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Discrimination by Private Clubs

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DISCRIMINATION BY PRIVATE CLUBS*

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> The human frame being what it is, heart, body and brain all mixed together, and not contained in separate compartments as they will be no doubt in another million years, a good dinner is of great importance to good talk. One cannot think well, love well, sleep well, if one has not dined well. The lamp in the spine does not light on beef and prunes.
>
> — Virginia Woolf,
> *A Room of One's Own*[1]

> 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.
>
> — Justice William O. Douglas,
> dissenting in *Moose Lodge No. 107 v. Irvis*[2]

I. INTRODUCTION

The fierce defense of a private right to discriminate in club membership, exemplified by Justice Douglas' *Moose Lodge* opinion,[3] is one of the glories and contradictions of our constitutional system; and, as Virginia Woolf deftly observes,[4] exercise of the right even in a seemingly benign form imposes real harm on those excluded. The paradigm case that I will be discussing grows out of the controversy that may occur when a private organization or association, which might loosely be called a "club," excludes from membership certain people because of their racial, ethnic, sexual,[5] or religious identity. The legal and human problems presented by such a case involve a conflict between the interest in being treated equally and the interest in being free to choose one's own personal relationships. Converted to a clash of rights, under federal[6] or state[7] law, the paradigm case becomes a collision between a right to be

1. V. WOOLF, A ROOM OF ONE'S OWN 18 (1929).
2. 407 U.S. 163, 179-80 (1972).
3. *See supra* note 2 and accompanying text.
4. *See supra* note 1 and accompanying text.
5. By "sexual" I am referring primarily to a person's male or female identity, but clubs that exclude persons who are homosexuals or heterosexuals would certainly come within the subject.
6. *See infra* notes 107-38.
7. *See infra* note 43.

free from discrimination[8] and a "right to discriminate" stemming from freedom of association.[9]

Litigation spawned by the controversy over private club discrimination has occurred frequently in recent years.[10] The Supreme Court of the United States has decided three such cases since 1984: *Roberts v. United States Jaycees*,[11] *Board of Directors v. Rotary Club*[12] and *New York State Club Association v. City of New York*.[13] All three of these Supreme Court cases involved a private club's exclusion of women and a law arguably prohibiting that exclusion. The *Jaycees* case involved the desire of the Minneapolis and St. Paul chapters to admit women contrary to the national bylaws of the United States Jaycees. The national organization was charged with violating the Minnesota Human Rights Act, which prohibited discrimination by places of public accommodation on the basis of race, color, creed, religion, disability, national origin, or sex.[14] The *Rotary* case also stemmed from an intraorganizational dispute which resulted when a local Rotary Club admitted three women to membership allegedly in violation of the Rotary constitution.[15] The case was decided in California under the Unruh Civil Rights Act, which prohibited "business establishments" from discriminating on the basis of sex, race, color, religion, ancestry, or national origin.[16] The *Club Association* case involved a facial attack on the constitutionality of a provision of New York City's Human Rights Law. That law prohibited discrimination by places of public accommodation on the basis of race, creed, color, national ori-

8. The Court has clearly recognized the equal protection clause as a guarantee of freedom *from* discrimination. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948); Strauder v. West Virginia, 100 U.S. 303, 306-07 (1880).

9. *See infra* notes 81-131, 166-71. Literature on the freedom of association is extensive. *See* Douglas, *The Right of Associations*, 63 COLUM. L. REV. 1361 (1963); Emerson, *Freedom of Association*, 74 YALE L.J. (1964); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Marshall, *Discrimination and the Right of Association*, 81 NW. U.L. REV. 68 (1986); and Raggi, *Individual Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV 1 (1977).

10. *See, e.g.*, Daniel v. Paul, 395 U.S. 298 (1969); Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (3rd Cir. 1986), *cert. denied*, 108 S. Ct. 362 (1987); United States Jaycees v. Cedar Rapids Jaycees, 754 F.2d 302 (8th Cir. 1985); Tiger Inn v. Edwards, 636 F. Supp. 787 (D.N.J. 1986); Rogers v. Int'l Ass'n of Lions Clubs, 636 F. Supp. 1476 (E.D. Mich. 1986).

11. 468 U.S. 609 (1984).

12. 481 U.S. 537 (1987).

13. 108 S. Ct. 2225 (1988).

14. 468 U.S. at 614-16.

15. 481 U.S. at 541-42.

16. *Id.* at 541 n.2.

gin, sex, or handicap and specifically provided that an exemption in favor of "distinctly private" operations did not apply to a club that has "more than 400 members," provides regular meal service, and "regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business."[17] In each of the cases, the Court recognized the possibility that the club might justify its discriminatory exclusion on the basis of its members' rights to either freedom of intimate association or freedom of association to enhance the freedom of speech or the free exercise of religion. But, in each of the three cases, the Court found either that the associational right had not been established or that it had been overridden by the state's compelling interest in eliminating discrimination.

Even though the essence of these cases is a conflict between two interests of constitutional magnitude,[18] a unanimous Supreme Court has supported each result. The Court has not, however, achieved unanimity of opinion. In the *Jaycees* case, then Justice Rehnquist concurred only in the judgment.[19] Justice Scalia concurred only in the judgment in the *Rotary* case,[20] and, in the *Club Association* case, Scalia concurred partially in the majority opinion and concurred in the judgment.[21] Justice O'Connor wrote a concurring opinion in *Jaycees* that included a strong disagreement with part of the majority opinion,[22] and, in the *Club Association* case, joined by Justice Kennedy, she wrote a more moderate concurrence.[23] In addition, two Justices did not participate in two of the cases.[24]

II. *SHELLEY V. KRAEMER* AND THE *CIVIL RIGHTS CASES*

It is impossible to talk about the constitutional problems raised by pri-

17. 108 S. Ct. at 2229-31.

18. Although both rights are of constitutional "magnitude," the antidiscrimination right has been characteristically based on legislation. *Compare* notes 25-80 and accompanying text, *infra* (*Shelley* and post-*Shelley* analysis) *with* notes 81-142 and accompanying text, *infra* (analysis of recent cases).

19. 468 U.S. at 631 (Rehnquist, J., concurring).

20. 481 U.S. at 550 (Scalia, J., concurring).

21. 108 S.Ct. at 2238 (Scalia, J., concurring).

22. 468 U.S. at 631 (O'Connor, J., concurring).

23. 108 S.Ct. at 2237-38 (O'Connor, J., concurring).

24. Chief Justice Burger and Justice Blackmun, both of whom were former members of the Jaycees, did not participate in the *Jaycees* case, which came out of Minnesota. Justices Blackmun and O'Connor did not participate in the *Rotary* case.

vate club discrimination without harking back to *Shelley v. Kraemer*.[25] Although *Shelley v. Kraemer* does not itself figure prominently in resolving the interrelated constitutional issues involved, *Shelley* nevertheless casts a silent shadow across the discussion. *Shelley*'s silent shadow, moreover, points back still further to the *Civil Rights Cases*.[26]

In the *Civil Rights Cases*, the Court, reflecting the mood of the post-Reconstruction era in which it decided the cases, read the fourteenth amendment narrowly and the pre-Civil War states' rights bias of the federal system broadly. The *Civil Rights Cases* established two important propositions. First, the Court decided that "public" accommodations did not entail the "state action" needed to bring the fourteenth amendment prohibitions into play. Instead, the Court found public accommodations to be "private" activities despite the fact that such accommodations were typically open to the public, served a public purpose, and operated under state license or other authority.[27] Second, the Court in the *Civil Rights Cases* decided that, under section five of the fourteenth amendment, which authorized legislation "to enforce" the "provisions of this article," Congress had no power to regulate private activity that was not itself considered "state action" by section one.[28] Together, these two propositions comprise the primary lesson of the *Civil Rights Cases*, and that primary lesson continues to be learned to this day. In fact, the *Civil Rights Cases* contain language suggesting that Congress' power might be greater if Congress determined that states were not adequately protecting citizens from discriminatory treatment.[29] Moreover, in connection with civil rights developments of the last generation, a significant opinion has emerged both on[30] and off[31] the Supreme Court that Congress has power to regulate private conduct when appropriate to remedy or prevent violations of the fourteenth amendment by state agen-

25. 334 U.S. 1 (1948).

26. 109 U.S. 3 (1883).

27. *Id.* at 10-11, 18-19.

28. *Id.* at 11.

29. *Id.* at 12-15.

30. *See infra* note 67 and accompanying text.

31. *See* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1475 (1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 351-52 (2d ed. 1988); Brest, *The Federal Government's Power to Protect Negroes and Civil Rights Workers Against Privately Inflicted Harm*, 1 HARV. C.R. - C.L.L. REV. 22 (1966); Cox, *The Supreme Court, 1965 Term*, 8 HARV. L. REV. 91 (1966). *See also* 18 U.S.C. § 245 (1982) (Civil Rights Act of 1968); S. RPT. No. 721, 90th Cong. 2d Sess., *reprinted in* 1968 U.S. CODE CONG. OF ADMIN. NEWS 1840, 1843 (legislative history for 18 U.S.C. § 245).

cies. But these qualifying views have never ripened into a Supreme Court holding; therefore, the second proposition of the *Civil Rights Cases* continues to raise a serious question about the power of Congress to act against private club discrimination on the basis of the fourteenth amendment.[32] The *Civil Rights Cases* thus seem to give private club discrimination an outer barrier of immunity from constitutional constraint.

