Monmouth Council, as he believed that review “would be futile.”126

B. The New Jersey Superior Court Agrees with Dale’s Assertion that the BSA is a Public Accommodation

James Dale filed a six-count complaint against the BSA and the Monmouth Council on July 20, 1992 in New Jersey state court, alleging that the BSA violated both the New Jersey Law Against Discrimination (LAD)127 and common law when it revoked his membership based solely

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120. See Dale II, 734 A.2d at 1205 (stating that previous communications to Dale had informed him that he was entitled to attend the review under the Monmouth Council Review procedures).
121. See id.
122. See id.
123. See id.
124. See id.
125. Id. (quoting BSA’s counsel); see also Dale v. Boy Scouts of Am., 706 A.2d 270, 276 (N.J. Super. Ct. App. Div. 1998) (Dale I) (clarifying that, according to Kay, Dale was not stripped of any of the awards he had earned, including the Eagle Scout Award, and that the membership revocation was kept confidential).
126. Dale II, 734 A.2d at 1205.
127. See N.J. STAT. ANN. § 10:5-4 (West 1993 & Supp. 1999). The statute states that all persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.
Dale sought declaratory and injunctive relief, compensatory and punitive damages, costs, and attorney fees on the ground that the BSA is a public accommodation.

Dale moved for partial summary judgement in September 1993 and sought an immediate reinstatement based on his assertion that the defendants violated the LAD and New Jersey's public policy. Defen-
dants cross-moved for summary judgment on all counts. The trial judge in the Chancery Division granted summary judgment to defendants on the grounds that the parties had stipulated that Dale was "a sexually active homosexual," and that the BSA consistently had refused membership to any self-declared gay individual because of its position that homosexual conduct was "neither 'morally straight' under the Scout Oath nor 'clean' under the Scout Law." The judge in the Chancery Division relied on biblical and historical views that denounced homosexuality, and he articulated that the BSA advocated the same viewpoint.

The trial judge found that the Boy Scouts was not a place of public accommodation as defined by New Jersey's statute. Consequently, Dale had no cause of action because the BSA fell under the statutory exclusion for a distinctively private institution. The judge further concluded that the state could not force the BSA to accept Dale as an adult leader-member because of the organization's First Amendment freedom of expressive association rights. He stated that the BSA's historical conviction regarding the immorality of homosexual conduct was such that "[t]he presence of a publicly avowed active homosexual as an adult leader of boy scouts is absolutely antithetical to the purpose of Scouting."

The state appellate court reversed the trial court and held that the BSA and its local councils were places of public accommodation because they invite the public at large. The superior court considered a number of other rulings that grappled with whether the BSA was a public accommodation. It rejected the narrow interpretation that Welsh v. Boy

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132. See id.
134. See Dale I, 706 A.2d at 277.
135. See id.
137. See id.
138. Id. (quoting Dale v. Boy Scouts of Am, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995)).
139. See Dale I, 706 A.2d at 280, 283; see also National Org. for Women, Essex County Chapter v. Little League Baseball, Inc., 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974) (holding that a baseball field was a sufficient "place" to qualify Little League for a "place of public accommodation" under the LAD, and therefore prohibit it from discriminating against females who wished to join).
140. See Dale I, 706 A.2d at 278-79 & n.2 (citing Welsh v. Boy Scouts of Am., 993 F.2d 1267 (7th Cir. 1993) (Welsh IV), which held that the the BSA was not a public accommodation under Title II). The Dale I court considered a number of divergent opinions, see,
Scouts of America\textsuperscript{141} gave to Title II on the basis that the New Jersey statute is remedial and should therefore be given a broad interpretation consistent with its objectives of eliminating discrimination.\textsuperscript{142} The court further underscored that the definition of "place" should not be the determinative factor in delineating the scope of the antidiscrimination statute.\textsuperscript{143} To support its conclusion, the superior court quoted the dissenting opinion in Welsh, which emphasized that people, not places, discriminate.\textsuperscript{144}

The court then considered New Jersey precedent on the interpretation of the LAD.\textsuperscript{145} The court concluded that it should interpret the LAD e.g., Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 238 (Cal. 1998) (Curran II) (BSA not a business establishment under Unruh Act); Yeaw v. Boy Scouts of Am., 64 Cal. Rptr. 85, 91-92 (Cal. Ct. App. 1997), review granted & opinion superseded by 942 P.2d 415 (Cal. 1997) (same); Randall v. Orange County Council, Boy Scouts of Am., 28 Cal. Rptr. 2d 53 (Cal. Ct. App.), review granted & opinion superseded by 874 P.2d 900 (Cal. 1994) (same); Quinipiac Council, Boy Scouts of Am. v. Commission on Human Rights and Opportunities, 528 A.2d 352, 360 (Conn. 1987) (finding that the BSA is a public accommodation under Connecticut statute); Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385, 391, 406 (Kan. 1995) (narrowly interpreting Kansas' public accommodation to allow the BSA to deny membership application to a professed atheist).

\textsuperscript{141} 993 F.2d 1267 (7th Cir. 1993).
\textsuperscript{142} See Dale I, 706 A.2d at 279 (construing precedent as establishing that the New Jersey LAD should be construed liberally to achieve its purpose as a remedial statute of eliminating discrimination). Previous cases have asserted that the New Jersey Legislature intended that the Act should be liberally construed, and therefore the narrow interpretation of Welsh IV, should not be duplicated. See id. In support of its position, the court cited Fuchilla v. Layman, 537 A.2d 652 (N.J. Super. 1988), which asserted that the goal of the LAD is "nothing less than the eradication 'of the cancer of discrimination,'" and Anderson v. Exxon Co., 446 A.2d 486 (N.J. Super. 1982), which maintained that the social significance of the LAD demands that it be read liberally. See Dale I, 706 A.2d at 279.
\textsuperscript{143} Dale I, 706 A.2d at 279.
\textsuperscript{144} See id. (declaring the Welsh majority's reliance on the term "place" to be "irrational"). Such an interpretation is itself discriminatory because it targets those who possess the financial resources to operate from a fixed place. See id. Further, there is no reason to conclude that those who operate from a fixed place are more likely to discriminate than organizations or businesses that do not. See id.
\textsuperscript{145} See id. at 279-282 (citing Fuchilla, 537 A.2d at 660-61, which emphasized the importance of construing the LAD liberally; National Org. for Women v. Little League Baseball, Inc., 318 A.2d 33, 36 (N.J. App. Div. 1974), which also emphasized the remedial status of the LAD and the importance of reading it with the statute's objectives in mind, and finding the Little League to comport with a broad reading of the statute as a place of public accommodation; Fraser v. Robin Dee Day Camp, 210 A.2d 208, 212 (N.J. 1965), which emphasized that "facilities and activities 'offered to and . . . dependent upon the broad-based participation of members of the general public' are the types of accommodation the legislature intended to reach through the LAD."; Clover Hill Swimming Club v. Goldsboro, 219 A.2d 161 (N.J. 1966), which held that a private swimming club was a public accommodation because it advertised and extended a general invitation to the public to join).
broadly in concurrence with legislative intent.\textsuperscript{146} It reiterated that New Jersey rejected Welsh's narrow view because the term "place of public accommodation" is a term of "convenience, not of limitation."\textsuperscript{147}

In its decision, the superior court considered several characteristics of the BSA.\textsuperscript{148} First, the Boy Scouts solicited a broad base for its membership.\textsuperscript{149} Second, the BSA extended an open invitation to boys to join the organization, and more stringent criteria for adult leaders was not sufficient to make the organization private.\textsuperscript{150} Third, the BSA had on-going relationships with other places of public accommodation.\textsuperscript{151} Finally, the lack of a specific place where the BSA is situated does not exempt the organization from the statute.\textsuperscript{152}

\textbf{C. The Supreme Court of New Jersey Affirms}

The Supreme Court of New Jersey upheld the trial court's evaluation.\textsuperscript{153} After a thorough discussion of the nature of the BSA, including its goals and values,\textsuperscript{154} the court considered the objectives of the New Jersey statute and its definition of the word "place."\textsuperscript{155} The court noted that terms of the LAD would bind the BSA if the court found it to be a place of public accommodation not meeting any of the statute's exemptions.\textsuperscript{156}

The court then discussed public accommodations, and asked three questions: (1) whether the BSA engages in broad public solicitation; (2) whether it maintains close relationships with the government or other public accommodations; and (3) whether the BSA is similar to enumerated or other previously recognized public accommodations.\textsuperscript{157} The court

\begin{itemize}
\item \textsuperscript{146} See Dale I, 706 A.2d at 279 (citing N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1999), which states explicitly that the legislature intends the Act to be liberally construed in combination with other protections available under New Jersey law).
\item \textsuperscript{147} Id. (quoting Little League, 318 A.2d at 37).
\item \textsuperscript{148} See id. at 280-83.
\item \textsuperscript{149} See id. at 280-81.
\item \textsuperscript{150} See id. at 282.
\item \textsuperscript{151} See id. at 282-83.
\item \textsuperscript{152} See id. at 283.
\item \textsuperscript{153} See Dale v. Boy Scouts of Am., 734 A.2d 1196, 1200 (N.J. 1999) (Dale II).
\item \textsuperscript{154} See supra Part I.A (discussing the background and structure of the BSA).
\item \textsuperscript{155} See Dale II, 734 A.2d at 1208-10 (stating that "[i]n New Jersey, 'place' has been more than a fixed location since 1974.").
\item \textsuperscript{156} See id. at 1208 (referring to N.J. STAT. ANN. § 10:5-5). These exceptions include, but are not limited to, "distinctly private entities," religious educational facilities, and parents or individuals acting "\textit{in loco parentis}" in respect of "the education and upbringing of a child." Id.
\item \textsuperscript{157} See id. at 1210 (acknowledging that inviting the public to join an organization is a primary characteristic of a public accommodation). An organization can extend this invi-
answered the three questions in the affirmative, and found the organization to be a place of public accommodation.\textsuperscript{158}

