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A Scout Is Friendly: Freedom of Association and the State Effort to End Private Discrimination

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NOTE

A SCOUT IS FRIENDLY: FREEDOM OF ASSOCIATION AND THE STATE EFFORT TO END PRIVATE DISCRIMINATION

The eradication of invidious discrimination is a great ideal of modern government, both federal and state.¹ To achieve the goal of equal treatment, states have enacted public accommodations acts (PAA's) requiring groups² that serve the public to serve the public equally.³ These acts naturally involve state intrusion into a private group's service and membership practices.

In recent years, the trend in state PAA's has been toward greater coverage of both the basis of discrimination and the entities reached.⁴ As a result, groups previously immune from integration laws are now included within their scope, particularly in the area of gender discrimination.⁵ In this era of aggressive private club integration, discriminatory groups are often faced with two choices: change discriminatory policies or defend them in court.

1. "[Eliminating discrimination] plainly serves compelling state interests of the highest order." *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984); see *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241, 245-46 (1964) (noting that the stated purpose of the legislation that President Kennedy proposed in 1963, which culminated in the passage of the Civil Rights Act of 1964, was to promote the general welfare by eliminating discrimination in public places based on race, color, religion or national origin); see also Marshall, *Discrimination and the Right of Association*, 81 NW. U.L. REV. 68, 68-70 (1986); Note, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 PAC. L.J. 1047, 1047, 1050-56 (1985) (discussing the scope of state and federal public accommodations laws, and describing the interest each level of government has in preventing discrimination).

2. For purposes of this Note, the words "group" and "club" are not terms of art and are used interchangeably.

3. See generally Note, *Discrimination in Access To Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978).

4. See *infra* notes 90-104 and accompanying text; see also Note, *supra* note 3, at 245-72; *Private Clubs: Round Two at the High Court*, Nat'l L. J., Mar. 30, 1987, at 1.

5. See *infra* note 98 and accompanying text.

Litigation, however, is becoming an increasingly unattractive option. Public opinion polls show little support for private clubs that discriminate.⁶ Influential trade organizations such as the American Bar Association officially denounce the practice of private club discrimination;⁷ and past or present membership in such clubs has become detrimental for federal judicial candidates before the Senate Judiciary Committee.⁸ Litigation can be cost prohibitive. Addi-

6. A Gallup Poll in August 1988 reported that 60% of Americans believe private clubs should not be permitted to practice gender discrimination. The percentage of Americans opposed to the right of clubs to discriminate on the basis of race or religion was 80%. *L.A. Times*, Aug. 21, 1988, § 2, at 2, col. 5.

7. At its August 1988 annual convention in Toronto, the ABA passed a resolution urging lawyers and law firms to cease membership in private clubs that practice gender and racial discrimination. *ABA Asks End to Use of Biased Clubs*, *Wash. Post*, Aug. 10, 1988, at A3, col. 3. Interestingly, Elizabeth Anderson Hishon, plaintiff in the landmark gender discrimination suit against the Atlanta law firm of King & Spaulding, was a featured speaker at the convention. Griffin B. Bell, partner in King & Spaulding and target of criticism for his membership in discriminatory private clubs when President Carter nominated him for Attorney General in 1976, served on the ethics panel at the convention. *ABA Sets Its Sights on Women; Bias Recognized*, *Nat'l L.J.*, Aug. 22, 1988, at 3, col. 1.

8. The Senate Judiciary Committee has increased its scrutiny of the club membership of nominees. Some nominees to the federal bench choose not to resign from all-male clubs unless the Committee requests it, preferring to enact change in those clubs from within. *Club Memberships: An Unresolved Issue for Judicial Nominees*, *Wash. Post*, Aug. 8, 1988, at A11, col. 1 [hereinafter *Club Memberships*]. Other candidates experience "nomination-day conversions" and resign from their all-male clubs. *All-White Clubs and Judicial Nominees: A Question of Motive*, *Wash. Post*, Aug. 9, 1988, at A19, col. 6. One such candidate for the United States District Court in Manhattan told the Committee: "It occurred to me that . . . female litigants and female attorneys . . . should not be under the misperception that the judge might discriminate." *Club Memberships*, *supra*, at A11, col. 6. Other converts include Supreme Court Justices Harry Blackmun, Antonin Scalia, and Anthony Kennedy. *High Court Gives New Life to Exclusive Private Clubs*, *United Press Int'l*, *Wash. News*, June 26, 1988.