It is at this juncture that *Shelley v. Kraemer*—or, more correctly, what *Shelley v. Kraemer* might have been—becomes relevant. One might think of *Shelley* as having had the potential to do for the antidiscrimination interest something comparable to what the *Civil Rights Cases* did for the right-to-discriminate interest. During the relatively brief period when *Shelley* was causing an uproar in the legal academic community,[33] it seemed to stand for the proposition that judicial enforcement of racial discrimination by a private club—no matter how small, intimate, selective, or socially oriented the club was in its operations—would be state action in violation of the equal protection clause of the fourteenth amendment.[34] But, in contrast to the robustness of the *Civil Rights Cases*, *Shelley* proved incapable of sustaining this seemingly far-reaching proposition. Indeed, one might say that that was the whole point about *Shelley*: the reason that it created an uproar in the first place was that the *logic* of *Shelley* required a sweepingly broad antidiscrimination result, but that result always lacked a certain credibility.[35]

Had *Shelley* been read to follow its apparent logic, it would have swept

32. *See* S. REP. No. 872, 88th Cong. 2d Sess., pt. 1 at 12-14, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2366-68; S. REP. No. 872, 88th Cong., 2d Sess., pt. 1 at 42-62, 82-92; H.R. REP. No. 914, 88th Cong. 1st Sess. 100, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2467; 110 CONG. REC. 5959, 6080, 6536-37, 7051-54, 7385, 7401-04, 7753-54, 8083-99, 8709, 9130, 10,370, 12,699-700, 13,334-76, 13,802-03, 13,921-26, 14,183-86 (1964); *Report of the Committee on Commerce, United States Senate on S.1732 to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce*, 88th Cong., 1st Sess. 12-13 (1963).

33. Many of the most important articles dealing with *Shelley* were published between 1949 and 1964. These include Habor, *Notes on the Limits of Shelley v. Kraemer*, 18 RUTGERS L. REV. 811 (1964); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Karst & Van Alstyne, *State Action*, 14 STAN. L. REV. 3 (1961); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); and Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

34. *See* Bell v. Maryland, 378 U.S. 226, 256-60 (1964) (Douglas, J., concurring).

35. *See* Karst & Van Alstyne, *State Action*, 14 STAN. L. REV. 3, 44 (1961).

aside the real significance of the *Civil Rights Cases*.[36] Of course, even if the Court followed the literal line of the *Shelley* opinion, a realm of potentially permissible private racial discrimination remained. *Shelley* did not directly prohibit home owners from covenanting not to sell their houses to black buyers. Only the judicial enforcement of their agreement in the event one of the covenantors did not hold the line implicated the power of the state for purposes of the fourteenth amendment equal protection clause. Similarly, if the private club discriminator kept its dark work "inside," so to speak, it would avoid the reach of the Constitution.[37] But once it went public—by invoking judicial protection—the Constitution would step in to limit the implementation of the discrimination. This step from permissible private discrimination to impermissible state intervention on the side of discrimination might occur in the private club context, for instance, if the club attempted to invoke the aid of state trespass laws to eject a prospective member who was physically present on the premises and insisted that she was denied membership and a member's use of club facilities only because of the club's discriminatory policy. In this situation, it would be argued under *Shelley* that the state court's enforcement of the trespass law, invoked by the private club to implement its policy of discrimination, would not be a neutral act but would implicate the state in the private club's discrimination.[38] Thus, the state's judicial enforcement of private discrimination would convert apparent state inaction into action sufficient to bring the fourteenth amendment into play.[39] But the Supreme Court has never extended *Shelley* to cover such a trespass action.[40]

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36. *See* Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 234 (1949).

37. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

38. *Shelley* might also be invoked, more plausibly today, in cases such as *Jaycees* and *Rotary*, *see supra* text accompanying notes 14 and 15, in which a national organization is invoking judicial assistance to force a local affiliated club to abide by a national bylaw requiring discrimination. *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972), holding that *Shelley* prohibits a state from enforcing a regulation which had the effect of causing the Moose Lodge to adhere to its own racially discriminatory rule.

39. *See generally* Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 481, 484 (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1113-14 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24 (1959).

40. In relatively straightforward situations involving an attempt to use trespass laws to enforce private race discrimination by private restaurants, only Justices Douglas and Goldberg argued that *Shelley* prohibited a state court from putting its force behind the private discrimination. *Compare* Bell v. Maryland, 378 U.S. 226, 227 (1964); *id.* at 286 (Goldberg. J., concurring); *id.* at 318 (Black,

Still, there is probably a distortion in all of this. It ignores the rival claim of a "right to discriminate." Whether or not the incredulity which greeted *Shelley* was prompted by an awareness of this "right," it almost surely reflected a recognition of an accustomed way of thinking about a private realm of personal decisionmaking not touched by the fourteenth amendment's proscription of state discrimination.[41] Perhaps they are moot questions whether the framers meant to constitutionalize this private sphere through the state action requirement, whether the early advent and long life of the *Civil Rights Cases* have contributed to our bias toward recognizing such a private liberty, whether our perception of an entrenched right reflects some more fundamental antecedent value, or whether some other explanation or explanations influenced our thinking. At least in retrospect, it seems safe to conclude that this private interest, easily translatable into a claimed right, was always there to prevent *Shelley* from converting some subpart of private discrimination into state discrimination. Even under a very strong reading of *Shelley v. Kraemer*, the Court might not have treated discrimination by private clubs—or at least some discrimination by some private clubs—as state action and, thus, would not hold such discrimination to be prohibited by the fourteenth amendment.[42]

III. LEGISLATIVE POWER TO PROHIBIT PRIVATE CLUB DISCRIMINATION

Because of what the *Civil Rights Cases* did and *Shelley v. Kraemer* did not do to the antidiscrimination reach of the fourteenth amendment, discrimination by private clubs is prohibited today if and only if it is prohibited by legislation. Many states prohibit some form of public accommodation discrimination in a manner which would reach some private clubs.[43] In addition, Congress clearly has the power to legislate

J., dissenting) *with* Bell v. Maryland, 378 U.S. at 255-57 (Douglas, J. concurring); Bouie v. Columbia, 378 U.S. 347, 363 (Douglas, J., concurring). *See also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which the Court denied an injunction to prohibit private club race discrimination in serving guests and did not discuss the possible relevance of *Shelley* in the enforcement of the club's policy.

41. *See* Gilmore v. City of Montgomery, 417 U.S. 556, 573-74 (1974); Norwood v. Harrison, 413 U.S. 455, 469 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting); Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

42. *See* Henkin, *supra* note 37, at 487-90.

43. For compilations of state laws prohibiting discrimination in public accommodations see Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L.

against private club discrimination. Congress has prohibited discrimination based on race or ancestry under section 1981 of the 1866 Reconstruction Act, which provides that "all persons" shall have the "same right to make and enforce contracts as is enjoyed by white citizens."[44] It has also prohibited discrimination in public accommodations on the basis of race, religion, and national origin—but not sex[45]—by Title II of the Civil Rights Act of 1964 (Civil Rights Act).[46]

In 1964, Congress skirted the *Civil Rights Cases* by relying on the commerce clause as the constitutional source of power on which to base the prohibition of private discrimination in the Civil Rights Act, thus avoiding the state action limitation. There was heated controversy over whether this was the appropriate route to take. It was argued that commerce was for cattle, and that the fourteenth amendment was the appropriate source of a law aimed at the moral evil of race discrimination. Of course, the latter course would have required a direct confrontation with the *Civil Rights Cases*, leaving the outcome in doubt.[47] My personal opinion is that Congress made the correct choice, both because it was the tactically safer route to vital legislation and because it was in fact a path that was intellectually and morally respectable. The commerce clause

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REV. 55, 56-67 (1979); Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 250 (1978).

44. 42 U.S.C. § 1981 (1982).

45. The fact that sex discrimination was not prohibited by the Public Accommodations provision in 1964 and that the cases now being litigated involve the exclusion of women presumably reveals a different level of acceptability for private race discrimination and private sex discrimination. *See* the confirmation hearings of Justices Kennedy, SENATE COMMITTEE ON THE JUDICIARY, NOMINATION OF ANTHONY M. KENNEDY TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REPT. NO. 100-13, 100th Cong., 2d Sess. (1988) (indicating Kennedy had been a member of the Olympic Club, an exclusive men's club, until November 13, 1987) and Scalia, *Nomination of Judge Antonio Scalia to be Associate Justice of the Supreme Court of the United States, Hearings Before the Committee of the Judiciary of the United States Senate*, 99th Cong., 2d Sess. (1986) (indicating Scalia was formerly a member of the Cosmos Club, an exclusive men's club, which he defended on the ground that, unlike a racially exclusive club, an all men's or all women's club did not entail invidious discrimination). The unavailability of accommodations while traveling has not been historically one of the notable forms of sex discrimination. Thus, it may not be surprising that sex discrimination in employment was prohibited by the 1964 Civil Rights Act, *see* 42 U.S.C. § 2000e-2 (1982), but sex discrimination in public accommodations was not. None of the foregoing, however, should suggest that discrimination against women by public accommodations or private clubs is acceptable now, nor was accepted by all in 1964. *See* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 1037 (1975); Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 HUM. RTS. 1 (1976).

46. 42 U.S.C. § 2000a-6 (1982) (Public Accommodations).

47. *See supra* text accompanying notes 28 and 32; authorities cited *supra* note 31.

suffers much derision because of its elastic availability as a clause for all reasons. But I find nothing tortured in the reasoning that concludes that people will be deterred from traveling by the absence of hotel and restaurant facilities that will serve them. There was an ample factual record showing that hotels, motels, and restaurants that would serve blacks were few in number[48]; in the case of establishments providing sleeping arrangements, fewer would take blacks than would take dogs.[49]

To say that the commerce clause was a defensible source of power for legislating against certain kinds of public accommodation discrimination is not to say that it was the only option. In a surprising evolution of constitutional law, the Supreme Court discovered in 1968 that section two of the thirteenth amendment provided a potent power to prevent discrimination through legislation designed to eliminate "badges and incidents of slavery."[50] This ruling did not entail a direct revision of the *Civil Rights Cases*, although it struck a very different tone concerning the scope of Congress' power to define badges and incidents of slavery.[51] The Court subsequently used this thirteenth amendment power to justify the congressional prohibition of racial discrimination in the making of contracts by private parties,[52] and the Court found that Congress had exercised that power in enacting section 1981 of the 1866 Reconstruction Act.[53] The Supreme Court has applied that Act not only to private employment[54] and private education,[55] but also to a private swimming club[56]; there is no obvious reason why this contract principle would not

48. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-53 (1964); Katzenbach v. McClung, 379 U.S. 294, 299 (1946); S. REP. No. 872, 88th Cong., 2d Sess., 17-20, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2372-76, 110 CONG. REC. 7383, 7397-99, 7402-03, 8343 (1964); *Report of the Committee on Commerce, United States Senate on S. 1732 to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce*, 88th Cong., 2d Sess. 17-22, 201-204 (1964); *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearings on S. 1732*, 88th Cong., 2d Sess. 622-34, 692-700, 744, 1383-87 (1964).

