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Roberts v. United States Jaycees: Discriminatory Membership Policy of a National Organization Held Not Protected by First Amendment Freedom of Association

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NOTES

ROBERTS v. UNITED STATES JAYCEES: DISCRIMINATORY MEMBERSHIP POLICY OF A NATIONAL ORGANIZATION HELD NOT PROTECTED BY FIRST AMENDMENT FREEDOM OF ASSOCIATION

Freedom of association, though not explicit in the Constitution, is a judicially recognized right deriving constitutional protection from its nexus with freedom of speech and expression under the first amendment.[1] The concept of freedom of association, however, is flawed by an inherent and irreconcilable tension: the right to choose with whom one will associate presupposes a commensurate right to choose with whom one will not associate.[2] When a

1. Since 1958 the Supreme Court has consistently recognized the existence of a constitutional right of association. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91 (1982); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908 (1982); Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981); *In re* Primus, 436 U.S. 412, 431 (1978); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977); Runyon v. McCrary, 427 U.S. 160, 175 (1976); Buckley v. Valeo, 424 U.S. 1, 15 (1976); Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975); Healy v. James, 408 U.S. 169, 181 (1972); NAACP v. Button, 371 U.S. 415, 431 (1960); Shelton v. Tucker, 364 U.S. 479, 486 (1960); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

2. In his dissent in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), Justice Douglas asserted:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

Id. at 179-80. *See* Bell v. Maryland, 378 U.S. 226, 313 (1964), wherein Justice Goldberg, in a concurring opinion, emphasized that:

> Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

Id. Cf. Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom From Discrimination*, 84 YALE L.J. 1441, 1455-57 (1975) (arguing that despite dicta in Supreme Court cases like *Bell v. Maryland* and *Moose Lodge No. 107 v. Irvis*, there is no direct precedent for the proposition that private groups have a constitutional right to discriminate). *See generally infra* text accompanying notes 95-125.

private all-male club discriminates on the basis of gender, this tension is revealed in the conflict between the interest in freedom of exclusive association claimed by men who are included and the interest in gaining access asserted by women who are excluded. It has long been the rule that truly private clubs are free to discriminate on the basis of any criteria they choose.[3] Where the allegedly private club is found not to be truly private, however, the issue becomes whether the right of association will continue to protect the group's discriminatory practices from government sanctions.

This was precisely the situation confronted in *Roberts v. United States Jaycees*.[4] On the one hand, the Minnesota Human Rights Act prohibited gender discrimination in "place[s] of public accommodation"[5] and the Minnesota Supreme Court certified that the Jaycees was a place of public accommodation within the meaning of the Act.[6] On the other hand, the national organization of the Jaycees defended its policy of excluding women from membership on the basis of its constitutional right to freedom of association.[7] The issue confronted by the United States Supreme Court was whether the state statute as applied to the Jaycees, compelling them to accept women as full voting members, was a violation of the male members' first amendment freedom of association.[8]

The United States Jaycees (Jaycees) is a national organization whose bylaws limit full membership to men aged eighteen to thirty-five; women and older men are eligible only for associate membership.[9] Female associate members are not allowed to vote, run for any office, or receive achievement awards.[10] Moreover, no criteria other than age and gender are employed by

3. Private clubs are specifically exempted from title II of the 1964 Civil Rights Act which prohibits racial discrimination in places of public accommodation. 42 U.S.C. § 2000a(e) (1982 & Supp. I 1983). Moreover, state antidiscrimination laws, patterned after the federal act either explicitly or implicitly exclude private clubs from coverage. *See infra* note 104.

4. 104 S. Ct. 3244 (1984).

5. MINN. STAT. ANN. § 363.03(3) (West 1982). The provision states "[i]t is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." *Id.*

MINN. STAT. ANN. § 363.02(18) (West 1982) provides that a place of public accommodation means "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." *Id.*

6. United States Jaycees v. McClure, 305 N.W.2d 764, 774 (Minn. 1981).

7. *See* United States Jaycees v. McClure, 534 F. Supp. 766, 768 (D. Minn. 1982), *rev'd*, 709 F.2d 1560 (8th Cir. 1983), *rev'd sub nom.* Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984).

8. Roberts v. United States Jaycees, 104 S. Ct. at 3246.

9. United States Jaycees v. McClure, 534 F. Supp. at 769.

10. *Id.*

the Jaycees in the selection of members.[11] The avowed purpose of the Jaycees organization is to train young men for civic and business leadership and the Jaycees assert that this training provides its members with an advantage in business and community advancement.[12] A primary activity of the Jaycees is the sale of memberships through continuous recruitment of new members.[13] As one court concluded, "[t]he Jaycees itself refers to its members as customers and membership as a product it is selling."[14]

A lengthy series of administrative proceedings were held on the state level culminating in the Minnesota Supreme Court's certification that the Jaycees organization was a place of public accommodation.[15] Following the state court's decision, the Jaycees renewed their complaint in the United States District Court for the District of Minnesota. The district court concluded that Minnesota's interest in prohibiting gender discrimination outweighed any interest in freedom of association asserted by the Jaycees.[16] A divided United States Court of Appeals for the Eighth Circuit reversed and held, in part, that the interest of the state was not sufficiently strong to override the

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11. *Id.*

12. *Id.* at 769. The Jaycees bylaws state its purpose:

> [To] promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement . . . .

Id.

13. *Id.*

14. *Id.*

15. *See* United States Jaycees v. McClure, 305 N.W.2d at 764. The case arose from a dispute between the national organization and two of its local chapters. *See* Roberts v. United States Jaycees, 104 S. Ct. at 3248. In violation of the Jaycees bylaws the Minneapolis and St. Paul chapters had been admitting women as full members. *Id.* at 3247. They were advised that revocation of their charters was being considered by the national organization. *Id.* at 3248. Both chapters filed charges of discrimination with the Minnesota Department of Human Rights alleging a violation of the Minnesota Human Rights Act. *Id.* The Commissioner ordered a hearing before the state examiner. *Id.* At the same time, the national organization filed suit in the federal district court for the District of Minnesota seeking declaratory and injunctive relief to prevent enforcement of the Act. *Id.* The district court dismissed the suit without prejudice pending the outcome of the state administrative proceeding. *Id.*

The hearing examiner concluded that the Jaycees organization was a "place of public accommodation" within the meaning of the Act and that it had discriminated against women by excluding them from full membership. *Id.* The examiner ordered the national organization to terminate its discriminatory practices. *Id.* Consequently, the Jaycees renewed its complaint in the district court and that court certified to the Minnesota Supreme Court the question whether the Jaycees organization was a place of public accommodation. *Id.* The court answered in the affirmative. *Id.*

16. United States Jaycees v. McClure, 534 F. Supp. 766, 774 (D. Minn. 1982). The court found that Minnesota's interest in prohibiting gender discrimination in places of public accommodation was compelling. *Id.* at 771.

Jaycees' constitutional right of association.[17]

In *Roberts v. United States Jaycees*,[18] the Supreme Court reversed, holding that the state's interest in eliminating gender-based discrimination justified the impact that requiring the Jaycees to admit women may have on the male members' freedom of association.[19] The Court emphasized that Minnesota's goal of providing its citizens equal access to publicly available goods, privileges, and advantages was a compelling state interest and served to protect its female citizens from a number of serious social and economic harms.[20] In addition, the Court rejected the organization's challenge that the Act, as construed by the Minnesota Supreme Court, was unconstitutionally vague and overbroad.[21] In the Court's view, the state court employed specific and objective criteria to determine whether the statute reached the Jaycees and adopted a limiting construction that would exclude private clubs from the Act's reach.[22]

In her concurring opinion,[23] Justice O'Connor agreed that applying the Act to the Jaycees did not violate the first amendment,[24] but she criticized the test used by the Court as "both over-protective of activities undeserving of constitutional shelter and under-protective of important First Amendment concerns."[25] As an alternative, she suggested an approach termed the "expressive-commercial dichotomy."[26] Under this analysis, a court's role was to determine whether an association was predominantly commercial or predominantly expressive.[27] In her view, the latter was entitled to full constitutional protection and freedom from state interference while the former was deserving of only minimal protection and subject to rational state regulation.[28]

This Note will examine the legal framework providing a starting point for the Supreme Court's opinion in *Jaycees*. The focus will be on the evolution

17. United States Jaycees v. McClure, 709 F.2d 1560, 1561 (8th Cir. 1983). Two judges concluded that although the state's interest was compelling "in the general sense" of the word, the state had not met its burden of demonstrating that the serious infringement of the Jaycees' right of association was clearly justified. *Id.* at 1576.

18. 104 S. Ct. 3244 (1984).

19. *Id.* at 3253.

20. *Id.*

21. *Id.* at 3256.

22. *Id.*

23. Chief Justice Burger and Justice Blackmun took no part in the decision. Justice Rehnquist concurred in the judgment and there was no dissent.

24. 104 S. Ct. at 3257 (O'Connor, J., concurring).

25. *Id.*

26. *Id.* at 3258-61.

27. *Id.* at 3259.

28. *Id.*

of a constitutional right to associate for expressive purposes and on the tentative formulation by the Court of a more limited right to be free from association. An analysis of the principal case will reveal the Supreme Court held for the first time that eradicating public discrimination against women was a compelling state interest and a state statute forcing the Jaycees to admit women did not violate its male members' freedom of association.