The court first considered the level of the BSA's public solicitation.\textsuperscript{159} It found overwhelming evidence of an invitation to the public to join the BSA in, among other media efforts, a $1 million national television advertising campaign in 1989, advertisements in periodicals such as \textit{Sports Afield} and \textit{Redbook}, and promotional materials\textsuperscript{160} that the BSA supplied to local councils.\textsuperscript{161} The greatest impetus for the court's decision was the BSA's encouragement of scouts to wear their uniforms in public, which the court stated was a "symbolic invitation."\textsuperscript{162} According to the New Jersey high court, this assertive conduct constituted intent to invite the public at large\textsuperscript{163} and, therefore, the LAD required that the public have equal rights to membership.\textsuperscript{164}

The court found further justification for its decision when it considered the last two questions.\textsuperscript{165} Organizations that benefit from relationships with the government or other public accommodations are themselves public accommodations.\textsuperscript{166} As a congressionally chartered organization though advertising or other methods of attracting the public. \textit{See id.} at 1210-11. In fact, New Jersey has well-established and long-standing precedents on the issue of public solicitation as a criteria for public accommodation. \textit{See id.} at 1227 (observing that New Jersey has long been a leader in the pursuit of protecting victims of invidious discrimination).

\begin{itemize}
\item \textsuperscript{158} \textit{See id.} at 1210-13.
\item \textsuperscript{159} \textit{See id.} at 1211. New Jersey courts have persistently held that "when an entity invites the public to join, attend, or participate in some way, that entity is a public accommodation within the meaning of the LAD." \textit{Id.}
\item \textsuperscript{160} The court drew attention to promotional materials that ranged from television and radio announcements to posters. \textit{See id.} at 1210.
\item \textsuperscript{161} \textit{See id.} The court also quoted a \textit{New York Times} article that described one BSA spokesperson as touting that: "scouting [is] a product and we've got to get the product into the hands of as many consumers as we can." \textit{Id.}
\item \textsuperscript{162} \textit{See id.} at 1211. Wearing a Boy Scout uniform to school and participating in "School Nights" and other demonstrations piques public curiosity. \textit{See id.} The BSA admitted that it encourages the wearing of uniforms in public to arouse such curiosity with the goal of attracting new members. \textit{See id.}
\item \textsuperscript{163} \textit{See id.} (quoting Evans v. Ross, 154 A.2d 441 (N.J. Super. Ct. App. Div. 1959), which emphasized that once invited, the public should not suffer the humiliation and embarrassment of being excluded).
\item \textsuperscript{164} \textit{See Dale II}, 734 A.2d at 1211-13.
\item \textsuperscript{165} \textit{See id.} at 1211-12 (citing Frank v. Ivy Club, 576 A.2d 241 (N.J. 1990), which grounded its decision of attributing public accommodation status to an all-male eating club on the club's symbiotic relationship with Princeton University). Additionally, a court is likely to hold that an entity that is similar to one listed in the New Jersey statute is a place of public accommodation. \textit{See id.} at 1213 (citing Board of Chosen Freeholders v. New Jersey, 732 A.2d 1053, 1059 (N.J. 1999), which explained that "[u]nder the \textit{ejusdem generis} principle of statutory construction, when specific words follow more general words in a
tion, the BSA has maintained close relations with every President of the United States, the military, and state governments. It also recruits new members in schools and holds meetings and other functions at school facilities. Finally, the court cited the similarities of the BSA to other entities listed in the statute. It found the BSA's educational and recreational functions to be sufficiently similar to day camps and baseball teams, which previous courts determined to be places of public accommodation under the LAD. Given this array of factors, the court declared that the BSA was a public accommodation.

The Boy Scouts contended, however, that even if it was a place of public accommodation, it was exempt from coverage by the statute under

statutory enumeration, we can consider what additional items might also be included by asking whether those items are similar to those enumerated.

167. See supra note 26 and accompanying text. Congress chartered the BSA in 1916. See Ch. 148, § 1, 39 Stat. 227 (1916) (current version at 36 U.S.C. §§ 21-28 (1994)). Another federal law facilitates the receipt of equipment, supplies, and services by the BSA from agencies of the federal government. See 10 U.S.C. § 2544(a) (1994 & Supp. IV 1998). The Dale court noted that the Secretary of Defense and other federal agencies are authorized to lend to the Boy Scouts of America, for the use and accommodation of Scouts, Scouters, and officials who attend any national or world Boy Scout Jamboree, such cots, blankets, commissary equipment, flags, refrigerators, and other equipment and without reimbursement, furnish services and expendable medical supplies, as may be necessary or useful to the extent that items are in stock and items or services are available. Dale II, 734 A.2d at 1212 (citing 10 U.S.C. § 2544(a)).

168. See Dale II, 734 A.2d at 1212 (illuminating the link by citing one of the BSA's promotional materials, which boasts that every president since William Howard Taft has served as Honorary President of the BSA).

169. See id. (quoting a BSA pamphlet to show that facilities are available to the BSA for its events at many Army, Navy, Air Force, and Coast Guard installations).

170. See id. (citing N.J. STAT. ANN. § 23:2-3 (West 1997), which allows the New Jersey Division of Fish, Game, and Wildlife in the Department of Environmental Protection to stock any body of water in New Jersey with fish that the BSA controls and uses, and N.J. STAT. ANN. § 39:3-27 (West 1990 & Supp. 2000), which exempts the BSA from motor vehicle fees).

171. See id. at 1212-13.

172. See id. at 1213.

173. See id. In support of its conclusion, the court cited Fraser v. Robin Dee Day Camp, 210 A.2d 208 (N.J. 1965). Fraser held that a day camp has much in common with swimming pools, recreation and amusement parks, and primary schools, and therefore was a public accommodation because of the similarity with the enumerated entities under the statute. The Dale court also relied on National Organization for Women v. Little League Baseball, Inc., 318 A.2d 33, 36 (N.J. App. Div. 1974), which held that a little league team's "educational and recreational nature" makes it similar to the places of public accommodation described by the LAD.

174. See Dale II, 734 A.2d at 1213.
three exceptions. These three exceptions were the "distinctly private" exception, the religious educational facility exception, and the in loco parentis exception.

The Supreme Court of New Jersey first considered the distinctly private exception and stated that the exception is a narrowly drawn statutory exclusion. Because the Boy Scouts solicits a broad membership base and has had over 87 million members since its inception, the court determined that it is not a selective organization, despite professed membership criteria. Therefore, the BSA did not qualify for the dis-

175. See id.
176. See id.; see also N.J. STAT. ANN. § 10:5-5(l) (West 1993 & Supp. 1999). The statute's exemption states:

Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed.

177. See Dale II, 734 A.2d at 1214. The Dale II court relied on the New York Court of Appeals' interpretation of New York's distinctly private exception in United States Power Squadrons v. State Human Rights Appeal Board, 452 N.E.2d 1199, 1204 (N.Y. 1983), which stated that the exception "does not refer simply to private clubs or establishments closed to the public but uses more restrictive language excluding from the statute's provisions only clubs which are 'distinctly private.'" Dale II, 734 A.2d at 1214. Further, distinctly private status is a question of fact which the organization has the burden of establishing. See United States Power Squadrons, 452 N.E.2d at 1204. The New York Court of Appeals laid out five criteria that the fact finder may consider: (1) whether the club has permanent, subjective membership criteria; (2) whether the club limits the use of its facilities to only its members and their bona fide guests; (3) whether the members control the club; (4) whether the club is "nonprofit and is operated solely for the benefit and pleasure of the members"; and (5) whether the club's publicity is only extended to its members. Id.

178. See Dale II, 734 A.2d at 1214-17. In 1992 alone, the Boy Scouts had over four million boys and one million adults in its membership. See id. In addition, the BSA publications indicated that one of its goals was to build its membership base. See id. The Dale II court considered a booklet, entitled A Representative Membership, which espouses the organization's national objective of extending the opportunity to all eligible youth to join the Boy Scouts. See id. The booklet stated:

We have high hopes for our nation's future. These hopes cannot flower if any part of our citizenry feels deprived of the opportunity to help shape our future. How can you persuade other Scouters to accept a commitment to a representative membership? Consider these facts:

1. Our federal charter sets forth our obligation to serve boys. Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy. The National Council and Executive Board have always taken the position that Scouting should be available for all boys who meet the entrance age requirements.

4. Another aim of Scouting is the development of leadership. Leadership in
tinctly private exception. Neither was the court receptive to the BSA's claims that it was an educational facility operated by a religious or sectarian institution, nor that it acted in loco parentis. Therefore, the exceptions did not apply and the BSA did not escape the statute's prohibition of discrimination.

Judge Handler concurred, but wrote separately to emphasize the importance of "genuine [membership] selectivity" as a paramount factor in the determination of whether an organization is a place of public accommodation. He further explored the case's implications for the in-

America is needed in all sections of the country and in all economic, cultural, and ethnic groups.

5. To meet these responsibilities we have made a commitment that our membership shall be representative of all the population in every community, district, and council.

Id. at 1215 (citing BOY SCOUTS OF AMERICA, A REPRESENTATIVE MEMBERSHIP 2 (1975)) (emphasis added by the court).