49. *See* 110 CONG. REC. 6532 (1964) (remarks of Senator Humphrey).

50. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

51. In rejecting the thirteenth amendment as a source of legislative power to prevent racial discrimination by public accommodations, the Court in the Civil Rights Cases had commented, "it would be running the slavery argument into the ground to make it apply to every act of discrimination . . . ." 109 U.S. 3, 24-25 (1883).

52. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973).

53. *See* cases cited *supra* at note 52.

54. *Johnson*, 421 U.S. 454.

55. *Runyon*, 427 U.S. 160.

56. *Tillman*, 410 U.S. 431.

cover other types of private clubs as well.[57]

Race discrimination obviously presents the clearest case for an exercise of Congress' remedial power under section two of the thirteenth amendment. In recent years, however, the Court has at least implicitly indicated that this thirteenth amendment legislative power to define and remedy badges and incidents of slavery extends well beyond discrimination against blacks.[58] There is no clear stopping point to the logic of this extension: if Congress has broad power to define badges and incidents of slavery; if there is no longer any requirement for an actual nexus between discriminatory treatment that qualifies as a badge or incident of slavery and membership in a group that was enslaved; if the general approach is to cover treatment that subjects a group to "slave-like" conditions; if discrimination against other racial and ethnic groups (including white racial groups!) is within the power; if all of these things are true, as they appear to be, then there is no evident bar to using the thirteenth amendment legislative power to proscribe discrimination of any kind.[59] Nevertheless, though the logic may not be self-limiting, there may be a limited domain for logic here as elsewhere. To accept all unequal treatment as slavery is to destroy the meaning of slavery. To sever the meaning of the thirteenth amendment from the unique and awful history of race slavery in the United States and from the post-Civil War black codes that *really* were slavelike in their operation would go beyond mere organic growth in constitutional interpretation. While the case for merging sex and race discrimination in the United States may be especially strong,[60] a political system that refuses to adopt an equal rights amendment may not be

57. Even if the Supreme Court should reverse these precedents and hold that Congress did not *intend* to prevent private contract discrimination by § 1981, that would not affect Congress' *power* to enact such legislation. (In Patterson v. McClean Credit Union, 57 U.S.L.W. 4705, 4707 (1989), the Court reasserted its *Runyon* position that § 1981 applies to private contract discrimination, albeit in a qualified manner. Of course, a qualification of the Court's statutory interpretation in no way qualifies the effect of these precedents in establishing Congress' *power* to enact such legislation.)

58. Without expressly deciding the thirteenth amendment issue the Supreme Court has held that § 1981 (or its companion, § 1982)—which is generally regarded as a statute enacted under Congress' thirteenth amendment power—prohibits discrimination against whites (and in favor of blacks), McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273 (1976); against persons of Arabian ancestry, St. Francis College v. Al-Khazraji, 107 S.Ct. 2022, 2026-28 (1987); and against Jews, Shaare Tefila Congregation v. Cobb, 107 S.Ct. 2019 (1987). *See also* Hodges v. United States, 203 U.S. 1, 17 (1906) (indicating that thirteenth amendment protects all "races" from slavery).

59. *See* Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313 (1977); Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969).

60. *See* Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (Brennan, J., plurality opinion).

ready to accept the former condition of women in this country as slave-like. At any rate, the conventional wisdom seems to be that the thirteenth amendment does not cover sex discrimination,[61] and the conventional wisdom is likely to prevail. The thirteenth amendment, then, seems a fully adequate power to prevent race discrimination and race-like discrimination, but it is not a likely candidate as a source of federal legislative power for preventing private club discrimination on the basis of sex.[62]

For still another potential source of congressional power to prevent private club discrimination, we must return to the lessons of the *Civil Rights Cases*. Recall that the second major holding of the *Civil Rights Cases* was that Congress' regulatory power under section five of the fourteenth amendment extends only as far as the state action concept of section one allows.[63] In short, the ungilded holding of the *Civil Rights Cases* was that Congress was without power to regulate private conduct. That *Civil Rights Cases* lesson continues to be taught. Indeed, its teaching steered Congress to the commerce clause for unchallengeable authority to prohibit public accommodations discrimination in 1964, as we have seen.[64] But contradictory lessons, albeit scanty and disputed ones, have emerged.[65] In a 1966 case, *United States v. Guest*,[66] one can find a combination of concurring dictum and dissenting "holding" that reveals six Supreme Court votes directly challenging the correctness of the *Civil Rights Cases* on this point.[67] According to these six Justices, Congress clearly has power to regulate private conduct under section five of the fourteenth amendment when such regulation is reasonably calculated to further, protect, or enhance the rights guaranteed against state action by section one of the fourteenth amendment. For example, the Supreme

61. *See* McAlester v. United Air Lines Inc., 851 F.2d 1249 (10th Cir. 1988); Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982); Rice v. New England College, 676 F.2d 9 (1st Cir. 1982); Bobo v. ITT, Continental Baking Co., 662 F.2d 340 (5th Cir. 1981); Grubb v. Broadcast Music, Inc., 699 F. Supp. 382 (E.D.N.Y. 1987); Davis v. Devereux Foundation, 644 F. Supp. 482 (E.D. Pa. 1986); National Organization for Women v. Sperry Rand Corp., 457 F. Supp. 1338 (D. Conn. 1978).

62. The Supreme Court has cast doubt on Congress' thirteenth amendment power to prevent national origin discrimination. *See* St. Francis v. Al-Khazraji, 107 S. Ct. at 2028 (§ 1981 covers discrimination based on ancestry but not *place* of birth).

63. *See supra* notes 28-32 and accompanying text.

64. *See supra* notes 47-49 and accompanying text.

65. *See supra* notes 30 and 31 and accompanying text.

66. 383 U.S. 747 (1966).

67. 383 U.S. 745, 762 (Clark, J., joined by Black and Fortas, JJ., concurring); *id.* at 782-84 (Brennan, J., joined by Warren, C.J., and Douglas, J., concurring and dissenting).

Court has suggested recently, in justifying state prohibitions of private club discrimination, that protection from such discrimination contributes significantly to a person's opportunities to participate in public areas—where sex discrimination by official acts would be constitutionally prohibited.[68] On this assumption, Congress might conclude that prohibiting the private club discrimination was a necessary step in protecting a person's right to enjoy the right to be free of state discrimination. The delicately constructed majority view contained in the various *Guest* opinions has been acknowledged by the Supreme Court,[69] but it has never been either definitively confirmed or repudiated.

In another heralded case of 1966, *Katzenbach v. Morgan*,[70] the Court indicated that, at least in some circumstances, Congress had the power to "expand," though not to contract,[71] the bounds of section one of the fourteenth amendment. That case involved a statute that protected the right to vote of persons who were only literate in a language other than English.[72] Conceding that, based on judicial interpretations, section one of the fourteenth amendment would not protect such a right of its own force, the Court concluded that Congress could restrike the balance of individual and state interests that had been considered by the Court in making its constitutional decision.[73] Based on this reevaluation, Congress could find the balance to favor the individual interests even though the Court had found it to favor the state, so long as the Court could "perceive a basis" for Congress' different conclusion.[74] The *Morgan* principle has been reasserted and seemingly applied in some contexts,[75] mentioned in passing in others,[76] and severely criticized in still others.[77]

68. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2234-35 (1988) (discussing claimed right of private association to advance public points of view).

69. District of Columbia v. Carter, 409 U.S. 418, 423-24 n. 8 (1973); Griffin v. Breckenridge, 403 U.S. 88, 107 (1971).

70. 384 U.S. 641 (1966).

71. 384 U.S. at 651 n. 10. *But see id.* at 666 (Harlan, J., dissenting). Professor Tribe has summarized the various theories concerning the dilution-expansion dilemma. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14 (2d ed. 1988).

72. *Morgan*, 384 U.S. at 643. The statute involved specified that eligibility to vote could not be denied to a person who had been educated through the sixth grade in an American-flag school in a language other than English on the basis of that person's inability to read English.

73. *Id.* at 653.

74. *Id.*

75. Trafficante v. Metropolitan Life Ins., 409 U.S. 205, 212 (1972); Welsh v. United States, 398 U.S. 333, 371 (1970) (White, J., dissenting).

76. EEOC v. Wyoming, 460 U.S. 226, 243 (1983); Mississippi University for Women v. Hogan, 458 U.S. 718, 732-33 (1982).

However, the Court has never squarely disowned it.[78] By the Court's own logic, this congressional power to determine substantively the constitutional boundaries would seem to be available to relocate the line separating state and private action or state action and inaction. Even if the power is limited to merely marginal expansions of court determined constitutional limits,[79] it would seem to support legislation prohibiting some discrimination by private clubs. In this fashion, public accommodations, which, under the first lesson of the *Civil Rights Cases*, are generally understood to entail merely private action despite their public nature and the state's involvement, could be transmuted into state action by act of Congress.[80]

IV. BACKGROUND OF RECENT PRIVATE CLUB DISCRIMINATION CASES

The current starting point for finding a right to discriminate embedded in the freedom of association is the majority opinion of Justice Brennan in *Roberts v. United States Jaycees*.[81] But the Court did not invent the basic ingredients of this analytical framework in the *Jaycees* case. One earlier and more general source of this analysis is Professor Wechsler's *Neutral Principles* article.[82] In regard to the Supreme Court's decision in *Brown v. Board of Education*,[83] Wechsler asked whether there was any principled way to choose between freedom to associate, which he saw as

77. *Morgan*, 384 U.S. at 666 (Harlan, J., dissenting); Oregon v. Mitchell, 400 U.S. 112, 293-96 (1970) (Stewart, J., concurring).