I. DEVELOPING TRENDS OF FREEDOM OF ASSOCIATION AND FREEDOM FROM ASSOCIATION

A. Evolution of the Doctrine of Freedom of Association

The freedom of association is fundamentally a right to associate with others for expressive purposes.[29] This right of expressive association is not

29. See the discussion of *NAACP v. Alabama infra* text accompanying notes 31-42. A second and narrower corollary to the freedom of association is an associational right based on the "right to privacy" that the Supreme Court has described as implicit in the due process clause of the fourteenth amendment. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

Since Griswold v. Connecticut, 381 U.S. 479 (1965), the Court has consistently recognized the existence of a right to privacy with respect to highly personal relationships and a freedom of individual choice in certain matters of marriage, procreation, contraception, child rearing and education, and family living arrangements. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraception); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (cohabitation with relatives); Roe v. Wade, 410 U.S. 113 (1973) (procreation); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (marriage and contraception); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child rearing and education).

The Court has been unwilling, however, to extend the scope of this privacy right beyond certain intimate, familial relationships and the important decisionmaking that accompanies them. *Compare* Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating a statute prohibiting distribution of contraceptives to unmarried persons) *with* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975) (upholding as not in violation of the right to privacy a state law making sodomy a crime). *Compare* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (sustaining a zoning ordinance that prohibited groups of more than two unrelated individuals from living together, finding no violation of the privacy right) *with* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (nullifying a housing ordinance that precluded certain groups of related individuals from living together as an infringement of freedom of choice in matters of child rearing and family living arrangements). *See generally* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 471 (1983) (focusing on whether as a constitutional matter courts should recognize right to privacy claims by unrelated individuals and groups who desire the same level of protection as that granted to relationships based on marriage or kinship).

In any event, this associational right to privacy has never been applied to protect large groups of unrelated individuals from governmental protection. *See* Burns, *The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321, 347-48 (1983) ("There is no precedent . . . for the proposition that the right of privacy encompasses the membership practices of a 'club with hundreds or

specifically guaranteed by the first amendment to the Constitution.[30] In *NAACP v. Alabama ex rel. Patterson*,[31] however, the Supreme Court acknowledged for the first time the existence of such a right as derived by implication from the first and fourteenth amendments.[32] In that case, the Supreme Court confronted the issue whether the state constitutionally could compel the NAACP organization to reveal the names and addresses of all its Alabama members.[33] A unanimous Court held that compelled disclosure of the organization's membership lists abridged the members' freedom of association.[34]

Justice Harlan, writing for the Court, described the right as the "freedom to engage in association for the advancement of beliefs and ideas," thus recognizing the close relationship between association and freedom of speech.[35] Further, the Court announced that state action curtailing the right would be subject to the closest scrutiny.[36] Justice Harlan observed the NAACP had made an unchallenged showing that in the past, disclosure of members' identities exposed them to economic sanctions such as the loss of employment, threats of physical harm, and other indications of public antagonism.[37] Consequently, the Court concluded that compelled disclosure of the membership lists would be likely to impair the ability of the NAACP and its members to express their collective voice.[38]

The Court next examined whether the state had demonstrated an interest sufficiently "compelling" to justify the serious effect that disclosure could have on the exercise of the NAACP's members' protected right of association.[39] The asserted purpose of the disclosure requirement was to determine whether the NAACP was carrying on intrastate business in violation of the

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thousands of members, where many members do not even know one another, much less lay claim to an intimate personal relationship.' ").

30. The first amendment provides, in part, that: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

31. 357 U.S. 449 (1958).

32. *Id.* at 460.

33. *Id.* at 451.

34. *Id.* at 462-63.

35. *Id.* at 460. Because of this nexus between freedom of expression and freedom of association, the Court required an initial showing that the challenged governmental action restricted the ability of the group to express itself.

36. *Id.* at 460-61.

37. *Id.* at 462.

38. *Id.* at 462-63. The Court reasoned that fear of exposure of members' beliefs revealed through their identification with the organization would force them to withdraw from the association and dissuade others from joining. *Id.*

39. *Id.* at 463.

state's foreign corporation registration law.[40] The Court was not persuaded that disclosing the names of the NAACP's rank and file members would aid the state in resolving this issue.[41] The Court concluded, therefore, that the state had failed to demonstrate a "controlling justification" for the adverse effect disclosure would have on the members' constitutional right of association.[42]

Supreme Court rulings since 1958 illustrate a number of ways governments have attempted to abridge the right of association: by imposing penalties or withholding privileges from the members of a disfavored group;[43] by requiring disclosure of a group's membership lists or of an individual's associational ties in situations where anonymity is important;[44] or by interfering, either directly or indirectly, with the internal organization or integral activities of the group.[45]

Cousins v. Wigoda[46] presents a situation in which a state attempted to interfere with the internal structure and organization of the National Democratic Party. The issue addressed by the Court was whether the national party rules or the state election law regarding selection of members to the national convention would prevail.[47] Pursuant to Illinois election law, Chicago's Democratic voters elected the "Wigoda delegates" as delegates to the

40. *Id.* at 464.

41. *Id.*

42. *Id.* at 466.

43. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 925 (1982) ("To impose liability for presence at weekly meetings of the NAACP would—ironically—not even constitute 'guilt by association,' since there is no evidence that the association possessed unlawful aims. Rather, liability could only be imposed on a 'guilt *for* association' theory. Neither is permissible under the First Amendment."); Healy v. James, 408 U.S. 169, 175 (1972) (college president denied campus recognition to a student group wishing to form a local chapter of Students for a Democratic Society because "the organization's philosophy was antithetical to the school's policies").

44. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 89 (1982) (state campaign law requiring every candidate for political office to report the names and addresses of campaign contributors and recipients of campaign disbursements); Shelton v. Tucker, 364 U.S. 479, 480 (1960) (state statute requiring every teacher as a condition of employment to disclose every organization of which he was a member).

45. See the discussion of Cousins v. Wigoda, 419 U.S. 477 (1975), *infra* notes 46-57 and accompanying text.

46. 419 U.S. 477 (1975).

47. A similar issue was addressed in Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981). The Democratic Party's Delegate Selection Rules provided that only those individuals who were willing to affiliate publicly with the Democratic Party could participate in selecting delegates to the party's national convention. *Id.* at 109. In Wisconsin, delegates to the national convention were selected in private caucuses rather than by vote. Moreover, a state statute required these delegates to vote at the convention in accordance with the results of the state's "open" Democratic primary in which any voter could participate without regard to party affiliation. *Id.* at 111-12.

Democratic Convention.[48] Meanwhile, the opposing "Cousins delegates" challenged the seating of the Wigoda delegates before the Credentials Committee of the party.[49] The committee found the Wigoda delegates were seated in violation of party guidelines and recommended the Cousins delegates be seated in their places.[50] In protest, the Wigoda delegates obtained an injunction in a state court enjoining the Cousins delegates from acting as delegates to the convention.[51]

Justice Brennan, writing for the majority, acknowledged the National Democratic Party and its members had a constitutional right of political association: "[F]reedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth amendments."[52] In evaluating whether the injunction impermissibly interfered with the protected right of political association, Justice Brennan applied the strict scrutiny test articulated in *NAACP v. Alabama*, requiring a compelling state interest to justify state interference with constitutionally protected activity.[53]

In *Wigoda*, the state court had justified the injunction on the grounds that the state had an interest in protecting both the integrity of its electoral process and the right of its citizens to participate in primaries.[54] The Supreme Court, however, held this interest was not compelling in the context of selecting delegates to the national party convention.[55] The Court explained the purpose of the convention was to nominate party candidates for the offices of president and vice-president and the states themselves had no constitutionally-required role in this process.[56] Therefore, the national interest in selecting these candidates outweighed any interest of an individual state.[57]

NAACP v. Alabama and *Cousins v. Wigoda* demonstrate that, in the absence of an articulated compelling state interest, governmental action cur-

48. *Cousins*, 419 U.S. at 478-79.

49. *Id.* at 479.

50. *Id.* at 479-80.

51. *Id.* at 480.

52. *Id.* at 487 (quoting Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973)). *Accord* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. at 122 ("And the freedom to associate for the 'common advancement of political beliefs,' . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.").

53. 419 U.S. at 489.

54. *Id.* at 488.

55. *Id.* at 491. "Consideration of the special function of delegates to such a Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest." *Id.* at 489.

56. *Id.* at 489-90.

57. *Id.* at 490.

tailing the right to associate for the advancement of beliefs and ideas violates the first amendment. On occasion, however, the Supreme Court has found particular governmental objectives constitutionally sufficient to justify the challenged limitation on freedom of association[58] suggesting the test applied is not "strict in theory and fatal in fact."[59]

In *Buckley v. Valeo*,[60] the Court considered a challenge to the contribution and expenditure limitations and disclosure provisions of the Federal Election Campaign Act of 1971, as amended in 1974.[61] In a lengthy per curiam opinion, the Court found the Act's contribution and expenditure limitations interfered with the protected freedoms of both expression and association.[62] The Court explained that restrictions on spending by both individuals and groups during a campaign necessarily reduce the quantity and diversity of political expression as well as the size of the audience reached.[63] According to the Court, political associational freedoms also were impinged because the ability to contribute serves to associate an individual with a candidate and enables "like-minded persons to pool their re-

58. *See* Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. 1883 (1984) (upholding certain provisions of the union's collective bargaining agreement that allowed use of nonmember employees' agency fees to finance the national union's conventions, social activities, and monthly magazine as justified by the governmental interest in industrial peace and in eliminating "free rider" employees); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 (1978) (affirming sanctions imposed on an attorney for commercial solicitation of legal business as justified by the state's "compelling' interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct' ").

59. *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Professor Gunther terms the Court's treatment of suspect classifications under equal protection analysis as a method of review that is " 'strict' in theory and fatal in fact" because (with one exception) racial classifications have always been invalidated under this test. *Id.* at 8. In the first amendment context, however, compelling state interest language does not invoke this level of strict scrutiny and one commentator suggests that interest-balancing is more often the approach used by the Court. *See* Comment, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529, 553 (1979).

60. 424 U.S. 1 (1976).