Sudden enlightenment is easy to understand. Senator Patrick J. Leahy (D-Vt.), who handles judicial nominations for the Committee, has said that "[i]f it's an all-male club that is certainly a business club . . . I cannot see somebody being confirmed for a judgeship if they insist they're going to stay in such a club because I think it sends absolutely the wrong signal." *Club Memberships*, *supra*, at A11, col. 3-4. Currently, the ABA is considering revisions to the *Code of Judicial Conduct*, a guide for the Senate Judiciary Committee, to clarify policy on private club membership for judges. *Id.* at A11, col. 3.

Membership in clubs that discriminate on the basis of race or religion raises different issues. Membership in such clubs constitutes an almost irrebuttable strike against a candidate, unredeemable by merely resigning on nomination. Perhaps for this reason, clubs that discriminate against minorities or Jews are more difficult to identify. Unlike many all-male clubs that proclaim their discriminatory policy in the bylaws, all-white clubs practice discrimination without any "official" policy. *All-White Clubs and Judicial Nominees: A Ques-*

tionally, the Supreme Court has heard and rejected the primary constitutional defense to forced private club integration—freedom of association—three times since 1984.⁹

Yet some private groups in America are constitutionally privileged to practice membership selectivity based on gender or sexual preference. Recently, many of these groups have been forced to relinquish that right unfairly. The Boy Scouts of America (BSA) is one group that recently changed its membership policy in light of local statutory challenges.

This Note examines the legal challenge to the BSA's exclusionary practices. The Note demonstrates that, despite the constitutional protections the Supreme Court has devised, a combination of vague state antidiscrimination laws and litigious activists have denied certain groups their legitimate right to exclude. First, the Note explores the present doctrine of freedom of association, setting forth three recent Supreme Court decisions on the issue. Second, the Note examines briefly freedom of association's chief rival, the state PAA's. Third, the Note demonstrates that some PAA's force "legitimate" groups like the BSA to open their doors and thereby lose their constitutionally protected character. Finally, the Note suggests a solution to the problem: a more focused definition of public accommodation.

FREEDOM OF ASSOCIATION

Doctrinal History

Scholars agree that freedom of association is fraught with theoretical ambiguity, not only in its constitutional source but in its scope and utility.¹⁰ The Supreme Court has repeatedly affirmed

tion of Motive, *supra*, at A19, col. 2; *Club Membership Kills Virginia Nomination to U.S. Bench*, Wash. Post, July 29, 1988, at D1, col. 2.

9. *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). For a discussion of these cases, see *infra* notes 36-84 and accompanying text.

10. For critical studies of the ambiguities of freedom of association, see Devins, *The Trouble with Jaycees*, 34 CATH. U.L. REV. 901, 905-08 (1985); Marshall, *supra* note 1, at 75-77.

As commentators have pointed out, the word "association" does not appear in the Constitution. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L.

the right "to engage in association for the advancement of beliefs

REV. 1878, 1887 (1984); Note, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 1970 DUKE L.J. 1181, 1191 [hereinafter Note, *Private Social Clubs*]. Traditionally, the Supreme Court has used freedom of association as a corollary liberty to safeguard an individual's rights to speech and petition when he exercises them in a group. Comment, *Roberts v. United States Jaycees and the Affirmation of State Authority to Prohibit Sex Discrimination in Public Accommodations: Distinguishing "Private" Activity, the Exercise of Expressive Association, and the Practice of Discrimination*, 38 RUTGERS L. REV. 341, 352 (1986); see Linder, *supra*, at 1887; Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1, 2-11 (1977); see also NAACP v. Alabama *ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("[F]reedom to engage in association . . . is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); Note, *Private Social Clubs, supra*, at 1194 (associational freedom a necessary concomitant to expression of first amendment freedoms). The first amendment, then, has been the primary source of freedom of association. Comment, *supra*, at 352; see generally D. FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* 1-5 (1963) (discussing the historical antecedents to the right of association).