78. In City of Rome v. United States, 446 U.S. 156 (1980), the majority eschewed the substantive power to redefine constitutional rights in favor of a very broad remedial authority, but Justice Rehnquist in dissent thought that only the *Morgan* derived substantive power — which he decried — could explain the majority's result. *Id.* at 219-21 (Rehnquist, J., dissenting).

79. *See* Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments, 67* MINN. L. REV. 299, 308-12 (1982).

80. Of course, if the exercise of this power results in legislation that interferes with a constitutionally protected right to freedom of association, it would directly implicate the controversy concerning dilution and expansion of fourteenth amendment rights. *See supra* note 71. As Professor Tribe has argued, however, the apparent dilemma concerning expansion and dilution is exaggerated since a constitutional doctrine that enables Congress to escape apparent limitations on its *powers* carries no implication whatsoever that these powers any more than other powers, may override constitutional prohibitions designed to protect individual rights. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14 (2d ed. 1988).

81. 468 U.S. 609, 617-29 (1984).

82. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

83. 349 U.S. 483 (1954).

the interest protected by *Brown*, and freedom not to associate, which he saw as the interest overridden by *Brown*.[84] A more pointedly applicable forerunner of the *Jaycees* opinion is Professor Henkin's article, *Shelley v. Kraemer: Notes for a Revised Opinion*.[85] Henkin argued that some of the more far-reaching readings of *Shelley* would infringe upon a fundamental liberty interest protecting the right not to associate.[86] *Abood v. Detroit Board of Education*[87] is the modern Supreme Court authority for the proposition that the first amendment includes a right *not* to associate. In *Abood*, the Court reasoned that nonunion workers could not be required to contribute to a union fund used to pay for political expression. In fact, the *Abood* model exemplifies a form of the right not to associate quite different from the one presented by private club discrimination. In *Abood*, nonunion adherents claimed a right not to be forced into unwanted membership. In the case of private club discrimination, club members claim a right to deny membership to unwanted applicants.

More than any of these other authorities, however, *Runyon v. McCrary*[88] most fully anticipated the associational right-to-discriminate approach of the *Jaycees* opinion. Having found that section 1981 prohibited a private school from denying a student admission on the basis of race,[89] *Runyon* addressed the question whether the school had a constitutional "right to discriminate" that overrode the statutory mandate.[90] The Court considered the question under three headings—a right of parents to control their children's education, a right of privacy, and the freedom of association. The Court's analysis of the first two of these rights was not sharply differentiated and was heavily influenced by the Court's limited view of the parental educational prerogatives under *Pierce v. Society of Sisters*[91] and *Meyer v. Nebraska*.[92] Although the Court acknowledged the existence of a right of privacy stemming from *Skinner v. Oklahoma*,[93] *Griswold v. Connecticut*,[94] *Loving v. Virginia*,[95]

84. Wechsler, *supra* note 82, at 33-34.
85. 110 U. PA. L. REV. 473 (1962).
86. *Id.* at 487-90.
87. 431 U.S. 209 (1977).
88. 427 U.S. 160 (1976).
89. *Id.* at 168-75.
90. *Id.* at 175-77.
91. 268 U.S. 510 (1925).
92. 262 U.S. 390 (1923).
93. 316 U.S. 535 (1942).
94. 381 U.S. 479 (1965).
95. 388 U.S. 1 (1967).

Roe v. Wade,[96] and other cases, it concluded that preventing racial discrimination in private schools "does not represent governmental intrusion into the privacy of the home or a similarly intimate setting."[97]

The *Runyon* Court's treatment of freedom of association is of special interest for its relevance to the private club context. The Court acknowledged the associational right of parents to send their children to schools "that promote the belief that racial segregation is desirable,"[98] but the Court quoted the court of appeals with approval for the proposition that *"there is no showing"* that discontinuing the discriminatory admission policy "would inhibit *in any way* the teaching" of any ideas or dogmas.[99] The Court also relied on its own earlier statement in *Norwood v. Harrison*,[100] in which the Court invalidated a textbook loan program as it applied to private discriminatory schools:

> [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 protection. And even some private discrimination is subject to special remedial legislation in certain circumstances under section 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts.[101]

Because the *Runyon* analysis is so relevant to the issues raised by private club discrimination, it deserves careful attention. First, and most generally, the Court told us that it concedes some substance to this first amendment claim of a right to associate, but apparently not too much. A right that is so readily discounted is not likely to provide serious competition for an anti-race discrimination policy, and probably not for an anti-sex discrimination policy either. The goal of eliminating private school discrimination seemed easily to justify the infringement of the parents' first amendment association right. The Court did not invoke "strict scrutiny" or a "compelling state interest" even though, by the time of *Runyon*, that was familiar language for explaining why fundamental

96. 410 U.S. 113 (1973).

97. 427 U.S. 160, 178 (1976) (footnote omitted).

98. *Id.* at 176.

99. *Id.* (emphasis added).

100. 413 U.S. 455 (1973).

101. *Runyon*, 427 U.S. at 176 (quoting *Norwood*, 413 U.S. at 470). Actually, the quoted language is part of a larger section of the *Norwood* opinion in which the Court is trying to explain why textbook loans to private discriminatory schools puts the weight of the state behind the discrimination even though textbook loans to private religious schools do not amount to support in violation of the establishment clause. Whether or not the Court's attempted distinction in *Norwood* is convincing, the purpose of the language may help to explain why it does not quite work in *Runyon*.

rights must yield to a state interest.[102]

Second, it is hard to know what to make of something that is, at once, "a form" of freedom of association "protected by the First Amendment," but not entitled to "affirmative constitutional protection." We are, of course, not talking about any sort of positive liberty in Isaiah Berlin's terminology.[103] Rather, we are talking about good old-fashioned negative liberty: the protection of constitutionally protected freedom from government interference. The rest of the *Norwood* quotation, indicating that "some private discrimination is subject to special remedial legislation in certain circumstances,"[104] is a bit cryptic but seems to be making the unremarkable claim that any right—including a right to discriminate—may be infringed for a good enough reason. This would seem, again, to demand that the Court tell us that the reason is good enough here, and that, following the conventional analysis, there is not a less restrictive alternative for achieving it.

Finally, the assertion that forcing a school to admit black children will "in no way" inhibit the school's intended message that racial integration is bad proves too much to swallow. Just as government-mandated school segregation conveys a powerful message that black people are unworthy to associate with whites,[105] state-mandated integration conveys a powerful message that blacks and whites are human beings with equal worth and dignity. That message must blunt any merely verbal message, taught in the school, that segregation is a good thing. Furthermore, unless the prohibition of racial discrimination by the private school is to be subverted significantly by the attitude of the school toward the black children admitted, the ban on discrimination in admission policy must be accompanied by some requirement that all students be treated on an equal basis. That, in turn, means that certain types of hostile messages by the school must be prohibited too.[106] All of this adds up to a conclusion that a decision favoring the interest of nondiscrimination over the

102. *See* Buckley v. Valeo, 424 U.S. 1, 23-38 (1976) (speech and association); Kramer v. Union Free School District No. 15, 395 U.S. 621, 625-630 (1969) (equal protection); Sherbert v. Verner, 374 U.S. 398, 406-409 (1963) (free exercise of religion).

103. I. BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 131 (1969).

104. 413 U.S. at 470.

105. Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

106. *See* Smith v. St. Tammany Parish School Bd., 316 F. Supp. 1174 (E.D. La. 1970), *aff'd*, 448 F.2d 414 (5th Cir. 1971) (school under desegregation decree ordered not to display Confederate flag). *But see* Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972) (student disciplined for walking out of voluntary pep rally at school under desegregation decree in protest of playing of "Dixie").

interest of free association undermines the underlying expressive interest far more substantially than the Court was willing to concede. Naturally, that does not mean that the result is wrong, only that the collision of rights is greater and the implications of the Court's decision more far-reaching than the Court will acknowledge.

V. PRIVATE CLUB DISCRIMINATION IN THE SUPREME COURT

In the *Jaycees* case and its sequels, *Rotary* and *Club Association*, we can see the rearticulation of much of the *Runyon* analysis. The Court acknowledged the associational rights on which a right to discriminate might be based. It subdivided these associational rights into two types for careful elaboration—intimate association[107] and association to further first amendment expressive or religious rights.[108] In the end, the Court found these rights only tenuously implicated and easily overwhelmed by the weight of the antidiscrimination interest furthered by the legislative provisions involved.

In sharp contrast to *Runyon*, in which the Court offhandedly dismissed privacy arguments as not involving "the privacy of the home or a similarly intimate setting,"[109] the Court in *Jaycees* and its successors treated seriously the *potential* right of intimate association. In each of the three cases, as in *Runyon*, the Court found the actual claim based on the right of intimate association weak and inadequate—the organizations involved were too large, too commercially oriented, and too permissive in their admission policies and operational practices.[110] There were hints, nevertheless, of closer cases to come. In *Jaycees*, Justice Brennan left us in doubt as to how broadly he conceives this right to form and preserve "certain kinds of highly personal relationships" that require "a substantial measure of sanctuary from unjustified interference by the State."[111]

107. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984); *see also* New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2233 (1988); Board of Directors v. Rotary Club, 481 U.S. 537, 544-45 (1987).

108. *Jaycees*, 468 U.S. at 622; *see also Club Ass'n*, 108 S. Ct. at 2234; *Rotary*, 481 U.S. at 548-49.

109. *Runyon*, 427 U.S. at 178.