61. *Id.* at 15. Specifically challenged were provisions (1) limiting contributions to candidates for federal office by an individual or group to $1,000 and by a political committee to $5,000 for any one candidate per election, with an overall annual ceiling of $25,000 for an individual contributor; (2) limiting expenditures by individuals or groups "relative to a clearly identified candidate" to $1,000 per candidate per election, and by a candidate from his personal or family funds to various specified amounts depending upon the federal office sought; (3) requiring political committees to keep detailed records of contributions and expenditures and to disclose this information to the Federal Election Commission. *See id.* at 7.

62. *Id.* at 21-22.

63. *Id.* at 19.

sources in furtherance of common political goals."[64] Before assessing the validity of the various provisions of the Act, the Court reiterated the test enunciated in *NAACP v. Alabama* that governmental action impinging upon the freedom of association will be subject to the closest scrutiny.[65] The *Buckley* Court also determined the right to associate was not absolute and even a significant interference with the freedom of political association may be upheld where the state demonstrates a "sufficiently important" interest and the means employed are narrowly tailored to prevent unnecessary infringement of associational rights.[66] In *Buckley*, the government asserted three objectives advanced by the Act: to prevent corruption and the appearance of corruption, to limit the disproportionate influence of the affluent, and to reduce escalating costs of political campaigns.[67]

The Court first held that, under a rigorous standard of review, Congress' primary interest in preventing corruption was a constitutionally sufficient rationale for the contribution provisions and, therefore, justified the limited impact upon first amendment concerns.[68] Moreover, the Court found contribution limitations were focused narrowly on the problem presented by large campaign contributors.[69] In comparison, the Court reached a different result when it applied this "rigorous standard of review" to the expenditure provisions. Initially, the Court found an expenditure ceiling "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association."[70] The Court held the government's interest in preventing corruption did not justify the expenditure ceilings because these provisions placed direct and substantial restrictions on the quantity of political expression by individual citizens, candidates, and associations.[71] Fi-

64. *Id.* at 22.

65. *Id.* at 25.

66. *Id.* Use of the language "sufficiently important" rather than requiring the asserted state objective to be "compelling" may signal that the Court is applying a less strict standard of review. *Cf.* Young & Herbert, *Political Association Under the Burger Court: Fading Protection*, 15 U.C.D. L. REV. 53, 53 (1981) (arguing that the Burger Court "has gradually retreated from the traditional strict scrutiny" of the Warren Court "in favor of the less stringent rational relation standard of review"). *But see In re* Griffiths, 413 U.S. 717, 722 n.9 (noting that characterizations of state interest as "overriding," "compelling," or "important" are not significantly different).

67. 424 U.S. at 25-26.

68. *Id.* at 26-29.

69. *Id.* at 28. The Court reasoned that the Act's contribution provisions aimed at the "narrow aspect of political association where the actuality and potential for corruption have been identified" while leaving individuals free to engage in political expression and association. *Id.*

70. *Id.* at 22.

71. *Id.* at 39, 58-59.

nally, as to the Act's requirements for contribution and expenditure disclosure, the Court first observed the "strict scrutiny test" articulated in *NAACP v. Alabama* was applicable because compelled disclosure had the potential for serious interference with the exercise of first amendment rights.[72] Applying this principle, the Court concluded that the asserted governmental interests—informing voters of the source of candidates' funds, deterring corruption, and collecting data necessary to uncover violations—were sufficiently important to outweigh the possibility of infringement.[73] In the Court's view, the disclosure requirements appeared to be the least restrictive means of furthering substantial congressional objectives.[74]

In freedom of association cases following *NAACP v. Alabama*, the Court consistently has described the right as inextricably bound to the freedoms of speech and expression guaranteed by the first amendment and has required that the challenged state action restrict the group members' ability to express themselves.[75] Association as a vehicle for expressive purposes is highly valued because "by collective effort individuals can make their views known, when, as individually, their voices would be faint or lost."[76] Moreover, group expression is deemed essential in a democratic society to preserve political and cultural diversity and to protect unpopular views from majoritarian control.[77] As construed by the Court, the Constitution protects an associational right only where the association's goal or purpose is one

72. *Id.* at 66.

73. *Id.* at 66-68, 72.

74. *Id.* at 68. *But see* Young & Herbert, *supra* note 65, at 83:

> Though purporting to undertake the traditional strict scrutiny analysis, the Court did not meaningfully address whether the government could achieve its asserted objectives through less expansive disclosure requirements. One must, therefore, at least question whether the strict scrutiny test of the Burger Court in *Buckley* is the same strict scrutiny test which the Warren Court employed nearly two decades earlier in *NAACP v. Alabama ex rel. Patterson*.

Id.

75. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 98 (1982) (enforcement of disclosure provisions of state campaign law "could cripple a minor party's ability to operate effectively and thereby reduce 'the free circulation of ideas both within and without the political arena' "); NAACP v. Claiborne Hardware Co., 458 U.S. at 911-14 (boycott of white merchants by NAACP to effect political, social, and economic change involved constitutionally protected activity and state court's issuance of an injunction directly impinged on the NAACP's freedom of expression); Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. at 299 (local ordinance imposing a contribution limit operated as "a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue").

76. *Citizens Against Rent Control*, 454 U.S. at 294.

77. *See* Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1979) ("The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.").

that the first amendment independently protects such as political advocacy,[78] litigation to advance social goals,[79] or religious worship.[80] Consequently, the Supreme Court has not identified the freedom of association to be an independent right;[81] there is no constitutionally guaranteed right to associate freely with others for all purposes.

B. Freedom From Association

Paradoxically, the constitutional right to associate necessarily suggests a parallel right to be free from association. The freedom from association consists of two parts. The first is a presumed right to refrain from associations not of one's choosing and focuses on the interest of the nonmember in independence from coerced association.[82] The second part is an implied right of the existing members of an association to exclude individuals with whom they do not wish to associate.[83] In the latter aspect, the emphasis is on the tension between the interest of members in maintaining exclusive membership and the interest of nonmembers in gaining access.

In *Abood v. Detroit Board of Education*,[84] the Supreme Court confronted a claim of coerced association in the context of a public employees' union. Justice Stewart, writing for the majority, evaluated a freedom of association challenge to an "agency shop" arrangement contained in a collective bargaining agreement.[85] The agreement required every teacher, as a condition

78. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); Buckley v. Valeo, 424 U.S. 1 (1976); Cousins v. Wigoda, 419 U.S. 477 (1975); Healy v. James, 408 U.S. 169 (1972).

79. *See, e.g.*, *In re* Primus, 436 U.S. 412 (1978); NAACP v. Button, 371 U.S. 415 (1963).

80. *See, e.g.*, Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

81. *See* Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977). The author concludes that the Court's conception of the right of association is narrow: "[W]henever men may speak as individuals, they may speak in and through groups . . . ." *Id.* at 10. She advocates the development of an "independent, nonexpressional formulation of freedom of association" for the reason that:

> [M]ost associations are not formed solely to express ideas or to petition the government, but to take action to implement those ideas. The basic value of this associational action is that it allows an individual to achieve through collective effort what he might not otherwise be able to achieve for himself.

Id. at 11.

82. Two commentators suggest that the Burger Court may treat claims of coerced association as less deserving of constitutional protection than claims of freedom to associate. Young & Herbert, *supra* note 65, at 87.

83. In other words, members may discriminate on the basis of any criteria they choose.

84. 431 U.S. 209 (1977).

85. *Id.* at 213. An "agency shop" agreement requires employees to pay periodic dues and fees to the union but does not require the employees to actually join the union as in a "union shop" agreement. T. HAGGARD, COMPULSORY UNIONISM, THE NLRB AND THE COURTS 38 (1977); *cf.* R. GORMAN, LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 642

of employment by the city, either to become a member of the union or to pay the union a service charge equal to membership dues.[86] A group of teachers filed a class action against the union alleging, in part, that requiring objecting employees to contribute to ideological activities, unrelated to collective bargaining, violated their freedom of association.[87] Initially, the Court noted that financing the union could be construed as an interference with an employee's "freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit."[88] Nevertheless, the Court found that to the extent the service charges were used to finance expenditures by the union for "collective bargaining, contract administration and grievance adjustment" purposes, the agency shop clause was valid.[89] The Court perceived any interference with nonmember employees' freedom of association was justified by the state's interests in deterring free-riders by allocating the costs of collective bargaining among all who benefit and in promoting labor peace through avoidance of multiple negotiations with rival unions.[90]

In *Abood*, the Court declined to hold that it would be unconstitutional for public employee unions to expend funds for the expression of political or ideological causes not pertinent to their duties as collective bargaining agent.[91] Instead, the majority held the union could not require any teacher, as a condition of employment, to contribute to the support of any ideological cause he or she opposed.[92] The Court explained compulsory contribution for political or other ideological purposes infringed upon the constitutional rights of dissenting employees in the same way that prohibiting contributions abridged the rights of advocates.[93] Further, the Court concluded that

(1976) ("The *agency shop* requires that an employee . . . simply pay the union for services rendered by the union to employees within the bargaining unit as the employees' 'agent' in negotiating and administering the labor contract.").

86. 431 U.S. at 212.

87. *Id.* at 212-13. The plaintiffs also argued that collective bargaining in the public sector was fundamentally political and as such, coerced contributions violated the first and fourteenth amendments. *Id.* at 227.

88. *Id.* at 222.

89. *Id.* at 225-26. In reaching this conclusion, the Court relied upon its prior ruling in Railway Employes' Dep't v. Hanson, 351 U.S. 225, 238 (1956) (upholding the constitutionality under the first amendment of a "union shop" agreement requiring every member of the bargaining unit to contribute financially to the exclusive bargaining representative).

90. *Abood*, 431 U.S. at 221-22.