Other commentators have described freedom of association as a product of privacy rights, which themselves fall within the penumbra of the due process clause of the fifth and fourteenth amendments. See Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 624-29, 659-66 (1980); Linder, *supra*, at 1884-86; Sengstock & Sengstock, *Discrimination: A Constitutional Dilemma*, 9 WM. & MARY L. REV. 59, 63-65 (1967); Note, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460, 466 (1970) [hereinafter Note, *Association, Privacy and the Private Club*]. Associational freedoms are also arguably part of the "unwritten Constitution," the presuppositions regarding higher law that the constitutional framers simply assumed and later secured in the ninth amendment. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom*, 10 HARV. J.L. & PUB. POL'Y 101, 102-104, 110-12 (1987). But see Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91, 98-99 (1987) ("These doctrines assume that the political and moral philosophy underlying the Constitution is the Constitution. The text, from this perspective, is but an imperfect expression of the governing political and moral premises." *Id.* at 95). See generally Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928) (examining ancient "natural law" conceptions of the legitimacy of laws, their interrelationship with social mores, and the impact of these concepts on the establishment of the Constitution); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (asserting the credibility of constitutional interpretation that finds protected rights that do not appear in the express language of the Constitution). Indeed, purported sources of freedom of association include communitarian ideals, see Linder, *supra*, at 1881-82; the political-moral writings of Locke, see Barnett, *supra*, at 103; and de Tocqueville, see Devins, *supra*, at 905; Linder, *supra*, at 1901-02; Raggi, *supra*, at 11-12; Sengstock & Sengstock, *supra*, at 61-62; Note, *Private Social Clubs, supra*, at 1190-91. NAACP v. Alabama *ex rel. Patterson*, 357 U.S. 449 (1958), is generally regarded as the first case in which the Supreme Court identified freedom of association as a constitutional right. Raggi, *supra*, at 2; Note, *Private Social Clubs, supra*, at 1192. In *Patterson*, however, the Supreme Court described freedom of association not as an independent right, but as a right necessary to secure first amendment advocacy. 357 U.S. at 460-61.

and ideas"¹¹ thereby reducing association to a first amendment adjunct. Yet, some cases have hinted that freedom of association may be an independent right.¹² In *Bell v. Maryland*,¹³ for instance, Justice Goldberg characterized the right to choose one's associates as a "protected liberty," framed in the language of a privacy right:

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.¹⁴

In *Evans v. Newton*,¹⁵ Justice Douglas, equating association to a form of protected expression, referred to:

the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. . . . A private golf club . . . restricted to either Negro or white membership is one expression of freedom of association.¹⁶

Many commentators have also examined whether freedom of association is an independent right. Although their arguments are based more on philosophical yearnings and dicta than firm precedent,¹⁷ several scholars have argued that such a right exists.

11. *NAACP v. Button*, 371 U.S. 415, 430 (1963) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

12. See Note, *Private Social Clubs*, *supra* note 10, at 1190-95.

13. 378 U.S. 226 (1964).

14. *Id.* at 313 (Goldberg, J., concurring). For references to the Goldberg quotation, see Linder, *supra* note 10, at 1886 n.49; Note, *Association, Privacy and the Private Club*, *supra* note 10, at 465-66; Note, Roberts v. United States Jaycees: *Discriminatory Membership Policy of a National Organization Held Not Protected By First Amendment Freedom of Association*, 34 CATH. U. L. REV. 1055, 1055 n.2 (1985).