110. In *Jaycees*, the Minneapolis Chapter of Jaycees had 430 members and the St. Paul Chapter had 400. Testimony at the state administrative hearing indicated sex and age were the only reasons for denial of membership. *See Jaycees*, 468 U.S. at 621. In *Rotary*, club membership ranged from 20 to 900 members. Rotary not only had no membership requirements other than a tie to business, but it carried out its operation in public. *See Rotary*, 481 U.S. at 340-41. In the *Club Ass'n* opinion, the Court stated that each and every club could not be assumed to be intimate enough to survive a facial challenge. *See Club Ass'n*, 108 S. Ct. at 2234.

111. *Jaycees*, 468 U.S. at 618.

He relied on the family-oriented privacy decisions, as *Runyon* had, but he characterized the precedents in terms of "personal affiliations that exemplify" the relevant considerations—relative smallness, a high degree of selectivity in beginning and maintaining the affiliation, and seclusion from others—and that "suggest some relevant limitations" on the relationships entitled to constitutional protection.[112] Brennan appeared to avoid carefully any suggestion that family and home represent the outer boundary of the right:

> Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority . . . entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.[113]

Of course it is quite possible that Justice Brennan was merely contemplating the protection of these rights in contexts other than their collision with antidiscrimination interests. There is, in any event, language in the Court's opinion, building on the opinion of the Minnesota Supreme Court, that suggests that members of the Kiwanis Club, which, unlike the Jaycees, employs selective membership criteria, might have a constitutionally protected right to discriminate that would shield them from state regulation.[114] Contrary to this suggestion, Justice Powell in his *Rotary* opinion for the Court denied any implicit approval of the Jaycees-Kiwanis distinction.[115] Powell furthermore put off for another day "the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country."[116] In her concurring opinion in *Jaycees*, Justice O'Connor said, "[w]hatever the precise scope of the rights" recognized in the marriage, procreation, and family relationships cases, they do not "encompass associational rights of a 295,000-member

112. *Id.* at 619.

113. *Id.*

114. *Id.* at 620 (citing Justice Powell's concurring opinion in *Runyon*), and 630.

115. *See Rotary*, 481 U.S. at 547 n.6. Without reaching the constitutional issue, courts have permitted Kiwanis clubs to exclude women, on the ground that they were not *public* accommodations. These decisions existed both before (Kiwanis of Great Neck v. Board of Trustees, 41 N.Y. 1034, 363 N.E. 2d 1378, 395 N.Y.S. 633 (1977)) and after (Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (3d. Cir. 1986)) the Supreme Court's *Jaycees* decision.

116. *Rotary*, 481 U.S. at 547 n.6. Only Justice Powell has characterized the right of intimate association as a first amendment right.

organization . . . ."[117] But, in the *Club Association* case, Justice O'Connor specifically anticipated a different result:

> In a city as large and diverse as New York City, there surely will be organizations that fall within the potential reach of Local Law 63 and yet are deserving of constitutional protection. For example, in such a large city a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence.[118]

In his short separate opinion in *Club Association*, on the other hand, Justice Scalia pointedly stated that the Court "assumes for purposes of its analysis, but does not hold, the existence of a constitutional right of private association for other than expressive or religious purposes."[119] Scalia's characterization of the majority opinion seems accurate. Justice White, responding only to a facial attack on the New York City law, said:

> [I]t may well be that a considerable amount of private or intimate association occurs in such a setting, as is also true in many restaurants and other places of public accommodation, but that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination . . . . Although there *may be* clubs that would be entitled to constitutional protection . . . , surely it cannot be said that . . . [the law] infringes the private associational rights of each and every club covered by it.[120]

Following the pattern set by *Runyon*, none of the three recent cases found any violation of the expressive dimension of the associational right. In two respects, however, the Court has not followed the lead of *Runyon*. First, it has conceded, generally, that requiring an organization to accept members it would choose to exclude is a prima facie violation of their right not to associate. The Court fully recognized that coercing acceptance of members is a potentially powerful means of impairing the right of the individuals who choose to associate with each other in expressing "only those views that brought them together."[121] Second, the Court upheld the statute in overriding this right on the specific grounds that the statute achieves a compelling interest in eliminating sex discrimination by the least restrictive means.[122]

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117. *Jaycees*, 468 U.S. at 631.

118. *Club Ass'n*, 108 S. Ct. at 2237. Only Justice O'Connor seems to have taken the position that a larger organization is more likely to be intimate because it is located in a larger city.

119. *Id.* at 2238.

120. *Id.* at 2233-34.

121. *Jaycees*, 468 U.S. at 623.

122. *Id.* at 628.

Nevertheless, the Court's analysis echoed *Runyon* in minimizing the actual impact on the association's expressive activities. Recognizing that the Jaycees do engage in political expression,[123] the Court refused to concede that the admission of women to membership would have any necessary effect on positions taken or agendas pursued.[124] The Court reached this conclusion on the basis of one primary argument and one subordinate argument. The primary argument was that nothing "in the record" supported the view that the women's positions would be different,[125] and the Court refused to indulge in the stereotypical assumption that there is a correlation between sex and point of view.[126] The conclusion that women would not undermine the male-oriented program of expression that would otherwise prevail also was reinforced somewhat on the distinct basis that the Jaycees already permitted nonmember female participation in its activities in various respects.[127] There is an unconvincing glibness in the Court's lofty disdain for any suggestion that there might be significant differences in the content of discussion that would take place in all-male and sex-integrated groups. Moreover, it appears to be facially inconsistent with a substantial body of feminist literature.[128] Nevertheless, in the setting of the Jaycees organization, the Court's minimization of any characteristically male and female points of view is not marred by the disingenuity of the *Runyon* opinion. Although one articulated purpose of the Jaycees is (or perhaps was) to promote the views of young men,[129] there is nothing in the organization's structure or activities—as there is in a racially segregated school—that makes admission of the previously excluded group a strong and inevitable contravention of the view that the organization was partly organized to promote.

The *Jaycees* position concerning expressive association is repeated in the *Rotary* and *Club Association* opinions. In all of these cases, there is the implicit indication, as stated by Justice White in *Club Association*, that:

> it is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to

123. *Id.* at 626.
124. *Id.* at 627.
125. *Id.*
126. *Id.* at 628.
127. *Id.* at 613.
128. *See* V. SACKVILLE-WEST, ALL PASSION SPENT 152-66 (1983); Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106, 119-20 (1986).
129. *Jaycees*, 468 U.S. at 612-13.

> advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.[130]

In none of these cases, however, does the Court tell us what the result would be under those facts.[131]

In her *Jaycees* concurring opinion, Justice O'Connor strongly attacked this entire approach: "Whether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it."[132] But Justice O'Connor herself asserted that she has a "more fundamental" disagreement with the majority's approach to expressive association.[133] She would draw a distinction between commercial and expressive associations, giving little protection to the former and nearly absolute protection to the latter.[134] She advanced this position in full recognition that drawing such a bright line will not always be easy.[135] Nevertheless, she believed that the need for a clear line is imperative, and she thought that it is particularly justified because the organizations themselves decide which route they will take.[136] O'Connor apparently held to this position in her concurring opinion in the *Club Association* case, when she said, "Predominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the antidiscrimination provisions triggered by the law."[137] Somewhat more ambiguously, she added, "There may well be organizations whose ex-

130. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2234 (1988).

131. *See infra* notes 172-200 and accompanying text.

132. *Jaycees*, 468 U.S. at 633 (O'Connor, J., concurring).

133. *Id.*

134. *Id.* at 633-34. There is some apparent tension between the O'Connor position and both the commercial speech doctrine and First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), but there need not be a fatal inconsistency. With respect to commercial speech, Justice O'Connor may be saying simply that the low level of protection to which commercial speech is entitled would never be adequate to overcome the state's overriding interest in preventing invidious discrimination by private clubs. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y., 447 U.S. 557, 564 (1980) (government may regulate commercial speech to further an interest less important than a compelling interest). As to *First National Bank*, Justice O'Connor could be saying that commercial organizations are not presumptively engaged in the political speech activity that entitles an association to prophylactic protection; of course, if the association does advance a political position, *that communication* would be protected under *First National Bank*, 435 U.S. at 778-83, and nothing in the O'Connor position would prevent that.

135. *Jaycees*, 468 U.S. at 636.

136. *Id.* Justice O'Connor would include the Boy Scouts and Girl Scouts as expressive activities. *Id.*

137. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2237 (1988).

pressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other such common bond. The associational rights of such organizations must be respected."[138] Read straightforwardly, this latter statement seems to endorse the test she criticized in *Jaycees*: the undermining of expressive purpose in the manner she described would seem to depend on the particular purpose of the club and the relationship to that purpose of the views of the excluded members. But perhaps she was just saying that, whenever such organizations have expressive purposes, the possibility of such undermining requires that they be permitted to discriminate in selecting members as they wish.

Despite the differences, there is obviously a great deal of common ground between the majority and Justice O'Connor. Commercial purposes may be dispositive for her; they are certainly going to be influential to the majority. Under the majority analysis, the existence of commercial purposes may make a collision of views between forming and excluded members less likely.[139] Furthermore, the Court seems to regard the existence of a commercial purpose as highly important in concluding that the state has a compelling interest in restricting any associational rights. The particular amendments to the New York City law challenged in the *Club Association* case were based on the specific findings of the New York City Council that private clubs described by the amendments were centers of commercial transactions[140]—places where business was carried out and advantageous professional contacts were made. Evidently the Court also thought that protecting members of excluded groups from losing commercial advantages was of paramount importance. In both the *Jaycees* and *Rotary* cases, the Court squarely concluded that the state had a compelling interest in preventing these injuries and that such interest was sufficient to override "some incidental abridgement" of protected speech[141] or "some slight infringement" of the right of expressive association.[142]

138 *Id.*

139. *See infra* notes 193-200 and accompanying text.

140. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2230 (1988).

141. *Jaycees*, 468 U.S. at 628.