91. *Id.* at 235.

92. *Id.* A similar holding was reached in International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), where the Court confronted a challenge to the constitutionality of a "union shop" agreement authorized by the Railway Labor Act. The Court, however, did not reach the first amendment issue because it held that the Act itself prohibited the unions, over an employee's objection, from using his dues to support political causes that he opposed. *Id.* at 768-69.

93. 431 U.S. at 234.

expenditures for noncollective bargaining activity must be financed from dues paid by employees who neither object to supporting those causes nor are forced into doing so by fear of losing their government jobs.[94]

The second aspect of freedom from association implicates a potential right of the members of a private organization to choose with whom they will not associate. Two principal cases raise a question about the extent to which the Supreme Court recognizes a private right to discriminate on the basis of race.

In *Moose Lodge No. 107 v. Irvis*,[95] the Court addressed whether a private club with a racially discriminatory guest policy violated the fourteenth amendment.[96] The plaintiff, a black guest of a white member of Moose Lodge, was refused service at the club's dining room and bar solely because of his race.[97] Although conceding the right of private clubs to choose members on a discriminatory basis, the plaintiff asserted that the licensing of Moose Lodge to serve liquor by the Pennsylvania Liquor Control Board amounted to state action.[98] The relief sought was an injunction requiring the liquor board to revoke the lodge's license until it ceased its discriminatory practices.[99]

Justice Rehnquist, writing for the Court, held that the grant of a state liquor license to Moose Lodge did not constitute sufficient state action to invoke the equal protection clause of the fourteenth amendment.[100] At the

94. *Id.* at 235-36.

95. 407 U.S. 163 (1972).

96. *Id.* at 164-65. The Court determined initially that the plaintiff had no standing to litigate the club's membership policy because he had not applied for and been denied admission. *Id.* at 166-67.

97. *Id.* at 165.

98. *Id.* at 171.

99. *Id.* at 165.

100. *Id.* at 177. The fourteenth amendment applies only to conduct by the state and to private conduct that is significantly involved with state action. *See* The Civil Rights Cases, 109 U.S. 3, 10-11 (1883) (nullifying Congress' attempt through the Civil Rights Act of 1875 to prohibit private discrimination in public accommodations).

The Supreme Court has not considered any cases in which women, excluded from private clubs, have urged that a sufficient link between the club and the state exists to constitute state action. Decisions by lower federal courts, however, addressing the issue do not hold out much promise for future challenges on equal protection grounds. *See, e.g.*, United States Jaycees v. Philadelphia Jaycees, 639 F.2d 134 (3d Cir. 1981); New York City Jaycees v. United States Jaycees, 512 F.2d 856 (2d Cir. 1975); Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce, 508 F.2d 1031 (8th Cir. 1975); Junior Chamber of Commerce v. United States Jaycees, 495 F.2d 883 (10th Cir.), *cert. denied*, 419 U.S. 1026 (1974); Millenson v. New Hotel Monteleone, Inc., 475 F.2d 736 (5th Cir.), *cert. denied*, 414 U.S. 1011 (1973). In each case the Court found that the requisite state action was absent.

In addition to the general problem of finding state action, it has been suggested that lower federal courts require a more substantial showing of state action in cases of alleged gender-

outset, the Court stated that Moose Lodge was a private club as the term was commonly understood.[101] The Court explained that the Lodge was private because it was a local chapter of a national organization whose bylaws provided well-defined criteria for membership, the building where all lodge activities were conducted was privately owned, the club received no public funds, and only members and their invited guests were permitted inside the lodge.[102] The Court also noted that the club did not hold itself out as a place of public accommodation, but maintained that it was not open to the general public.[103] Moreover, the Pennsylvania courts had found that the local

based discrimination than in cases involving alleged racial discrimination. *See* Burns, *supra* note 29, at 370-71; Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313, 338-48 (1977); Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 SW. U.L. REV. 237, 243-44 (1982). The rationale advanced for this double standard seems to be that historically race has been considered a suspect criterion and classifications based on race invoke the most rigorous review while gender is not a suspect criterion and classifications based on gender receive only heightened scrutiny. *Id.* *See generally* Jakosa, *Parsing Public From Private: The Failure of Differential State Action Analysis*, 19 HARV. C.R.-C.L. L. REV. 193, 194 (1984) (asserting that his purpose is not to offer an additional critique of the "conceptual disaster area" of conventional state action analysis but to examine an alternative approach formulated by lower federal courts).

101. *Moose Lodge*, 407 U.S. at 171.

102. *Id.* *Cf.* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 438-39 (1973) (community swimming pool was not a private club within the meaning of § 2000a(e) of the 1964 Civil Rights Act because membership was open to all whites within the geographic area, with no selective criteria used other than race); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969) (corporation that operated playground facility and community park was not a private club because there was "no plan or purpose of exclusiveness").

103. *Moose Lodge*, 407 U.S. at 175. Title II of the 1964 Civil Rights Act prohibits discrimination or segregation in places of public accommodation and declares that: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (1982). Lower federal courts in cases involving challenges of racial discrimination based on title II have outlined a number of factors relevant in assessing a club's contention that it is "private." The list of variables includes: selectiveness of the group in choosing new members; existence of well-defined criteria for membership; presence of formal membership procedures; size of the group; members' role in selection or rejection of new members; amount of dues; openness of guest policies; public advertisement; and presence of business or commercial characteristics. Generally, the courts will employ a totality of the circumstances test by evaluating the presence or absence of the above factors to determine whether the club qualifies for exemption under § 2000a(e) of the Act. *See, e.g.*, Smith v. YMCA, 462 F.2d 634, 648 (5th Cir. 1972); United States v. Richberg, 398 F.2d 523, 526-29 (5th Cir. 1968); Nesmith v. YMCA, 397 F.2d 96, 101-02 (4th Cir. 1968); United States v. Trustee of the Fraternal Order of Eagles, 472 F. Supp. 1174, 1175-76 (E.D. Wis. 1979); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1203-04 (D. Conn. 1974); Wright v. Cork Club, 315 F. Supp. 1143, 1151-53 (S.D. Tex. 1970); United States v. Johnson Lake, Inc., 312 F. Supp. 1376, 1378-81 (S.D. Ala. 1970); Bell v. Kenwood Golf & Country Club, Inc., 312 F. Supp. 753, 755-56 (D. Md. 1970); United States v. YMCA, 310 F. Supp. 79, 80-81 (D.S.C. 1970); United States v.

Moose Lodge was not a place of public accommodation within the meaning of the Pennsylvania Human Relations Act.[104] In concluding that Moose Lodge could continue its discriminatory guest policy, the Court reaffirmed the dichotomy between discriminatory action by the state, which is prohibited by the fourteenth amendment, and private discrimination, which the

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Jordan, 302 F. Supp. 370, 375-77 (E.D. La. 1969); United States v. Jack Sabin's Private Club, 265 F. Supp. 90, 92-93 (E.D. La. 1967); Williams v. Rescue Fire Co., 254 F. Supp. 556, 560-63 (D. Md. 1966).

104. *Moose Lodge*, 407 U.S. at 175 n.2. *See* Pennsylvania Human Relations Comm'n v. Loyal Order of Moose, 220 Pa. Super. 356, 286 A.2d 374 (1971).

State legislatures are free to enact their own public accommodations laws and to expand the concept of "public" as used in title II and to extend coverage to other groups. At present, 40 states and the District of Columbia have enacted such statutes and 36 of these proscribe discrimination on the basis of gender. ALASKA STAT. § 18.80.230 (1981); CAL. CIV. CODE § 51 (West 1982); COLO. REV. STAT. § 24-34-601 (1982); CONN. GEN. STAT. ANN. § 46a-64 (West 1984); D.C. CODE ANN. 1-2519 (1981); DEL. CODE ANN. tit. 6, § 4502 (1975); IDAHO CODE § 18-7301 (1979); ILL. ANN. STAT. ch. 68, § 5-102 (Smith-Hurd Supp. 1985); IND. CODE ANN. § 22-9-1-2 (Burns Supp. 1984); IOWA CODE ANN. § 601A.7 (West 1975); KAN. STAT. ANN. § 44-1001 (1981); KY. REV. STAT. § 344.145 (Supp. 1984); LA. REV. STAT. ANN. § 49:146 (West Supp. 1985); ME. REV. STAT. ANN. tit. 5, § 4552 (1979); MD. ANN. CODE art. 49B, § 5 (Supp. 1984); MASS. GEN. LAWS ANN. ch. 272, § 98 (West Supp. 1984-1985); MICH. COMP. LAWS ANN. § 37.2302 (West Supp. 1985); MINN. STAT. ANN. § 363.03(3) (West 1985); MO. ANN. STAT. § 314.010 (Vernon Supp. 1985); MONT. CODE ANN. § 49-2-304 (1983); NEB. REV. STAT. § 20-132 (1983); N.H. REV. STAT. ANN. § 354-A:8 (1984); N.J. STAT. ANN. § 10:5-12(f) (West Supp. 1984-1985); N.M. STAT. ANN. § 28-1-7 (1983); N.Y. EXEC. LAW § 291 (McKinney 1982); N.D. CENT. CODE § 12.1-14-04 (1976); OHIO REV. CODE ANN. § 4112.02 (Page 1980); OR. REV. STAT. § 30.670 (1983); PA. STAT. ANN. tit. 43, § 953 (Purdon Supp. 1985); R.I. GEN. LAWS § 11-24-1 (1981); S.D. CODIFIED LAWS ANN. § 20-13-23 (1979); TENN. CODE ANN. § 4-21-111 (1979); UTAH CODE ANN. § 13-7-3 (Supp. 1983); WASH. REV. CODE ANN. § 49.60.030 (West Supp. 1986); W. VA. CODE § 5-11-2 (Supp. 1984); WIS. STAT. ANN. § 942.04 (West 1982 & Supp. 1984-1985); WYO. STAT. § 6-9-101 (1983).