15. 382 U.S. 296 (1966).

16. *Id.* at 298-99. For references to the *Evans* quotation, see Sengstock & Sengstock, *supra* note 10, at 65; Note, *Association, Privacy and the Private Club*, *supra* note 10, at 465.

17. Compare Note, Roberts v. United States Jaycees: *What Price Freedom of Association?*, 1985 DET. C.L. REV. 149, 150-53 ("[I]t is apparent that the Court has not recognized freedom of association, either intimate or expressive, as an independent right." *Id.* at 152) with Note, *supra* note 1, at 1067 ("Freedom of association . . . is not necessarily relegated to the position of a secondary right. . . . [T]he right to associate has been regarded as a fundamental liberty, frequently described as one of the preferred rights of the first amendment.")

The counterpart of the right to associate—the right to exclude¹⁸—also has historical roots.¹⁹ In *Moose Lodge No. 107 v. Ivis*,²⁰ Justice Douglas claimed that:

[t]he associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.²¹

However, Douglas' strong language never reflected reality.²² The Court qualified the right to exclude in several respects.

First, the right to exclude was merely a rhetorical handmaiden to the right to associate. Exclusion for its own sake was unprotected.²³ The exclusion had to be tied to a protected first amend-

(footnotes omitted)). For further comments on the constitutional status of freedom of association, see Devins, *supra* note 10, at 905-08; Easterbrook, *supra* note 10, at 91-92; Karst, *supra* note 10, at 652-66; Marshall, *supra* note 1, at 77-91; Raggi, *supra* note 10, at 11-14; Sengstock & Sengstock, *supra* note 10, at 63-65, 115-24; Note, *Association, Privacy and the Private Club*, *supra* note 10, at 463-66.

18. Note, *supra* note 1, at 1067-75 ("Concurrent with the right to associate exists a right not to associate, which includes the first amendment interest of an association in not being forced to accept unwanted members." *Id.* at 1067.). See also Karst, *supra* note 10, at 637-38 (discussion of the right to exclude others from intimate relationships).

19. But see Note, *Association, Privacy and the Private Club*, *supra* note 10, at 464 ("At no time has the Court as a whole addressed itself to the question of exclusive association.").

20. 407 U.S. 163, 179 (1972).

21. *Id.* at 179-80 (Douglas, J., dissenting). See Note, *supra* note 14, at 1055 n.2; Comment, *supra* note 10, at 349, for references to the *Moose Lodge* quotation.

22. See Comment, *supra* note 10, at 354 ("Case law thus far seems to indicate that the right of association simply does not include any right to discriminatorily exclude."); see also Note, *Private Social Clubs*, *supra* note 10, at 1206-09 (discussing the right to exclude). But see Marshall, *supra* note 1, at 68 ("[A]cts of discrimination may themselves be entitled to constitutional protection.").

23. *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976); Marshall, *supra* note 1, at 73, 79-80. In *Runyon*, the Court drew a distinction between the advocacy of exclusionary beliefs and the practice of exclusion, though it assumed that the practice of exclusion was not a part of the advocacy. 427 U.S. at 175-76. For commentary on this distinction, see Marshall, *supra* note 1, at 103-05; McGovern, Board of Directors of Rotary International v. Rotary Club of Duarte: *Prying Open the Doors of the All-Male Club*, 11 HARV. WOMEN'S L.J. 117, 133 n.87 (1988); Comment, *supra* note 10, at 355-56. The Court, however, has decided to hear arguments on whether *Runyon* should be reconsidered. *Patterson v. McLean Credit Union*, 108 S. Ct. 1419 (1988) (per curiam).

ment interest.²⁴ As the Court in *Norwood v. Harrison* noted, "Invidious private discrimination . . . has never been accorded affirmative constitutional protections."²⁵