142. Board of Directors v. Rotary Club, 481 U.S. 537, 548-49 (1987).

VI. POSSIBLE FUTURE TREATMENT OF PRIVATE CLUB DISCRIMINATION.

Speculation about the future treatment of private club discrimination must begin with the inheritance of the *Civil Rights Cases* and *Shelley v. Kraemer*. In the absence of a radical constitutional change, private clubs are not prevented from discriminating by the Constitution itself. Recent Supreme Court decisions have dealt with *statutory* prohibition of private club discrimination, but they have left many questions unanswered. In general, these cases tell us that discrimination in the membership policy of private clubs will meet one of three possible fates. First, the discrimination may be prohibited by legislation, but nevertheless protected under a constitutional right of intimate or expressive association. Second, as in the three recent Supreme Court cases, the discrimination may be prohibited by legislation and not protected by any constitutional right, either because no constitutional right exists under the circumstances or because the right is justifiably restricted to further a compelling state interest. Third, the particular discrimination may be immunized by a statutory exemption from a more general legislative prohibition of discrimination. The succeeding sections, in dealing with these possibilities, treat separately the right to intimate association and the right of expressive association.

A. The Private Club Exemption

The statutory exemption is likely to occupy a pivotal role in the treatment of private club discrimination. Under the unvarying pattern of modern public accommodation legislation, an exemption is carved out in favor of truly private associations by specific language or interpretative gloss.[143] For example, Title II of the Civil Rights Act of 1964 exempts discrimination by "a private club or other establishment not in fact open to the public."[144] The New York City law involved in the *Club Association* case exempted from coverage "any institution, club or place of accommodation which proves that it is in its nature distinctly private."[145] The Minnesota statute involved in *Jaycees* applied only to "public" busi-

143. *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, 377 (1983); Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 250 (1978).

144. Title II, Civil Rights Act of 1964, 42 U.S.C. § 201(e) (1982).

145. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2229 (1988).

nesses,[146] and the California statute involved in *Rotary* covered only "business establishments."[147] When there is no explicit exemption, the courts may nonetheless find that the legislature intended one. In a concurring opinion in *Runyon v. McCrary*, Justice Powell argued that the Court should read section 1981's prohibition of private discrimination to include an implied exception removing a class of intimate private contractual relationships from coverage.[148] Justice Powell acknowledged that the line could not be identified with clarity in the abstract, but he thought that contractual relationships such as those involved in hiring a housekeeper or a babysitter were so intimate and personal that the legislature would not have intended to preclude the use of race among the factors affecting such a decision.[149]

These statutory exemptions evidently reflect a policy distinction between cases in which the private choices of an association should be honored and cases in which the public nature of the association makes paramount the state's interest in equal opportunity. The private club exemptions may also be designed to remove from government regulation those situations most likely to invoke plausible constitutional claims of an association-based right to discriminate. Furthermore, without regard to the legislative intent behind these exemptions, the courts will probably construe them in light of the constitutional right actually or potentially involved. There is little doubt that the factors considered in applying the private club statutory exemptions are virtually identical to the factors identified by the Court as relevant in determining whether a constitutional right of intimate association is involved.[150]

B. Intimate Association: The Constitutional Right to Discriminate.

The preceding discussion of statutory exemptions is likely to be especially pertinent to a claimed constitutional right to discriminate based on the right of intimate association. The recognition of a protected realm of

146. Roberts v. United States Jaycees, 468 U.S. 609, 616 (1984).

147. Board of Directors v. Rotary Club, 481 U.S. 557, 541 n.2 (1987).

148. 427 U.S. 163, 186-87 (1976) (Powell, J., concurring).

149. *Id.* at 188-89. With respect to private school admissions, Justice Powell saw the small music class or kindergarten on the excluded side and, on the covered side, he saw a commercially operated school that advertised for and admitted students without restriction except for race.

150. *Compare* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Daniel v. Paul, 395 U.S. 298 (1969); Sullivan v. Little Huntington Park, 396 U.S. 229 (1969) *with* New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988); Board of Directors v. Rotary Club, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

"privacy" or private decisionmaking—including discriminatory decisionmaking—underlies both the legislative exemption of some private club discrimination from antidiscrimination statutes and the judicial creation of a constitutional right of intimate association. Thus, if the legislative exemption is broad and the constitutional right of intimate association is assumed to be narrow, the actual scope (and even the existence) of the constitutional right will remain undetermined.

The right of intimate association had its first full-blown explication in Justice Brennan's *Jaycees* opinion.[151] Although this opinion portrayed the right as a potentially broad one, the portrayal was only dictum since the right was not implicated by the kind of private club involved in that case.[152] Nor was the right of intimate association implicated in the *Rotary* case.[153] Furthermore, the Court's consideration of a potentially affected freedom of intimate association in the *Club Association* opinion was severely limited by the fact that that case involved only a facial attack on the New York City law.[154] Justice O'Connor, concurring, opined that there undoubtedly would be instances of intimate association not protected by the private club exemption in the New York City law,[155] but Justice Scalia skeptically pointed out that the Court "assumes for purposes of analysis, but does not hold the existence of a constitutional right of private association."[156]

The *Jaycees* Court constructed the right to intimate association from the right to privacy cases. Even the narrowest reading of those cases reveals an associational element—between husbands and wives[157] or parents and children.[158] Plainly, the fundamental interests involved in these family relationships are capable of extension[159] and manifestation in other contexts,[160] but it can hardly be said that the extension of these

151. *See supra* notes 109-14 and accompanying text.

152. *Jaycees*, 468 U.S. at 621.

153. *Rotary*, 481 U.S. at 540-41; *see supra* notes 115-16 and accompanying text.

154. *Club Ass'n*, 108 S. Ct. at 2234.

155. *Id.* at 2237 (O'Connor, J., concurring).

156. *Id.* at 2238 (Scalia, J., concurring).

157. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Griswold v. Connecticut, 381 U.S. 479 (1965).

158. *See* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

159. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

160. *Cf.* United States Dept. of Agric. v. Moreno, 413 U.S. 528 (1973) (regulation requiring food stamp recipients to be related if living in same household violates equal protection clause).

rights has found fertile soil for growth outside the family setting.[161] With the family privacy cases as a guide and the Court's *Jaycees* criteria as a compass, it may be possible to identify private clubs which are sufficiently small and selective in their choice of members, which have members who are sufficiently intimate with each other and participatory in the club, and which pursue objectives that are sufficiently personal, social, and noncommercial to qualify for the constitutional right of intimate association. Possibly, even when these criteria of size, intimacy, and purpose are satisfied only weakly and the private club is located well down the spectrum from the family, the Constitution will prove generous in giving the club protection on the basis of the freedom of intimate association. Should a new *Moose Lodge* case be brought on the basis of antidiscrimination legislation rather than the equal protection clause,[162] we might learn much about the scope of constitutional immunity for private clubs claiming to be intimate associations. The *Jaycees* Court may be correct in asserting that constitutionally protected intimate associations may be found at various points along a spectrum, with the family being merely the paradigmatic extreme case, but that is clearly not yet the law.

C. *Intimate Association: The State's Compelling Interest in Prohibiting Discrimination.*

As previously indicated, the associations most likely to qualify for constitutional protection on the basis of their highly personal, highly selective character are also the associations most likely to fall within a statutory exemption.[163] Assuming, however, that an exemption is not available, the associations with the strongest claim for constitutional protection based on freedom of intimate association are nevertheless likely to escape regulation because of the relative weakness of the state's regulatory interest in that context. The strongest case for regulation is based on the connection between membership in the private club and business and professional opportunities. The Supreme Court prominently emphasized the exclusion from the commercial marketplace which operates within the sanctuary of the private club in *Jaycees*, *Rotary*, and *Club Association*.[164] Likewise, virtually everyone who has written on the sub-

161. *See* Bowers v. Hardwick, 478 U.S. 186 (1986); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

162. *See supra* notes 38 and 40 and accompanying text.

163. *See supra* note 150 and accompanying text.

164. *See* New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2234 (1988); Board

ject has stressed the vital link between club membership and both the transaction of business and the making of contacts.[165] Yet the existence of commercial activities and objectives is itself a factor leading the courts to find no right of intimate association at all. Furthermore, the more selective the club, the more intimate the relationships, and the smaller the membership, the less likely it is that the private club will be a locus of commercially relevant activity. Therefore, in the usual case, when the arguments for recognizing a right of intimate association are at their peak, the state interest in regulating such an association is likely to be at its weakest.

In addition to the provision of access to commercial opportunities, the other primary reason for private club antidiscrimination legislation is the protection of excluded groups from the stigmatization and indignity resulting from exclusion. If we once again assume that a private club has the characteristics of size, selectivity, intimacy, and noncommercial purpose entitling it to claim the right of intimate association, it appears that injury to the individual justifying state regulation will be least severe in the case where the associational claim is the strongest. Of course, exclusion is often intended or perceived as rejection and so tends to cause injury to individual dignity, and the likelihood that the exclusion will be stigmatizing is greatest for excluded groups that are already identified as traditionally disadvantaged minorities. But this type of injury is substantially reduced when the exclusion results from high selectivity and when the resulting membership is small and "private." Exclusion is less insulting when it is the norm rather than the exception, when fewer are chosen than excluded, and when a disfavored basis for selection is used for inclusion rather than exclusion—at least when the basis for selection is narrow and coherent, like Irish ancestry, rather than large and amorphous, like white Christian.

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of Directors v. Rotary Club, 481 U.S. 537 *passim* (1987); Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984).

165. *See, e.g.*, 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 (1983); Linder, *Freedom of Association after Roberts v. Jaycees*, 82 MICH. L. REV. 1878 (1984); Marshall, *Discrimination and the Right of Association*, 81 NW. U.L. REV. 68 (1986); Raggi, *Individual Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977); Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106 (1986); Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Law*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 250 (1978).

D. Expressive Association: The Constitutional Right to Discriminate.

When the right of a private club to discriminate stems from the constitutional right of intimate association, we have seen that the scope and existence of the constitutional right is largely unsettled; that antidiscrimination legislation often exempts private club discrimination that might otherwise qualify for constitutional protection; and that, for private clubs that are sufficiently private and intimate to be entitled to prima facie constitutional protection, the state is not likely to have a sufficiently strong justification for restricting the right. When the focus shifts to the constitutional right of expressive association, very different conclusions obtain.