The statutes of 25 states and the District of Columbia explicitly provide an exemption for private organizations and no statute specifically prohibits discrimination by private clubs. ARIZ. REV. STAT. ANN. § 41-1441(2) (1974 & Supp. 1975-1984); D.C. CODE ANN. § 1-2502(24) (1981); IDAHO CODE § 18-7302(e) (1979); ILL. REV. STAT. ch. 68, § 5-103 (Smith-Hurd 1985); IOWA CODE ANN. § 601A.2(10) (West Supp. 1984-1985); KAN. STAT. ANN. § 44-1002(h) (1981); KY. REV. STAT. § 344.130 (1983); LA. REV. STAT. ANN. § 49:146A(2) (West Supp. 1985); MD. ANN. CODE art. 49B, § 5 (Supp. 1984); MICH. COMP. LAWS ANN. § 37.2303 (West Supp. 1967-1984); MO. ANN. STAT. § 314.040 (Vernon Supp. 1985); NEB. REV. STAT. § 20.138 (1983); NEV. REV. STAT. § 651.060 (1979); N.J. STAT. ANN. § 10:5-5(*l*) (West Supp. 1984-1985); N.M. STAT. ANN. § 28-1-2(G) (1983); N.Y. EXEC. LAW § 292(9) (McKinney 1982); OKLA. STAT. ANN. tit. 25, § 1401(1)(i) (West Supp. 1984-1985); OR. REV. STAT. § 30.675(2) (1983); PA. STAT. ANN. tit. 43, § 954 (*l*) (Purdon 1985); R.I. GEN. LAWS § 11-24-3 (1981); S.D. CODIFIED LAWS ANN. § 20-13-1(12) (1979); TENN. CODE ANN. § 4-21-102(13) (Supp. 1984); UTAH CODE ANN. § 13-7-2(a) (Supp. 1983); WASH. REV. CODE ANN. § 49.60.040 (West Supp. 1985); W. VA. CODE § 5-11-3(j) (Supp. 1984); WIS. STAT. ANN. § 942.04(2) (West 1982). Federal law does not mandate this result; title II establishes a threshold level of protection and the states are free to enlarge, but not diminish the scope of equal access rights guaranteed by federal law.

equal protection clause does not reach.[105]

Although the Court upheld a private right to discriminate in *Moose Lodge*, it invalidated, in *Runyon v. McCrary*,[106] a private school's practice of denying admission on the basis of race.[107] In *Runyon*, black school children, in a suit brought by their parents, alleged they were refused admission to all-white private schools solely because of their race in violation of section 1981 of the Civil Rights Act of 1866.[108] In defense, the schools contended that application of section 1981 violated the first amendment right of association possessed by the white parents of children enrolled in the schools.[109]

The Court, in an opinion written by Justice Stewart, specifically stated that whether a private social organization had a right to exclude individuals from membership on racial or other grounds was not at issue.[110] Instead, the Court asked whether section 1981 prohibited private commercially-operated schools from denying admission to qualified black applicants on the basis of their race.[111] First, the Court acknowledged that section 1981's prohibition against racial discrimination in the making and enforcing of contracts applied to private acts of discrimination.[112] Justice Stewart held that the racial discrimination practiced by the schools constituted a clear violation of section 1981: the children's parents sought to enter into a contractual relationship with the schools but discovered that the schools did not offer

105. *Moose Lodge*, 407 U.S. at 172.

106. 427 U.S. 160 (1976).

107. *Id.* at 178-79. It is important to note that the plaintiff in *Moose Lodge* brought suit under the equal protection clause, which requires a demonstration of state action, while the plaintiffs in *Runyon* based their claim on § 1981 of the 1866 Civil Rights Act, which does not require state action. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Although § 1982 and not § 1981 was at issue in *Jones*, the decision effectively made both sections applicable to private acts of discrimination. *See id.* at 422 n.28, 441 n.78.

108. 427 U.S. at 163-64. 42 U.S.C. § 1981 (1982 & Supp. 1983) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

Id.

109. 427 U.S. at 175. The schools also defended their admissions policies on the basis of the parents' right to privacy and right to educate their children. The Court found neither argument persuasive. *Id.* at 176-78.

110. *Id.* at 167.

111. *Id.* at 163.

112. *Id.* at 175. Commentators have noted, however, that lower federal courts, with very few exceptions, have refused to extend 42 U.S.C. § 1981 to reach private gender discrimination in the contract setting. These courts have apparently construed the language of § 1981 as an expression of Congress' intent to limit the prohibition to discrimination of a racial nature. Calhoun, *supra* note 100, at 319. *Accord* Goodwin, *supra* note 100, at 241 (there is no federal statute that proscribes gender-based discrimination in private contracts or property transactions).

educational services on an equal basis to white and nonwhite students.[113]

The Court next considered whether section 1981 as applied violated the parents' constitutionally protected right of association.[114] Before assessing the constitutional challenge, the Court reaffirmed the principle stated in *NAACP v. Alabama* that the first amendment protects association for the advancement of beliefs and ideas because it promotes "effective advocacy of both public and private points of view, particularly controversial ones."[115] From this principle, the Court extrapolated that parents have a right under the first amendment to send their children to schools that foster the belief that segregation is desirable and that their children have a commensurate right to attend such schools.[116] The Court suggested, however, that the right of association for expressive purposes does not protect the practice of denying admission to racial minorities.[117] Thus, there was no violation of the parents' freedom of association as they remained free to advocate segregation.[118] Moreover, the Court added there was no evidence that cessation of the school's discriminatory admissions policy would curtail in any way its expression of discriminatory ideas.[119]

Justice Powell, in a concurring opinion, emphasized that the Court's opinion should not be construed to imply that every refusal to contract is subject to the sanctions of section 1981.[120] He distinguished between personal con-

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113. *Runyon*, 427 U.S. at 172-73.

114. *Id.* at 175-76.

115. *Id.* at 175 (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958)).

116. *Id.* at 176.

117. *Id.* Justice Stewart reasoned that " 'the Constitution . . . places no value on discrimination,' and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.' " *Id.* (quoting Norwood v. Harrison, 413 U.S. 455, 469-70 (1973)).

118. One commentator suggests that because the *Runyon* Court perceived association only in terms of speech and expression, it avoided the more basic associational claim: the white parents' asserted right not to associate with blacks in the educational setting. Raggi, *supra* note 81, at 25. The author proposes an alternative approach:

> [R]ather than twisting the associational goal of the parents in the case in order to show that "freedom of association" was not being impinged, the Court . . . could have stated candidly that *the mere presence of an associational interest in a case does not grant immunity from liability for violations of the law committed in pursuit of that interest.*

Id. at 26 (emphasis added).

119. *Runyon*, 427 U.S. at 176.

120. *Id.* at 187 (Powell, J., concurring). *See generally* Note, *supra* note 2. The author analyzes the conflict between freedom of association, which implies a right to discriminate, and freedom from racial discrimination guaranteed by the principles of equality derived from the thirteenth and fourteenth amendments. *Id.* The note encourages courts applying § 1981 in the context of private clubs to develop an approach that provides "meaningful freedom for

tractual relationships and commercial relationships. The former, he explained, were private in the sense that the choice to contract made by the offeror reflected a plan or purpose of exclusiveness or selectivity other than an interest in excluding black persons from the relationship.[121] These relationships, Powell asserted, would implicate the right of association[122] and should not be restricted by section 1981.[123] Commercial relationships, in contrast, are those openly offered to the general public with the decision to contract based on no selective qualifications other than race.[124] Justice Powell found this type of relationship to be more public than private and clearly within the purview of section 1981.[125]

The Court's opinions in *Moose Lodge* and *Runyon* suggest that in the narrow context of private clubs and schools some degree of private racial discrimination, implied by the right of association, is not specifically prohibited by the Constitution. The Court, however, had not considered the closer case involving whether the freedom of expressive association could be invoked to protect the policy of a 295,000-member national organization excluding women from membership.

II. *ROBERTS V. UNITED STATES JAYCEES*: OPENING THE DOOR TO CHALLENGES AGAINST QUASI-PRIVATE CLUBS

A. A Fine Line Between Free Speech and Free Association

In *Roberts v. United States Jaycees*,[126] the Supreme Court evaluated the interest of the State of Minnesota in securing equal access to publicly available goods and services for its female citizens and the Jaycees' interest in freedom of association. The Court concluded for the first time that the state's "compelling interest" in eliminating gender discrimination justified any effect that requiring the Jaycees to admit women might have on the male members' freedom of association.[127] The ruling is significant because it affirms the broad power of the state to prohibit gender discrimination even at the expense of invaluable first amendment rights. The Court's analysis,

private groups to choose social intimates without granting a blanket and absolute right to practice racial discrimination." *Id.* at 1476.

121. 427 U.S. at 187-88. Examples of personal contractual relationships, Powell suggested, would be those between an employer and a private tutor, babysitter, or housekeeper. *Id.* at 187.

122. *Id.* at 188.

123. *Id.* at 189.

124. *Id.* at 188-89. *See* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

125. 427 U.S. at 188-89.

126. 104 S. Ct. 3244 (1984).

127. *Id.* at 3253.

however, will generate confusion about the extent to which the freedom of association can still be used by single-sex organizations as a shield for discriminatory membership policies.