179. See id. at 1215-16 (noting that the size of the BSA implies an open membership policy). Further, the requirement that members comply with the Boy Scout Oath and the Boy Scout Law did not constitute genuine selectivity criteria, despite the BSA's reliance on Welsh IV. See id.; see also supra Part I.B.1 (discussing the Welsh decision). The court observed that the joining requirements must act to truly limit individuals from joining an organization, and that the BSA had used the Oath and Law to exclude prospective members infrequently. See Dale II, 734 A.2d at 1216. Therefore, the BSA placed practically no limitation on joining the organization. See id. Finally, the court echoed the appellate division's finding that more stringent criteria for adult members does not make the BSA as a whole a public accommodation. See id. at 1217. The lower court ruled that basing the status of a public accommodation on an organization because of its adult membership criteria was "clearly inconsistent with the remedial purposes of the LAD." Id. (citing Dale v. Boy Scouts of Am., 706 A.2d 270, 282 (N.J. Super. Ct. App. Div. 1998) (Dale I)).

180. See Dale II, 734 A.2d at 1217-18 (dismissing the BSA's assertion that it was "a educational facility operated or maintained by a bona fide religious or sectarian institution" because the BSA stated that the organization was nonsectarian in its bylaws and its Scout Handbook). Further, the BSA does not act in loco parentis because it undertakes no responsibility to rear or maintain its members who are minors. See id. (citing In re M.S., 374 A.2d 445, 447 (N.J. 1977), which defines in loco parentis as "one who means to put himself in the situation of the lawful father with reference to the father's office and duty of making provision for the child.").

181. See id. at 1230 (holding that the BSA is a place of public accommodation and falls under the LAD). The Supreme Court of New Jersey affirmed the judgment of the Appellate Division and remanded the suit to the Chancery Division for proceedings consistent with its opinion. See id.

182. See id. at 1230-45 (Handler, J., concurring) (recognizing that the 'distinctly private' exception is the 'other side of the public accommodation coin,'" and citing Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 476 (3d Cir. 1986)). The direct relationship emphasized by Judge Handler signified that a court must find that an organization is distinctly private in order for it to escape classification as a public accommodation. See id. at 1231. Further, Judge Handler opined that selectivity is the preeminent factor in such a determination. See id. Judge Handler elaborated, however, that membership selectivity is not the deterministic factor of an organization's public accommodation status. See id. at 1234. Genuine membership selectivity may prove that an otherwise public organization is
terdependence of expression and identity for lesbians and gay men through self-identifying speech. Judge Handler concluded that the New Jersey Legislature recognized the consequence of the link between identity and expression for homosexuals when it included protection against discrimination on the basis of affectional or sexual orientation. From this conclusion, Judge Handler extrapolated that the BSA excluded Dale because of his sexual orientation, meaning his status, not because he expressed his views.

Judge Handler then determined that the BSA had not established a sufficiently robust point of view regarding homosexuality, and therefore, the First Amendment's protection of freedom of expression did not reach the organization in its membership selection. Finally, the concurring opinion issued a strong repudiation of the reliance on stereotypes and assumptions as the basis for discrimination based on affectional or distinctly private, but a lack of genuine selectivity always suffices to classify an organization as public. See id.

183. See id. at 1235-39. Justice Handler made clear that a club may make member selection criteria dependent upon an individual's viewpoints through the constitutional protection of the club's freedom of expression. See id. at 1235-36. Nevertheless, a club may not discriminate in its membership selection based on an individual's status, whether that status be sex, race, or sexual orientation. See id. If an organization has a "specific expressive purpose" that is "clear, particular, and consistent," then the organization may refuse to admit individuals according to their purpose, because then the admission of such individuals would alter the organization's speech. Id. at 1236-37. Judge Handler cited Ku Klux Klan v. Town of Thurmont, 700 F. Supp. 281, 289 (D. Md. 1988), which stated that the core purpose of the Klan is to advance a certain message. See Dale II, 734 A.2d at 1236-37 (Handler J., concurring). Judge Handler explained that the Maryland court thus upheld the exclusion of African-American participants in a Klan march because allowing them to march would prohibit the Klan from advancing its primary message. See id.

The concurrence defined self-identifying speech as "[t]he confluence of status and expression when both relate to the speaker's sexual orientation." Id. at 1238. It is a major factor in conveying identity. See id. Some scholars have deemed self-identifying speech critical in construing identity for lesbians and gay men. See Nan D. Hunter, Identity, Speech, and Equality, 79 VA. L. REV. 1695, 1718 (1993); Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell," 108 YALE L.J. 485, 550 (1998).

184. See Dale II, 734 A.2d at 1239 (Handler, J., concurring); see also N.J. STAT. ANN. § 10:5-5(hh) (West 1993 & Supp. 1999) (defining affectional or sexual orientation); supra note 127 (quoting the definition).

185. See Dale II, 734 A.2d at 1239 (Handler, J., concurring).

186. See id. at 1241 (finding that the BSA had "not established a clear, particular, and consistent message concerning homosexuality" and therefore the status-based discrimination of the BSA was not protectable under the First Amendment); see also U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.").
sexual orientation. Judge Handler contended that using stereotypes does not define societal mores and viewpoints. Consequently, admitting a homosexual leader would not disturb the BSA’s goals of adhering to traditional moral values and encouraging those values in its members because the stereotypes are not representative of social values.

On January 14, 2000, the United States Supreme Court agreed to hear the BSA’s appeal. The Court held oral arguments on April 26, 2000 on the issue of whether requiring the BSA to admit an openly gay leader violates the organization’s rights of free association and free speech under the First Amendment to the United States Constitution.

III. PUBLIC ACCOMMODATION STATUTES FRUSTRATE THEIR PURPOSE OF ERadicATING DISCRIMINATION

The field of public accommodation law seems both unsettled and confused, given that the same organization can be included under one state’s statute and be exempted under another’s. Problems exist with the federal statute, and some commentators suggest that plaintiffs should assert

187. See Dale II, 734 A.2d at 1242 (Handler, J., concurring) (emphatically rejecting the use of stereotypes as a justification for discrimination against homosexuals). There exists no scientific evidence that supports the stereotype that homosexuals are inherently immoral; further, ample evidence exists to prove the contrary. See id. (citing Gregory M. Herek, Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research, 1 LAW & SEXUALITY 133, 134 (1991)).

188. See id. at 1245 (Handler, J., concurring) (arguing that stereotypes are a vehicle for discrimination against individuals).

189. See id. Judge Handler found stereotypes and other baseless assumptions regarding the immorality of homosexuals to be contrary to current law and public policy, and therefore an inaccurate representation of present-day social values. See id. Therefore, admitting members who are homosexuals will not prevent the BSA from promoting moral values among its membership. See id.


191. See Joan Biskupic, Court Takes Cases on Abortion, Gays, WASH. POST, Jan. 15, 2000, at A1; see also Kathy Barrett Carter, Scouting Case Goes to Justices, STAR-LEDGER (Newark) (Jan. 15, 2000) <http://www.nj.com/page1/ledger/e34fd1.html>. The question presented to the court in the appeal by the BSA and Monmouth Council was: “Whether a state law requiring a Boy Scout troop to appoint an avowed homosexual and gay rights activist as an assistant scoutmaster responsible for the communicating of Boy Scouting’s moral values to youth members abridges First Amendment rights of freedom of speech and freedom of association.” Interview with Charles Schmitz, supra note 12. Oral argument was held on April 26, 2000 and a decision is expected in late June 2000. See Biskupic, supra note 12.

192. Compare Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 220 (Cal. 1998) (Curran II) (finding the BSA to be exempt from California’s Unruh Act), with Dale II, 734 A.2d at 1200, 1228 (N.J. 1999) (requiring that the BSA conform to the requirements of New Jersey’s LAD).
claims under their state statute since Title II is limited in its coverage.\footnote{193} This is, in large part, because Congress has been reluctant to expand the scope of the federal public accommodation statute beyond racial discrimination.\footnote{194}

A. A Wellspring of Inconsistency: The Obstacle of Ambiguous Statutory Drafting

In reaction to the minimal protection provided by the federal statute, state legislatures expanded their public accommodation statutes.\footnote{195} States formulated provisions to guard against discrimination on the basis of race, national origin, religion, sex, disability, sexual orientation, marital status, sexual preference, pregnancy, parenthood, political affiliation, and personal appearance.\footnote{196} State statutes, however, lack uniformity.\footnote{197} This dissimilarity especially

\footnote{193. See Paul Varela, Note, A Scout is Friendly: Freedom of Association and the State Effort to End Private Discrimination, 30 WM. & MARY L. REV. 919, 932 (1989) (contending that state, rather than federal, statutes have been the most effective avenue to fight discrimination); see also Pamela Griffin, Comment, Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law, 16 PAC. L.J. 1047, 1052 (1985) (illustrating that the scope of state public accommodations laws is generally greater than that of federal law in regards to the range of covered establishments, and further, the class of covered individuals is greater in state laws); cf. Lerman & Sanderson, supra note 7, at 287-89 (advocating the amendment of Title II because of the narrowness of the federal law and the demonstration of the potential for expansion exemplified by innovative state statutes).

194. See Varela, supra note 193, at 933 (explaining that in addition to being limited to racial discrimination, Title II is generally limited to “traditional places of public accommodation, such as restaurants and hotels”).

195. See, e.g., CONN. GEN. STAT. § 46a-64 (1999); D.C. CODE ANN. § 1-2501 (1999); R.I. GEN. LAWS § 11-24-2 (1994 & Supp. 1998). These statutes have greater protection than Title II, including provisions to prevent discrimination based on sex, handicap, age, sexual preference, and personal appearance. However, even these three expansive statutes do not cover all of the listed classifications; thus, these three jurisdictions exemplify the disparity in statutory coverage nationwide.

196. See Singer, supra note 13, at 1491, app. II (listing state laws and their coverage); see also Lerman & Sanderson, supra note 7, at 260 (detailing the disparate coverage of state statutes).