The rights of intimate and expressive association diverge sharply with respect to the relative clarity and stability of each right's existence. The Supreme Court has recognized a right to freedom of association derived from freedom of speech for over fifty years.[166] In contrast to its reluctance to recognize a right of intimate association, in the three recent cases—*Jaycees*, *Rotary* and *Club Association*—involving private clubs that excluded women as members, the Court recognized a right of expressive association.[167]

It is probably a truism to observe that the exemptions carved out of antidiscrimination statutes are not inserted with expressive association in mind.[168] The statutes involved are basically aimed at preventing discrimination by "public" accommodations or some equivalent public entity, and the exemptions are intended to draw a line between what is truly public and what is truly private. In fact, litigation interpreting the private club exceptions has involved identifying sham private clubs and denying them the protection that is appropriate for legitimately private activities.[169] None of this has much to do with clubs that have expressive

166. *See* NAACP v. Alabama, 357 U.S. 449 (1958); De Jonge v. Oregon, 299 U.S. 353 (1937); Whitney v. California, 274 U.S. 357 (1927).

167. *See supra* notes 121-31 and accompanying text. Because it was reviewing a facial challenge, the Court in *Club Ass'n* had less occasion to develop the right of expressive association.

168. The New York City law considered in *Club Ass'n* specifically exempted benevolent orders and religious corporations on the ground that they were in their nature "distinctly private." The Court concluded that singling out these particular kinds of clubs for advantageous treatment easily satisfied a rational basis equal protection inquiry. 108 S. Ct. at 2234; *id.* at 2238 (Scalia, J., concurring). But, given the content-based classification involved, it would seem that a stricter scrutiny should have been applied. *See* Widmar v. Vincent, 454 U.S. 263 (1981); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

169. *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969); Daniel v. Paul 395 U.S. 298, 301 (1969); United States v. Richberg, 398 F.2d 523, 529 (5th Cir. 1968); Nesmith v. Y.M.C.A.,

purposes or engage in expressive activities. Of course, such a club might coincidentally fall within the exemption, but that would not depend upon the constitutional basis for recognizing a right of expressive association.

The rights of intimate association and expressive association are also very different in terms of the kinds of considerations that lead to a determination that a private club is entitled to constitutional protection. The Court's intimate association criteria are designed to identify an essence: whether a private club is sufficiently small, selective, intimate in purposes and activities to *be* an intimate association. By contrast, a private club qualifies for protection as an expressive association, not because of what it is, but because of what it *does*. Protection for an expressive association is based on the fact that individuals use the association for expressive purposes. What the club is like in general, what the character of the club may be in various respects—indeed, what it does other than engage in speech activity—is irrelevant. If individuals exchange ideas within the associational structure or use that structure to disseminate views, the club has satisfied the justification for recognizing a constitutional right to associate. The Supreme Court was very clear in *Jaycees* that state interference with an expressive association's control of its own membership directly impacts on the agenda for discussion that the association would otherwise set for itself, and directly threatens to alter the message that the association would otherwise communicate:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.[170]

Justice O'Connor said it even more strongly: "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[171]

E. Expressive Association: The State's Compelling Interest in Preventing Discrimination.

The differing considerations that qualify for constitutional protection

397 F.2d 96, 101 (4th Cir. 1968); Wright v. Cork Club, 315 F. Supp. 1143, 1150-53 (S.D. Tex. 1970); United States v. Clarksdale King & Anderson Co., 288 F. Supp. 792, 795 (N.D. Miss. 1965).

170. *Jaycees*, 468 U.S. at 623.

171. *Id.* at 633 (O'Connor, J., concurring).

as an intimate association and as an expressive association are directly relevant to making a determination whether a state has a sufficiently compelling interest to prevent discrimination by a private club. With respect to the right of intimate association, there is a natural intersection between the state's interest in regulation and a private club's interest in intimate association. A club's commercial character directly qualifies its privacy interest and directly implicates the state's regulatory interest. The more clearly commercial the club, the weaker its claim of right based on intimate association. At the same time, the more clearly commercial the club, the stronger the state's legitimate ground for protecting excluded individuals from the disadvantage of lost commercial opportunity. There is no such natural link between a state's antidiscrimination interest and a private club's interest in expressive association. As a consequence, a private club may have a very strong constitutional claim of right of expressive association in precisely the same situation in which the state has a very strong justification to protect excluded individuals from commercial disadvantage. Thus, the collision forces a choice between two values that are comparable in magnitude but different in kind.

1. Balancing Interests or Absolute Rule: The Strength of the Antidiscrimination Principle.

To solve this conflict, the Supreme Court has professed to adopt structured balancing—the well known "strict scrutiny" test—under which fundamental individual interests are subject to restriction on the basis of a compelling state interest furthered in the least restrictive manner. As we have seen, Justice O'Connor has criticized this test in part for being insufficiently protective of first amendment interests, and has seemed to call for absolute protection of a private club's right of expressive association.[172] In fact, it is arguable that the Court's actual approach is even less protective of the associational interest than invocation of the compelling interest test would suggest. Contrary to the usual understanding that this is a highly protective test, there are indications that a state's antidiscrimination interest will always be compelling enough to prevent a private club from relying on its right of expressive association to justify discrimination in admitting members.

A general indication that the state's antidiscrimination interest will always trump the associational interest comes from several different deci-

172. *See supra* notes 132-38 and accompanying text.

sions and several different opinions, particularly the majority opinion in the *Jaycees* case. In the face of both religious and associational first amendment interests, the Court has consistently upheld state discrimination bars and rejected first amendment claims, without questioning the validity of those claims, when a significant economic disadvantage was attributable to the denial of equal admission.[173] Furthermore, these opinions suggest that the antidiscrimination interest is so overwhelming that the question is not even close.[174]

There are also more specific indications in the *Jaycees* majority opinion that the antidiscrimination interest will always prevail, with supplementary support in the *Rotary* and *Club Association* opinions. Although the *Jaycees* opinion mentions the state's interest in preventing injury to individual dignity,[175] its main focus is on the state's interest in preventing exclusionary policies that denied excluded groups tangible benefits.[176] In *Jaycees*, the benefits identified were the goods and services which the club provided its members—commercial programs, leadership skills, business contacts and employment promotions.[177] In *Rotary*, the benefits were copies of the Rotary magazine and other publications, the Rotary emblem, and conferences that taught management and professional techniques.[178] In *Club Association*'s facial challenge, the Court simply recited without comment the findings of the City Council that the New York City law covered private clubs providing valuable activities of a commercial nature that would be beneficial for full participation in the business and professional life of the city.[179] Whether one focuses attention on the items specified in each individual case or on the category of items mentioned in the cases collectively, it seems patent that the real import of the exclusion is not the particular economic goods to which a member has access but participation in the mainstream of the commercial world. Securing access to that mainstream is the compelling interest which the states justifiably further through their antidiscrimination legislation.

173. *See* New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988); Board of Directors v. Rotary Club, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984); Hishon v. King & Spalding, 467 U.S. 69 (1984); Bob Jones University v. United States, 461 U.S. 574 (1983); Daniel v. Paul, 395 U.S. 298 (1969); *cf.* Runyon v. McCrary, 427 U.S. 160 (1976).

174. *See supra* notes 140-42 and accompanying text.

175. *Jaycees*, 468 U.S. at 625.

176. *Id.* at 628.

177. *Id.* at 626.

178. *Rotary*, 481 U.S. at 543.

179. *Club Ass'n*, 108 S. Ct. at 2230.

But, of course, that interest is going to be present in any case in which the private clubs are engaged in activities that facilitate economic success in American society—whatever expressive activities may also occur. And, of course, it is protecting the opportunity to enter the mainstream, without regard to race, or sex, or other invidious classifying characteristics, for which there is a strong constitutional consensus.

The conclusion that *Jaycees* and its progeny may foreshadow an absolute rule in upholding the antidiscrimination interest over the expressive associational interest is also suggested by the Court's statement that the legislative prohibition is not aimed "at the suppression of speech."[180] Once again, this description will be true of *all* antidiscrimination legislation. Furthermore, it is a reminder that this associational right is derivative. Expressive association is protected because individuals need to be able to join together to exercise their freedom of speech more effectively. Thus, an abridgement of the freedom of association is, indirectly, an abridgement of the freedom of speech. Nevertheless, restricting associational freedom by restricting an association's membership policy does not, as such, prevent either the association itself or its members from communicating their chosen messages.[181] In other contexts, associational freedom has been subjected to regulation in the service of important government interests.[182]

In pointing out that the regulation was not *aimed* at suppressing speech and that the harm of discriminatory membership did not derive from the communicative impact of the club's expressive activities,[183] the *Jaycees* opinion conjures up the case of *United States v. O'Brien*.[184] In *O'Brien*, the Supreme Court adopted the rule that, when government regulations further interests unrelated to the suppression of free expression, the Court will scrutinize them using a more deferential standard than the compelling interest/least restrictive alternative test.[185] In *Jaycees*, the Court did not explicitly adopt the *O'Brien* test nor explicitly eschew the

180. *Jaycees*, 468 U.S. at 623.

181. When *intimate* association is regulated by barring exclusion of certain members, the regulation directly interferes with the core right involved; it determines that the right of association to choose one's associates by being admitted prevails over the right of association to choose one's associates by excluding. In *Jaycees*, Justice Brennan refers to the right of intimate association as "an *intrinsic* element of personal liberty." 468 U.S. at 620 (emphasis added).

182. *See* Buckley v. Valeo, 424 U.S. 1 (1976). *But see infra* note 192 and accompanying text.

183. *Jaycees*, 468 U.S. at 628.

184. 391 U.S. 367 (1968).