Justice Brennan began his analysis for the Court with a discussion of the two aspects of freedom of association he labeled freedom of "intimate association" and freedom of "expressive association."[128] The Court emphasized the narrow scope of freedom of intimate association as it relates to certain "personal affiliations" such as marriage, procreation, child rearing, and family living arrangements[129] and concluded that because the Jaycees are a large, unselective group whose activities involve the participation of outsiders to the association, they lack the necessary attributes of familial relationships and cannot claim protection under the right of intimate association.[130]

Turning to the freedom of expressive association, the Court first observed that it had long recognized the right to associate with others in order to engage in activities independently protected by the first amendment—speech, assembly, petition for redress of grievances, and religion.[131] Given the existence of such a right, the Court outlined the general ways that government may seek to interfere with its enjoyment.[132] Justice Brennan determined that application of Minnesota's Human Rights Act to the Jaycees to compel them to accept unwelcome members was the clearest example of the state's interference with the internal organizational affairs of the group.[133] Next, the Court stated, without elucidation, the axiomatic principle that freedom of association necessarily implies a right not to associate.[134] Having determined the Jaycees' freedom of association had been infringed, the Court reaffirmed the principle that the right to associate for expressive purposes is not absolute and stated the test to be applied: "infringements on that right may be justified by regulations adopted to serve compelling state interests,

128. *Id.* at 3249-50. This is the first time that the Court has used this terminology and the bifurcated approach in freedom of association analysis. The Jaycees did not challenge application of the statute on the grounds that it violated the members' right to privacy or "intimate association." *See* United States Jaycees v. McClure, 534 F. Supp. at 770. Allegedly "private" organizations when confronted with a claim of discrimination generally raise two defenses—freedom of association and the right to privacy. *See, e.g., Runyon*, 427 U.S. at 175. Justice Brennan, therefore, may have felt compelled to examine both issues.

129. 104 S. Ct. at 3250-51.

130. *Id.* at 3251. Justice O'Connor agreed with the Court's conclusion stating: "Whatever the precise scope of the rights recognized in [the Court's privacy] cases, they do not encompass associational rights of a 295,000-member organization whose activities are not 'private' in any meaningful sense of that term." *Id.* at 3257 (O'Connor, J., concurring).

131. *Id.* at 3251.

132. *Id.* at 3252. *See generally supra* notes 43-45 and accompanying text.

133. *Jaycees*, 104 S. Ct. at 3252.

134. *Id.* (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[135]

In applying this three-part test, the Court first asserted the Minnesota Act on its face was content and viewpoint neutral and was not susceptible to abuse by enforcement officials.[136] Second, Justice Brennan concluded Minnesota's goal of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order."[137] By prohibiting discrimination in places of public accommodation, he reasoned the Act protected the state's citizens from the twin evils of deprivation of personal dignity[138] and denial of equal opportunity, which were suffered by victims of both gender-based and racial discrimination.[139] Third, the Court turned to the least restrictive means part of the test and concluded, at the outset, that in compelling the Jaycees to accept women the state had effectuated its interests through means that did not unnecessarily restrict the Jaycees' freedom of expressive association.[140]

On the one hand, the Court acknowledged that many of the activities engaged in by the Jaycees were deserving of constitutional protection under the first amendment.[141] On the other hand, the Court perceived no basis in the record to warrant a conclusion that admission of women as full voting members would impair the group's ability to continue these activities or to circulate its preferred views.[142] Moreover, the Court pointed out that the Jaycees, while denying women the privilege of voting, already allowed women to participate in many of the organization's other expressive activities.[143] Justice Brennan unequivocally rejected the view of the Jaycees, supported by the Eighth Circuit, that allowing women to vote would change the content or impact of the group's speech because women hold different

135. *Id.*

136. *Id.* at 3253.

137. *Id. See* United States Jaycees v. McClure, 534 F. Supp. 766, 771 (D. Minn. 1982).

138. *Jaycees*, 104 S. Ct. at 3253.

139. *Id.* at 3254.

140. *Id.*

141. *Id.* This was the conclusion reached by the Eighth Circuit in United States Jaycees v. McClure, 709 F.2d 1560, 1570 (8th Cir. 1983) ("[A] good deal of what the [Jaycees] does indisputably comes within the right of association, even as limited to association in pursuance of the specific ends of speech, writing, belief, and assembly for redress of grievances.").

142. "The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Jaycees*, 104 S. Ct. at 3254.

143. *Id.* at 3254-55.

views on issues of concern to the Jaycees.[144] The Court found this position untenable because the Jaycees, in advancing the argument, had relied exclusively on unsupported generalizations about the gender-based interests and perspectives of men and women.[145] Justice Brennan underscored the Court's position by asserting that to meet their burden, the Jaycees would have to demonstrate by a substantial showing that admission of women as full voting numbers would "change the content or impact" of the group's speech.[146] Finally, the Court concluded that even if compelling the Jaycees to admit women resulted in some incidental abridgement of the Jaycees' expression, that effect was no more than necessary to effectuate the state's legitimate interests.[147]

In the last section of the opinion, the Court confronted the Jaycees' challenge that the Act, as construed by the Minnesota Supreme Court, was unconstitutionally vague and overbroad.[148] The Court rejected the Jaycees' challenge for two reasons. First, Justice Brennan acknowledged that the state court employed a number of specific and objective criteria—size, selectivity of members, commercial characteristics, and use of public facilities—to determine whether the Jaycees was a place of public accommodation as contemplated by the Act.[149] Second, the Court found the Minnesota court's

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144. *Id.* at 3255. *Contra* United States Jaycees v. McClure, 709 F.2d at 1571:

> If the statute is upheld, the basic purpose of the Jaycees will change. It will become an association for the advancement of young people. . . . [S]ome change in the Jaycees' philosophical cast can reasonably be expected. . . . [I]t will not be long before efforts are made to change the Jaycee Creed. Young women may take a dim view of affirming the 'brotherhood of man,' or declaring how 'free men' can best win economic justice.

Id.

145. *Jaycees*, 104 S. Ct. at 3255.

146. *Id.*

147. *Id.*

148. *Id.* at 3256. Justice O'Connor joined this portion of the Court's opinion. *See id.* at 3257.

149. *Id.* at 3256. *See* United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981). The Minnesota Supreme Court found that the state legislature expressly required by statute that all the provisions of the Act be broadly construed to accomplish the purpose of securing for its citizens freedom from discrimination. *Id.* at 766. Furthermore, in tracing the legislative history of the Act, the state court found that the legislature had continually broadened the term "place of public accommodation" to mean "a business . . . facility of any kind . . . *whose* goods . . . [and] privileges are . . . offered, sold, or otherwise made available to the public." *Id.* at 768 (emphasis in original) (quoting MINN. STAT. § 363.01(18) (1967)). Applying this definition to the Jaycees the court concluded that the Act reached the organization because it was:

> a *business* in that it sells goods and extends privileges in exchange for annual membership dues[,] . . . a *public* business in that it solicits and recruits dues paying members but is unselective in admitting them[,] and . . . a public business *facility* in that

reference to the Kiwanis club as a private organization[150] helped to clarify rather than obscure the standards used to determine whether the organization was public or private[151] because the Kiwanis organization, unlike the Jaycees, had a formal procedure for selecting members that employed specific, identifiable criteria.[152]

Justice O'Connor, in her concurrence, agreed with the Court that application of the Act to the Jaycees did not violate the first amendment, but she criticized the Court's analysis of the right of expressive association.[153] In particular, she interpreted the Court's language as imposing a requirement that an organization raising the defense of freedom of association demonstrate by a substantial showing that admitting women as full voting members will actually change the content or message of the group's speech.[154] Initially, she objected that the Court did not provide any guidance regarding the nature of the showing that would be required to satisfy the Court.[155] More specifically, she expressed concern that imposing this requirement in conjunction with what she perceived to be the Court's use of a "balancing-of-interests test" might shield the discriminatory practices of "commercial associations" undeserving of constitutional protection and, at the same time, provide inadequate protection for expressive associations.[156] She suggested that use of this approach inappropriately would focus the inquiry on the content of the organization's speech.[157] Constitutional protection for association, in her view, should not be dependent on "what the association says or why its members say it."[158] Moreover, Justice O'Connor contended the Court failed to establish at the outset that the Jaycees was an association

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> it continuously recruits and sells memberships at sites within the State of Minnesota . . . .

Id. (emphasis in original).

150. *Id.* at 771 (rejecting the Jaycees' "suggestion that it be viewed analogously to private organizations such as the Kiwanis").

151. *Jaycees*, 104 S. Ct. at 3256.

152. *Id.* at 3256. *See* United States Jaycees v. McClure, 709 F.2d 1560, 1582 (8th Cir. 1983) (Lay, C.J., dissenting):

> The membership of the Kiwanis group is limited so that the number of members in any one given occupational classification cannot exceed 20% of the total active membership. Such a restriction circumscribes membership boundaries and would serve in itself to make the Kiwanis "private," unlike the Jaycees which has no limiting requirements except for age and sex.

Id.

153. *Jaycees*, 104 S. Ct. at 3257 (O'Connor, J., concurring).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 3258.

158. *Id.*

worthy of first amendment protection.[159]

Justice O'Connor articulated an alternative approach that involved characterizing the association as either predominantly "commercial" or predominantly "expressive."[160] The rationale behind this dichotomy, she explained, was that an association engaged exclusively in expressive activity deserved protection for both the content of its speech and the selection of its members, while an association engaged primarily in commercial transactions received only minimal constitutional protection.[161] Thus, expressive associations were essentially free from state interference while commercial associations were subject to any rational state regulation.[162]

From the start, she recognized that making this determination often would be difficult because, although many activities are expressive, not all of them are forms of protected expression.[163] She suggested relevant considerations would include the objectives of an association and the reasons why its members joined it.[164] Under her analysis, the threshold question was whether the organization was predominantly expressive or predominantly commercial. If the answer was the latter, then there was no need, in her view, to apply any other test because of the absence of any significant interference with protected first amendment rights. Justice O'Connor assessed the Jaycees as a straightforward case for application of her framework.[165] Although she acknowledged the Jaycees engaged in some protected expressive activity, she emphasized their organization was primarily involved in the commercial activities of recruitment, training, and selling.[166] Therefore, the amount of protected Jaycees' activities was insufficient to offset the essentially commercial nature of the group, and application of the Act to compel the Jaycees to admit women as full members did not violate any constitutional rights.[167]

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159. *Id.*

160. *Id.* at 3259.

