

November 2015

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### Recommended Citation

Daniel Ortner, *Scout's Honor: The Boy Scouts, Judicial Ethics, and the Appearance of Partiality*, 2015 BYU L. Rev. 1381 (2016).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2015/iss5/9>

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## Scout's Honor: The Boy Scouts, Judicial Ethics, and the Appearance of Partiality

In January 2015, the California Supreme Court officially adopted an amendment to its Code of Judicial Ethics with the express purpose of forbidding judges from remaining members of the Boy Scouts of America (BSA).<sup>1</sup> Starting on January 21, 2016, judges in California will no longer be permitted to hold membership in the Boy Scouts of America<sup>2</sup> or other youth organizations that limit membership on the basis of “race, sex, gender, religion, national origin, ethnicity, or sexual orientation.”<sup>3</sup> Although California is the only state to take affirmative steps to ban membership in the Boy Scouts, forty-seven states have judicial codes of ethics that ban judges from membership in groups that practice invidious discrimination. Twenty-two of those states include in that bar groups that engage in “invidious discrimination” on the basis of sexual

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1. As will be discussed further, the proposed amendment expressly referenced the Boy Scouts as its intended target. SUPREME COURT ADVISORY COMMITTEE ON THE CODE OF JUDICIAL ETHICS, INVITATION TO COMMENT: SP14-02, at 2, 4 (Feb. 5, 2014) [hereinafter INVITATION TO COMMENT], <http://www.courts.ca.gov/documents/SP14-02.pdf> (“The Bar Association of San Francisco initiated the request, joined by the Santa Clara County Bar Association.”). Moreover, the amendment eliminated an exemption, which had been in place since 1996 allowing for membership in non-profit youth organizations without regard to their discriminatory practices. *See infra* Section I.A.

2. The BSA recently changed its policies to allow individual scout troops to decide whether or not to allow gay scout leaders. As discussed *infra* in Section I.B, it is not clear whether the California ban will continue to apply to the BSA. However, in some ways, the changes in the BSA policy make the discussion of the constitutionality of California’s ban even more relevant. The policy change came as a result of continued legal challenges such as California’s pending ban. That unconstitutional efforts such as the judicial ban in California were successful in pressuring the BSA to change its policies means that such efforts deserve greater scrutiny. Because these efforts were successful in pressuring the BSA, there is reason to believe that they may be subsequently implemented against other unpopular groups and causes.

3. Associated Press, *California Bars Judges from Belonging to Boy Scouts*, FOX NEWS (Jan. 24, 2015), <http://www.foxnews.com/us/2015/01/24/california-bars-judges-from-boy-scouts/>; Mark Pulliam, *Blacklisting the Boy Scouts*, CITY J. (Feb. 6, 2015), <http://www.city-journal.org/2015/cjc0206mp.html>. *See generally* INVITATION TO COMMENT, *supra* note 1.

orientation.<sup>4</sup> Such canons raise significant constitutional concerns which have received surprisingly little scholarly attention.<sup>5</sup>

This Comment will consider the constitutionality of California's new ban on judicial participation in the Boy Scouts ("Boy Scout ban"). Because most states, including California, model their judicial codes of ethics after the Model Code of Judicial Conduct, these observations will apply with equal force to other states that have bans on judicial membership in groups that engage in discrimination that is deemed invidious. Part I will examine the text and history of the California Judicial Code of Ethics to show that the State has deliberately targeted the Scouts and other expressive associations. Part II will examine the wide range of constitutional rights that are substantially burdened by the canon, including freedom of association, free exercise, and parental autonomy. As a result, the proper standard of review is strict scrutiny, even though judges are public officials, and the State must justify the restriction by pointing

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4. It is unclear whether the policies in these states would ban membership in the Scouts. As will be discussed in Section I.A, the commentary to the California rule explains that determining whether a group practices invidious discrimination is a fact-specific, case-by-case inquiry. California, however, in its request for comment regarding the elimination of the exemption for youth organizations, expressly stated that this change would impact the Boy Scouts. See INVITATION TO COMMENT, *supra* note 1, at 4.

5. Sean Grindlay wrote an invaluable article regarding the change in the *Model Code of Judicial Conduct* to include sexual orientation. Since his article was published in 2007, there has been a sea change in the way that society views sexual orientation discrimination, as well as significant developments in the campaign finance realm, which I rely on heavily in this article. In addition, Grindlay's article did not examine other rights that the canon might burden, such as free exercise or parental rights, nor did he closely examine whether avoiding an appearance of impartiality could ever constitute a compelling state interest. See generally Sean V. Grindlay, *May a Judge Be a Scoutmaster?* Dale, White, and the New Model Code of Judicial Conduct, 5 AVE MARIA L. REV. 555 (2007). Harvard Professor Noah Feldman has also been a prominent public voice on the topic and has been interviewed in scores of articles relating to the Scout ban. I am grateful to Professor Feldman for his extensive contribution to the public discourse over that ban. See Emily Green, *California Judges Must Cut Ties with the Boy Scouts*, NPR (Mar. 18, 2015, 2:52 PM ET), <http://www.npr.org/2015/03/16/392360308/california-judges-must-cut-ties-with-the-boy-scouts>; Noah Feldman, *Why Can't California Judges Join the Boy Scouts?*, TAMPA TRIB. (Jan. 31, 2015), <http://www.tbo.com/list/news-opinion-commentary/why-cant-california-judges-join-the-boy-scouts-20150131/>; John Blosser, *Orwellian: California Bars Judges from Joining Boy Scouts*, NEWSMAX (Mar. 18, 2015, 6:43 PM), <http://www.newsmax.com/US/Boy-Scouts-judges-California/2015/03/18/id/631012/>.

to a compelling interest and employ the least restrictive means of achieving that interest.<sup>6</sup>

To justify its restriction, the California Supreme Court opines that membership in a group such as the Boy Scouts, which in the Court's view engages in invidious discrimination, creates an appearance of partiality and bias.<sup>7</sup> It suggests that gays and lesbians standing before a judge who is a member of the Scouts will have reason to believe the judge cannot fairly administer justice, and that the general public will lose confidence in the integrity and objectivity of the judiciary.<sup>8</sup>

However, as Part III will show, avoiding a generalized appearance of impropriety cannot be a compelling governmental interest: Specifically, drawing on recent Supreme Court cases in the realm of campaign finance, Part III will argue that avoiding a generalized appearance bias (as opposed to the appearance of specific bias against an actual party before the court) does not rise to the level of a compelling interest.<sup>9</sup> Moreover, Part IV will argue that the California policy is poorly tailored to achieve the State's interest because it is both grossly over- and underinclusive, and relies on a cynical view of the judiciary which undermines the State's purported interest in public confidence in the system. Additionally, a wide variety of less restrictive alternatives exist.

As a result of these deficiencies, California's Scout ban is unconstitutional and should be vigorously challenged and overturned.

#### I. THE CALIFORNIA RULE DELIBERATELY TARGETS EXPRESSIVE ASSOCIATIONS SUCH AS THE BOY SCOUTS

Although seemingly a modest change, the new amendment to the California Code of Judicial Ethics represents a sweeping view that the State has a sufficiently compelling interest to ban judicial membership in any organization (even an expressive association) on the basis of discriminatory policies.

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6. See *infra* Section II.D.

7. See INVITATION TO COMMENT, *supra* note 1, at 4.

8. *Id.*

9. See *infra* Section III.A.

*A. The History and Text of the Ban Show that It Was Intended to Target Expressive Associations Such as the Boy Scouts*

California's Judicial Canon 4 speaks to extrajudicial activities of judges. Canon 4(c) states that as a general principle, "a judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, service, or civic organization not conducted for profit."<sup>10</sup> Indeed, the commentary to Canon 4A emphasizes that "[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which he or she lives."<sup>11</sup> Yet Canon 4A emphasizes that judges should not engage in extra-judicial activities that "(1) cast reasonable doubt on the judge's capacity to act impartially, (2) demean the judicial office, (3) interfere with the proper performance of judicial duties, or (4) lead to frequent disqualification of the judge."<sup>12</sup> The commentary emphasizes that "[e]xpressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge."<sup>13</sup>

Judicial Canon 2 prohibits judges from engaging in particular activities that create impropriety or the appearance of impropriety.<sup>14</sup> It is modeled after the Model Code of Judicial Conduct, which in 2007 added a prohibition on membership in groups that discriminate on the basis of sexual orientation.<sup>15</sup> Canon 2(c) bars judicial "membership in any organization that practices invidious

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10. CAL. CODE OF JUDICIAL ETHICS Canon 4C(3)(b) (2015), [http://www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf).

11. *Id.* Canon 4A cmt.

12. *Id.* Canon 4A.

13. *Id.* Canon 4A cmt.

14. *Id.* Canon 2.

15. See ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT 6 (Nov. 2006), <http://www.bjs.state.mn.us/file/code-of-judicial-conduct/aba-joint-comm-report-nov-2006.pdf>. There is reason to believe that this change was in part intended to specifically impact membership in the Boy Scouts. The ABA filed an amicus brief in the *Boy Scouts v. Dale* case arguing against allowing the Boy Scouts to continue to exclude gay members and has been very active in its opposition to the Scouts. See Grindlay, *supra* note 5, at 563. For more on the history of the ban on membership in organizations that practice invidious discrimination, see Natasha A. Phillips, *The Belle Meade Example: Enforcement of Canon 2C Under the Judicial Conduct and Disability Act*, 25 GEO. J. LEGAL ETHICS 733, 735 (2012).

discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.”<sup>16</sup> The advisory committee notes explain that this prohibition is necessary “to preserve the fairness, impartiality, independence, and honor of the judiciary, to treat all parties equally under the law, and to avoid impropriety and the appearance of impropriety.” The canon once contained an exemption for “an official military organization of the United States,” and “a nonprofit youth organization.”<sup>17</sup> The Canon still retains an exemption for “membership in a religious organization.”<sup>18</sup> And the *prior* commentary justified the exemption for membership in youth organizations on the ground that such an exemption was necessary “to accommodate individual rights of intimate association and free expression.”<sup>19</sup> For reasons discussed in Part II, such an accommodation was and remains necessary under the reasoning of the Supreme Court’s decision in *Boy Scouts v. Dale*.

With regards to determining “[w]hether an organization practices invidious discrimination,” the most recent commentary notes that this “is often a complex question to which judges should be sensitive,” and if a group is “dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members” or is an “an intimate, purely private organization,” the canon may not apply.<sup>20</sup> However, that commentary also makes clear that other organizations that “arbitrarily exclude[] from membership” on the basis of one of the aforementioned classifications can be said to discriminate invidiously.<sup>21</sup> In addition, the comment suggests that membership in any organization that engages in illegal discriminatory practices is also forbidden even if the exclusion is not based on a specified protected class such as race, gender, or sexual orientation.<sup>22</sup> According to the comment, any “public manifestation” of a “knowing approval of invidious

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16. CAL. CODE OF JUDICIAL ETHICS Canon 2 (2015), [http://www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf).

17. *Id.* The military organization exception was once necessary because of policies such as Don’t Ask Don’t Tell.

18. *Id.*

19. *Id.* Canon 2 cmt.

20. *Id.*

21. *See id.*

22. *Id.*

discrimination” “gives the appearance of impropriety . . . and diminishes public confidence in the integrity and impartiality of the judiciary.”<sup>23</sup>

While the reference to groups “dedicated to the preservation of religious, ethnic, or cultural values” might at first glance seem to refer to expressive associations such as the Boy Scouts, it is clear that the change is intended expressly to foreclose membership in the Boy Scouts: The invitation to comment expressly stated that eliminating the exception would have the effect of “prohibiting judges from being members of or playing a leadership role in the BSA.”<sup>24</sup> Public comments on the change overwhelmingly focused on the Boy Scouts and the impact this change would have on judicial Boy Scout membership.<sup>25</sup> Indeed, several of those commenting on the proposed changes expressed concern that the BSA was singled out for attention while other youth groups that might have selective membership policies such as the Girl Scouts were ignored.<sup>26</sup> Thus, it seems clear that the California change was expressly meant to apply to the Boy Scouts.

Moreover, by deleting the sentence in the commentary to Canon 2C regarding the need “to accommodate individual rights of intimate association and free expression,” the California Supreme Court Advisory Committee on the Code of Judicial Ethics made it clear that “the code prohibits judges from being associated with *any* organization if that association would affect the integrity or impartiality of the judiciary.”<sup>27</sup> In so stating, the advisory committee is implying that the State’s interest in “public confidence in the impartiality of the judiciary” trumps or outweighs the right to belong to even an organization such as the Boy Scouts, which has been designated as an expressive association by the Supreme Court.<sup>28</sup>

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23. *Id.*

24. INVITATION TO COMMENT, *supra* note 1.

25. SP14-02: PROPOSED AMENDMENTS TO CANON 2C OF THE CODE OF JUDICIAL ETHICS [hereinafter AMENDMENT COMMENTARY], [http://www.dailyjournal.com/DJEditorialAttachment/SP14-02\\_Chart\\_05\\_08\\_14\\_Final\\_w\\_attachments.pdf](http://www.dailyjournal.com/DJEditorialAttachment/SP14-02_Chart_05_08_14_Final_w_attachments.pdf).

26. *See id.* cmt. 43 at 295–302 (Jeffrey S. Bostwick, Comment on SP14-02: PROPOSED AMENDMENTS TO CANON 2C OF THE CODE OF JUDICIAL ETHICS); *see also id.* cmt. 354 at 350–52 (Life Legal Defense Fund, Comment on SP14-02: PROPOSED AMENDMENTS TO CANON 2C OF THE CODE OF JUDICIAL ETHICS).

27. INVITATION TO COMMENT, *supra* note 1.

28. *See infra* Section II.A.

Therefore, even though the amendment at first glance seems limited to the Boy Scouts and perhaps a narrow range of other youth organizations, it actually represents a sweeping assertion by the State that it can bar membership in any organization (except perhaps a religious organization) on the basis of discriminatory policies.<sup>29</sup>

Although California is the only state to eliminate an existing exemption, the code of conduct of many other states would also arguably prohibit a judge from membership in the Boy Scouts and other expressive associations. Indeed, the codes of other states are perhaps even more explicit on this point. For instance, commentary to the Massachusetts Code of Judicial Conduct is almost identical to California's, with this addition: "The purpose of this Rule is to prohibit judges from joining organizations practicing invidious discrimination, whether or not their an organization's membership practices are constitutionally protected."<sup>30</sup> Some states likewise lack even an express exemption for membership in religious organizations.<sup>31</sup> Thus, it seems clear that several states either believe that restricting judicial membership in groups such as the Boy Scouts does not generate serious constitutional problems or that they have a sufficiently compelling interest to restrict judicial membership. Thus, although California is the only state to expressly focus on the Boy Scouts, it is likely that as discrimination on the basis of sexual orientation becomes more and more strongly prohibited throughout the country, more states will make express efforts to prohibit judicial membership in the Boy Scouts and other groups with traditional moral views about homosexuality. Unfortunately, as the next part

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29. This is in contrast to the approach taken in New York, where there is an express exemption for "membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members." N.Y. RULES OF THE CHIEF ADMIN. JUDGE § 100.2 (2010), <http://www.nycourts.gov/rules/chiefadmin/100.shtml>. While the California rules suggest that such an organization might not be considered one that engages in invidious discrimination, there is no express exemption.