185. *Id.* at 377.

compelling interest test. The *Jaycees* Court went beyond *O'Brien*, however, in diminishing the level of first amendment protection by adopting an absolute rule that expressive activities producing such harms "are entitled to no constitutional protection."[186]

2. Balancing or Absolute Rule: Balancing Possibilities

Despite these strong indications that private clubs will never be able to defend their discriminatory membership policies on the basis of their constitutional right of expressive association, they may not be the whole story. A more accurate predictive conclusion might take the form of a rebuttable presumption. Ordinarily, the club's interest based on freedom of expressive association will yield to the state's compelling interest in preventing discrimination, but under special circumstances, the expressive associational interest may prevail. On the surface, the possibility that the associational interest would be protected is required by a test which purports to weigh important values against each other. Moreover, in concluding that there was no appreciable interference in the Jaycees' expression, the Court twice referred to the absence of any evidence in "the record" indicating that admitting women as members would alter the Jaycees' speech agenda or change the views or positions it advocated.[187] Borrowing from the suggestion of the Eighth Circuit, the Court in *Jaycees* implied that it might have made a difference had the Jaycees taken positions on issues directly implicating the interests of women.[188] Taken together, these judicial hints may suggest that clubs can rebut the presumption in favor of the state's compelling antidiscrimination interest by either an actual evidentiary showing—going beyond mere statistics[189]—that the excluded group has a discrete, identifiable and different position on some issue of concern to the club, or a showing that there are issues of concern to the club inherently likely to produce different positions by current club members and members of a now excluded group.[190] The Court has displayed this approach to expressive association in its treatment of legislative rules governing disclosure of campaign contributions. Without questioning the existence of a possible interference with first amendment interests, the Court has upheld disclo-

186. *Jaycees*, 468 U.S. at 628.
187. *Id.*
188. *Id.*
189. *Id.*
190. *See supra* notes 130 and 138 and accompanying text.

sure requirements on the ground that the government interest in disclosure was comparatively strong and the likely chilling effect on political speech comparatively weak.[191] But the Court has refused to permit application of the disclosure rules in circumstances in which the chilling effect appeared more severe.[192]

A second, more convoluted argument also suggests that *Jaycees* does not preclude the use of a real balancing test under which certain expressive association claims might prevail over antidiscrimination interests. By using rhetoric not fully in harmony with the facts of the case or the results of the litigation, the *Jaycees* Court may have left a misleading impression of what it was actually doing. On the one hand, the Court stated that "a 'not insubstantial part' of the Jaycees' activities constituted protected expression"[193]; the organizations at the national and local levels "have taken public positions on a number of diverse issues"[194]; and Jaycees members "regularly engaged in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment."[195] On the other hand, the Court concluded that the Jaycees did not show that the antidiscrimination requirements imposed "any serious burdens on the male members' freedom of expressive association"[196]; the admission of women cannot be assumed to entail different views, agendas, or positions[197]; "expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"[198]; and the state has a compelling interest in preventing "invidious discrimination in the distribution of publicly available goods, services, and other advantages."[199] In sum, despite the Court's apparent recognition of the Jaycees' strong expressive interests the Court found virtually nothing on the Jaycees' side of the scale; therefore, it appears that any private club legitimately claiming a right of expressive association will meet the same fate.

What feels wrong about all of this is the exaggeration of the potency of

191. Buckley v. Valeo, 424 U.S. 1, 68 (1976).

192. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982). *See generally* Stone & Marshall, Brown v. Socialist Workers: *Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583.

193. *Jaycees*, 468 U.S. at 626 (quoting the court of appeals).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 627.

198. *Id.* at 628.

199. *Id.*

the Jaycees' speech interests. There is no doubt the Jaycees do engage in activities protected by the first amendment, and no doubt it would be difficult to make a sharp distinction between these activities and those of other clubs whose expressive purposes and activities might be much more central to their existence. Nevertheless, it seems unavoidable that the centrality of the club's expressive activities to its existence will influence the Court's evaluation of the strength of a club's constitutional claim of the right to exclude unwanted members. The *Jaycees* case may appear to say that the antidiscriminaiton interest prevails against the associational interest no matter how strong the expressive element; it may be better understood to say that the antidiscrimination interest prevails at least (or only) when the associational interest in expression is rather weak.

3. *An Alternative to Balancing or Absolute Rule: Subdividing the Club.*

The difficult choice between antidiscrimination protection and freedom of association might be moderated in some circumstances by permitting clubs to subdivide their functions. The most well established ground for denying an association the right to select its members is the elimination of the economic harm that results from excluding disfavored groups.[200] At the same time, the *Jaycees* Court recognized the right of an organization engaged in political speech activity to protect itself against intrusion by those with views different from existing members.[201] Thus, it is arguable that a club may be required to admit excluded groups to pursue commercial advantages, but that it is not necessarily required to open membership to engage in the club's expressive activities.

In *Abood*, where the concern was compelled membership rather than withheld membership, the Court only partially granted the requested relief.[202] It permitted employees who chose not to join or support a labor union to refrain from becoming full members and from contributing financially to the union's political treasury.[203] But the Court did not excuse these employees from contributing the equivalent of dues to the union's collective bargaining expenses because, in the Court's view, there were strong justifications for establishing a system of collective bargain-

200. *See supra* notes 164-65 and accompanying text.

201. *Jaycees*, 468 U.S. at 627.

202. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241-42 (1977).

203. *Id.* at 212.

ing with exclusive representation.[204] So, in the context of a private club that is engaged in expressive *and* commercially valuable activity, the Court might accommodate the associational interests of both the already included members and the applicants who desire access for the advantage of the economic marketplace by mandating inclusion for only the economic benefits, and not for participation in expressive activities. In a somewhat similar manner, an organization that wishes to engage in political lobbying may lose the favored tax treatment for that activity[205]; but the organization may still divide its activities between two separate, albeit affiliated, organizations so that it is not forced to sacrifice the advantages of charitable tax treatment in order to pursue political speech other than lobbying.[206] The private club required to admit members it would otherwise exclude may also support its argument for subdividing expressive and economic activities on the ground that neither individuals nor corporations may be forced to communicate the messages of the government[207] or another individual.[208]

Short of an actual subdivision of the club into two separate parts engaged in two separate kinds of activities, an attempt to sever the club's expressive activities from its economically oriented activities might undermine the advantages of admission even for purposes of gaining access to the club's business and professional opportunities. It would not do, for example, to have a luncheon speaker and to deny a member who was lunching with a client the right to participate in the question and answer period. Similarly, it would seem that a member entitled to the privileges of doing business at lunch would have to be afforded full participation in the organizational procedure for selecting lunchtime speakers and structuring such talks. On the other hand, if the private club truly does divide its expressive and commercial activities, the possible injury to the dignity of persons denied participation in the expressive activities should not preclude the separation. Private clubs having the strongest reasons for excluding a class of people to preserve the substance of the members' views will often have views that are hostile or offensive or insulting to the excluded group. But the offensiveness of the message of an organization,

204. *Id.* at 224.

205. *See, e.g.*, Regan v. Taxation with Representation, 461 U.S. 540 (1983).

206. *Id.* at 544; *id.* at 552-53 (Blackmun, J., concurring).

207. Wooley v. Maynard, 430 U.S. 705 (1977).

208. Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

such as the Ku Klux Klan to blacks, is not aggravated meaningfully by denying membership to blacks. Nor would the sense of injury worsen in the unlikely event that a group, such as the Ku Klux Klan, provided club facilities for its members to learn business skills or entertain customers but organized itself in a manner that withheld participation in the formulation of the club's political messages from its black members.

F. Minority Private Clubs.

Private clubs which operate on an exclusive basis in favor of some "minority" group are also subject to general antidiscrimination legislation, and they could make the same constitutional arguments and be subject to the same overriding state interests that might warrant constitutional protection or justify regulation of any other private club. In the context of excluding whites or males, however, the constitutional arguments would tend to be stronger and the arguments for regulation weaker. Limiting membership to members of a small minority is more selective and thus more likely to satisfy the criteria for intimate association. Similarly, groups formed to provide support and reinforcement for members who are generally excluded and disadvantaged in society are more likely to satisfy criteria concerning intimacy and seclusion. Even when such groups have business and professional purposes, they may qualify for the constitutional protection based on intimate association if the club operates in a manner calculated to provide a buffer against, rather than entry into, society's mainstream.

Based on parallel considerations, the state may not have a compelling interest for preventing discrimination by minority private clubs. The strongest state interest for regulating the associational choices of private clubs is assuring that excluded group members enjoy equal opportunity to tangible economic goods and services, including access to the commercial world of clients and contacts. It is safe to conclude that exclusive minority clubs, in general, will have a less ample supply of goods and services and a lower level of power and influence to offer. Similarly, though exclusion on the basis of group membership may always damage the dignity of excluded individuals, exclusion of majority members by minority groups is likely to hurt less and to carry none of the stigmatizing insult that accompanies exclusion of minorities with its implicit message of inferiority or unworthiness.[209]

209. *See* University of Cal. Regents v. Bakke, 438 U.S. 265, 374-75 (1977) (Brennan, J., concur-

There is little reason to suppose that a claim of minority clubs to a right of expressive association would be stronger or weaker than the parallel claim of majority clubs. Of course, minority groups might have an especially strong argument in a particular case that admission of majority group members would significantly impair their messages on particular issues. But the strength of the argument would depend on the actual set of messages the club is engaged in advocating. In this respect, the Nation of Islam would be no more compromised than the Ku Klux Klan.

VII. CONCLUSION

Had *Shelley v. Kraemer* loomed larger in proscribing private club discrimination, the courts would have had the difficult task of striking a balance between competing constitutional claims based on equal protection of the laws and freedom of association. In fact, the actual role of the courts differs only slightly whenever they must determine whether the state's interest is weighty enough to justify a restriction of constitutional associational rights through antidiscrimination laws. Under the actual development, there is a valuable role for legislative discretion to preserve a domain of associational freedom for private clubs. Outside this domain, the courts are still developing standards to ensure equal access to commercial opportunity while preserving enough of the bulwark of associational freedom to protect the free expression of individual members.

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ring and dissenting). *See generally* R. DWORKIN, *Reverse Discrimination* in TAKING RIGHTS SERIOUSLY 231 (1977).