Second, whether recognized explicitly, the strength of the right to exclude was only as strong as the strength of the first amendment interest from which it derived. Groups granted the most protection from government intrusion were politically oriented, such as the NAACP. Conversely, a nonpolitical group, such as a law partnership,²⁶ possessed a weak claim to first amendment protection, and a correspondingly weak right to exclude.²⁷

Third, the Supreme Court always balanced countervailing interests against freedom of association.²⁸ A state or federal interest could defeat a group's freedom of association claim.²⁹ Unlike freedom of association, which affirmatively protected gatherings from government intrusion or disruption, the right to exclude did not emerge as a true constitutional right. Exclusion was only an occasionally necessary counterpart to freedom of association.³⁰

24. See 427 U.S. at 175-77. Perhaps alternatively the exclusion must be tied to a privacy right. For a discussion of the protection of exclusionary intimate ties, as opposed to the first amendment protection, see Sengstock & Sengstock, *supra* note 10, at 64-65.

25. 413 U.S. 455, 470 (1973). See Comment, *supra* note 10, at 353-56. But see *supra* notes 18-19 and accompanying text.

26. *Hishon v. King & Spaulding*, 467 U.S. 69 (1984).

27. For support of these contentions, see, e.g., Easterbrook, *supra* note 10, at 94-99. Easterbrook criticizes what he calls the "malleability of claims based on 'association'" and the ultimate result: "Association has constitutional protection whenever the legislature chooses to leave it alone—which is say, it has none whenever the Court, speaking for 'society,' approves of the legislature's objectives." *Id.* at 696-97. Another author attributes the variable protection afforded associational freedom not to the whim of the legislature, but to the "hierarchy" of first amendment rights, with political speech at the highest rung. If the purpose of the association is political, it is granted a similarly high constitutional protection. McGovern, *supra* note 23, at 136.

28. For commentary, see, e.g., Marshall, *supra* note 1, at 77; Rumsey, *Legal Aspects of the Relationship Between Fraternities and Public Institutions of Higher Education: Freedom of Association and Ability to Prohibit Campus Presence or Student Membership*, 11 J.C. & U.L. 465, 471-72 (1985); Note, *Sex Discrimination in Private Clubs*, 29 HASTINGS L.J. 417, 422-23 (1977).

29. Note, *supra* note 28, at 422-23.

30. See Marshall, *supra* note 1, at 75-76; McGovern, *supra* note 23, at 133.

Recent Developments

The competing values of associational freedom and equal access created a dilemma for the Supreme Court from the beginning.³¹ William Marshall wrote that the conflict "involves the two virtual first principles of contemporary constitutional law: freedom and equality. The right to choose one's associates (freedom) is pitted against the right to equal treatment (equality)."³² Choosing one might result in the unfair denial of goods and services to an arbitrarily excluded group. Choosing the other could trample the legitimate first amendment rights of the excluding groups. Professor Laurence Tribe noted that the clash is even more complex.³³ The rights of the individual group member are implicated in freedom of association because the individual has a first amendment interest in choosing with whom to engage in protected activity. Likewise, an abridgement of an individual's freedom to associate exists whenever that person is denied access to an organization.³⁴

In the effort to reconcile these values, the Supreme Court has tread lightly. In the three cases that dealt squarely with the antidiscrimination/freedom of association issue, the Court employed a fact-specific analysis.³⁵

Roberts v. United States Jaycees

In *Roberts v. United States Jaycees*,³⁶ the all-male Jaycees brought suit against the State of Minnesota, claiming that the state public accommodation act violated first amendment and associational rights. The Minnesota PAA forbade sex discrimination in a place of public accommodation,³⁷ forcing the local Jaycees

31. See Linder, *supra* note 10, at 1880-84 (discussing how the Court addressed the tension between associational freedom and equality in *Roberts v. United States Jaycees*). However, the Court sometimes employs intellectual artifice to obscure the degree of tension. Marshall, *supra* note 1, at 102-03.