161. *Id.* Justice O'Connor reasoned: "It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute or silence one collective voice that would otherwise be heard." *Id.*

162. As Justice O'Connor explained, as soon as an association "enters the marketplace of commerce" in any significant way, it relinquishes the exclusive control over membership selection that it previously enjoyed. *Id.*

163. *Id.* For example, Justice O'Connor provided that lawyering to further social goals was probably speech while day-to-day commercial law practice was not. Similarly, a boycott for political or social purposes was generally expression while a boycott in order to maintain a cartel was not. *Id.*

164. *Id.*

165. *Id.* at 3261.

166. *Id.*

167. "The members of the Jaycees may not claim constitutional immunity from Minne-

B. The Jaycees *Decision: Establishing Divergent Theories of Associational Rights in Private Clubs*

The Court's opinion in *Jaycees* affirms the Minnesota Supreme Court's determination that the Jaycees was a place of public accommodation within the meaning of the state's antidiscrimination law. Thus, the Court reinforces the authority of state legislatures to decide the kinds of facilities covered and the groups protected by their public accommodation statutes and emphasizes the responsibility of state courts to determine on a case-by-case basis which organizations are within reach of their laws. Noticeably absent from the Court's analysis, moreover, is any attempt to formulate "the test" to determine whether an allegedly private club is, in reality, a place of public accommodation. One practical effect of the Court's deference is that to the extent assuring women equal access to publicly available benefits and privileges is a desirable goal, the primary responsibility for its achievement rests with the individual states and not with the Supreme Court.[168]

The Court's inquiry was focused not on the issue whether a truly private club has a constitutional right to discriminate but on whether compelling the Jaycees, as a place of public accommodation, to accept women violated its members' protected right of association.[169] The central thrust of Justice Brennan's analysis was on the freedom of "expressive association," and use of this language reaffirms the principle first enunciated in *NAACP v. Alabama* that the Constitution protects association for the advancement of beliefs and ideas.[170] Moreover, it emphasized the current Court's perception that the constitutional right of association exists solely as a vehicle for freedom of expression and has not achieved an independent status.[171]

In his analysis, Justice Brennan applied a three-part test[172] similar to the strict standard of review previously articulated by the Supreme Court in associational cases but with an added dimension. In addition to requiring a

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sota's antidiscrimination law by seeking to exercise their First Amendment rights through this commercial organization." *Id.*

168. Title II of the 1964 Civil Rights Act does not include a prohibition against gender discrimination in public accommodations. *See supra* note 102. Although Congress, pursuant to its authority under the Commerce Clause, has the power to amend the Act, one commentator suggests that such legislative action is "unlikely in the present political climate." Burns, *supra* note 29, at 376.

169. The Minnesota Supreme Court had previously decided the Jaycees was not a private club within the meaning of the state statute. *See* United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981). The public/private issue was not before the United States Supreme Court except to the extent that it related to Justice Brennan's evaluation of the Jaycees' vagueness and overbreadth challenges.

170. *See supra* note 35 and accompanying text.

171. *See supra* notes 75-81 and accompanying text.

172. *See supra* text accompanying note 135.

compelling state interest effectuated through means that are the least restrictive of associational freedoms, the *Jaycees* Court required the regulation to be neutral in content and viewpoint and administered in an evenhanded fashion.[173] Prior Supreme Court rulings involving freedom of association did not impose this requirement, although it is analogous to the Court's treatment of "time, place and manner" regulations in the area of freedom of expression.[174] While this additional requirement does not materially change the traditional strict scrutiny test, it reinforces the *Jaycees* Court's emphasis on the speech element as the essence of the freedom of association.

In applying the compelling interest component of the test, Justice Brennan announced for the first time that Minnesota's goal of eradicating discrimination against its female citizens was a compelling state interest.[175] The facts and procedural background of *Jaycees* presented a case of first impression. The Supreme Court never before considered a constitutional challenge to a state public accommodation law prohibiting gender-based discrimination.[176] Moreover, in no other context had the Court taken the opportunity to evaluate an articulated state interest in protecting women from public discrimination. Justice Brennan's use of the adjective "compelling" rather than "important"[177] in describing Minnesota's interest suggests the strong ideological commitment of the members of the Court to the state's goal.

Use of "compelling interest" language raises a question whether the present Court believes that the interest in eliminating discrimination against women is always compelling or whether such a determination is dependent on the context of the discrimination. For example, in the principal case, Justice Brennan had no difficulty holding that the state's interest in providing equal access to *publicly* available goods and services was compelling. If, however, a state sought through legislation to eradicate gender discrimination in truly private clubs would the Court again find such a goal compelling? Although the Court's broad language could be construed as a per se rule, the more conservative argument is that the state's interest would be evaluated on a case-by-case basis according to the relevant circumstances.

The Court's previous rulings in *Moose Lodge No. 107 v. Irvis* and *Runyon v. McCrary* suggest that a truly private organization with a highly selective

173. *Jaycees*, 104 S. Ct. at 3253.

174. *See, e.g.*, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636, 637 (1980) (the government may further its legitimate interests only through "narrowly drawn regulations" designed to further "sufficiently strong, subordinating interest[s]" and "without unnecessarily interfering with First Amendment freedoms").

175. *Jaycees*, 104 S. Ct. at 3253.

176. *See supra* note 100.

177. See the discussion of *Buckley supra* note 66 and accompanying text.

membership policy not open to the general public may have a private right to discriminate and the right of association will prevail over the state's interest.[178] Moreover, in *Jaycees* the Court emphasized the personal and social harms suffered by women who are denied equality of opportunity with regard to *public* goods and services.[179] Thus, in a private context, the Court might be less inclined to hold that the harm, resulting from denied access to benefits and privileges provided by truly private clubs, was substantial enough to warrant abridgement of the members' freedom from association.[180]

In addressing the third component of the test, the Court concluded the state had employed the least restrictive means available to effectuate its interest.[181] As Justice O'Connor suggested, the Court apparently required the Jaycees to demonstrate by a substantial showing that allowing women to become full voting members would change the content or message of the group's speech.[182] In imposing this requirement, the Court observed that forcing the organization to accept unwanted members significantly interfered with its freedom of association. There was, however, no first amendment violation without the requisite showing that such action had a negative impact on the male members' ability to express themselves. Although previous Supreme Court rulings required a similar showing,[183] its imposition in the context of gender discrimination poses difficult questions of quantification. The Court's analysis in this regard is problematic.

In rejecting the Jaycees' claim that allowing women to vote would change the group's speech, Justice Brennan did not suggest that this argument could not be advanced but indicated instead that the Jaycees had failed to meet its burden of proof by relying on unsubstantiated generalizations about the gender-based interests and views of men and women.[184] Justice Brennan noted such generalizations might have a statistical basis in fact. In light of the present Court's articulated antipathy toward judicial decision making based on sexual stereotypes, however, an all male organization like the Jaycees should be cautioned against attempting to present such statistics.[185]

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178. *See generally supra* notes 95-125 and accompanying text.

179. 104 S. Ct. at 3253.

180. As the nature of the club becomes more private, it could be argued that on the basis of a "right to privacy," the members' interest in exclusive association increases and the state's interest in eradicating the harms of public discrimination becomes less persuasive.

181. *Jaycees*, 104 S. Ct. at 3254.

182. *Id.* at 3255.

183. *See supra* note 75 and accompanying text.

184. *Jaycees*, 104 S. Ct. at 3255.

185. *See supra* text accompanying notes 144-46; *see also* Denniston, *A Hard Sell at the High Court*, THE AMERICAN LAW., Sept. 1984, at 102 ("It would take a super salesman—one,

Thus, the Court appeared to leave open the possibility that the right of expressive association may prevail where an organization can demonstrate men and women hold different views on issues of concern to the association, and where such organization can prove that admission of women will impair the members' ability to promote male views.[186] Justice Brennan's opinion, however, provided no practical guidance either for lower courts or the organizations themselves regarding the necessary form of the evidence or the level of proof required to win the point in court.

As the foregoing discussion illustrates, much of Justice Brennan's opinion focused on the Court's conclusion that application of the Minnesota Act to the Jaycees did not violate the male members' freedom of expressive association. The Court's ruling also rests on an alternative ground that even if compelling the Jaycees to admit women results in some incidental curtailment of their protected expression, that result is essential to effectuate the state's interest.[187] In reaching this alternative holding, the Court weighed the state's goal of protecting its female citizens from invidious public discrimination against what it perceived to be either an incidental or speculative interference with the Jaycees' freedom of speech and concluded that the state's "compelling interest" justified any impact that admission of women might have on the Jaycees' freedom of expressive association.[188] The ultimate effect of this alternative analysis, coupled with the requirement that the organization demonstrate impairment of its members' speech, is to eliminate any possibility that a single sex organization determined to be a place of public accommodation will succeed in claiming a right of expressive association to protect its discriminatory admissions policy.

In the concurring opinion, Justice O'Connor implied that the Court went farther than necessary to resolve the issue presented and she proposed that application of her "expressive-commercial dichotomy" would eliminate any need to apply either a balancing-of-interests test or compelling interest lan-

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perhaps, who would stand out among the hustling young businessmen who join the Jaycees—to peddle sex stereotyping to the Supreme Court. Attitudes about such things are changing on the bench, especially with a woman justice.").