Dale v. Boy Scouts of America presents a problem for organizations and businesses that act in several states, and the patrons of such organizations. Hence, these parties can expect little consistency in their protection from one state to another because the definition of what constitutes a place of public accommodation remains dissimilar and unsettled. 198

A state is free to construct its own definition of a place of public accommodation because there is no constitutional guidance on the subject. 199 Indeed, as one commentator notes, "[a]n organization may be 'public' for the purposes of the [public accommodation statute] of one state and 'private' for the purposes of the [statute] in another state." 200

The disparate treatment of an organization is attributable both to varia-

198. See Varela, supra note 193, at 934 (explaining that the United States Supreme Court has placed limitations on the definition of a place of public accommodation based upon statutory construction, rather than constitutional interpretation). Mr. Varela suggests that the "problem lies in identifying the groups that may legitimately seek protection under the umbrella of freedom of association." Id. at 937.

199. See id. at 934; see also Koppen, supra note 15, at 643, 647-48 & nn.35 & 37. The limits of the Commerce Clause do not bind the states' internal regulations; therefore, they may be more restrictive in their prohibitions of discrimination. See id. at 648. In addition, the states have paternal interests in protecting their residents, which leads to the inclusion of protection for additional classes. See id. In order to fall under the provisions of the Civil Rights Act of 1964, an establishment's acts must "affect commerce." See 42 U.S.C. § 2000a(c) (1994); Koppen, supra note 15, at 648 n.41. New Jersey's LAD was enacted according to the state's police power. See N.J. STAT. ANN. § 10:5-2 (West 1993 & Supp. 1999). The LAD states: "The enactment hereof shall be deemed an exercise of the police power of the State for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights." Id.

200. Varela, supra note 193, at 934. Compare Schwenk v. Boy Scouts of Am., 551 P.2d 465, 469, 469 n.5 (Or. 1976) (holding that the BSA is a private organization under Oregon's public accommodation statute, and is therefore not required to admit a female as a cub scout), with Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 220 (Cal. 1998) (Curran II) (finding that the BSA is not a "business establishment") under California's public accommodation statute, and is therefore not required to admit a homosexual as an adult leader), and Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights and Opportunities, 528 A.2d 352, 355 (Conn. 1987) (holding that the BSA is a place of public accommodation under Connecticut's public accommodation statute; however, the BSA is not required to admit a female applicant for a position as an adult leader because it is not a discriminatory accommodation practice). Nonprofit entities arguably deserve clear statutory notice as to the Unruh Act's applicability to them. See Steven B. Arbuss, Comment, The Unruh Civil Rights Act: An Uncertain Guarantee, 31 UCLA L. REV. 443, 458 (1983). It is uncertain, however, under present statutory construction, which nonprofit entities are classified as "business establishments," and therefore subject to the Unruh Act's provisions. See id. at 459.
tions in statutory construction and to judicial interpretation.\textsuperscript{201} Further, the disparity in statutory definitions of "place of public accommodation" has led to extensive litigation.\textsuperscript{202}

Legislatures may craft the definition of covered organizations under a public accommodation statute in one of three ways.\textsuperscript{203} The first method of construction is a long, specific, laundry-list of covered institutions, which enumerates institutions and entities that are within the reach of the statute, but provides no qualifying language extending the coverage

\textsuperscript{201} See Varela, \textit{supra} note 193, at 934-36 (stating that a legislature's precision in defining what constitutes a place of public accommodation is determinative of the scope of the statute); see also Antonin Scalia, \textit{Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW} 3, 14 (Amy Gutmann, ed., 1997) (lamenting the fact that the judiciary has no clear-cut, intelligible theory of statutory interpretation). Justice Scalia attributes the absence of a framework for statutory interpretation to the modern method of legal instruction, where no classes are required on statutory interpretation, and the process of interpretation "is left to be picked up piecemeal, through the reading of cases (good and bad) in substantive fields of law that happen to involve statutes[.]" \textit{Id.} at 14-15. Justice Scalia further emphasizes the shortage of treatises on the subject and the apathetic attitude of legal scholars as to whether there are acceptable rules of statutory interpretation. \textit{See id.}

\textsuperscript{202} See \textit{supra} Parts I.B-II (detailing several cases involving only the BSA). There has also been litigation in several jurisdictions concerning the United States Jaycees, the Rotary Club, and multiple other entities. \textit{See, e.g.}, Roberts v. United States Jaycees, 468 U.S. 609, 612, 630-31 (1984) (holding that the Minnesota Human Rights Act was not unconstitutionally vague or overbroad and that the Jaycees were forbidden from denying women regular membership under the statute). The Jaycees are a nonprofit national membership organization. \textit{See id.} at 612. Like the Boy Scouts, the Jaycees espouse their educational and charitable purposes of encouraging personal development and civic interest in young men. \textit{See id.}

Rotary International is a nonprofit corporation that, as an organization of business and professional men, sought to provide humanitarian services and encourage business ethics. \textit{See Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte,} 481 U.S. 537 (1987) (holding that California's Unruh Act is constitutional, and upholding the California court's decision that the Rotary Club was a public accommodation and thus was required to admit women). The Rotary Club did not warrant First Amendment constitutional protection because it was not an intimate or private organization. \textit{See id.} at 546. The Supreme Court based this decision largely on the fact that one of the main purposes of Rotary International was to build a large membership that was representative of the business community. \textit{See id.} It also considered that the organization did not keep its business private. \textit{See id.}


\textsuperscript{203} See Lerman & Sanderson, \textit{supra} note 7, at 241.
of the statute to other institutions. The second manner is a long, specific list that extends the statute's coverage beyond being merely illustrative or exclusive through the addition of such language as "coverage includes but is not limited to" before the list. Therefore, the statute applies to other, non-listed organizations. Finally, a statute may employ a general characterization, which extends coverage to a certain class of establishments that provide a certain service, or to a certain class. Despite these categories, there is little correlation between the construction of the definition and the breadth of the statute.

Further, even though different statutory constructions exist, the form utilized presents little opportunity for predictability as to how a court will classify a particular organization. For instance, California's Unruh Civil Rights Act contains a general definition, while the New Jersey Law Against Discrimination and Kansas' Act Against Discrimination utilize a long, specific list and state expressly that a place of public accommodation is not limited to the listed institutions. The structure of the definitions in the statutes provides no predictability when courts in

204. See id.

205. Id. at 243.

206. See id. The statute covers additional institutions because the second formulation demonstrates by giving examples, but does not confine coverage to those examples. See id.

207. See id. at 242; N.M. STAT. ANN. § 28-1-2(H) (Michie 1993). The New Mexico Human Rights Act covers "any establishment that provides or offers its services, facilities, accommodations, or goods to the public, but does not include a bona fide private club or other place or establishment which is by its nature and use distinctly private." Id. Another example is California's statute, which encompasses "all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (West 1982 & Supp. 2000); see supra note 76 (setting out the text of the Unruh Civil Rights Act).

208. See Lerman & Sanderson, supra note 7, at 241 (observing that a statute that contains a long, specific list may be interpreted to be narrower than the other forms of construction, unless amendments have been added to accommodate social change). "[I]t should not be assumed that any particular category of accommodations is covered because a statute is drafted in a certain form." Id.


210. CAL. CIV. CODE § 51.

211. N.J. STAT. ANN. § 10:5-5(f) (West 1993 & Supp. 1999); see supra note 130 (setting out the definition of a place of public accommodation).

212. KAN. STAT. ANN. §§ 44-1001, 44-1002 (1993 & Supp. 1998) (defining public accommodation); see supra note 88 and accompanying text (setting out the relevant text of the statute).

213. See KAN. STAT. ANN. § 44-1002; N.J. STAT. ANN. § 10:5-5(f).
respective jurisdictions apply the statutes to the Boy Scouts.214

In Curran, the plaintiff presented the California court with numerous examples of BSA activities that one could construe as business dealings.215 These ranged from transactions with nonmembers on a regular basis through the operation of retail shops that sell T-shirts, patches, uniforms, equipment, publications, and other official scouting items to the licensing and use of the BSA insignia.216 The activities also included one council’s business contact with members through a full-time staff of twenty-two individuals and an additional thirty-person summer staff, an annual budget of over $1.7 million, and retail stores.217 Despite the Curran courts’ recognition that the term “business establishment” is subject to a broad interpretation,218 the court held that such evidence did not make the Boy Scouts a business establishment.219 Therefore, in California, the BSA is not a place of public accommodation.220 This decision was surprising given the language of the statute that appears to be more inclusive.221 The Curran court, however, viewed the BSA as “charitable,

214. See Dale II, 734 A.2d at 1208-13 (construing the LAD, with its definition of a public accommodation in the form of a long, qualified list, to require the BSA to alter its discriminatory membership practices); see also Curran II, 952 P.2d at 229-38 (deciding that the BSA did not meet the requirements to be a “business establishment” under the general definition of California’s Unruh Act); Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385, 403-06 (Kan. 1995) (holding that the Kansas statute, which defines public accommodation in the form of a long, qualified list, did not apply to the BSA).


216. See id.

217. See id. at 223.

218. See id. at 236 (citing Burks v. Poppy Constr. Co., 370 P.2d 313 (Cal. 1962) for the proposition that past decisions of the California Supreme Court have emphasized that the term must “properly be interpreted ‘in the broadest sense reasonably possible’”).

219. See id. at 238.

220. See id. (emphasizing that the BSA’s participation in business transactions is superceded in importance by its function as an expressive social organization). The organization’s “primary function is the inculcation of values in its youth members, and whose small social group structure and activities are not comparable to those of a traditional place of public accommodation or amusement.” Id.