32. Marshall, *supra* note 1, at 69.

33. Laurence Tribe's treatment of the "dual character" of freedom of association may explain the Court's reticence in formulating a *per se* rule. L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-17 (2d ed. 1988). See also Marshall, *supra* note 1, at 69-71; Note, *Private Social Clubs*, *supra* note 10, at 1208.

34. L. TRIBE, *supra* note 33, §§ 15-17.

35. See *infra* note 78 and accompanying text.

36. 468 U.S. 609, 615 (1984).

37. MINN. STAT. ANN. § 363.03, subd. 3 (West Supp. 1988-1989).

chapter to admit women as members.³⁸ The Supreme Court held that by forcing the Jaycees to admit women members, the PAA did not violate freedom of association.³⁹

The *Jaycees* case was a landmark opinion.⁴⁰ For the first time, the Court devised a balancing test⁴¹ to determine whether antidiscrimination legislation infringes on an organization's associational freedoms. The *Jaycees* test consisted of two distinct prongs: (1) freedom of intimate association and (2) freedom of expressive association.⁴² Either prong may be used separately to prevail in a claim of freedom of association.⁴³ The Jaycees failed both prongs of the test.

Freedom of intimate association, the first prong of the test, protects the right to privacy of certain groups. Without reference to any one amendment, the Court explained that "because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."⁴⁴ A long list of cases protecting the right to privacy followed:⁴⁵ cases that protected freedoms "central to any concept of liberty."⁴⁶ Gatherings protected by the freedom of intimate association related to the family: marriage,⁴⁷ childbirth,⁴⁸ child rearing and education,⁴⁹ and cohabitation with relatives.⁵⁰

38. 468 U.S. at 614-17.

39. *Id.* at 621, 628-29. Justice Brennan authored the opinion, joined by Justices White, Marshall, Powell, and Stevens. Justice O'Connor joined in parts I and III of the opinion, and filed a separate concurrence. Justice Rehnquist concurred in the judgment. Chief Justice Burger and Justice Blackmun took no part in the decision.

40. Linder, *supra* note 10, at 1878.

41. The balancing test apparently applies to the expressive association prong. *See infra* text accompanying notes 63-70.

42. 468 U.S. at 617-18.

43. *Id.* at 618 ("We . . . find it useful to consider separately the effect of applying the Minnesota statute to the Jaycees on what could be called its members' freedom of intimate association and their freedom of expressive association.").

44. *Id.*

45. The list included *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Jaycees*, 468 U.S. at 618-19.

46. 468 U.S. at 619.

47. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

48. *Carey v. Population Servs., Int'l*, 431 U.S. 678 (1977).

49. *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977).

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

The Court noted that the right of intimate association “presupposes deep attachments.”⁵¹ Determining the extent to which intimate association protects an organization “unavoidably 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.”⁵² In determining whether an association should be protected, the Court considered “size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.”⁵³

The Jaycees failed to qualify for protection under freedom of intimate association. The two local chapters were neither small nor selective. The memberships hovered around 400 members each, and neither chapter had ever denied a male membership in the club. Moreover, women and other nonmembers were already included in many Jaycees activities.⁵⁴

The second prong of the test focuses on the freedom of expressive association. The Supreme Court recognized this second area of protection for associations that gather in the pursuit of “political, social, economic, educational, religious, and cultural ends.”⁵⁵ The Court noted the danger to expressive freedom that antidiscrimination laws can impose: “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. . . . Freedom of association therefore plainly presupposes a freedom not to associate.”⁵⁶ To protect this interest, the Court devised a nexus requirement: the right of expressive association would be abridged if the group’s message or purpose was diluted or altered by the forced inclusion of another group.⁵⁷ For example, a state could not force a white supremacist organization to admit black members.⁵⁸ Similarly, a state could not force an all-male as-

51. 468 U.S. at 619-20.

52. *Id.*

53. *Id.* For criticism of these standards, see Marshall, *supra* note 1, at 81-83.

54. 468 U.S. at 621.

55. *Id.* at 622.

56. *Id.* at 623.

57. *Id.* at 626-28.