30. MASS. SUPREME JUDICIAL COURT r. 3:09: CODE OF JUDICIAL CONDUCT Canon 3 r. 3.6 cmt. [2] (2016), <http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/sjc309.html>.

31. See CONN. CODE OF JUDICIAL CONDUCT Canon 3 r. 3.6 (2011), [https://www.jud.ct.gov/Publications/PracticeBook/Judicial\\_Conduct.pdf](https://www.jud.ct.gov/Publications/PracticeBook/Judicial_Conduct.pdf). There is no reason to believe that judicial membership in a religious organization would not be protected in Connecticut—indeed, as I argue in Part II, such an exemption would be constitutionally required. Nevertheless, the absence of an express exemption is notable.

will show, these efforts trample on a wide range of constitutional rights.

*B. Even Though the Boy Scouts Recently Changed Their Policy with Regard to Gay Scoutmasters, It Is Likely that Membership in Scouting Could Still Be Barred*

On July 27, 2015, the Boy Scouts of America voted to officially change its controversial policy regarding gay Scoutmasters.<sup>32</sup> This change came in response to legal pressures faced by the Boy Scouts.<sup>33</sup> The newly ratified policy lifts the national ban on gay Scout leaders but allows individual troops the freedom to set their own policies with regard to the selection of Scoutmasters. This change was met with criticism from long-term supporters of Scouting, such as the Church of Jesus Christ of Latter-day Saints,<sup>34</sup> and led other churches to abandon the BSA and join Trail Life USA, a more conservative alternative.<sup>35</sup>

Nevertheless, it is possible that judicial membership in the Boy Scouts will continue to be foreclosed as a result of the discretion given to local chapters and affiliates to exclude gay Scout leaders. Gay rights organizations lambasted the changes as “half steps”<sup>36</sup> and

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32. Todd Leopold, *Boy Scouts Change Policy on Gay Leaders*, CNN (July 28, 2015, 9:16 AM ET), <http://www.cnn.com/2015/07/27/us/boy-scouts-gay-leaders-feat/>.

33. Robert M. Gates, *National Annual Meeting Remarks*, OFFICIAL NEWSROOM BSA (May 21, 2015), <http://scoutingnewsroom.org/wp-content/uploads/2015/05/DR-GATES-REMARKS.pdf>. The California ban was expressly mentioned in a memo from the Boy Scouts legal counsel at Hughes Hubbard regarding the legal impacts of the new policy. Hughes Hubbard & Reed LLP, *Effect of Changes in Adult Leader Standard on Religious Chartered Organizations*, OFFICIAL NEWSROOM BSA, <http://scoutingnewsroom.org/wp-content/uploads/2015/07/Religious-Organization-Protections-Memo-062915.pdf> (last visited Sept. 24, 2015).

34. The Church of Jesus Christ of Latter-day Saints, *Church Re-Evaluating Scouting Program*, MORMON NEWSROOM (July 27, 2015), <http://www.mormonnewsroom.org/article/church-re-evaluating-scouting-program>; see also The Lutheran Church Missouri Synod, *LCMS Statement on Boy Scouts of America Policy Change*, PRESSROOM (July 28, 2015, 10:42:32), <http://blogs.lcms.org/2015/lcms-statement-on-boy-scouts-of-america-policy-change>.

35. Greg Garrison, *After Boy Scouts Welcome Gays, Some Churches Start Alternative Group*, AL.COM (Aug. 5, 2015, 10:44 AM), [http://www.al.com/living/index.ssf/2015/08/after\\_boy\\_scouts\\_welcome\\_gays.html](http://www.al.com/living/index.ssf/2015/08/after_boy_scouts_welcome_gays.html).

36. Liz Halloran, *HRC to Boy Scouts of America: You Can't End Discriminatory Ban with Half Steps*, HUM. RTS. CAMPAIGN: BLOG (July 13, 2015), <http://www.hrc.org/blog/entry/hrc-to-boy-scouts-of-america-you-cant-end-discriminatory-ban-with-half-step>.

a “monumental step back,”<sup>37</sup> suggesting that the Scouts will face continued social and legal pressure.<sup>38</sup> At least one court has found that the relationship between the Scouts and its affiliates might be described as a principal-agent relationship, which suggests that the Boy Scouts could be held liable for the conduct of its affiliates.<sup>39</sup>

In November 2015, the California Committee on Judicial Ethics Opinions provided an oral advice summary for California judges. Rather than providing uniform advice as to whether the ban would bar judicial membership in religious Scout troops, the summary noted that each “judge must investigate his troop’s policies, practices, and values of common interest to the troop members.”<sup>40</sup> This advisory opinion suggests that judges have some discretion in choosing whether to belong to Scout troops but does not foreclose the possibility that the ban will be enforced against members of the judiciary.

This article will proceed based on the assumption that the California ban and other similar bans will continue to impact the Boy Scouts. If, however, that is not the case, the arguments are still applicable to other organizations, such as Trail Life USA, which were started as a conservative alternative to the Boy Scouts and retain the

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37. Dashanne Stokes, *Op-Ed: Why the Boy Scouts’ New Policy Still Discriminates*, ADVOCATE (July 20, 2015, 3:00 AM EDT), <http://www.advocate.com/commentary/2015/07/20/op-ed-why-boy-scouts-new-policy-still-discriminates>.

38. In light of the Ninth Circuit’s decision that sexual orientation discrimination is subject to heightened scrutiny, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014), and the EEOC decision that sexual orientation discrimination is equal to sex discrimination, it is highly likely that a policy that allows a large number of scouting troops to exclude gay Scoutmasters will be considered invidious discrimination, at least in California. Allen Smith, *EEOC: Sexual Orientation Discrimination Is Sex Discrimination*, SOC’Y FOR HUM. RES. MGMT. (July 20, 2015), <http://www.shrm.org/legalissues/federalresources/pages/eecoc-ruling-sexual-orientation.aspx>. Moreover, the Supreme Court’s decision in *Boy Scouts v. Dale* relied on the fact that exclusion of homosexuals was essential to the Boy Scouts’ mission and purpose, and the Court’s *Dale* ruling may, therefore, not continue to shield the Boy Scouts after the change, opening them up for further litigation.

39. *Mayfield v. Boy Scouts of Am.*, 95 Ohio App. 3d 655 (1994). This argument has been raised unsuccessfully in other instances. See *Randall v. Orange Cty. Council*, 952 P.2d 261, 263 (Cal. 1998) (local Cub Scouts allegedly discriminated and plaintiffs also sued the Scout council); *Vargas-Santana v. Boy Scouts of Am.*, 2007 U.S. Dist. LEXIS 24004 (D.P.R. Mar. 30, 2007) (local church troop allegedly discriminated and plaintiffs also sued the BSA).

40. Calif. Supreme Court Comm. on Judicial Ethics Ops., Oral Advice Summary No. 2015-014 4 (Nov. 12, 2015), <http://www.judicialethicsopinions.ca.gov/sites/default/files/CJEO%20Oral%20Advice%20Summary%202015-014.pdf> (discussing judicial membership in church-sponsored BSA troops).

policies that were traditionally embraced by the Boy Scouts.<sup>41</sup> And, regardless of its impact on particular groups, the declaration that judicial ethics trumps even the freedom of association of expressive associations is deeply problematic and violates a wide variety of constitutional rights.

## II. FUNDAMENTAL RIGHTS ARE ADVERSELY IMPACTED BY THE SCOUT BAN IN WAYS THAT REQUIRE STRICT SCRUTINY

This section will consider the constitutional rights implicated by the Boy Scout ban.<sup>42</sup> First, the ban most directly burdens freedom of expressive association. Second, the ban burdens the rights of free exercise of religion because participation in Scouting is a major part of the religious tradition of many judges. Third, the ban also burdens the parental right to direct the upbringing of children. And in each case, the ban burdens these rights in a way that calls for strict scrutiny.

### *A. The Scout Ban Burdens Freedom of Expressive Association*

The California canon burdens freedom of association by preventing judges from participating in expressive organizations such

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41. Fred Lucas, *Bible-Based Alternative to Boy Scouts Launches After Policy Change for Gay Scouts*, BLAZE (Jan. 2, 2014, 9:00 PM), <http://www.theblaze.com/stories/2014/01/02/bible-based-alternative-to-boy-scouts-launches-after-policy-change-for-gay-scouts/>.

42. In addition to the rights that will be discussed, there are more arguments that could be made that will not receive expanded attention here. An argument can be made, for example, that the State's action constitutes a Religious Test Oath or a Bill of Attainder. These arguments are, in my judgment, less plausible than the ones I have chosen to focus on and so they will only be described here in brief: First, the ban could constitute a Religious Test Oath because it creates a job condition which "dampen[s] the exercise generally of First Amendment rights." *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976); *see also* *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). The Ninth Circuit has acknowledged that the notion that a judge would be required to recuse himself from certain matters as a result of religious beliefs "stands in conflict with the principle embedded in Article VI." *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995). If a recusal requirement violates Article VI, then surely a complete bar on judicial service raises even more serious Article VI concerns. Second, the ban is arguably a Bill of Attainder because it serves as "legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965). Although the rule was ratified by the California Supreme Court rather than a traditional legislator, it is likely that the Court is acting in a quasi-legislative function. Of course, this argument is weakened by the fact that removal from office for being a Scout is not retroactive and is not automatic. A judge would thus be given a hearing before being removed from office.

as the Boy Scouts. The Supreme Court has long held that freedom of association is at the core of First Amendment freedoms. In *NAACP v. Alabama*, the Court held that requiring the NAACP to disclose its membership would violate each individual member's right to freely associate with groups of his or her choosing.<sup>43</sup> The Court recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association" and that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."<sup>44</sup> The Court also explained that any measure which "would have the practical effect 'of discouraging' the exercise of constitutionally protected political rights" would be subject to strict scrutiny even if the statute did not facially seem to target association.<sup>45</sup>

Of course, this right to freedom of association is not absolute, and the Supreme Court has found, at times, that a state has a sufficiently compelling interest to overcome the individual's interest in free association. In *Roberts v. United States Jaycees*, the Court found that a public accommodations law that required the Jaycees to accept female members was constitutional.<sup>46</sup> The Court made it clear that the right to freedom of association was "plainly implicated" and that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."<sup>47</sup> However, the Court concluded that the "compelling interest in eradicating discrimination . . . justifies the impact that the application of the statute . . . may have on the . . . members' associational freedoms."<sup>48</sup> Because discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life," the State clearly had a compelling

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43. Interestingly, the Court chose to focus on the rights of members and allowed the NAACP to litigate on behalf of its membership rather than consider whether the group itself had a right to be free from scrutiny into its membership. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 458 (1958).

44. *Id.* at 460.

45. *Id.* at 461.

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

47. *Id.* at 622–23.

48. *Id.* at 623.

interest.<sup>49</sup> The Court also noted that the State's interest was "unrelated to the suppression of ideas."<sup>50</sup> The Court concluded that this was "the least restrictive means" because it did not impose "any serious burden on the . . . members' freedom of expressive association."<sup>51</sup> Because there was no evidence that including women as full members would "impede the organization's ability to engage in these protected activities or to disseminate its preferred views," the law burdened expressive activity "no greater than is necessary."<sup>52</sup>

Sixteen years later, the Court reached a drastically different outcome when considering whether a New Jersey anti-discrimination ordinance would unduly burden the Boy Scouts' freedom of association rights by restricting its ability to exclude gay officers.<sup>53</sup> In *Boy Scouts v. Dale*, the Court ultimately concluded that the ordinance violated the Boy Scouts' First Amendment right of expressive association.<sup>54</sup>

In doing so, the Court first considered whether the Boy Scouts was a group that engaged in "some form of expression." Because the organization sought to transmit a system of values to youth, it qualified as an expressive association.<sup>55</sup> The Court next concluded that because "homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law," the anti-discrimination

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49. *Id.* at 625.

50. *Id.* at 624.

51. *Id.* at 626.

52. *Id.* at 628.

53. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 641 (2000). For background on the *Dale* cases, see Dennis Amari, *Boy Scouts May Discriminate Against Homosexuals on the Basis of the First Amendment Right of Expressive Association: Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), 9 AM. U. J. GENDER, SOC. POL'Y & L. 451, 460 (2001). For an overview of the question of whether a group like the Boy Scouts constitutes a public accommodation for anti-discrimination laws, see William F. Grady, *The Boy Scouts of America As a "Place of Public Accommodation": Developments in State Law*, 83 MARQ. L. REV. 517, 524 (1999) (discussing the evolution of the question of whether a group like the Scouts is a public accommodation).

54. See generally David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121, 124 (2001) (suggesting a variety of ways to reconcile *Dale* and freedom of association decisions that predate it); see also Fredrick W. Quast, *Does Morally Straight Mean Only Straight Is Moral?: The First Amendment Versus Public Accommodation Laws in Boy Scouts of America v. Dale*, 53 BAYLOR L. REV. 507, 530 (2001) (arguing that the Court struck the proper balance in *Dale* regarding expressive association rights).