221. See Arbuss, supra note 200, at 450-51 (delineating the history of California’s antidiscrimination statute). Before 1959, California’s statute had the structure of a long list qualified by the clause: “and all other places of public accommodation or amusement.” See id. at 449-50 n.32 (citing Act of May 28, 1923, ch. 235, § 1, 1923 Cal. Stat. 485, originally enacted as Act of Mar. 13, 1897, ch. 108, 1897 Cal. Stat. 137). Notwithstanding the state courts’ contention that the statute was to be liberally construed, a line of cases in the 1950s limited its application. See id. at 450. The legislature then revised the statute in 1959 in response to public disapproval of the decisions, and named the new statute the Unruh Civil Rights Act. See id. at 450-51. Arbuss noted that “[t]he clear intent of the legislature in so acting was to increase the number of places where discrimination was proscribed.” Id. at 451.
expressive, and social,” and thus found that the statute did not apply to the organization.222

Similarly, in Seabourn v. Coronado Area Council, Boy Scouts of America,223 the Kansas Supreme Court stated that although the state “abhors discrimination,”224 the legislative intent of Kansas’ Act Against Discrimination was to encompass all businesses “which can reasonably be described as offering goods, services, facilities, and accommodations to the public.”225 The Seabourn court derived this interpretation from Kansas’ statute, which contains a long, specific list of institutions, and a caveat that the list was not exclusive.226 Despite a non-exclusive list, the court exempted the Boy Scouts from the statute’s coverage.227

In contrast, the New Jersey Supreme Court has construed its state’s statute liberally throughout a long line of cases.228 The court examined

222. See Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 236 (Cal. 1998) (Curran II) (explaining that the activities of the BSA are not related to “the promotion or advancement of the economic or business interests of its members”).

223. 891 P.2d 385 (Kan. 1995); see supra Part I.B.3 (setting out the facts of the case).

224. Seabourn, 891 P.2d at 403.

225. Id.; see also Kansas Comm’n on Civil Rights v. Sears, Roebuck & Co., 532 P.2d 1263, 1269-70 (Kan. 1975) (establishing the policy as to the application of the Kansas Act Against Discrimination). The Kansas Supreme Court in Seabourn dismissed any argument that the Boy Scouts fell under the exception in Kansas’ statute for a nonprofit fraternal or social association or corporation, and instead found that the BSA is not open to the general public. Seabourn, 891 P.2d at 392.


227. See Seabourn, 891 P.2d at 406 (emphasizing that “the Boy Scouts has no business purpose other than maintaining the objectives and programs to which the operation of facilities is merely incidental”).

228. See Dale v. Boy Scouts of Am., 734 A.2d 1196, 1208 (N.J. 1999) (Dale I) (citing Andersen v. Exxon Co., 446 A.2d 486, 492 (N.J. Sup. Ct. 1982) (internal citation omitted)). The Dale court stated: “We have adhered to that legislative mandate by historically and consistently interpreting the LAD ‘with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.’” Id.; see also N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1999) (“[D]iscrimination threatens not only the rights and proper privileges of the inhabitants of [New Jersey,] but menaces the institutions and foundation of a free democratic state.”). The places of public accommodation listed in the New Jersey statute are not the sole places of public accommodation, given that the use of the word “include” before the list of specific “places” was meant to encompass other accommodations that were similar to those listed. See, e.g., Fraser v. Robin Dee Day Camp, 210 A.2d 208, 211 (N.J. 1965); National Org. of Women v. Little League Baseball, Inc., 318 A.2d 33, 37 (N.J Super. Ct. App. Div. 1974), aff’d, 338 A.2d 198 (N.J. 1974) (affirming that “[t]he statutory noun ‘place’... is a term of convenience, not of limitation[,]... employed to reflect the fact that public accommodations are commonly provided at fixed ‘places.’”). The Little League decision relied on the revised public accommodation statute which read that a place of public accommodation “shall include but not be limited to” the enumerated examples. See 318 A.2d at 38; see also N.J. STAT. ANN. § 10:5-5. New Jersey had been a leader in fighting to eliminate invidious discrimination—it adopted the LAD in 1945, nearly 20 years before
the activities of the BSA, including its fundraising and its solicitation of members in several advertising media.\(^{229}\) It also considered the BSA’s close ties to federal and state governmental bodies as well as to covered public accommodations, including schools.\(^{230}\) After considering all of these factors, the New Jersey court deviated from California and Kansas’ interpretations and held that, in New Jersey, the BSA is a public accommodation.\(^{231}\)

**B. Undefined Statutory Exemptions: Another Obstacle for Clear Decisions**

In addition to unclear definitions and differences in statutory form, statutory exemptions to the antidiscrimination laws often perplex the courts.\(^{232}\) Legislatures have created categories in the statutes that delineate certain groups, including private clubs, religious organizations, and sexually segregated accommodations for which the statute is inapplicable.\(^{233}\) State legislatures promulgated these exemptions in recognition of an individual’s right to have intimate and private relationships.\(^{234}\) This

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\(^{229}\) See Dale II, 734 A.2d at 1211.

\(^{230}\) See id. at 1211-13 (reviewing the contact that the BSA has with the military, public schools, community colleges, state and local governments, and local government agencies).

\(^{231}\) Congress passed Title II. See James L. Fennessy, Comment, New Jersey Law and Police Response to the Exclusion of Minority Patrons From Retail Stores Based on the Mere Suspcion of Shoplifting, 9 SETON HALL CONST. L.J. 549 (1999). The LAD “is one of the oldest and most sweeping civil rights laws in the nation.” Id. at 567.

\(^{232}\) See, e.g., N.J. STAT. ANN. § 10:5-5(l). The statute reads:

Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, . . . nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation, in the admission of students. Id.; see, e.g., KAN. STAT. ANN. § 44-1002(h) (1993 & Supp. 1998) (“Public accommodations do not include a religious or nonprofit fraternal or social association or corporation.”).

\(^{233}\) See Arbuss, supra note 200, at 449 n.30 (providing examples of state-enacted exemptions).

\(^{234}\) See id. at 467 n.124 (explaining that, theoretically, a private club’s membership policy is protected by the constitutional right to freedom of association and the right of privacy); Koppen, supra note 15, at 649 (explaining that the Civil Rights Act of 1964 expressly exempts private clubs from its coverage).

The Supreme Court’s decision in Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) illustrates that state legislatures promulgated exemptions in recognition of an individual’s right to have intimate and private relationships. The
right is grounded in the First Amendment freedoms of expression and association.\textsuperscript{235} The most frequently employed exception is the private club exemption.\textsuperscript{236} Unfortunately, despite a goal of forwarding members' rights of association and expression, legislative efforts provide more confusion than protection.\textsuperscript{237} These exceptions compel courts to grapple with whether organizations, including the Boy Scouts, are private clubs,\textsuperscript{238}

\textit{Rotary} Court recognized the freedom to enter into "certain intimate or private relationships" as a fundamental right under the \textit{Bill of Rights}. See \textit{id.} at 545. The Court quoted its decision in \textit{Roberts v. United States Jaycees}, 468 U.S. 609, 619-20 (1984) where it acknowledged protection for 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 distinctive personal aspects of one's life." \textit{Id.} Both \textit{Rotary} & \textit{Roberts} emphasized the importance of undertaking a careful evaluation of the parameters of state authority to regulate an individual's freedom to associate. See \textit{id.}

In furtherance of the constitutional protection of intimate relationships, Congress and state legislatures have emphasized the need for protection, but have also mandated that the courts only extend such protection to bona fide private organizations. See Koppen, \textit{supra} note 15, at 654-55. This is evidenced by Senator Humphrey's testimony during the debate over Title II's private club exemption: "We intend only to protect the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis." 110 \textit{CONG. REC.} 13,697 (1964).

\textsuperscript{235} See \textit{Lerman & Sanderson, supra} note 7, at 250-51. The United States Constitution does not mandate that the states exempt private clubs from coverage. See \textit{id.} In fact, although Title II contains a private club exemption, it defers to state law on the issue of antidiscrimination laws. See \textit{id.} at 251. A state may therefore refuse to include such an exemption and the organization will be subject to the state's antidiscrimination law. See \textit{id.}

\textsuperscript{236} \textit{Cf. Varela, supra} note 193, at 934. Less than half the states exempt private clubs from their public accommodation statute. See \textit{id.} This is a recent trend because, as of 1970, all states with public accommodation statutes implicitly or explicitly exempted private clubs. See \textit{id.} at 934 n.103.