186. This conjures up an image of the Jaycees or a similar organization conducting a nationwide poll of men and women on issues such as the federal deficit, abortion, school prayer, voting rights, and nuclear war to determine if there is a significant statistical breakdown according to gender.

187. 104 S. Ct. at 3253.

188. *Id.* The Court's use of this alternative analysis indicates that the individual members may have been reluctant to conclude that the Jaycees was not the kind of organization entitled to claim constitutional protection for discrimination under the freedom of association, however, Justice O'Connor reached this correct conclusion. *See supra* notes 165-167 and accompanying text.

guage in resolving future conflicts.[189] Significantly, her analysis avoids any requirement that the group demonstrate a change in the content or message of its speech.

Justice O'Connor's alternative framework appropriately focused on the nature of the organization rather than on the nature of its speech. She questioned whether the outcome in this case would have been different if the Jaycees' members had a long history of opposition to public issues believed by the Court to be espoused by women.[190] Because the Court's opinion appeared to suggest this possibility, Justice O'Connor responded that constitutional protection for association should not hinge on the content of the members' speech or their reasons for holding particular views.[191] Furthermore, her expressive-commercial dichotomy does not distinguish between protected versus unprotected *speech* or noncommercial versus commercial *speech*. Justice O'Connor did not maintain the Jaycees engaged in commercial or unprotected *speech* and, therefore, deserved less constitutional shelter.[192] Justice O'Connor asserted instead that the Jaycees was, in fact, a commercial organization because its members were involved predominantly in commercial activities such as recruitment, training, and solicitation.[193]

To guide lower courts in drawing the line between expressive and commercial associations, Justice O'Connor suggested the starting point should be the organization's purpose and the reasons why its members joined.[194] Other related areas of inquiry indicated by her framework would be whether the organization primarily furthers members' business interests rather than their social and recreational interests and whether benefits such as business contacts and employment opportunities are provided through membership in the organization. From a policy standpoint, Justice O'Connor's emphasis on the commercial character of the association is supported by the argument that exclusion from business-oriented associations (rather than social clubs) is especially detrimental to women because it denies them access to unique benefits and opportunities that give men a competitive edge in the market-

189. *See Jaycees*, 104 S. Ct. at 3258-60 (O'Connor, J., concurring). Justice O'Connor suggested that the Court's discussion of Minnesota's compelling interest was simply a balancing-of-interests test in which the Court weighed the state interest in eliminating gender discrimination against the Jaycees' interest in freedom of association. *Id.* at 3258.

190. *Id.* at 3257.

191. *Id.* at 3258.

192. *Cf.* United States Jaycees v. McClure, 709 F.2d at 1574 ("The degree of constitutional protection to which certain conduct is entitled becomes progressively greater as the element of 'speech' or 'expression' grows, and that of 'act' or 'conduct' increases. It becomes progressively less as the speech begins to appear more 'commercial.' ").

193. *Jaycees*, 104 S. Ct. at 3261.

194. *Id.*

place.[195] Significantly, the Jaycees claimed the management training offered to its male members gave them an advantage in business.[196] It is unequal access to this kind of opportunity that may cause substantial harm to women seeking to advance their professional careers.

On balance, Justice O'Connor's expressive-commercial framework has an appealing simplicity and may provide a useful analytical tool for determining when a particular organization warrants first amendment protection. The "test" suggested by Justice Brennan's opinion, by contrast, is less straightforward and further complicated by its apparent imposition of a burden on the all-male organization to demonstrate that admission of women will curtail the members' speech.[197]

As a practical matter, the implications of the respective methodologies are also dissimilar. On the one hand, application of Justice O'Connor's dichotomy likely would result in very few organizations of men being compelled to admit women because it will be extremely difficult for women seeking admission to prove that the club is "predominantly commercial" in nature. In essence, only those organizations that can be sufficiently analogized to the Jaycees in terms of their participation in commercial activities such as recruitment, training, and selling will be affected.[198]

On the other hand, Justice Brennan's analysis has a potentially extensive

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195. *Id.* According to several commentators, the exclusion of women from all-male private clubs continues to be a tenacious obstacle impeding women from achieving equal opportunity and status in all facets of contemporary society. It is argued that prestigious men's clubs are much more than social or recreational facilities because they provide important sources of business contact and the right connections for members seeking to further their professional careers. *See* Burns, *supra* note 29, at 323; Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 HUMAN RTS. 1, 19 (1977); Note, *Sex Discrimination in Private Clubs*, 29 HASTINGS L.J. 417, 419-20 (1977). A more subtle yet equally damaging result of private club discrimination is reinforcement of traditional stereotypes about the proper place of women in society: women do not belong in business or politics, nor do they belong in male clubs whose members are engaged in such activities. *See* Burns, *supra* note 29, at 333. *Cf.* Tuchman, *Why Should I Want to Join a Men's Club?*, Wash. Post, Oct. 7, 1983, at A23, col. 2.

> Men's clubs seem to me to offer little more attraction [than joining the armed forces]. . . . I am aware of the argument that women in business and in certain of the professions need equal access to the clubs because that is where deals and contracts are made over lunch through the old boy network. This may be an exaggerated benefit, because my hunch is that the network engages largely in most places, if not here [at the Cosmos Club], in members absorbing martinis and telling each other tall stories about their amorous adventures . . . .

Id.

196. *Jaycees*, 104 S. Ct. at 3261.

197. This requirement is couched in language that is far from unambiguous and lower courts may entirely disregard it as dicta. *See id.* at 3255.

198. Justice O'Connor's argument that the Jaycees was a commercial organization was facilitated because the bylaws suggest that the purpose of the association was to train young men for civic and business achievement. *See supra* note 12 and accompanying text. The con-

reach. Assuming an all-male association must prove the male views of its members will be impaired by admission of women, and assuming also that men and women really do not espouse differing views by virtue of their sexes, organizations like the Cosmos Club[199] may be compelled to open their doors to women members.[200]

III. CONCLUSION

Individuals who initially hailed *Roberts v. United States Jaycees* as a significant advance for women's right to equal access to the nation's clubs may be disappointed. No widespread integration of single sex organizations should be expected to occur as a result of the Supreme Court's ruling. Other state legislatures and courts, however, who are supportive of Minnesota's goal of providing women with equal access to public goods and services may

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stitution of Kiwanis International, another large organization that restricts membership to men provides that its objectives are:

> To give primacy to the human and spiritual, rather than to the material values of life.
>
> To encourage the daily living of the Golden Rule in all human relationships.
>
> To promote the adoption and the application of higher social, business, and professional standards.
>
> To develop, by precept and example, a more intelligent, aggressive, and servicable [sic] citizenship.
>
> To provide, through Kiwanis clubs, a practical means to form enduring friendships, to render altruistic services, and to build better communities.
>
> To cooperate in creating and maintaining that sound public opinion and high idealism which make possible the increase of righteousness, justice, patriotism and good will.

Kiwanis Club v. Board of Trustees, 83 Misc. 2d 1075, 1077, 374 N.Y.S.2d 265, 267 (N.Y. Sup. Ct. 1975) (concluding that these "objectives certainly cannot be construed, on their face, as having any commercial implications"), *aff'd*, 52 A.D.2d 906, 383 N.Y.S.2d 383 (N.Y. App. Div. 1976), *aff'd*, 41 N.Y.2d 1034, 363 N.E.2d 1378, 395 N.Y.S.2d 633 (N.Y. 1977).

199. The Cosmos Club, located at 2121 Massachusetts Avenue in Washington, D.C., was organized in 1878 and its bylaws declare that:

> This Club shall be composed of men
>
> (a) Who have done meritorious original work in science, literature, or the arts; or
>
> (b) Who, though not professionally occupied in science, literature, or the arts, are well known to be cultivated in some field thereof; or
>
> (c) Who are recognized as distinguished in a learned profession or in public service.

Extract from the Bylaws, Cosmos Club List of Members (Oct. 9, 1965). The 3,000 member Cosmos Club, "one of the nation's most prestigious clubs," has staunchly refused on three occasions over the last fifteen years to yield to internal pressure to allow women to be members. Weiser, *Proposal to Admit Women Is Agitating Cosmos Club*, Wash. Post, Nov. 15, 1980, at A1, col. 3.

200. According to the club's bylaws, female guests of male members or members' widows are allowed to use the Club's facilities and in 1973 the Club approved an amendment permitting women guests to enter the club through the front door. Weiser, *supra* note 199, at A11, col. 2.

be encouraged by *Jaycees* to attack the problem of gender discrimination in their states.

Significantly, *Jaycees* did not resolve the extent to which freedom of association will protect organizations that discriminate on the basis of sex in their membership practices. On the one hand, truly private clubs, as defined by state legislatures and courts, will be immune from the *Jaycees* holding for the reason the Supreme Court did not decide the issue whether a private club has a right to discriminate that is protected by the freedom of expressive association. On the other hand, it seems clear that where an allegedly private club is found to be a place of public accommodation by a state court, the freedom of expressive association will not shield it from state sanctions unless it demonstrates by a substantial showing that the content or message of its speech will be impaired by the admission of women. The Court's imposition of this requirement is problematic and it remains for future courts to decide how, if at all, it is to be applied. Initially, the kinds of organizations most likely to be affected by the Supreme Court's (either Justice Brennan's or Justice O'Connor's) analysis are other national organizations with local chapters that can be analogized to the Jaycees in terms of size, absence of selective membership criteria, and commercial character. The potential reach of Justice Brennan's opinion, however, is implicitly tempered by the fact that theoretically the Court's "test" does not apply until a state court determines the organization is not a private club but a place of public accommodation. The fate of the nation's private and quasi-private clubs, therefore, will be controlled to a great extent by state legislatures and courts.

Ann H. Jameson