55. *Dale*, 530 U.S. at 650–51. But see Mark Hager, *Freedom of Solidarity: Why the Boy Scout Case Was Rightly (but Wrongly) Decided*, 35 CONN. L. REV. 129, 130 (2002) (arguing that all membership decisions are inherently expressive).

ordinance would limit the group's "ability to advocate public or private viewpoints."<sup>56</sup> Although the dissent argued that including gay individuals was not truly antithetical to the Scout's mission,<sup>57</sup> the Court gave substantial deference to the group's stated values and beliefs, explaining that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."<sup>58</sup> The Court also explained that it "must also give deference to an association's view of what would impair its expression."<sup>59</sup> Nor must a group "trumpet its views from the housetops" in order to receive "First Amendment protection."<sup>60</sup> Moreover, because the ban directly restricted associational rights, strict scrutiny was the proper standard of review. Examining the State's purported interest in requiring the Scouts to include gay members, the Court made it clear that "public or judicial disapproval of a tenet of an organization's expression does not justify the State's

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56. Professor Garnett has urged the Supreme Court to reconsider the *Jaycees* opinion in light of *Dale*. Richard W. Garnett, *Jaycees Reconsidered: Judge Richard S. Arnold and the Freedom of Association*, 58 ARK. L. REV. 587 (2005). He persuasively argues that membership in and of itself should raise First Amendment concerns even if the group does not express a position on a particular issue of public concern. *Id.* Were the Court to reevaluate the *Jaycees* opinion, it would only further strengthen the arguments advanced regarding the judicial Scout ban. *See id.* at 601 ("The conduct at issue—i.e., discrimination in membership and leadership—is of First Amendment concern not simply because it is freighted with or motivated by ideas, but because it goes to the structure and identity of the association as an association.").

57. *Dale*, 530 U.S. at 666 (Stevens, J., dissenting).

58. *Id.* at 651 (majority opinion).

59. *Id.* at 653. *But see* N. Nicole Endejann, *Coming Out Is a Free Pass Out: Boy Scouts of America v. Dale*, 34 AKRON L. REV. 893, 909 (2001) (criticizing *Dale* on the basis that it failed to require the group to prove that its identity would truly be compromised).

60. *Dale*, 530 U.S. at 656; *see also* Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 650 (2001) ("But expression worthy of First Amendment protection need not be explicit or broadcast to the public at large, and a threat to associational activity built around such expression need not be particularly dramatic."). But some have suggested that it is precisely the fact that a group must be open about its discriminatory practices to qualify for protection under *Dale* which justifies the Court's conclusion. *See* Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 1019 (2013) ("Another advantage is that, because freedom of association protects expressive association, it forces organizations to be clear about their membership rules and about what membership in their organizations represents and expresses. It would be better to force religious organizations to state openly their willingness to discriminate on the basis of race, gender, disabilities, sexual orientation, national origin, and age than to give them the free pass to disobey the laws for any reason that the Court awarded them in *Hosanna-Tabor*.").

effort” to regulate membership in an expressive association.<sup>61</sup> Accordingly, the State lacked a truly compelling interest that could justify intruding upon the organization’s interest in expressive association. Indeed, the State cannot “interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one.”<sup>62</sup>

Yet this is precisely the rationale underlying the Scout ban.<sup>63</sup> As Noah Feldman has pointed out, the ultimate purpose of the ban on membership in organizations that engage in discrimination is to express collective moral disapproval of discriminatory organizations.<sup>64</sup> However, as Feldman argues, this rationale is clearly problematic when read against the Court’s ruling in *Dale*. *Dale* makes it clear that, despite society’s clearly compelling interest in limiting discrimination, a ban on expressive associations exceeds the limits of the First Amendment.<sup>65</sup> If a group is protected by First Amendment association rights, then punishing an organization or its members in order to show moral disapproval of the organization’s membership practices is forbidden under the First Amendment.

Furthermore, under *Dale*, it is clear that the Scout ban significantly burdens judges’ freedom of association. Judges are no longer able to join an expressive association and to partner with likeminded individuals. While judges are free to be members of other organizations, those judges who feel connected to the Scout’s motto are barred from association. As a result, they are unable to participate

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61. *Dale*, 530 U.S. at 661.

62. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995).

63. See Grindlay, *supra* note 5, at 562 .

64. Noah Feldman, *Should California Judges Join the Boy Scouts?*, BLOOMBERG VIEW (Jan. 27, 2015, 8:54 AM EST), <http://www.bloombergvew.com/articles/2015-01-27/should-california-judges-join-the-boy-scouts->.

65. Thus, even if society can be said to have a compelling interest in limiting discrimination on the basis of sexual orientation, it does not necessarily follow that it has a compelling interest in restricting associative freedoms on that basis. See Tribe, *supra* note 60, at 654 (“Indeed, even when a particular characteristic has come to be seen as presumptively impermissible for the state to employ in classifying persons, as I believe sexual orientation ought to be, the state’s interest in imposing that particular egalitarian and liberty-enhancing vision upon a private person or association cannot automatically be deemed compelling without further inquiry into the size and nature of the association and the adverse social or economic consequences for those ‘discriminated’ against.”).

in the many valuable community- and society-building activities of Scouting.

Moreover, the Ban also burdens the associational rights of the BSA: If forbidding an expressive association from excluding an individual violates freedom of association, then certainly forbidding an association from including an individual that it wishes to see as a member likewise violates freedom of association.<sup>66</sup>

*B. The Scout Ban Burdens Free Exercise Interests*

The Scout ban also restricts the free exercise of religious judges, churches, and the BSA itself. And it does so in a way that requires the application of strict scrutiny.

*1. The ban places burdens on faiths that see scouting as a religious ministry*

Participation in Boy Scouts is an important facet of the youth programs of a variety of churches in the United States. For instance, for Catholics, “[p]articipation in Boy Scouts is a Youth Ministry of the Catholic Church” with meetings occurring on church property and with the participation of priests.<sup>67</sup> Likewise, for the Church of Jesus Christ of Latter-day Saints (the “LDS” or “Mormon” Church), Scouting “functions as an integral part of the Church’s activity program.”<sup>68</sup> Indeed, individuals in the LDS Church are occasionally given church assignments to serve in the Boy Scout program. As one California judge described it: “The men consider it a religious obligation and commitment to accept these assignments and to assist

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66. Of the burdened rights, ruling on the freedom of association grounds likely has the broadest implications for laws that exclude judges from group membership. Any restriction on membership in expressive associations such as the Boy Scouts would be highly suspect and subject to strict scrutiny. Given that the *Dale* decision dealt specifically with membership in the Boy Scouts, this argument also seems the most likely to gain traction among judges reviewing a challenge to the canon.

67. AMENDMENT COMMENTARY, *supra* note 25, cmt. 332 at 142 (comment of Hon. Barbara A. Kronlund); *see also Scouting in the Catholic Community*, BOY SCOUTS AM., [http://www.scouting.org/About/FactSheets/operating\\_orgs/Catholic.aspx](http://www.scouting.org/About/FactSheets/operating_orgs/Catholic.aspx) (last updated Mar. 2011).

68. *Scouting in the Church of Jesus Christ of Latter-day Saints Community*, BOY SCOUTS AM., [http://www.scouting.org/About/FactSheets/operating\\_orgs/Latter-day\\_Saints.aspx](http://www.scouting.org/About/FactSheets/operating_orgs/Latter-day_Saints.aspx) (last visited Sept. 24, 2015).

with the Boy Scout program.”<sup>69</sup> Service in the Scouts is seen by individuals as part of “their duty to God.”<sup>70</sup>

For members of these churches and many other faiths, the ban would substantially burden the free exercise of religion. Even though in theory one is able to attend Boy Scout events without being a member of the organization, attending critical events such as Scout Camp with one’s children requires formal membership in the Boy Scouts.<sup>71</sup> Moreover, individuals feel a duty to accept assignments that are given by religious leaders, which could include service in Boy Scout leadership. One commentator emphasized that: “[b]ecause of my faith, I do not feel it would be appropriate to turn down such ‘callings’ of service.”<sup>72</sup> Another California judge emphasized that, “[t]o deprive me of serving as a member or leader in my congregation’s local boy scout [sic] units would, at least in my case, deny me the religious freedom preserved by the Constitutions I have taken a solemn oath to uphold.”<sup>73</sup> Thus, it is clear that the free exercise rights of these judges would be substantially burdened by the ban.

The Boy Scout ban also burdens the free exercise interests of the many churches that sponsor Boy Scout units. Indeed, some religious organizations, such as the Church of Jesus Christ of Latter-day Saints, consider Scout leadership to be a ministerial calling. Effectively prohibiting a church from appointing a judge to a particular ministerial position seems deeply inconsistent with the Supreme Court’s conclusion in *Hosanna-Tabor* that such interference in the internal affairs of churches violates both the Free Exercise Clause and the Establishment Clause.<sup>74</sup> At a minimum, such

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69. AMENDMENT COMMENTARY, *supra* note 25, cmt. 14 at 11 (comment of Philip M. Andersen, Sr.).

70. *Id.*

71. *Id.* cmt. 332 at 146 (comment of Hon. Barbara A. Kronlund).

72. *Id.* cmt. 350 at 157 (comment of Nathan Lewis).

73. *Id.* cmt. 369 at 163 (comment of Hon. Roger L. Lund).

74. Of course, the application of the ministerial exception requires a threshold finding that a position is ministerial. Although a fuller discussion of this issue is beyond the scope of this article, it seems highly likely at the very least that a member of the LDS Church who is called to be a Young Men’s Leader and a Scout Leader is a minister. Some of the public commentary on the proposed amendment illustrates this point. For instance, one commentator noted that “[p]articipation is done by calling or assignment by church leaders. It is generally accepted that such a ‘call’ is by divine direction and rejection of such a calling

a prohibition is a serious intrusion into a church's free exercise interest in choosing its own ministers and leaders. In particular, with the LDS Church, many adult leaders, including bishops (the equivalent of parish priests), are expected to register with the Boy Scouts—which makes this restriction on the ability of churches to select ministers even more troubling from a free exercise standpoint.<sup>75</sup>

The free exercise rights of the Boy Scouts as an organization might also be burdened by the ban. Although the Boy Scouts does not formally claim to be a religious organization, it persuasively established in *Dale* that its gay Scout leader ban is motivated by religious and moral teachings.<sup>76</sup> And with its *Hobby Lobby* decision,

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would not be appropriate.” *Id.* cmt. 5 at 4 (comment of Franklin C. Adams); *see also id.* cmt. 14 at 11 (comment of Philip M. Andersen, Sr.) (“The men feel it is their duty to God to hold these leadership positions in the Boy Scout program.”); *id.* cmt. 43 at 296 (comment of Jeffrey S. Bostwick) (“The willingness of Latter-day Saints to respond to calls to serve is a representation of their desire to do the will of the Lord . . . . It is not in the proper spirit for us to decide where we will serve or where we will not. It does not matter what the call may be.” (quoting Boyd K. Packer, Acting President of the Quorum of the Twelve Apostles, The Church of Jesus Christ of Latter-day Saints, 167th Semiannual General Conference: Called to Serve (Oct. 4, 1997), in *ENSIGN*, Nov. 1997)).

75. *Id.* cmt. 532 at 241 (comment of Jeffrey W. Shields).

76. There is considerable ongoing debate as to whether the Boy Scouts is a religious organization. The Boy Scouts currently maintains that although it is motivated by religious values, it is not a religious organization. A federal district court judge in California concluded that the Boy Scouts was a religious organization for purposes of the Establishment Clause. *See* Associated Press, *Court Won't Hear Appeal on Boy Scouts Land Rental*, SAN DIEGO UNION-TRIB. (May 3, 2010, 8:24 AM), <http://www.utsandiego.com/news/2010/may/03/court-wont-hear-appeal-on-boy-scouts-land-rental/>. The Ninth Circuit affirmed the conclusion that the Boy Scouts “is a religious organization” as a result of the reference to Duty to God in the Scout oath and encouragement for members to earn the religious emblem of their faith. *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1072 (9th Cir. 2012). For discussion in the media, *see The O'Reilly Factor: Is the Boy Scouts of America a Religious Organization?* (FoxNews television broadcast Jan. 15, 2003), <http://www.foxnews.com/story/2004/01/16/is-boy-scouts-america-religious-organization/> (partial transcript of broadcast). Other courts, in contrast, have concluded the opposite. *See Powell v. Bunn*, 59 P.3d 559, 579-80 (Or. Ct. App. 2002) (concluding that the Boy Scouts is not religious because “the bulk of Boy Scouts' activities is secular”); *see also Good News/Good Sports Club v. Sch. Dist. of Ladue*, 859 F. Supp. 1239, 1248 (E.D. Mo. 1993); *Good News Club v. Milford Cent. Sch.*, 21 F. Supp. 2d 147, 160 (N.D.N.Y. 1998); *Powell v. Bunn*, 59 P.3d 559 (Or. Ct. App. 2002). The Boy Scouts itself has made arguments regarding religious freedom, which suggest that it sees itself as religious to some degree or another. *See Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1435 (N.D. Ill. 1990); *see also Erez Reuveni, On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. REV. 109, 113 (2006) (arguing “that the BSA is a quasi-religious organization deserving

the Court made it clear that entities that are not formally religiously affiliated may still bring religious freedom claims.<sup>77</sup>

Because the values of the Boy Scouts are heavily religiously motivated, it is problematic for the State to conclude that the group practices invidious discrimination in the first place. The canon requires consideration of whether the group is “dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members.”<sup>78</sup> Yet, as the Supreme Court has noted, “it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.”<sup>79</sup> Classifying the Boy Scouts as a non-religious organization that engages in invidious discrimination, while exempting other similarly situated church-led youth organizations, is thus deeply problematic and suggests that one of the aims of the law seems to be shaming the Boy Scouts into changing its religiously motivated practices by making membership in the organization seem unacceptable or undesirable.<sup>80</sup>

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greater associational protections than secular organizations”). See generally Zoë Robinson, *What Is A “Religious Institution”?*, 55 B.C. L. REV. 181, 210 (2014).

77. The *Hobby Lobby* decision only concerned an interpretation of the Religious Freedom Restoration Act rather than the First Amendment itself. Nevertheless, there is no reason to believe that the application of RFRA to non-religiously affiliated organizations would not also apply equally to the First Amendment.

78. To determine this, the State would be required to engage in a burdensome and sweeping inquiry into the group’s religious beliefs and practices to determine whether the group in fact engages in invidious discrimination. As the New York Judicial Ethics Advisory Committee acknowledged when it was asked to determine whether the Freemasons engaged in invidious discrimination, such a determination would require a “fair ranging investigation into the history, background, policies and internal membership of the organization.” New York Judicial Ethics Advisory Comm., Opinion 96–82 (1997), <http://www.courts.state.ny.us/ip/judicialethics/opinions/96-82.htm>. Yet, such a “fair ranging investigation” into the policies and practices of quasi-religious organizations such as the Boy Scouts also raises Establishment Clause concerns. See Carl H. Esbeck, *The Establishment Clause As a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 77 (1998) (“[R]egulatory burdens that touch on matters in the religious domain (doctrine, polity, clerics, church membership) violate no establishment.”).

79. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

80. See Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 977 (2013) (using the *Dale* case to emphasize that rights of religion and association exceed the scope of religious organizations).