\textsuperscript{237} See \textit{Lerman & Sanderson, supra} note 7, at 251-52 (pointing to the state courts' lack of decisiveness on the issue of the private club exemption). There is also significant divisiveness on the issue of the proper method for the evaluation of private organization status. See Koppen, \textit{supra} note 15, at 656. The Fourth Circuit deemed the issue a question of fact, and the majority of courts adhere to this standard. See \textit{id.} (discussing Nesmith v. Y.W.C.A. of Raleigh, 397 F.2d 96, 98-100 (4th Cir. 1968)). The Fifth Circuit, however, found the determination of private club status to be "a question of law once the underlying facts are determined." \textit{Id.} at 656-57 (quoting with approval United States v. Richberg, 398 F.2d 523, 525-26 (5th Cir. 1968))). Treating the term as an issue of law will lead to a different interpretation of the term with every case. See \textit{id.} Designating the definition of "private club" as an issue of law will afford appellate courts more latitude to determine the issue on appeal, since issues of law are reviewed \textit{de novo}. See \textit{id.} at 657. Greater authority on the part of the appellate courts will resolve discrepancies in lower court decisions. See \textit{id.}

\textsuperscript{238} One commentator noted the existence of a "hodgepodge of bases for suits, courts and rules" because litigants may raise the private club exemption under state and federal law. See Koppen, \textit{supra} note 15, at 657. There are many components that courts use to reach their determinations of whether an organization falls under a statute's exemption for
largely because the legislatures draft the exemptions ambiguously.\textsuperscript{239} For instance, New Jersey's statute exempts "any institution, bona fide club, or place of accommodation, which is in its nature distinctly private"\textsuperscript{240} but does not define "distinctly private."\textsuperscript{241} This determination is imperative in determining statutory coverage, because an organization that offers accommodations to the public is subject to the applicable public accommodation statute, and is no longer private.\textsuperscript{242} Nevertheless, some statutes do not provide clear definitions, leaving courts with little direction on the issue and further confusing public accommodation litigation.\textsuperscript{243}

private clubs. \textit{See id.} These include: genuine selectivity of the group in the admission of members, including objective standards for admission; formality of admission procedures; membership control over member selection; statistics concerning denial of membership; numerical limit on membership and membership fees; membership control over operations of establishment; history of the organization; use of facilities by nonmembers; club's purpose for formation and continuing; club advertisement; profit or non-profit organizations; observed formalities; general characteristics of private clubs; operation for the sole benefit of members; and public funding. \textit{See id.} at 657-75. \textit{See, e.g.,} Dale v. Boy Scouts of Am., 734 A.2d 1196, 1213-17 (N.J. 1999) (\textit{Dale II}) (weighing arguments concerning the BSA's membership policies and size and determining that while the BSA is a bona fide club, it is not distinctly private). The BSA, therefore, did not fall under the New Jersey statute's private club exemption. \textit{See id.; see also} Lerman & Sanderson, \textit{supra} note 7, at 251 (finding that courts have weighed criteria such as "advertising, profit orientation, openness to the public, and the general purpose of the facility").

\textsuperscript{239} \textit{See Arbuss, supra note 200, at 467-68} (advocating the need to clarify the definition of private organization under the California Unruh Act). Discriminating businesses would reorganize into "clubs" in order to avoid falling under the applicable public accommodation statute. \textit{See, e.g.,} Daniel v. Paul, 395 U.S. 298, 301-02 (1969) (finding that a place of amusement that awarded membership based on race was not member-owned and had no self-governing provisions, and therefore was not a private club under Title II).


\textsuperscript{241} \textit{Id.; see also id.} § 10:5-5 note (SENATE STATE GOV'T, FEDERAL AND INTERSTATE RELATIONS AND VETERANS AFFAIRS, COMM. STATEMENT, S. 1608-L.1977, c. 122) (providing some guidance on legislative intent, which is absent from the statutory provision). The statement announced that

\begin{quote}
[the definitions section of the statute, as it now stands, excludes a club which is exclusively social "or a fraternal, charitable, educational or religious association or corporation, if such club, association or corporation is not organized and operated for private profit," from the preview of the provisions pertaining to discrimination in employment.
\end{quote}

\textit{Id.}

\textsuperscript{242} \textit{See Arbuss, supra note 200, at 468.}

\textsuperscript{243} \textit{See supra note 232} (setting out the text of the New Jersey and Kansas club exemptions). There is a clear lack of clarification in New Jersey's exemption of a "distinctly private" organization. \textit{See N.J. STAT. ANN. § 10:5-5(l).} This nebulous statement has given rise to litigation, such as \textit{Dale v. Boy Scouts of America}. The Supreme Court provided factors that a court should use in considering a club's private or public status. \textit{See Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987); Roberts v. Jaycees, 468 U.S. 609, 620 (1984).} These factors include "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." \textit{Rotary,} 481 U.S. at 546 (applying \textit{Roberts,} 468 U.S. at 620). These factors, however, have not provided con-
C. “Place” is a Crucial Term When Interpreting the Statute

A further frustration with public accommodation statutes is the failure of legislatures to provide a coherent definition of “place.” Several cases have focused on whether “place” refers to a physical situs, and many courts have tied the applicability of the statute to groups that meet at a regular site. Other courts, however, have noted that “places do not discriminate; people who own and operate places do.”

The New Jersey Supreme Court addressed this issue directly in Dale when it noted that the legislature had made multiple alterations to the LAD, but had never clarified the definition of “place” to make it more concrete guidance for the courts, since the BSA’s status as a private organization has not been uniform throughout the litigation in which it has been involved. Compare Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1276-77 (7th Cir. 1993) (Welsh IV) (holding that the BSA is not a public accommodation, but if it were, it would be exempt under the private club exception to Title II), with Dale II, 734 A.2d at 1213-18 (finding that the BSA does not fall under the distinctly private exception).

244. See, e.g., CONN. GEN. STAT. § 46a-63 (1995) (providing an ambiguous definition of public accommodation). The statute states:

“Place of public accommodation, resort or amusement” means any establishment which caters or offers its services or facilities or goods to the general public, including, but not limited to, any commercial property or building lot, on which it is intended that a commercial building will be constructed or offered for sale or rent.”

Id.

245. See Quinnipiac Council, Boy Scouts of Am. v. Commission on Human Rights and Opportunities, 528 A.2d 352, 357 (Conn. 1987) (concluding that the legislature linked its definition of “place” with the term “any establishment” in the statute, rather than a site). The Quinnipiac court found this construction sufficiently ambiguous to consider extrinsic evidence. See id. The court stated that “[i]nquiry into the statute’s legislative history makes it exceedingly doubtful that linkage to a physical site is a necessary element of the present definition of a ‘place of public accommodation.’” Id. This was due to the legislature’s repeated amendments that enlarged the scope of the statute. See id. The original statute contained a specific list of qualified enterprises, but the legislature amended this formulation in 1953 to be phrased as a general definition: “any establishment which caters or offers its services or facilities or goods to the general public.” Id. at 358 (quoting CONN. GEN. STAT. § 2464c (Supp. 1953)). The court found that “the unconditional language of the statute, the history of its steadily expanded coverage, and the compelling interest in eliminating discriminatory public accommodation practices persuade us that physical situs is not today an essential element of our public accommodation law.” Id. at 358; see also Dale II, 734 A.2d at 1210 (noting the discrepancies between interpretations of “place”).

246. Welsh IV, 993 F.2d at 1282 (Cummings, C.J., dissenting); see also Quinnipiac, 528 A.2d at 358 (declaring that “our statute now regulates the discriminatory conduct and not the discriminatory situs of an enterprise which offers its services to the general public”).
limiting.\(^{247}\) This ruling follows New Jersey precedent.\(^{248}\) For example, the New Jersey Supreme Court affirmed a decision that the Little League is a place of public accommodation, even though it does not operate at a physical structure, such as a building; therefore, the Little League could not exclude girls who wished to join.\(^{249}\) An earlier case held that a day camp was a public accommodation even before the statute included day camps; thus, it could not discriminate based on race.\(^{250}\)

The New Jersey decisions, however, are in sharp contrast to the approach taken by other jurisdictions, which emphasize the importance of interpreting statutes according to their plain meaning.\(^{251}\) The disparate

\(^{247}\) See Dale II, 734 A.2d at 1210 (emphasizing that the legislature’s failure to alter the definition of place was tacit support of the judicial interpretation that place was not constricted to a physical place). The Dale II court cited Massachusetts Mutual Life Insurance Co. v. Manzo, 584 A.2d 190, 201 (N.J. 1990), which stated that “[t]he Legislature’s failure to modify a judicial determination, while not dispositive, is some evidence of legislative support for the judicial construction of a statute . . . [especially when] the Legislature has amended [the] statute several times without altering the judicial construction.” Id.

\(^{248}\) See, e.g., Frank v. Ivy Club, 576 A.2d 241, 249, 257 (N.J. 1990) (finding a private eating club to be a public accommodation because of its symbiotic relationship with the university, when the university was a public accommodation); Clover Hill Swimming Club v. Goldsboro, 219 A.2d 161, 166 (N.J. 1966) (construing an incorporated swimming club to be a public accommodation, and not a private club); National Org. for Women, Essex County Chapter v. Little League Baseball, Inc., 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974), aff’d, 338 A.2d 198 (N.J. 1974) (holding that the LAD should be applied to little league baseball fields; therefore, the organization cannot prohibit females to join).

\(^{249}\) See Little League, 318 A.2d at 37-39. The Appellate Division of the Superior Court of New Jersey decreed that because the Little League held out an invitation to children in the community with no limitation (except for sex), it was a public accommodation and therefore could not discriminate on the basis of sex. See id. at 37-38.

The statutory noun “place” (of public accommodation) is a term of convenience, not of limitation. It is employed to reflect the fact that public accommodations are commonly provided at fixed “places” . . . . The “place” of public accommodation in the case of Little League is obviously the ball field at which tryouts are arranged, instructions given, practices held and games played.

Id. at 37.

\(^{250}\) See Fraser v. Robin Dee Day Camp, 210 A.2d 208, 211-12 (N.J. 1965) (finding the day camp to be a public accommodation because it was similar to other recreational and educational institutions listed in the statute). The court stated: “A day camp is essentially an educational-recreational accommodation for children. We therefore think it clear that respondent’s day camp is the type of accommodation which the Legislature intended to reach.” Id. at 212.

\(^{251}\) See Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1269 (7th Cir. 1993) (Welsh IV) (resolving that a statute should be interpreted by considering the ordinary meaning of the words used).

A reading of [Title II] for its plain meaning renders but one conclusion: Congress when enacting § 2000a(b) never intended to include membership organizations that do not maintain a close connection to a structural facility within the meaning of “place of public accommodation.” The statute clearly governs only an entity that: (1) “serves the public” and (2) may be classified as an “establishment,”
interpretations are in conflict because New Jersey emphasizes the need for a liberal interpretation in light of the statute's goal of eradicating discrimination,252 while other jurisdictions construe "place" to limit the scope of the statute using a plain meaning interpretation.253 Clearly, clarification is necessary.254

When a court finds that a statute is ambiguous on its face, it will consider the legislative intent behind the statute to interpret the statute's

“place,” or “facility.”