## 2. *Why these burdens require strict scrutiny*

In *Employment Division v. Smith*, the Supreme Court broke with past precedent and concluded that neutral and generally applicable laws which incidentally burden religious expression are presumptively valid and are only subject to rational basis review.<sup>81</sup> Under such a standard, the ban would almost certainly be upheld.<sup>82</sup> However, there are at least two bases under which strict scrutiny may still be the appropriate standard of review: First, the hybrid rights exemption, and second, the fact that the Boy Scout ban can be said to be directly discriminatory on the basis of religion.

*a. The hybrid rights exception should apply.* As to the first basis: The Court in *Smith* pointed to a potential hybrid rights exception as a way to explain certain classes of violations of religious freedom which had previously been subject to strict scrutiny. The Court explained: “The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.”<sup>83</sup> As an illustration, the Court pointed to cases that involved laws that adversely impacted “the right of parents . . . to direct the education of their children.”<sup>84</sup> The Court also expressly noted that “it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.”<sup>85</sup>

Although there is considerable scholarly debate as to whether the hybrid rights exception has any independent weight, this case seems to be a paradigmatic case for the application of such an exception if it

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81. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990) (upholding the denial of unemployment benefits to Native Americans fired because of their religious use of peyote).

82. While Part III argues extensively that preventing the appearance of partiality should not be a compelling governmental interest, it certainly can be classified as a legitimate governmental interest, and there is little question that the ban is at least rationally related to advancing that interest.

83. *Emp’t Div.*, 494 U.S. at 881.

84. *Id.*

85. *Id.* at 882.

exists.<sup>86</sup> It involves both freedom of association claims, which have religious implications, and restrictions on the ability of parents to freely direct the religious upbringing of their children, which will be discussed below.<sup>87</sup> Indeed, it is difficult to imagine a case that more fully presents a hybrid claim of the type talked about in *Smith* because each of the other claims is “reinforced” by the existence of deeply held religious beliefs that urge membership in the Boy Scouts. Moreover, given that freedom of association and freedom of speech are somewhat muddled when applied to government employees, this might be a case in which the hybrid rights claim has teeth and would be embraced by a court hoping to avoid stepping into the employee-speech quagmire.<sup>88</sup>

*b. The ban purposefully singles out religious practice for discriminatory treatment.* The other major exception to the standard articulated in *Smith* arises in cases where religious observance is singled out for targeting or discriminatory treatment. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court applied strict scrutiny to such a law enacted by the City of Hialeah, which restricted religious ritual sacrifice while carving out a wide range of exemptions for other causes.<sup>89</sup> The Court explained that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”<sup>90</sup> Even though the statute in question at first glance appeared facially neutral, the Court held that the Free Exercise Clause “forbids subtle departures from

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86. See Benjamin I. Siminou, Note, *Making Sense of Hybrid Rights: An Analysis of the Nebraska Supreme Court's Approach to the Hybrid-Rights Exception in Douglas County v. Anaya*, 85 NEB. L. REV. 311 (2006) (arguing that a Nebraska court should have applied strict scrutiny in a case regarding parent's refusal to get medical care for their child); Hope Lu, Comment, *Addressing the Hybrid-Rights Exception: How the Colorable-Plus Approach Can Revive the Free Exercise Clause*, 63 CASE W. RES. L. REV. 257 (2012); Fredrick Mark Gedicks, *Three Questions about Hybrid Rights and Religious Groups*, 117 YALE L.J. POCKET PART 192 (2008), <http://yalelawjournal.org/forum/three-questions-about-hybrid-rights-and-religious-groups>.

87. *Infra* Section II.C.

88. See *infra* Section II.D.

89. 508 U.S. 520 (1993).

90. *Id.* at 533.

neutrality” and “covert suppression of particular religious beliefs.”<sup>91</sup> “[G]overnmental hostility which is masked” is still forbidden.<sup>92</sup>

To determine whether a law that appeared facially neutral in fact was motivated by anti-religious animus, the Court considered several factors: It looked to the language of the text, the disparate impact the law would have on religious organizations, and the legislative history—all of which suggested the law was motivated out of a desire to harm a religious observance.<sup>93</sup> The Court also was concerned with the law’s lack of general applicability, explaining that “inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.”<sup>94</sup> Severe under-inclusion was thus fatal.

Just as with the religious animal slaughter in *Lukumi*, the Scout ban “pursues the [government’s] . . . interests only against conduct motivated by religious belief.”<sup>95</sup> While it theoretically bans membership in any organization that engages in invidious discrimination, it is clear from the proposal and commentary that the ban was focused on membership in a particular set of organizations whose policies on homosexuality are based on the religious beliefs of its major allies. Thus, while the law theoretically might apply to other youth groups such as the Girl Scouts, it is clearly “covert suppression of particular religious beliefs” and a not so subtle departure from neutrality.<sup>96</sup> Indeed, the commentary is filled with criticism of the beliefs that animate the Boy Scouts as well as comments generally hostile to religion.<sup>97</sup> In addition, membership in other public and community organizations is not merely allowed, but encouraged.<sup>98</sup>

Nor should the analysis change because the State is eliminating an existing exemption that was crafted for the Boy Scouts. Indeed, the circumstances of the passage of this change lend even more credence to a conclusion of animus. A previously rejected

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91. *Id.* at 534.

92. *Id.*

93. *Id.* at 540–43.

94. *Id.* at 542–43.

95. *Id.* at 545.

96. *Id.* at 534.

97. *See infra* note 102 and accompanying text.

98. *See infra* Section IV.A.

amendment was revived precisely at the time when the Boy Scouts came under increased criticism for their policies and passed in short order despite an overwhelming number of critical public comments. This suggests not merely disagreement with the Scouts' membership practices but hostility to the religious beliefs and practices underlying the organization's policy. Accordingly, the *Lukumi* exception should apply to California's ban, and the State should be required to justify it by offering a compelling governmental interest and showing that it has advanced that interest through the least restrictive means possible.

Even if neither of these exceptions applies, heightened scrutiny may still apply as a matter of state law. Many states have either passed state Religious Freedom Restoration Acts (RFRAs) or interpreted their own constitutions to require a heightened level of protection for free exercise claims.<sup>99</sup> While California does not have a RFRA and has refused to decide whether or not it follows *Employment Division v. Smith* as a matter of State constitutional law, if other states with RFRAs adopt similar bans, heightened scrutiny should apply to those bans.<sup>100</sup>

Moreover, the line between forbidding religiously motivated membership in organizations such as the Boy Scouts and excluding membership in religious organizations is quite thin.<sup>101</sup> Indeed, some have argued that membership in religious organizations inevitably leads to judicial partiality on a wide variety of topics. For instance, one commentator on the proposed amendment urged eliminating the religious exemption altogether because membership in a religion can limit the ability of a judge to apply "the law in an impartial

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99. WILLIAM W. BASSETT, W. COLE DURHAM, JR. & ROBERT T. SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 2:63 (2013).

100. *Id.* § 2:64.

101. See Eric Metaxas, *De-Judging the Boy Scouts*, BREAKPOINT (Feb. 5, 2010, 8:00 AM), <http://www.breakpoint.org/bpcommentaries/entry/12/26818> ("It's not that hard to imagine a setting in the not-too-distant future when membership in any of these religious groups will be seen as incompatible with being a judge. This is especially true when you learn that the advisory panel cited 'recent developments in the law regarding same-sex relationships.' While religious groups are still exempt for now, these same 'recent developments' have made their First Amendment rights increasingly precarious.").

matter.”<sup>102</sup> Of course, banning membership in a religious organization would raise deeper Free Exercise and Establishment Clause concerns and be deeply inconsistent with our nation’s history and tradition. Yet, if the State’s interest is truly compelling enough to ban membership in the Boy Scouts, why is that interest not also sufficiently compelling to limit membership in religious organizations?<sup>103</sup>

Indeed, one California judge plausibly argued in his comment on the proposed change that allowing for individuals to belong to religious groups that participate in discrimination, but not certain other groups that likewise practice discrimination, “cannot promote public confidence in the judiciary” and is therefore inconsistent with the State’s interest.<sup>104</sup> It is difficult to make a principled case for allowing judges to belong to religious associations that engage in so-called invidious discrimination but not in secular associations that do the same. Regardless, the Scout ban burdens the associational and free exercise rights of judges from a wide variety of religious backgrounds, and does so in ways that require strict scrutiny.<sup>105</sup>

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102. AMENDMENT COMMENTARY, *supra* note 25, cmt. 225 at 98 (comment of Elena Gross).

103. One reason might be avoiding a clear violation of the Establishment Clause. Indeed, a violation of the Establishment Clause would serve as a total bar on government conduct and there can be no sufficiently compelling interest to justify a violation. As Professor Esbeck argued in a highly influential article, the Establishment Clause serves as a structural restraint on government rather than a “rights based” clause. *See* Esbeck, *supra* note 78; *see also* Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669 (2013), <http://ssrn.com/abstract=1997807> (arguing that this is one of the key reasons that the Establishment Clause was rightly incorporated against the states). Yet, as already mentioned, the Scout ban in and of itself raises the same Establishment Clause concerns. *See supra* notes 62, 65, & 66 and accompanying text.

104. AMENDMENT COMMENTARY, *supra* note 25, cmt. 342 at 152 (comment of Hon. Edward F. Lee).

105. A ruling on the Free Exercise Clause would be narrow, as the proper remedy would be to allow membership in organizations where membership is seen as part of a judge’s religious obligations and duties. One shortcoming with this approach is that it allows certain judges the ability to belong to a group, while denying others the ability to belong to the same group, even though both wish to affiliate with the group and identify with the group’s purpose and mission. Thus, a ruling on the Free Exercise Clause or a state RFRA would be somewhat less desirable than a ruling on one of the other proposed bases discussed here.

*C. The Scout Ban Burdens the Rights of Some Parents to Direct the Upbringing of Their Children*

A restriction on a judge's participation in Boy Scouts may also infringe that judge's ability to direct the upbringing of his children. The Supreme Court has recognized that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>106</sup> Because many parents want to help direct their children's education through participation in Scouting, and sometimes are required to participate so that their children may participate in key events such as scout camp,<sup>107</sup> the ban on Scout membership substantially burdens this fundamental right.

In *Meyer v. Nebraska*, the Supreme Court first considered this parental right when it invalidated an ordinance that made teaching children in any language other than English illegal if those students had not yet passed the eighth grade.<sup>108</sup> The Court explained that the liberty interest protected by the Fourteenth Amendment protected the right of an individual to "establish a home and bring up children."<sup>109</sup> The Court emphasized that "it is the natural duty of the parent to give his children education suitable to their station in life."<sup>110</sup> It was improper for the State to interfere "with the power of parents to control the education of their own."<sup>111</sup>

The Supreme Court again affirmed the fundamental nature of this right in *Pierce v. Society of Sisters*, when it struck down a compulsory education law which would have restricted the ability of parents to educate their children at home or through private schools.<sup>112</sup> The Court famously emphasized that "[t]he child is not the mere creature of the State," and that parents "who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>113</sup>

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106. Troxel v. Granville, 530 U.S. 57, 65 (2000).

107. See *supra* note 71 and accompanying text.

108. Meyer v. Nebraska, 262 U.S. 390, 397–99 (1923).

109. *Id.* at 399.

110. *Id.* at 400.

111. *Id.* at 401.

112. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

113. *Id.* at 535.

The parental autonomy right recognized in both *Meyer* and *Pierce* was further extended by *Wisconsin v. Yoder*, in which the Court upheld the right of Amish families to violate compulsory school laws on Free Exercise grounds.<sup>114</sup> The Court emphasized: “the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society” and that, absent “a state interest of sufficient magnitude,” any restriction on such direction would be invalid.<sup>115</sup> Any law that substantially burdens parental autonomy must, therefore, survive strict scrutiny.<sup>116</sup>

More recent decisions have also reaffirmed the vital interest that parents have in directing the upbringing of their children. In *Troxel v. Granville*, the Court invalidated a statute that allowed state courts to award visitation rights to a paternal grandparent against the wishes of the parents.<sup>117</sup> In so doing, it emphasized that “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>118</sup> As the Court made clear:

so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.<sup>119</sup>

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114. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

115. *Id.* at 213–14.

116. Despite the strong language in *Yoder*, the Court's decisions in this area are not entirely clear as to what the proper standard of review would be if a law burdened a parent's right to direct his or her child's upbringing. As Justice Thomas pointed out in his concurrence in *Troxel v. Granville*—one of the more recent Supreme Court decisions to invoke this right—none of the other justices who embraced the parental right actually articulated “the appropriate standard of review.” 530 U.S. 57, 80 (2000) (Thomas, J., concurring). Justice Thomas chose to “apply strict scrutiny to infringements of fundamental rights,” *id.*, and his choice seems most consistent with requiring a state interest of “sufficient magnitude,” *Yoder*, 406 U.S. at 214, but it is possible that the Court might apply intermediate scrutiny. Considering the fundamental nature of parental autonomy, strict scrutiny appears to be the proper standard.

117. *Troxel*, 530 U.S. 57.

118. *Id.* at 66.

119. *Id.* at 68.

Justice Stevens dissented, but also recognized the right and even saw it in a somewhat more expansive light as providing parents “a corresponding privacy interest—absent exceptional circumstances” to care and guide for their children “without the undue interference of strangers to them and to their child.”<sup>120</sup> Indeed, the right to parental autonomy has closely been linked to the notion of a “private realm of family life which the state cannot enter.”<sup>121</sup>

For many parents, having their children participate in the Scouts is an integral part of the child’s moral, spiritual, and ethical education.<sup>122</sup> Moreover, as one commentator noted, a parent is required to participate in Cub Scout activities and is expected to participate in Boy Scout activities as well.<sup>123</sup> Even if parental presence is not strictly mandated, it is strongly encouraged.<sup>124</sup> At the Boy Scouts level, moreover, only male parents are allowed to participate in many activities, such as campouts, which are integral to the Scouting program. And, for many parents, participation in Scouts with their children is an important bonding experience.<sup>125</sup> Parental involvement also allows the parent to help ensure that the child

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120. *Id.* at 87; *see also* Bruce Frohnen, *Liberation Jurisprudence: How Activist Courts Have Torn Family and Society Asunder*, FAM. POL’Y, May–June 2001, at 1 (arguing that anti-discrimination laws have been harmful to families because of an increasing focus on the rights of the individual as opposed to the collective needs and rights of the family).

121. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *see also* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 541 (2008).