Id. (quoting 42 U.S.C. § 2000a(b)). The court refused to override the strong presumption accorded to the canon that the plain language of a statute expresses the legislative intent, and found that the presumption can only be rebutted in the face of rare circumstances where a contrary intent is explicit. See id. at 1270. Because the Supreme Court stated in Daniel v. Paul, 395 U.S. 298, 307-08 (1969) that the purpose of Title II was to eliminate discrimination in “facilities ostensibly open to the general public,” and because it is not the prerogative of the judicial branch to do more than interpret the law, the Seventh Circuit Court of Appeals flatly refused to expand the statute beyond the ordinary meaning of the term “place.” Id. at 1270-71.

252. See Dale II, 734 A.2d at 1208. “Certainly, if the statute is broadly applicable, the antidiscriminatory impact of its provisions is greater. The Legislature’s finding that the effects of discrimination are pernicious, and its directive to liberally construe the LAD, have informed our cases interpreting the reach of ‘place of public accommodation.’” Id. The New Jersey Supreme Court noted that other jurisdictions also do not interpret “place” narrowly. See id. at 1210. The court cited New York and Minnesota decisions which applied place to “‘the place where [the organizations] do what they do,’ including ‘the place where [the organizations'] meetings and activities occur.’” Id. (citing United States Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1204 (N.Y. 1983) and United States Jaycees v. McClure, 305 N.W.2d 764, 773 (Minn. 1981)). The Minnesota Supreme Court stated that “a ‘place of public accommodation’... is less a matter of whether the organization operates on a permanent site, and more a matter of whether the organization engages in activities in places to which an unselected public is given an open invitation.” Id. (referring to the New Jersey Supreme Court’s decision in Little League).

253. See supra Part I.B.1 (explaining the reasoning of the Seventh Circuit Court of Appeals); see also United States Jaycees v. Richardsen, 666 P.2d 1008, 1011 (Alaska 1983) (confirming its statute to its interpretation of “place,” which it found “would not encompass a service organization lacking a fixed geographical situs”); United States Jaycees v. Massachusetts Comm’n Against Discrimination, 463 N.E.2d 1151, 1156 (Mass. 1984) (refusing to extend the scope of Massachusetts' antidiscrimination statute to membership organizations because “such an organization does not fall within the commonly accepted definition of a ‘place’”).

254. Cf. Scalia, supra note 201, at 16 (questioning the rule of statutory construction that investigation into the meaning of a statute stops when the meaning is clear on the face of the statute). Justice Scalia raised this point because the admitted purpose of statutory interpretation is to ascertain the legislative intent behind the promulgation of the statute. See id. He emphasized that seemingly contradictory canons of interpretation exist, but that each canon is one approach, and that it must yield to other approaches if they are more appropriate. See id. at 27; see also Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed, 3 VAND. L. REV. 395, 401 (1950) (explaining that there are two opposing canons on every point).
language. Despite this maxim, absent an explicit statement of legislative intent in the statute, the court must extrapolate what it perceives to be the intent from committee reports or other legislative history.

Given that the court’s examination is already extensive due to the factors described above, it is clear that the failure of the legislature to include a statement of intent further exacerbates the process of determining the statute’s scope.

IV. PUBLIC ACCOMMODATION STATUTES REQUIRE REVISION TO EFFECTUATE THE GOAL OF ELIMINATING DISCRIMINATION

As is evident from the problems enumerated above, legislatures must act to clarify the statutes. Given that the goal of public accommodation statutes is to eradicate the invidious “cancer of discrimination,”

255. Compare Welsh IV, 993 F.2d at 1270 (employing the canon that one must, if possible, find the legislative intent in the plain meaning of the statute), with Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 229 (Cal. 1998) (Curran II) (finding the term “business establishment” to be unclear on the face of California’s antidiscrimination statute and therefore turning to the legislative history of the statute to find the legislature’s intent).

256. See Varela, supra note 193, at 935 (stating that the judiciary has an easier task if a statement of intent is present); cf. Scalia, supra note 201, at 29-37 (finding that reliance on legislative history to interpret statutes is an imprecise and unreliable method of interpretation). The traditional English and American practice of interpretation eschewed such an approach because the individual motivations of legislators do not capture the force of the statute itself; instead, one should find the will of the statute in its words. See id. at 30. Legislative dissatisfaction with the judiciary’s use of “legislative intent” and feigned canons of interpretation as a tool to force their own views resulted in the growth of legislative history as an interpretive device in America in the 1920s and 1930s. See id. Scalia finds fault in legislative history for two main reasons. First, lawyers routinely substitute legislative history for the actual statutory text as support for their arguments. See id. at 31-35. Second, committee reports and other legislative documents are often neither written nor read by the members of Congress who supposedly penned them. See id. (supporting his argument with an amusing, although embarrassing Senate transcript quoted in one of Justice Scalia’s D.C. Circuit Court of Appeals opinions, wherein Senator Dole could not identify any senator who had written a report for the Senate Finance Committee, and further stated that he had not read the report in its entirety).

257. See Varela, supra note 193, at 935.

258. Cf. Perlman, supra note 4, at 127-39 (outlining an approach to clarify the statutes). Mr. Perlman suggests that the implications of an organization’s right of association, compared with the prospective member’s right to associate with the organization, constitute an important constitutional consideration that courts should examine in determining the applicability of a public accommodation statute to the organization. See id. at 115-16. In fact, “courts and commentators have underestimated the constitutional scope of public accommodation laws and unduly limited the permissible breadth of such statutes. This absence of adequate constitutional boundaries for such laws reflects a failure to acknowledge the dual nature of the freedom of association.” Id. at 143-44.

changes in the field are imperative in order to provide courts with consistent direction. Further, the adherence to definitions in statutes, some of which are decades old, could perpetuate archaic public policies.

Most courts are reluctant to expand the scope of their state’s public accommodation statute because the augmentation of statutes is the purview of the legislature. Consequently, the most effective manner to forward the goal of public accommodation statutes on a nationwide level is for the American Law Institute (ALI) to draft a Restatement of Anti-Discrimination Law, or for the National Conference of Commissioners on Uniform State Laws to draft a uniform state statute.

Through an examination of the necessary components of public accommodation statutes, focusing on the goal of eliminating discrimination and the concerns voiced by state legislatures as they drafted their original statutes, the ALI or the National Conference of Commissioners could formulate an effective statute. This statute could then provide notice to organizations and their prospective members as to exactly where they fall on the spectrum of public accommodations, as well as furnish guidance to

...
courts presiding over related litigation. Further, a clearer statute would eliminate the need for much litigation.

A. A Public Accommodation Should Not be Defined by its Link to a Physical Site

The first consideration in drafting the statute must be its scope; specifically, what entities the statute prohibits from discriminating in their activities. Once the scope is determined, the drafting body should formulate precise definitions to clearly illustrate the statute’s purpose. Next, the Institute or the Conference must determine a structure for the definition of public accommodation. Then it must delineate the exceptions to the statute, again through clear definitions. A key principle, which the drafter’s must consider throughout the drafting process, is the determination that the statutory definition of a public accommodation cannot be tied to physical situs. This determination is paramount because it looms as a central issue in public accommodation cases, often driving conflicting results.

Mandating that a public accommodation be tied to a physical place is an illogical requirement because public accommodation laws have their roots in common law principles that prohibited discrimination by common carriers, innkeepers, and other entities that furnished services to the

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264. The Dale decision has already caused turmoil for private organizations because they are now unsure what affect the decision will have on their ability to select members. See Assaulting the Boy Scouts, VETERANS OF FOREIGN WARS MAG., Oct. 1, 1999, at 8. An article in the Veterans of Foreign Wars Magazine posited that “[i]f BSA membership eligibility can be mandated by judicial edict, then the membership standards of every private social service organization can be challenged as discriminatory based on the definition of ‘public accommodation.’” Id. Others have called for Supreme Court review of the Dale case. Id.

265. See Arbuss, supra note 200, at 452 (quoting Mohr & Weber, The Unruh Civil Rights Act: Just How Far Does it Reach?, 11 BEV. HILLS B. ASS’N J. 32-33 (1977)). The imprecise definition of “business establishments” in California’s Unruh Act is an “invitation to litigation.” Id.

266. See Varela, supra note 193, at 951. “[S]tate and local legislatures need to draft the definition of public accommodation as precisely as possible. The legislature must first have an idea of what type of organization it seeks to integrate through its” public accommodation statute. Id.

267. See id.


269. See Welsh III, 787 F. Supp. at 1534; Little League, 318 A.2d at 37.
Since common carriers are by definition transient, they are analogous to an entity that acts in several locations, rather than at one specific site, such as a little league baseball organization. In addition, courts have commented on the absence of reason in mandating that a public accommodation is solely a static place because it is individuals who discriminate, and the presence of a permanent building does not affect the severity of the discrimination. Finally, the drafters should consider that "place of public accommodation" has become a term of art, and therefore lawmakers should no longer define "place" separately by its traditional meaning.

270. See Arbuss, supra note 200, at 444-45. This early designation of inns as a public accommodation has its basis in the fact that inns held themselves out as open to the public. See Singer, supra note 13, at 1318 (asserting that "[h]olding oneself out as open to the public, one simply should do what one has undertaken to do, especially when others rely on you to fulfill your role.").

271. See BLACKS LAW DICTIONARY 205 (7th ed. 1999) (defining "common carrier" as "[a] carrier that is required by law to transport passengers or freight, without refusal, if the approved fare or charge is paid. – Also termed public carrier."); see also Little League, 318 A.2d at 37 (finding ball fields to be sufficient to qualify under the definition of place).