122. Indeed, in *Dale*, it may have been the Scouts’ critical role in helping some parents to bring up their children with moral values that led the Supreme Court to rule in favor of the Scouts. *See* Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 CREIGHTON L. REV. 641, 689 (2002) (arguing that the fact that the Scouts played a role in childrearing was ultimately a critical factor in the Court’s decision to hold that the expressive association rights of the Scouts justified exclusion of gay Scouts); *see also* John C. O’Quinn, Note, *Recent Developments: The United States Supreme Court, 1999 Term “How Solemn Is the Duty of the Mighty Chief”: Mediating the Conflict of Rights in Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), 24 HARV. J.L. & PUB. POL’Y 319, 354 (2000) (emphasizing that the Boy Scouts embody characteristics of other protected intimate associations).

123. AMENDMENT COMMENTARY, *supra* note 25, cmt. 2 at 1 (comment of Rene Abraham).

124. *Id.* cmt. 493 at 217 (comment of Hon. Craig G. Riemer).

125. As a practical matter, one commentator pointed out that this change might make it more difficult for California to attract qualified judges since judges must make the choice between participating in youth organizations with their families or their judicial nomination. *Id.* cmt. 484 at 212 (comment of Hon. Roger D. Randall).

learns the desired moral lessons from his experience in Scouts.<sup>126</sup> Thus, even if the children are able to participate in the Scouting program without their parents, the judicial Scouting ban adversely impacts and burdens the ability of parents to direct their child's education.<sup>127</sup> Accordingly, the Scout ban must be justified by truly compelling State interests and satisfy strict scrutiny.<sup>128</sup>

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126. Some scholars have argued that the Supreme Court's parental rights doctrine is too focused on the rights of parents without sufficient concern for the rights of children. *See, e.g.*, AMY GUTMANN, *DEMOCRATIC EDUCATION* (Princeton 1987); David Gan-wing Cheng, *Wisconsin v. Yoder: Respecting Children's Rights and Why Yoder Should Be Overturned*, 4 CHARLOTTE L. REV. 45, 47 (2013) (arguing that *Yoder* should be overturned because children should have a "right to an open future"). *But see* Jocelyn Floyd, *The Power of the Parental Trump Card: How and Why Frazier v. Winn Got It Right*, 85 CHI. KENT L. REV. 791, 792 (2010) (discussing cases involving a tension between parental and child interests); Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 114 (2000) (arguing that harm should be narrowly defined in order to allow parents discretion); Stephen G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149, 186 (1999) (reviewing JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* (1998)) (defending the parent's right against Establishment Clause concerns advanced by other scholars). Unlike some of those situations, allowing parental participation in the Boy Scouts is one situation where parental and child rights are balanced because the child is already participating in Scouts, so there is no sense of parental interest trumping the interest of the child.

127. Of course, the right to direct the upbringing of one's child does not give the parent unlimited rights. A parent, for instance, could not demand the right to attend school with her child or demand a particularized public school curriculum. *But see* Noa Ben-Asher, *The Lawmaking Family*, 90 WASH. U. L. REV. 363 (2012) (arguing for a limited right of parents to influence a child's curriculum based on values). Yet, when the Government prohibits a parent from participating in an activity with her children that all other parents are able to engage in, serious constitutional concerns arise. *See* Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, 760 (2013). This is especially true given that parents "have a liberty interest in rearing offspring in the parents' chosen value systems." *Id.* *See generally* Matthew Ormiston, *Parental Choice and School Vouchers: A Viable Facet of Texas Public Education Reform?*, 9 SCHOLAR 497, 518 (2007). Accordingly, a law that significantly burdens the "parental concern for the nurture and upbringing of their children" must be justified under strict scrutiny. *Id.*; *see supra* note 120 and accompanying text.

128. A ruling striking down the Scout ban on parental autonomy grounds would also be quite narrow in that it would only impact membership in youth organizations such as the Boy Scouts. Such a ruling would effectively restore the pre-existing youth organization exception but do little to impact membership in other non-youth organizations. On the other hand, such a ruling would be a pretty substantial expansion of the ability of parents to be involved in the upbringing of their children.

*D. Strict Scrutiny Should Still Apply even Though the Scout Ban Restricts Judicial Conduct*

While it is unquestionable that a general restriction on membership in the Boy Scouts would raise several constitutional concerns, California might attempt to defend the Scout ban on the ground that judges are unique and have been treated differently both as a result of their judicial office and as a result of their general status as public officers. However, the Supreme Court has made it clear that even though the State can impose greater restrictions on its officers, the State is still constitutionally limited in its ability to restrict the exercise of fundamental rights.<sup>129</sup> Likewise, in recent years, the Supreme Court has emphasized that the speech and conduct of judges are constitutionally protected.<sup>130</sup>

*1. Public officers generally retain their constitutional rights*

For example, the Court has made it clear that a public servant, including a government officer, cannot be fired “on a basis that

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129. Most of the cases deal with either freedom of speech or freedom of association rather than free exercise or parental autonomy, but there is no reason to think that the State would be allowed to impinge on these rights in situations when it cannot impinge on the judge’s speech rights. Indeed, it seems likely that the State would have even less of a justification for impinging on the parental decisions that employees or judges make, because these decisions are far less likely to directly impact the employees’ work. Moreover, as mentioned in the previous section, parental rights are also protected under a theory of privacy as a sphere of conduct where the Government simply has less reason to intrude or invade. As such, the Government has a weaker case for the termination of an employee for conduct involving an exercise of parental rights.

130. Freedom of Association and other constitutional rights have frequently come up in the context of lawyers and admission to the bar. For instance, in *Konigsberg v. State Bar*, the Supreme Court overturned a decision by the California Bar to deny admission to the bar of an individual who was suspected of being a member of the Communist Party. 353 U.S. 252 (1957). After concluding that the character and fitness evidence submitted on the prospective attorney’s behalf overwhelmingly supported his admission, the Court turned to the question of whether Communist Party membership would have been disqualifying. *Id.* at 264–68. The applicant was accused of membership in 1941 when the organization was fully legal and membership in the organization did not lead to any kind of penalty. *Id.* at 267–68. Nor could the fact that “some members of that party were involved in illegal or disloyal activities” justify sweeping the individual into that group and excluding him. *Id.* at 267. Thus, the Court has made it clear that such bans are highly disfavored in the context of the legal profession. *See id.* at 267–68.

infringes his constitutionally protected interests.”<sup>131</sup> If the Government were able to do so, it would allow the Government to “produce a result which [the Government] could not command directly.”<sup>132</sup> In other words, as a general matter of principle, the Government cannot penalize a public servant for conduct that it otherwise could not prohibit or proscribe generally.

Likewise, the Supreme Court has made it clear that conditioning public employment on an employee’s pledging not to belong to a disfavored but legal organization is unconstitutional. For instance, in *Elfbrandt v. Russell*, the Court concluded that a loyalty oath which required employees to swear that they had not been members of an organization dedicated to overthrowing the government was impermissible even though overthrowing the government constitutes an illegal objective.<sup>133</sup> The Court concluded that because membership was not necessarily “accompanied by a specific intent to further the unlawful aims of the organization,” this was an illegitimate basis for excluding an individual from public employment.<sup>134</sup>

On the other hand, the Court has at times been more solicitous of restrictions on the freedom of speech and the free exercise of public officers. In *Pickering v. Board of Education*, the Supreme Court overturned a decision to fire a teacher who wrote an opinion-editorial that was critical of the school board.<sup>135</sup> The Court laid out a balancing test “between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer.”<sup>136</sup> However, in doing so, the Court explained that a teacher could not be punished for speech that had not

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131. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Treatment of the speech of lawyers is also closely analogous and highly relevant. For instance, in *Gentile v. State Bar*, the Court declared that a rule limiting the ability of lawyers to make extrajudicial statements was unconstitutionally void for vagueness. 501 U.S. 1030 (1991). Although this decision did “not call into question the constitutionality of other State’s prohibitions of attorney’s speech,” the Court emphasized that because this was a “punishment of pure speech” there was no “standard of diminished First Amendment protection.” *Id.* at 1034–35.

132. *Sindermann*, 408 U.S. at 597.

133. 384 U.S. 11 (1966); *accord* Grindlay, *supra* note 5, at 564.

134. *Elfbrandt*, 384 U.S. at 16.

135. 391 U.S. 563, 564 (1968).

136. *Id.* at 568.

“impeded the . . . proper performance of his daily duties.”<sup>137</sup> Because the teacher’s speech in *Pickering* did not interfere with his ability to teach, the State did not have a “significantly greater . . . interest in limiting” the teacher’s speech than that of the general public’s.<sup>138</sup>

The Supreme Court further elaborated on the *Pickering* balancing test in *Connick v. Meyers*, leading this balancing test to commonly be referred to as the *Pickering-Connick* test.<sup>139</sup> But this test has been highly controversial and notoriously difficult for lower courts to apply.<sup>140</sup>

Moreover, for several reasons, it is doubtful that the *Connick-Pickering* test applies to judges. First, judges are not employees in the traditional sense and often have some form of tenure and heightened job protection. Furthermore, many of the policy considerations motivating *Connick*, such as ensuring employee-supervisor unity, simply do not apply in the judicial context.<sup>141</sup>

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137. *Id.* at 572.

138. *Id.* at 573.

139. *Connick v. Myers*, 461 U.S. 138 (1983). See generally DAVID L. HUDSON JR., BALANCING ACT: PUBLIC EMPLOYEES AND FREE SPEECH (Dec. 2002), <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.PublicEmployees.pdf> (describing application of the *Pickering-Connick* test in a variety of contexts).

140. See Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 119 (2006) (“*Pickering* guaranteed a steady flow of doctrinal disputes for decades to come.”); Jessica Reed, Note, *From Pickering to Ceballos: The Demise of the Public Employee Free Speech Doctrine*, 11 N.Y. CITY L. REV. 95, 98 (2007) (“[T]he Court’s ruling created a compartmentalization that not only leaves public employees vulnerable to retaliation for exposing governmental misconduct or inefficiencies, but also neglects the public’s interest in hearing such speech.”); Molly K. Smith, *Compelled Investigatory and Testimonial Speech: An Overdue Clarification of the Public Employee Speech Doctrine that Rehabilitates “All of the Values at Stake,”* 101 KY. L.J. 403, 408 (2012–13) (“As the public employee speech doctrine evolved, certain drawbacks of the case-by-case approach of *Connick-Pickering* became apparent.”).

141. Another lingering question is whether the *Connick-Pickering* test is the appropriate test for employee free exercise claims or religion-related statutory claims under Title VII or RFRA. At least two courts of appeals have applied this test in the context of religious freedom claims. See *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156 (2d Cir. 2001); *Brown v. Polk Cty.*, 61 F.3d 650, 658 (8th Cir. 1995). The *Pickering-Connick* test seems inappropriate for religious freedom claims inasmuch that religious freedom claims should be fully protected whether or not they touch on a matter of public concern. For instance, a Sikh hoping to carry a Kirpan to work would not be expressing an opinion on any matter of great public concern, but participating in an act of personal devotion. Yet, it seems absurd that his claim should receive less protection than a claim of an individual seeking to discuss his religious views about homosexuality in the workplace. Nevertheless, it seems likely that the public concern prong

Additionally, as will be further discussed in the following section, the Supreme Court has emphasized that our judicial system is enriched rather than undermined when judges have and express their opinions on matters of public concern. Thus, *Connick-Pickering* should not be seen as reducing the standard of review for restrictions on judicial speech. Instead, strict scrutiny should apply with full force.

Nor do other decisions applying the reasoning of *Pickering* support the Boy Scout ban. For instance, the Supreme Court's decision in *U.S. Civil Service Commission v. National Ass'n of Letter Carriers, AFL-CIO*, upholding portions of the Hatch Act that prohibited federal employees from "taking an active part in political management or in political campaigns,"<sup>142</sup> does not support the Scout ban. First, the Hatch Act was linked to a prohibition on civil servant political activity that reached back to the Jefferson Administration. That history thus gave the Hatch Act a strong historical pedigree—unlike a prohibition on judicial group membership, which lacks this historical pedigree.<sup>143</sup> Moreover, unlike the ban on membership in only certain disfavored groups, the Hatch Act's prohibitions were also truly neutral and applied equally to all "parties, groups, or points of view."<sup>144</sup> Additionally, the type of corruption that the Hatch Act sought to remedy, where civil servants received patronage and support for their electioneering conduct, is much more akin to quid pro quo corruption than the mere appearance of partiality that the State asserts exists with judicial membership in the Boy Scouts.<sup>145</sup> Most importantly, the decision in *Letter Carriers* predates the Supreme Court's recent decisions, such as *Republican Party of Minnesota v. White*<sup>146</sup> and *Citizens United v. FEC*,<sup>147</sup> in which efforts to reduce partiality or corruption have received far more searching scrutiny. Indeed, as the following section

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would be met in any case involving the Boy Scouts as a result of the fact that the group has come to stand very publically for a certain position on a matter of great public concern.

142. *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 562 (1973).

143. These historical arguments seem critical to the Court's decision and, absent the same historical pedigree, it is not likely that the Court would have upheld the Hatch Act. *Id.* at 577.

144. *Id.* at 564.

145. *See infra* Part IV.

146. 536 U.S. 765 (2002).

147. 558 U.S. 310 (2010).

will discuss, the Eighth Circuit, applying the Supreme Court's decision in *White*, invalidated a law that imposed restrictions on judges similar to those imposed by the Hatch Act.

2. *The Supreme Court Has Made It Clear That Judges Are Fully Protected in Their Exercise of Constitutional Rights*

The Supreme Court has been highly skeptical of efforts to restrict the rights of judges. In *Republican Party of Minnesota v. White*, the Supreme Court struck down a Minnesota judicial canon that forbade a judge from “announc[ing] his or her views on disputed legal or political issues.”<sup>148</sup> Minnesota had a separate provision that forbade judges from making “pledges or promises” as to how they would decide a specific case before the court.<sup>149</sup> Thus, the Minnesota statute dealt with positional conflicts and the appearance of partiality that would arise from a judge announcing his views on a contested issue. The Court concluded that while impartiality in the sense of a “lack of bias for or against either *party* to the proceeding” was essential for due process, the clause was “not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense.”<sup>150</sup> Indeed, because the clause did not “restrict speech for or against particular *parties*, but rather speech for or against particular *issues*,” it was “barely tailored to serve that interest *at all*.”<sup>151</sup> The Court explained that “lack of preconception in favor of or against a particular *legal view*” is “not a *compelling* state interest, as strict scrutiny requires.”<sup>152</sup> “A judge’s lack of predisposition” was not “a necessary component of equal justice” and in fact “would be evidence of lack of qualification, not lack of bias.”<sup>153</sup> Nor could creating the appearance of that type of impartiality be considered compelling.

One lingering question that remained after the *White* decision was the proper standard of review for laws that impinge upon judicial

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148. 536 U.S. at 768.

149. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002); *see also White*, 536 U.S. at 812–13.

150. *White*, 536 U.S. at 775–76.

151. *Id.* at 776.

152. *Id.* at 777.

153. *Id.* at 777–78.

free speech or other fundamental rights. The majority opinion clearly applied strict scrutiny, but Justice Kennedy in his concurrence, while agreeing that “[t]here is authority for the Court to apply strict scrutiny,” undertook a different analysis that focused on the content-based nature of the restrictions.<sup>154</sup> Kennedy also left open the question of “whether the rationale of *Pickering* . . . and *Connick* . . . could be extended to allow a general speech restriction on sitting judges.”<sup>155</sup> Because Justice Kennedy was the critical fifth vote, circuits have split as to how to apply the *White* decision.<sup>156</sup> Some apply strict scrutiny, while others apply the *Pickering* balancing test.<sup>157</sup>

However, the Supreme Court’s recent decision in *Williams-Yulee v. Florida Bar* seems to decisively resolve this question in favor of strict scrutiny. In that opinion concerning restrictions on judicial fundraising, Chief Justice Roberts in his majority opinion clearly applied strict scrutiny.<sup>158</sup> While two of the Justices in the majority indicated that they would not apply strict scrutiny, all four dissenting judges applied strict scrutiny.<sup>159</sup> There is now therefore a clear 7-2

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154. *Id.* at 792 (Kennedy, J., concurring).

155. *Id.* at 796.

156. See Ashna Zaheer, *Judging Judges: Why Strict Scrutiny Resolves the Circuit Split over Judicial Speech Restrictions*, 87 NOTRE DAME L. REV. 879, 882 (2011).

157. See *id.* Another rather unsatisfying possibility is that a different standard might apply to appointed and elected officials. This standard would be especially problematic in a state like California that employs a hybrid system. It would mean that elected judges at trial courts can be members of the Scouts while appointed judges such as state appellate or supreme court judges would not. Such a standard also is difficult to apply in states like Utah where judges are appointed by the Governor but then subject to retention elections. See *id.* at 906 (arguing that “in the case of elected judges, while the government is technically the employer, the judge ultimately is accountable to the people”). Zaheer makes compelling arguments that strict scrutiny is the proper standard of review because the expressive activity involved is frequently core political speech touching on matters of great public concern and such bans are often not content neutral. Zaheer argues that as a result of these conditions strict scrutiny should be triggered. Both of these factors are also present with the Boy Scout ban: Membership touches on matters of great public concern such as the degree to which the law should prohibit discrimination against homosexuals, and the Boy Scout ban is not content or viewpoint neutral because it allows membership in gay rights groups but not in a group such as the Boy Scouts with a more conservative viewpoint. See generally *id.*

158. See *infra* Section III.B. for an extensive discussion of *Williams-Yulee*.

159. It has been noted that the application of strict scrutiny by the majority was incredibly lax, especially in regard to the tailoring prongs. Nevertheless, this opinion clearly establishes that strict scrutiny is the proper standard. As will be shown in Part IV, the tailoring of the Boy Scout ban is far more egregious than that in the *Williams-Yulee* case. See Floyd

majority in favor of the application of strict scrutiny, at least when judicial speech rights are implicated.<sup>160</sup>

The Court's conclusion in *White* directly implicates the Scout ban. Indeed, on remand after the Supreme Court's decision in *White*, the Eighth Circuit applied the Supreme Court's ruling to invalidate a ban on partisan political activities on the part of judges. The Eighth Circuit concluded that the ban on group membership was meant "to keep judges from aligning with particular views on issues by keeping them from aligning with a particular political party" and was therefore constitutionally suspect.<sup>161</sup> The court reasoned that the argument "*that associating with a particular group will destroy a judge's impartiality*—differs only in form from that which purportedly supports the announce clause—that *expressing one's self on particular issues will destroy a judge's impartiality*"—the very argument the Supreme Court had rejected in *White*.<sup>162</sup> The court therefore applied traditional strict scrutiny and found that the law violated the judge's right to freedom of association. In rejecting the State's purported interest, moreover, the court rejected the notion that mere membership in a political party could create bias and explained that "any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with" a partisan organization.<sup>163</sup>

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Abrams, *Symposium: When Strict Scrutiny Ceased to be Strict*, SCOTUSBLOG (Apr. 30, 2015, 9:47 AM), <http://www.scotusblog.com/2015/04/symposium-when-strict-scrutiny-ceased-to-be-strict/> ("But the scrutiny actually provided by the majority to the Florida Code provision was anything but strict. Justice Samuel Alito rightly concluded that the rule at issue was 'about as narrowly tailored as a burlap bag.'").

160. Chief Justice Roberts, in dicta, briefly suggested that freedom of association might be treated differently when he emphasized that the less stringent standard of *Buckley v. Valeo* applied because that case was about "freedom of political association." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015) (quoting *Buckley v. Valeo*, 424 U.S. 1, 24 (1976) (per curiam)). However, Justice Roberts here is attempting to distinguish *Buckley* from the total solicitation ban in *Williams-Yulee* and it is obvious that freedom of speech and association are closely related rights. As mentioned in Section II.A., freedom of association claims traditionally trigger strict scrutiny and this opinion provides no reason to treat the rights of judges differently. Moreover, other rights implicated such as free exercise and parental autonomy clearly trigger strict scrutiny. As such, this article will proceed with the assumption that strict scrutiny is the proper standard when the associative, religious, and parental rights of judges are implicated just as it is for speech rights.

161. *Republican Party of Minn. v. White*, 416 F.3d 738, 754 (8th Cir. 2005).

162. *Id.*

163. *Id.*

*White* and the subsequent Eighth Circuit opinion, as well as *Williams-Yulee*, stand strongly for the principle that judges are entitled to exercise their constitutional rights free from interference by the State and make it clear that laws that burden the expressive and associative rights of judges will be subject to searching scrutiny.

### III. AVOIDING THE APPEARANCE OF JUDICIAL IMPROPRIETY IS NOT A COMPELLING GOVERNMENTAL INTEREST

As the preceding section shows, the Boy Scout ban impacts multiple fundamental rights, any of which would be sufficient to require strict scrutiny. Even though judges are public officers, that fact does not reduce the State's burden of justification. Thus, to justify its ban, California would need to offer a compelling interest of the highest magnitude and also show that its policy is as narrowly tailored as possible to meet its compelling interest.<sup>164</sup>

The chief interest advanced by the California Supreme Court in its rulemaking was avoiding "the appearance of impropriety," which in its view "diminish[es] public confidence in the integrity and impartiality of the judiciary."<sup>165</sup> While it is generally not controversial that avoiding judicial impropriety *in specific cases* is a compelling state interest, it is not settled whether a more generalized fear of the appearance of impropriety qualifies as a compelling governmental interest. Likewise, the U.S. Supreme Court's recent campaign finance decisions suggest a great skepticism on the Court's part of arguments based on general appearances of impropriety or corruption.<sup>166</sup> In that context, the Court has held that only preventing quid pro quo corruption can be a compelling interest. This suggests that preventing a generalized appearance of

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164. As Justice Breyer pointed out in oral arguments for the *Williams-Yulee* case, which will be discussed in detail in the following section, the Court has never expressly used the wording "strict scrutiny" in cases regarding judicial speech. It has, however, suggested a very heightened standard of review.

165. See *supra* Part I.

166. I am not the only one to draw a connection between *Dale* and the Court's campaign finance decisions. See Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. Seiu, Local 1000*, 98 CORNELL L. REV. 1023 (2013) (discussing *Dale* and *Citizens United*, and their impact on mandatory union dues); Mark D. Bauer, *Freedom of Association for College Fraternities After Christian Legal Society and Citizens United*, 39 J.C. & U.L. 247, 299 (2013) (considering how *Citizens United* might impact the Court's decision in *Christian Legal Society*).

impropriety, as opposed to impropriety or bias in specific cases, does not constitute a compelling governmental interest. Although the Supreme Court's recent *Williams-Yulee* opinion suggests that it will provide greater latitude to the State in its efforts to prevent the appearance of judicial impropriety, these decisions taken as a whole still suggest that a mere abstract and generalized appearance of impropriety will not be sufficient.

*A. The Court's Campaign Finance Decisions Show That Avoiding the Appearance of Impropriety Is Not a Compelling Interest*

While the connection between campaign finance and the rights burdened by the Scout Ban may seem oblique, the U.S. Supreme Court has made this connection explicit, at least as to the freedom of association. In *Buckley v. Valeo* itself, for example, the Court acknowledged that finance restrictions "impinge on protected associational freedoms."<sup>167</sup> More recently, in *McCutcheon v. Federal Election Commission*, the Court suggested that aggregate donation limits restrict a potential donor's ability "to exercise his expressive and associational rights."<sup>168</sup> Moreover, while the Supreme Court has always been suspicious of campaign finance reform laws, it has in recent years increasingly struck down laws that the Government has attempted to justify on the basis of avoiding a generalized appearance of impropriety or corruption.

The Court's approach to this issue has evolved substantially since *Buckley v. Valeo*, in which the Court first considered a constitutional challenge to the Federal Election Campaign Act.<sup>169</sup> In that decision, the Court upheld a wide range of campaign finance measures, including a cap on the amount of donations that can be given to any single candidate in a given year. In doing so, the Court held that "the prevention of corruption and the appearance of corruption" is a "constitutionally sufficient justification" for the limits.<sup>170</sup> The Court stated that "the impact of the appearance of corruption" was "[o]f almost equal concern as the danger of actual quid pro quo

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167. 424 U.S. 1, 22 (1976).

168. 134 S. Ct. 1434, 1448 (2014).

169. 424 U.S. at 1.

170. *Id.* at 25–26.

arrangements.”<sup>171</sup> In response to the overbreadth challenge brought by those opposing the limit, the Court explained that Congress was justified “in safeguarding against the appearance of impropriety.”<sup>172</sup> Indeed, the *Buckley* Court even accepted a congressional interest in “the appearance of the purity and openness of the federal election process” as an important state interest.<sup>173</sup>

Since *Buckley*, however, the Supreme Court has gradually undermined the basis of that decision. In *Citizens United v. FEC*, the Court struck down a prohibition on electioneering activities during a campaign by corporations and unions.<sup>174</sup> In doing so, the Court emphasized that, while “the potential for *quid pro quo* corruption” justified limits on direct contributions to candidates, it could not justify a limit on independent campaign related expenditures.<sup>175</sup> While the Court paid some lip service to the prevention of the appearance of corruption, it is clear that the Court was skeptical of general efforts to simply create the appearance of fairness. Indeed, the Court emphasized that “[r]eliance on a ‘generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.’”<sup>176</sup>

The Court’s more recent *McCutcheon v. FEC* decision is even more explicit in the limits it places on campaign finance restrictions.<sup>177</sup> There the Court struck down aggregate spending limits that curtailed donations to candidates and political party committees.

While the dissent emphasized that these laws serve “the public’s interest” in ensuring a more representative and fair government,<sup>178</sup> the majority rejected any effort to “define the boundaries of the First Amendment by reference to such a generalized conception of the public good.”<sup>179</sup> The Court made clear that “preventing corruption

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171. *Id.* at 25–27.

172. *Id.* at 30.

173. *Id.* at 78.

174. 558 U.S. 310 (2010).

175. *Id.* at 345.

176. *Id.* at 359.

177. 134 S. Ct. 1434, 1434 (2014).

178. *Id.* at 1467 (Breyer, J., dissenting).

179. *Id.* at 1449 (Roberts, J., plurality opinion).

or the appearance of corruption” is the *only* legitimate governmental interest for restricting campaign contributions.<sup>180</sup> And the *McCutcheon* Court went even further, emphasizing that “Congress may target only a specific type of corruption—‘*quid pro quo*’ corruption.”<sup>181</sup> Simply limiting “the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions” was not sufficient.<sup>182</sup> Nor was the mere possibility that large expenditures may lead to “‘influence over or access to’ elected officials or political parties.”<sup>183</sup> Likewise, the Court emphasized that “the Government’s interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption.”<sup>184</sup> Accordingly, limiting “the appearance of mere influence or access” is insufficient.<sup>185</sup>

The Court also rejected the government’s argument “that there is an opportunity for corruption whenever a large check is given to a legislator.”<sup>186</sup> It held instead that only contributions made by an individual or group to a specific legislator can be said to cause *quid pro quo* corruption.<sup>187</sup> The “basic nature of the party system,” the Court said, “in which [individuals] join together to further common political beliefs,” creates feelings of “particular gratitude,” but such feelings of “shared interest” are not preventable.<sup>188</sup> Labeling them as “*quid pro quo* corruption would dramatically expand government regulation of the political process” and be invalid.<sup>189</sup> Indeed, such feelings of “particular gratitude” and “shared interest” are inherent in the democratic process and are not indicia of the existence of *quid pro quo* corruption.<sup>190</sup>

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180. *Id.* at 1450.

181. *Id.*

182. *Id.*

183. *Id.* at 1451.

184. *Id.*

185. *Id.*

186. *Id.* at 1460.

187. *Id.* at 1461.

188. *Id.*

189. *Id.*

190. *Id.*

Thus, while the Court reaffirmed that “[t]he Government has a strong interest . . . in combatting corruption and its appearance,” that interest had to “be limited to a specific kind of corruption.”<sup>191</sup> Only direct efforts to influence the decision making of legislator qualified. Neither general feelings of gratitude caused by common associational interests, nor the mere sense of special access, could justify limits on expressive and associational freedoms.<sup>192</sup>

*B. While Williams-Yulee Suggests That the Court Is More Willing to Find a Compelling Interest in the Judicial Context, It Remains Unlikely to Find a Compelling Interest Absent a Likelihood of Quid Pro Quo Corruption*

This year, the Supreme Court, in a 5-4 decision, upheld a provision of the Florida Supreme Court's Code of Judicial Conduct that restricts judges from engaging in direct solicitation of funds for their judicial campaigns.<sup>193</sup> Although parties argued extensively based on *Citizens United* and *McCutcheon*, the Court dismissed these comparisons and explained that “a State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections.”<sup>194</sup> The Court also emphasized that “[s]tates may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians.”<sup>195</sup> The Court even went so far as to say that “our precedents applying the First Amendment to political elections have little bearing on the issues here.”<sup>196</sup>

Despite the Court's unwillingness to apply its campaign finance decisions directly in the judicial context, the Court went to great lengths to emphasize the concrete nature of the impropriety that the State was combatting. Unlike the Scout Ban, the policy in Florida was specifically focused on quid pro quo corruption,<sup>197</sup> and the

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191. *Id.* at 1462.

192. *Id.*

193. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

194. *Id.* at 1667.

195. *Id.*

196. *Id.*

197. Transcript of Oral Argument at 8, *Williams-Yulee*, 135 S. Ct. 1656 (No. 13-1499) (“There are three interests. One, the interest in preventing quid pro quo corruption. One

Florida Bar explained the purpose of the canon as “to prevent the appearance of quid pro quo, bias or corruption, and to preserve the integrity of our judiciary and maintain the public’s confidence in an impartial judiciary.”<sup>198</sup> A judge that gets a donation from an individual who frequently appears before the Court will readily create the appearance of a direct conflict of interest or judicial corruption in a way that mere group membership cannot. It was thus reasonable for the State to conclude that “the public may lack confidence in a judge’s ability to administer justice without fear or favor if he comes to office by asking for favors.”<sup>199</sup> As the Court explained, “it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity,” which justifies the restriction.<sup>200</sup>

The majority also emphasized the coercive and corrupting influence of direct judicial solicitations: It pointed out that those solicited will personally fear retaliation from the judge if they do not donate and that potential litigants will be forced to select attorneys based on who has made the requested donations.<sup>201</sup> Indeed, the Court elsewhere has made clear that individual litigants have a due process right against the “probability of actual bias” caused by an opposing party’s financial support to a judge.<sup>202</sup> Accordingly, the Florida restriction sought to target not the mere suggestion of partiality, but the influence of coercive requests for donations on the judicial process. As Justice Ginsburg noted in her concurrence,

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[sic], the interest in promoting impartiality/preventing bias. And third, the interest in protecting persons solicited against coercion.”)

198. Brief for Petitioner at 14, *Williams-Yulee*, 135 S. Ct. 1656 (No. 13-1499), <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/11/13-1499-ts-1.pdf> (quoting Amended Answer Brief at 8, *Fla. Bar v Williams-Yulee*, 138 So. 3d 379 (Fla 2014), *aff’d*, 135 S. Ct. 1656 (No. SC11-265), [http://www.floridasupremecourt.org/clerk/briefs/2011/201-400/11-265\\_AnsBrief.pdf](http://www.floridasupremecourt.org/clerk/briefs/2011/201-400/11-265_AnsBrief.pdf)); *see also Fla. Bar*, 138 So. 3d at 385 (Fla. 2014) (“Therefore, in light of this Court’s prior holding that Florida has a compelling interest in protecting the integrity of the judiciary and maintaining the public’s confidence in an impartial judiciary—a holding that is bolstered by the broad acceptance of comparable compelling State interests by other state supreme courts—we conclude that Canon 7C(1), which furthers these goals, serves compelling State interests.”).

199. *Williams-Yulee*, 135 S. Ct. at 1666.

200. *Id.* at 1667.

201. *Id.* at 1667–68.

202. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877–78, 884 (2009).

“[d]isproportionate spending to influence court judgments threatens both the appearance and actuality of judicial independence.”<sup>203</sup>

Ultimately, the danger caused by judges’ direct solicitation closely mirrors the danger caused by donations that raised the specter of quid pro quo corruption. Indeed, as Justice Kennedy pointed out in *McConnell*, “[t]he *quid pro quo* nature of candidate contributions justified the conclusion that the contributions pose inherent corruption potential; and this in turn justified the conclusion that their regulation would stem the appearance of real corruption.”<sup>204</sup>

In short, while the Supreme Court seems more broadly supportive of efforts to combat the appearance of partiality in the judicial context because of the distinctive role of judges,<sup>205</sup> the *Williams-Yulee* decision should not be seen as a complete embrace of all efforts to root out the appearance of partiality in the judiciary. The narrowness of the decision also suggests that a policy such as the Scout ban, which is less closely rooted in efforts “to prevent a concrete as opposed to speculative harm,”<sup>206</sup> would be treated less favorably by the Court.<sup>207</sup>

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203. *Williams-Yulee*, 135 S. Ct. at 1675 (Ginsburg, J., concurring). Justice Ginsburg relied on studies that that “the money pressure groups spend on judicial elections ‘can affect judicial decision-making across a broad range of cases.’” *Id.* (quoting Brief of Professors of Law, Economics, and Political Science as Amici Curiae Supporting Respondent at 14, *Williams-Yulee*, 135 S. Ct. 1656 (No. 13-1499)) (citing Joanna Shepherd & Michael S. Kang, SKEWED JUST. (2014), <http://skewedjustice.org>).

204. *McConnell v. FEC*, 540 U.S. 93, 298 (2003) (Kennedy, J., concurring in part and dissenting in part).

205. Joseph Grodin, *Symposium: The Distinctive Character of Judging*, SCOTUSBLOG (Apr. 30, 2015, 3:18 PM), <http://www.scotusblog.com/2015/04/symposium-the-distinctive-character-of-judging/>.

206. Brief for The Thomas Jefferson Center for the Protection of Free Expression as Amicus Curiae Supporting Petitioner, *Williams-Yulee*, 135 S. Ct. 1656 (No. 13-1499), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/Brief\\_sV4/13-1499\\_amicus\\_JeffersonCenter.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/Brief_sV4/13-1499_amicus_JeffersonCenter.authcheckdam.pdf).

207. It is illustrative to contrast Chief Justice Roberts’s more restrained majority opinion with Justice Ginsburg’s broad concurrence. Justice Ginsburg wrote “separately to reiterate the substantial latitude, in my view, States should possess to enact campaign-finance rules geared to judicial elections.” *Williams-Yulee*, 135 S. Ct. at 1673 (Ginsburg, J., concurring). Chief Justice Roberts, in contrast, emphasized that his opinion does not touch on “a slew of broader questions” such as whether judicial campaign spending can be capped. *Id.* at 1672 (majority opinion). Chief Justice Roberts thus makes it clear that his opinion applies only to the narrow set of circumstances implicated by direct judicial solicitation of funds. *Id.*; see also Jessica Ring

*C. The Scout Ban Does Not Further a Compelling  
Governmental Interest*

While the *Williams-Yulee* opinion cautions against mechanically importing campaign finance logic into the judicial realm, the fact that California's rationale falls so far outside of what the Court has accepted as a compelling interest suggests that, for this reason alone, the Scout ban should fail strict scrutiny.

Just as only the appearance of quid pro quo corruption could justify restrictions on campaign finance donations, judicial codes of ethics should only be permitted to forbid a specific type of action in which an undue influence creates the perception that a judge is incapable of rendering an impartial or unbiased decision in a specific case. This was precisely the case with the direct solicitation in *Williams-Yulee*. In contrast, a general sense that a judge, through group membership, is more inclined towards a certain worldview should be deemed insufficient. As with membership in political parties and affiliation with political interest groups, judges are invariably influenced by ideology, association, and life experience. Attempting to isolate or prevent any sense of "shared interest" between members of the judiciary and the outside world would "dramatically expand government regulation" to impermissible levels.<sup>208</sup>

As with elected officials, judges generally are given a wide degree of discretion and trust by society. As with those we elect, "public awareness of the opportunities for abuse inherent in a regime" of judicial discretion invariably creates some appearance of the potential for impropriety.<sup>209</sup> Yet judges are presumed capable of putting aside individual feelings about certain issues in order to render an impartial and just verdict. Just as it may be unrealistic to expect the legislator *always* to legislate for the common good rather than for personal interests, so too might it be unrealistic to expect a judge *always* to be impartial despite personal feelings. But both of these expectations are essential for the functioning of a democratic society.

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Amunson, *Symposium: A Rare Case Indeed*, SCOTUSBLOG (Apr. 30, 2015, 11:15 AM), <http://www.scotusblog.com/2015/04/symposium-a-rare-case-indeed/>.

208. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1461 (2014).

209. *See id.* at 1450 (quoting *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)).

Indeed, as the Supreme Court has noted, allowing judges to be opinionated about issues and to participate in their community is actually a boon and does not undermine trust in the judiciary. Because of the important role that judges play, it is “all the more imperative that they be allowed freely to express themselves on matters of current public importance.”<sup>210</sup> Joining expressive associations such as the Boy Scouts is one way for a judge to express herself on a matter of great public importance. Membership in the Scouts also has other benefits such as community involvement and ensuring that judges interact with a variety of citizens.<sup>211</sup> The Model Code of Judicial Conduct also seems to recognize that the general benefits of judicial involvement in the community substantially outweigh any partiality that a judge may acquire through “shared interest” with certain groups.<sup>212</sup>

The fact that California seeks to restrict membership in only particular groups thus reveals that the State’s interest is not based on the existence of actual partiality or bias, which could constitute a compelling interest. Membership in permitted groups may just as strongly influence a judge’s worldview or ideology. For instance, a judge that is a member of a Humanist Society may feel strong antipathy toward religious plaintiffs. Likewise, a Jewish judge may feel great sympathy for a coreligionist plaintiff. On the other hand, members of groups are not monolithic and may disagree with certain policies and positions taken by that group while still remaining members. If a state truly has a compelling interest, it cannot be enforced haphazardly or selectively.<sup>213</sup> As the Court emphasized in

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210. *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)).

211. See Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 53 (2014) (arguing that freedom of association has independent value in enhancing “civic and political engagement,” and civic society).

212. See, e.g., MODEL CODE OF JUDICIAL CONDUCT r. 3.1 cmt. 2 (AM. BAR ASS’N 2007) (“Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.”). As Professor Feldman has noted, “[a]nd how important is it, really, for judges to be treated as secular monks, cut off from certain disfavored forms of social contact to convince the public that they are pure and holy?” Feldman, *supra* note 5.

213. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (noting that even categories of wholly unprotected speech cannot “be made the vehicles for content discrimination unrelated to their distinctively proscribable content”).

*Williams-Yulee*, “[u]nderinclusiveness can also reveal that a law does not actually advance a compelling interest.”<sup>214</sup> By seeking to selectively enforce a group membership ban, the State thus admits that group membership is not sufficient to create actual partiality. Instead, the ban is motivated (at best) by the same illegitimate concern for the *appearance* of partiality or bias which the Court rejected in *Citizen’s United* and *McCutcheon*.

Moreover, the State’s interest cannot be said to be compelling because it is based on pure conjecture that membership in the Scouts creates an appearance of partiality. There is no proof that the appearance of judicial partiality as a result of group membership is actually a problem of sufficient magnitude to justify the State’s restriction. As several judges on the San Diego Superior Court noted in their comment on the proposed change:

Notably, the Committee does not cite a single survey, a single complaint about the impartiality of any judge, or even a bare anecdote in support of its “view” and “agreement.” It offers no empirical evidence of any kind, much less any substantial evidence that would justify the impact of the Proposal on the private lives of judges.<sup>215</sup>

Absent any sort of finding that membership in groups such as the Boy Scouts actually raises concerns about the appearance of partiality, much less actual partiality, the radical step of banning membership cannot be justified. Even if the State’s interest is compelling in theory,<sup>216</sup> it simply has not laid the factual foundation to justify burdening the rights of judges.<sup>217</sup>

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214. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015).

215. AMENDMENT COMMENTARY, *supra* note 25, cmt. 516 at 231 (comment of Hon. Julia Kelety et al.).

216. Under strict scrutiny, it is not enough for a governmental justification to be theoretically compelling at a high level of generality. Instead, a court must “carefully examine[] the interest asserted by the government.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995).

217. By contrast, as to non-expressive groups such as the Jaycees, the State might be able to argue under the *Jaycees* opinion that its interests trump because of the less substantial burden on freedom of association. Yet, even in the *Jaycees* case, the Court still applied strict scrutiny. See *supra* notes 46–52 and accompanying text. Moreover, it also seems that the State’s interest in combating discrimination is weaker when it only restricts judges from membership while allowing the group to continue to engage in what it considers invidious discrimination. Given that the State’s interest in reducing the appearance of generalized

Ultimately, the rationale underlying the Scout ban is more similar to that which the Court rejected in *White* than that which it embraced in *Williams-Yulee*. California has not suggested that judges' mere membership in groups such as the Boy Scouts will impact their judicial decision-making and lead them to be biased towards or against particular litigants. The possibility of such an effect as this was central to the Court's reasoning in *Williams-Yulee*. In contrast, just like the restriction on judicial speech that the Court rejected in *White*, the Scout ban seeks to curtail the appearance that judges have prejudged or decided issues before they reach the Court. Yet, while there is good reason to suspect that money will have a powerful and subversive impact on the administration of justice, California has not explained how mere membership in groups such as the Scouts will in any way bias the administration of justice. California's interest is therefore not compelling.

#### IV. EVEN IF THE STATE'S INTEREST IS COMPELLING, THE SCOUT BAN IS NOT NARROWLY TAILORED TO ACHIEVE THAT INTEREST

The selective and haphazard nature of the ban also reveals how poorly fitted the law is to achieving the State's purported interests. Thus, even if the ban could be justified as an effort to reduce the appearance of partiality, it should still be invalidated under the second prong of strict scrutiny analysis. This section will first look at the lack of narrow tailoring and then consider the abundance of less restrictive alternatives that the State could employ.

##### *A. The California Scout Ban Is Not Narrowly Tailored Because It Is Severely Under- and Overinclusive*

One of the major problems with the California policy is its gross underinclusiveness. While there is "no freestanding 'underinclusiveness limitation,'"<sup>218</sup> as the Supreme Court explained in *City of Ladue v. Gilleo*, an ordinance that is underinclusive is especially problematic when it represents "a governmental attempt to give one side of a debatable public question an advantage in

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impropriety is not compelling, it seems hard to justify a restriction solely on judicial membership.

218. *Williams-Yulee*, 135 S. Ct. at 1668. (quoting *R.A.V.*, 505 U.S. at 387).

expressing its views to the people,” or involves the State seeking to “control . . . the search for political truth.”<sup>219</sup> Moreover, as the Court explained in *Ladue*, the existence of a wide range of exemptions can “diminish the credibility of the government’s rationale for restricting speech in the first place.”<sup>220</sup> With the California policy, the Government is banning membership in groups that are critical of homosexual conduct, while not restricting membership in advocacy groups that advocate for greater inclusion of sexual minorities. A judge could therefore be affiliated with the Gay and Lesbian Alliance Against Discrimination (GLAAD) or the Human Rights Campaign but not with the Boy Scouts of America.<sup>221</sup> Thus, unlike the canon that the Court upheld in *Williams-Yulee*, the Scout ban does not apply “evenhandedly to all judges and judicial candidates, regardless of [their] viewpoint.”<sup>222</sup>

Of course, it can be argued that the distinction is based not on the viewpoint of the group but on the choice to engage in what the State considers invidious discrimination. Yet this argument runs afoul of the Court’s reasoning in the *Dale* case: There are times when the act of discriminating in regard to membership is an essential part of the expressive message of a group.<sup>223</sup> By limiting membership in groups that express views critical of homosexual conduct and that act upon that message by restricting membership, the State of California is giving “one side of a debatable public question an advantage in expressing its views to the people.” The policy also seeks to “control . . . the search for political truth” as it labels as unqualified those judges who wish to support the expressive message of the Scouts.<sup>224</sup>

This viewpoint discrimination effectively undermines the State’s asserted interest even if that interest can be seen as compelling. If the State truly wanted to avoid all appearance of general partiality or bias, it would ban membership in all advocacy and expressive

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219. *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (citing *Consolidated Edison Co. of New York v. Public Serv. Comm’n*, 447 U.S. 530, 538 (1980)).