272. See Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights and Opportunities, 528 A.2d 352, 357-58 (Conn. 1987). The Supreme Court of Connecticut was forced to use legislative history to interpret the ambiguous term "place" in the public accommodation statute. See id. The court concluded that the legislature linked "place" with "any establishment" rather than a site. See id. at 357. The court concluded that the Connecticut statute "regulates the discriminatory conduct and not the discriminatory situs of an enterprise which offers its services to the general public." Id. at 358. But see Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1269 (7th Cir. 1993) (Welsh IV) (concluding that the plain meaning of 42 U.S.C. § 2000a(b) conveyed that Congress did not intend to include "membership organizations that do not maintain a close connection to a structural facility within the meaning of 'place of public accommodation'").

273. According to canons of traditional statutory construction, "[w]ords and phrases which have received judicial construction before enactment are to be understood according to their construction," unless "the statute clearly requires them to have a different meaning." Llewellyn, supra note 254, at 403. Further, while "[w]ords are to be taken in their ordinary meaning unless they are technical terms or words of art," "[p]opular words may bear a technical meaning and technical words may have a popular signification and they should be so construed as to agree with evident intention or to make the statute operate." Id. at 404. Contrast these canons, however, with two others: "every word and clause must be given effect," and "if inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage." Id. These last two can be reconciled by agreeing that "place of public accomodation" has become a term of art, and therefore the entire unit should be treated as a phrase, instead of considering each word separately. Id. Further, contrast different definitions of "place" provided by Webster's Dictionary. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1727 (1993). The definitions include: "a building or locality used for a special purpose," "an indefinite region or expanse," "a relative position in the social scale," "a proper or designated niche," and "a normal or suitable environment," among others. Id.
B. The Goods and Services an Entity Provides Should Determine if the Statute is Applicable

After determining that a public accommodation is not solely one with a fixed situs, the drafters must articulate a definition in the form of either a general definition or a laundry list-type definition. A general definition, coupled with carefully drafted exceptions will provide the clearest coverage because courts would consider the characteristics of the entity at issue and decide if it was encompassed within the category. This structure will be effective because definitions in the form of lists only supply courts with uncertainty; if a statute is in the form of a list, courts must first determine if the entity at issue is more similar than different to a listed entity.

The drafters should structure the general definition, however, by a different approach than that traditionally used by the courts. Instead of focusing the definition on the type of establishment, the definition should focus on the goods, services, or other advantages it provides. The model statute should define a public accommodation as an entity that provides goods, services, or advantages that are required, desired, or ad-

274. See Arbuss, supra note 200, at 464-65 (recommending an overhaul of California’s definition of “business establishment” to clarify the uncertainty in the present statute).

275. Cf. Lerman & Sanderson, supra note 7, at 242 (explaining that general definitions provide statutes with extensive coverage because courts “have little discretion to narrow” the laws).

276. See generally Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385 (Kan. 1995) (litigating a statute whose definition is a qualified list); Dale v. Boy Scouts of Am. & Monmouth Council, 734 A.2d 1196 (N.J. 1999) (Dale II) (same). The intention of legislators who employ general definitions is to broaden the scope of the statute, however, more specific statutes are less ambiguous. See Lerman & Sanderson, supra note 7, at 242-43. Some commentators advocate the long qualified list as more precise than a general definition and less arbitrary than an unqualified list. See id. at 243; Arbuss, supra note 200, at 467 (advocating the addition of an illustrative list of covered organizations to California’s Unruh Act).

277. See, e.g., MINN. STAT. § 363.01 (1998) (defining a public accommodation as “a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public.”). The Supreme Court held that the statute was not unconstitutionally vague or overbroad. See Roberts v. United States Jaycees, 468 U.S. 609, 629-31 (1984).

278. See Perlman, supra note 4, at 124. Perlman recommends that the constitutional protection an organization receives for its membership selection should be based on “whether an organization provides the kinds of goods, services, or advantages that give public accommodation statutes their value. This way, even if a group engages in expression, the group would not receive constitutional protection if it also provides some good or service to the public.” Id.
vantagous to the general public, and that are not directly connected to
an association's expressive purpose, if it was formed for such a purpose. Although there still is an element of uncertainty to this approach (for instance, in defining the relevant public), at least it eliminates the comparison between the entity and the statutory list of establishments. For example, instead of a court inquiring if a swimming club is analogous to listed entities or whether it invites the public at large to join, the court could simply conclude that public swimming facilities are an asset to the general public, and are not part of an expressive purpose; thus, individuals should not be excluded.

C. Clearly Defined Exemptions are Critical for Guidance to Courts and Member Organizations

The next important consideration for the drafting body is the exemptions that the statute will contain. Commonly exempted entities include private clubs, religious entities, or religious educational entities. Although not all states presently contain such a provision, the drafters should include in the statute an exemption for genuinely private organizations. This is primarily because the Constitution protects organizations' expressive interests in both membership selection and espousing their purpose. Further, such an exemption would fulfill the legislative goals voiced during discussion of the existing public accommodation statues, which are discernible in legislative testimony and several commentators' arguments on the merits of private organizations.

279. Cf. id. at 129-30 (considering the application of public accommodation statutes to expressive organizations who provide expressive goods to their members). Perlman argues that public accommodation laws should not be applied to an organization solely because it provides some good. See id. Instead, he contends that the laws should only apply when the good provided is not representative of the expressive purpose of the organization, and when the good is provided as the organization's primary function. See id.


281. See Arbuss, supra note 200, at 467-68 (describing the Unruh Act's exemptions); see, e.g., Welsh v. Boy Scouts of Am., 787 F. Supp. 1511, 1535 (N.D. Ill. 1992) (Welsh III) (quoting the remarks of Representative Senner during debate over Title II, who emphasized that Title II would not invade personal privacy or "compel . . . personal or confidential relationships."); see also N.J. STAT. ANN. §10:5-5(l) (West 1993 & Supp. 1999) (detailing New Jersey's LAD exemptions).

282. See Koppen, supra note 15, at 649 n.44, listing the 30 states that exempt private clubs from their public accommodation statutes.

283. See Lerman & Sanderson, supra note 7, at 250-51. "[T]he private club exemption is partially based on the customer's constitutional right to free association." Id.

284. See Arbuss, supra note 200, at 468-69 (advocating the exemption of genuine religious organizations from public accommodation statutes on the ground that they are de-
In order to properly protect the constitutional interests of private organizations and, at the same time, exclude organizations that are, by nature, public, it is imperative that exemptions be drafted clearly. Explicit requirements in the statute will assist courts in determining whether an organization is truly private. Quantitative standards, such as a size requirement or a percentage of applicants denied on non-discriminatory grounds, would provide concrete qualifications that can effectively protect an organization's constitutional rights while forwarding the goal of the statute.

D. Unambiguous Terminology, a Statement of Legislative Intent, and the Determination of Covered Individuals Will Coalesce to Finalize the Statute

In addition to unequivocal definitions for public accommodation and for private organization, the ALI or the National Conference of Commissioners must define all terminology clearly. Explicit, unambiguous definitions will relieve judicial conjecture and reliance on speculation of legislative intent during the interpretation of public accommodation statutes. A further tool in ascertaining the statute's purpose is a statement of legislative intent. A statement of intent on the face of the statute to guide the courts will simplify the judiciary's interpretative task.

285. See Arbuss, supra note 200, at 467-68 (contending that if exemptions for private clubs are not precisely drawn, clubs could avoid being covered by the statute); see also supra note 25 (enumerating the Landsdowne Swim Club Factors used by courts in determining whether an organization was a private club under Title II; this approach, however, was not codified and still required a considerable amount of judicial deliberation to reach a decision).

286. See Varela, supra note 193, at 951-53 (advocating quantitative standards for private club exemptions). The commentator touts New York City's public accommodation law as "a successful attempt to announce a clear policy goal and to draft responsive, bright-line measures implementing that goal" because it contains a clear definition of a public accommodation. See id. at 952-53. New York City amended its definition to apply to clubs with specified quantitative qualities. See id. at 952. These include: more than 400 members, regular meal service, and regular receipt of admission payments by nonmembers. See id. The statute exempts benevolent orders and religious corporations from this test, and therefore from the statute. See id.

287. See id. at 935 (emphasizing that unequivocal definitions will provide some uniformity in a state's decisions). Mr. Varela notes, however, that even with explicit definitions, some judges may rely on their own approach to statutory construction. See id.

288. Cf. Llewellyn, supra note 254, at 400 ("If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."). But see Varela, supra note 193, at 951-53 (advocating that an express statement of purpose must be accompanied by clear definitions).

289. See Varela, supra note 193, at 935 (observing that some states' public accommo-
Finally, the drafters must establish the classifications that the statute will cover. In the interests of pursuing the goals of antidiscrimination statutes, it would be advantageous to include as many protected classes as possible.\footnote{290} Only by setting an example that society will not tolerate discrimination will progress be made in eliminating it.\footnote{291}

V. CONCLUSION

As demonstrated by the courts' disparate interpretations in the aforementioned cases, we must refine public accommodation statutes to protect adequately against invidious discrimination. Providing state legislatures with a model statute so that they may clarify their own statutes will best achieve this goal. Such a statute must not base public accommodation on a physical site, because it is individuals who discriminate. Further, the statute must be drafted with explicit definitions and exceptions and include a statement of legislative intent. Creating uniformity among the state statutes will decrease discrimination by equalizing protection against an evil that society has targeted, but not eliminated.


\footnote{291. \textit{See} N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1999) (stating the finding and declaration of the legislature). The New Jersey statute states: The Legislature finds and declares that practices of discrimination against any of its inhabitants... are matters of concern to the government of the State, and that such discrimination 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[.]}

\textit{Id.}