220. *Id.* at 52.

221. *Accord Grindlay*, *supra* note 5, at 576 (“The Rule is also underinclusive in its one-sidedness.”).

222. *Williams-Yulee*, 135 S. Ct. 1656 at 1668.

223. *See supra* notes 54–62 and accompanying text.

224. *Ladue*, 512 U.S. at 51.

groups—or at least those with a view about homosexual conduct.<sup>225</sup> After all, if mere membership in a group is sufficient to create a bias, then religious plaintiffs should be concerned if their judge is a member of a group often hostile to religion—such as a Humanist group or a gay rights group. Instead, the State is favoring membership of groups that advocate a certain viewpoint concerning the treatment of sexual minorities and disfavoring other viewpoints. The State's concern for partiality is revealed as a façade because it is severely underinclusive.

As Justice Scalia has noted, “[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.”<sup>226</sup> By continuing to allow judges to participate in organizations that engage in issue advocacy, but not advocacy groups that have exclusive membership practices, the State still “leaves appreciable damage to [its] supposedly vital interest” in avoiding the appearance of bias “unprohibited.”<sup>227</sup> For instance, a judge could openly be a member of a group that strongly advocates against gay rights while still remaining on the judiciary. Indeed, nothing would stop that judge from deciding a case that involves questions of gay rights, just as nothing prevented openly gay Judge Walker from reviewing California's Proposition 8.<sup>228</sup> Thus, absent evidence that membership in groups that have discriminatory membership practices is so much more harmful to the appearance of partiality, the rule should be invalidated for its extreme under-inclusion.

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225. *Accord* Grindlay, *supra* note 5, at 574 (“The Rule is also underinclusive with respect to that interest since the Rule goes only so far as to prohibit judges from belonging to organizations that practice ‘invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.’ It does not prohibit membership in groups that discriminate on other bases, such as disability, wealth, veteran status, ideology, intelligence, or physical attractiveness. If a judge's membership in an exclusionary organization entails bias toward those excluded, then judges should also be prohibited from membership . . .”) (emphasis omitted) (citations omitted).

226. See *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (Scalia J., concurring) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989)); see also *Ladue*, 512 U.S. at 52 (stating that such under-inclusion can “diminish the credibility of the government's rationale for restricting speech in the first place”).

227. *White*, 536 U.S. at 780 (Scalia J., concurring).

228. Jennifer Epstein, *Gay-Marriage Foes: Judge was Biased*, POLITICO (Apr. 26, 2011, 6:52 AM EDT), <http://www.politico.com/news/stories/0411/53703.html>.

The Scout ban is also severely overinclusive. Specifically, the ban imposes a broad stereotype on all members of a group simply based on group membership.<sup>229</sup> But furthering the assumption that all members of the Boy Scouts are biased against sexual minorities “may come at the sacrifice of the long-term enhancement of the judicial system’s appearance of impartiality.”<sup>230</sup> Many members of the Boy Scouts disagree with the current policies and procedures and seek to change them.<sup>231</sup> Many others likely agree with the policies and yet would impartially decide a case brought by a member of the GLBTQ community and show great sympathy to such individuals. By stereotyping and prejudicing based on group membership, the California Supreme Court is sending the message that judges are simply creatures of bias who impose their personal views in the courtroom.<sup>232</sup> By selectively imposing a ban on membership only in groups that are critical of homosexuals, the court is also leading to cynicism and a sense that the judicial system is biased in favor of certain interests. That, too, undermines the stated interest in the appearance of impartiality.

*B. The California Scout Ban Is Not Narrowly Tailored Because There Are Far Less Restrictive Alternatives*

Several less restrictive alternatives to the Scout ban also exist. For example, requiring judicial disclosure of group membership is clearly

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229. See Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 627 (2004) (arguing that profiling individuals based on their belonging in a certain group is deeply problematic).

230. Michelle L. Jones, Note, *Religiously Devout Judges: A Decision-Making Framework for Judicial Disqualification*, 88 IND. L.J. 1089, 1107 (2013).

231. The Judicial Council for the Sixth Circuit grappled with this question when it considered whether a judge’s membership in a discriminatory golf club violated the Judicial Code of Ethics even though the judge had made efforts to get the club to change its membership practices. In a closely divided 10-8 decision, the Council concluded that the judge’s efforts “precluded a finding” that the canon was violated. See Phillips, *supra* note 15, at 734.

232. See Grindlay, *supra* note 5, at 581 (“Public confidence in the judiciary certainly has suffered in recent years, but this is hardly due to judges’ membership in groups like the Boy Scouts. On the contrary, public confidence in the judiciary has decreased in large part because of the perception that judges have departed from their constitutionally prescribed role and have become beholden to certain ideologies.”).

permissible and less restrictive.<sup>233</sup> In the case of *In re Anastaplo*, the Supreme Court affirmed a decision by the Illinois bar to deny admission to an individual who refused to answer questions regarding his Communist Party affiliation.<sup>234</sup> The Court concluded that it is not “constitutionally impermissible” to ask those seeking admission to the bar questions about their group membership and affiliation.<sup>235</sup> States are also free to adopt “recusal standards more rigorous than due process requires,” and to “censure judges who violate these standards.”<sup>236</sup>

Professor Geyh draws a distinction between ethical and procedural restrictions that might also be helpful in considering less restrictive options: Procedural restrictions such as requiring recusal are seen as less burdensome than those that impose ethical obligations on judges.<sup>237</sup> Indeed, the Supreme Court seems far more willing to allow for disqualification of judges in particular cases than punishment of judges attempting to exercise First Amendment rights.<sup>238</sup> Judges can also be more fully circumscribed in their in-court speech and perhaps greater limitations could be placed on the display of symbols of group membership, such as the Scout insignia,

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233. See *id.* at 574, 582; Andrew L. Kaufman, *Judicial Correctness Meets Constitutional Correctness: Section 2C of the Code of Judicial Conduct*, 32 HOFSTRA L. REV. 1293, 1293 (2004).

234. 366 U.S. 82 (1961).

235. *Id.* at 88.

236. Republican Party of Minn. v. White, 536 U.S. 765, 794 (Kennedy, J., concurring). While the Court in *Williams-Yulee* rejected recusal as a less restrictive alternative, it did so because of the immense burden that this would impose on the court system: “A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions.” See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015). In contrast, there is no reason to think that asking judges to recuse themselves from cases when their membership in a group would create direct bias would unduly burden the judicial system.

237. See Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 528 (2013) (noting that “it may be problematic under the First Amendment to reprimand a judge for making statements to the detriment of her perceived impartiality, but not to disqualify her from a case for doing so”).

238. See *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009) (concluding that Due Process requires recusal in cases where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable” (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975))); see also Keith Swisher, *Recusal, Government Ethics, and Superannuated Constitutional Theory*, 72 MD. L. REV. 219, 228 (2012); James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 298 (2010).

that would make those standing before the judge feel as though the judge is biased against them.<sup>239</sup>

Another significant concern with the Scout ban is that it unsettles judges' expectations. When the State enacted the restriction on membership in groups that practice sexual orientation discrimination, it also enacted an exception for membership in youth groups such as the Boy Scouts. Many judges presumably joined the Boy Scouts and had their children participate under the expectation that the State "would not penalize them, directly or indirectly, for doing so thereafter."<sup>240</sup> At the very least, therefore, the State should not be able to retroactively impose punishment on judges that are already members of the Boy Scouts.<sup>241</sup> A ban on new judges would still be unconstitutional, but the possibility of only a prospective ban shows that the existing law is far from the least restrictive alternative.

Another alternative, as Feldman notes, is in the judicial selection process.<sup>242</sup> In many states, voters directly elect judges and can choose those who do not belong to organizations such as the Boy Scouts. Likewise, as a result of social pressure, a President or Governor might become more reluctant to appoint judges that are active members of groups like the Scouts. Additionally, judges may voluntarily choose to limit or curtail involvement in groups such as the Scouts if in their judgment such an action is necessary to create greater community trust.

Yet another possibility is that the determination of whether a group participates in invidious discrimination is left up to the individual judge and is not enforceable as a cause for removing a

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239. See Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 687 (1997). See generally Margaret Tarkington, *Attorney Speech and the Right to an Impartial Adjudicator*, 30 REV. LITIG. 849, 864 (2011) (discussing limitations on attorney speech in a court room setting).

240. *Konigsberg v. State Bar*, 353 U.S. 252, 268 (1957).

241. While it of course is possible for a judge to cease membership in order to escape punishment, forcing a judge to decide between exercising his religious, expressive, and parental rights, or losing his livelihood is especially problematic.

242. Feldman, *supra* note 5 ("Then we wouldn't be able to rely on the canons of judicial conduct to create the appearance of fairness. We would have to rely instead on vigilance and common sense, and choose judges who are actually fair and actually don't discriminate. Which doesn't sound so bad after all.").

judge from service.<sup>243</sup> For instance, the commentary to the Arkansas Judicial code states that “[u]ltimately, each judge must determine in the judge’s own conscience whether participation in such an organization violates [the rule].”<sup>244</sup> This approach would encourage judges to self-regulate and avoid membership in organizations that would send the wrong message to litigants without infringing on constitutionally protected rights.<sup>245</sup>

Alternatively, the State could enforce the ban on membership in groups that engage in invidious discrimination only in cases where the facts “clearly and convincingly lead to the conclusion that the words and actions call into question the integrity and impartiality of the judge.”<sup>246</sup> The Washington Supreme Court for instance overturned sanctions against a judge who attended and spoke at an anti-abortion rally.<sup>247</sup> The Court concluded that “the strict scrutiny required” could only be satisfied with specific evidence that would justify construing the remarks “as an express or implied promise to decide particular issues in a particular way.”<sup>248</sup> Under the standard employed by the Washington Supreme Court, only a situation where membership in a group created “an express or implied promise to decide particular issues in a particular way” could justify excluding one from sitting on the bench, rather than simply general group

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243. The Oral Advice summary of November 2015 seems to hint at this approach without fully embracing it. It suggests that judges are ultimately responsible for determining whether a group practices invidious discrimination. Yet, it also does not foreclose the possibility of challenges and enforcement of the ban. Calif. Supreme Court Comm. on Judicial Ethics Ops., Oral Advice Summary No. 2015-014 (Nov. 12, 2015), <http://www.judicialethicsopinions.ca.gov/sites/default/files/CJEO%20Oral%20Advice%20Summary%202015-014.pdf>.

244. ARK. CODE OF JUDICIAL CONDUCT Canon 3 r. 3.6 AFFILIATION WITH DISCRIMINATORY ORGANIZATIONS cmt. [2A] (2014), <https://courts.arkansas.gov/rules-and-administrative-orders/court-rules/rule-36-affiliation-discriminatory-organizations>.

245. By inviting comments specifically on a ban of membership in the Boy Scouts of America, California took a stance and asserted that the Boy Scouts engaged in invidious discrimination. Thus, were California to adopt the Arkansas approach it would probably need to clarify that it is not taking a stance on whether or not the Boy Scouts engages in invidious discrimination.

246. *In re* Disciplinary Proceeding Against Sanders, 955 P.2d 369, 377 (Wash. 1998).

247. *Id.*

248. *Id.* at 376.

membership.<sup>249</sup> Such a ban on group membership would likely survive strict scrutiny because it deals with actual and specific partiality rather than merely the appearance of partiality that results from group membership.<sup>250</sup> If California wants to keep and actively enforce a ban on group membership, this seems like the least restrictive and most likely constitutional alternative.

## V. CONCLUSION

In his dissent in *In re Anastaplo*, Justice Black powerfully spoke of a tendency in the bar which also appears to underlie California's attempt to bar its judges from membership in the Boy Scouts:

To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it. . . . Too many men are being driven to become government-fearing and time-serving because the Government is being permitted to strike out at those who are fearless enough to think as they please and say what they think. This trend must be halted if we are to keep faith with the Founders of our Nation and pass on to future generations of Americans the great heritage of freedom which they sacrificed so much to leave to us.<sup>251</sup>

California's decision is unfortunately yet another step towards forcing out of public service individuals who disagree with the consensus position on controversial social issues. Once, communist membership was a badge of shame that barred membership from the bar and other professions. Today in California, membership in an organization that has produced at least four Presidents of the United States<sup>252</sup> and a variety of other national leaders has become a new

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249. *Id.* For instance, one could imagine that group which engages in invidious discrimination and also has an oath of membership could be seen as binding on the judge to decide a case in a certain way.

250. The Sixth Circuit Judicial Conference has likewise suggested that the code of judicial ethics can best be seen as "general guidance" and must be applied on a case-by-case basis. See Phillips, *supra* note 15, at 743.

251. 366 U.S. 82, 115–16 (1961) (Black, J., dissenting).

252. President Barack Hussein Obama was a member of Gerakan Pramuka; an Indonesian Scout Association roughly the equivalent of the Boy Scouts. If counted, he would be the fifth President to be a Scout. Jimmy Carter was also a Scoutmaster as an adult. See *100 Things You Didn't Know About Scouting*, BOY SCOUTS AM.: NAT'L SCOUT JAMBOREE, <http://www.scouting.org/JamboreeMedia/100Things.aspx> (last visited Sept. 24, 2015).

sign of stigma and exclusion. As Justice Black urged, in order to secure this nation's "great heritage of freedom" and "keep faith with the Founders of our Nation," this trend towards exclusion and ostracism "must be halted."<sup>253</sup>

California's ban is inconsistent with that "great heritage of freedom" because it stigmatizes, stereotypes, ostracizes and excludes people from judicial service in violation of deeply held fundamental rights of association, parental autonomy, and free exercise of religion. California's Scout ban—and similar bans that are likely to crop up in other states—cannot be justified by a compelling interest and is poorly tailored to achieve the State's purpose. It should be overturned.

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253. *Anastaplo*, 366 U.S. at 116 (Black, J., dissenting).

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