58. For a discussion of this possibility, see Devins, *supra* note 10, at 911-13; Marshall, *supra* note 1, at 104.

sociation devoted to the rejection of the equal rights amendment to admit women.⁵⁹

The Supreme Court held that the associational purpose of the Jaycees was predominantly humanitarian and professional in nature.⁶⁰ Although arguably protected by the first amendment, the purpose was only minimally tied to gender exclusivity.⁶¹ The forced inclusion of women by the Minnesota PAA, therefore, would have no significant deleterious effect on the Jaycees' constitutionally protected purpose.⁶²

In assessing the infringement on expressive association that the forced inclusion of women might cause, the Supreme Court balanced that infringement against the state's compelling interest in preventing discrimination.⁶³ According to the Court, freedom of expressive association is not absolute.⁶⁴ The Court explained that "[i]nfringements [on expressive association] . . . may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."⁶⁵ The Court said that state PAA's "plainly serv[e] compelling state interests of the highest order," eradicating invidious discrimination and assuring women equal access to goods and services.⁶⁶

Conversely the Jaycees failed to prove that the inclusion of women "impose[d] any serious burdens" on the Jaycees' constitutionally protected freedom of expressive association.⁶⁷ Even if an "incidental abridgement" did occur, Minnesota's interest in providing women with business contacts and leadership skills,⁶⁸ which

59. For a discussion of this possibility, see Devins, *supra* note 10, at 913-14; Linder, *supra* note 10, at 1892; McGovern, *supra* note 23, at 138 nn.103-04.

60. 468 U.S. at 626-28.

61. *Id.*

62. *Id.* Of course, the implication is that *some* deleterious effect is allowed.

63. *Id.* at 628.

64. *Id.* at 623.

65. *Id.*

66. *Id.* at 624. This statement is the first time the Court called the elimination of invidious gender discrimination a compelling state interest. Note, *Roberts v. United States Jaycees*, *supra* note 14, at 1080.

67. 468 U.S. at 626.

68. *Id.* The Supreme Court agreed with the Minnesota court that business contacts and leadership skills are legitimate goods and services. *Id.*

the Jaycees offered, outweighed that harm.⁶⁹ Moreover, enforcement of the PAA was the least restrictive means available to Minnesota.⁷⁰

Board of Directors of Rotary International v. Rotary Club of Duarte

The second Supreme Court case to address the conflict between antidiscrimination legislation and freedom of association was *Board of Directors of Rotary International v. Rotary Club of Duarte*.⁷¹ *Rotary* is notable for three reasons.⁷² First, the Court asserted that *Jaycees* "provides the framework for analyzing appellants' constitutional claims."⁷³ Second, the Court specifically denied having restricted the freedom of intimate association to family relationships.⁷⁴

Finally, in a footnote,⁷⁵ the Court clarified language in *Jaycees* that contrasted the Kiwanis with the Jaycees.⁷⁶ Scholars and litigants had interpreted the *Jaycees* language as implying that the Kiwanis might deserve constitutional protection under intimate as-

69. *Id.* at 628.

70. *Id.* at 628-29.

71. 481 U.S. 537 (1987). Justice Powell wrote the opinion, joined by Chief Justice Rehnquist and Justices Brennan, White, Marshall, and Stevens. Justice Scalia concurred in the judgment. Justices Blackmun and O'Connor took no part in the decision.

Rotary involved a local Rotary Club that had sued Rotary International in California state court after the local club lost its charter for admitting women members. Rotary International won on the trial court level based on statutory construction of California's PAA, the Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1982). The California Court of Appeals reversed, and Rotary International appealed to the United States Supreme Court. 481 U.S. at 542-44. The Supreme Court affirmed the judgment of the court of appeals, finding that the application of the California PAA did not violate Rotary International's right to freedom of private or expressive association. *Id.* at 544-49.

72. For a contrasting view on the impact of *Rotary* on freedom of association, see Note, *Board of Directors of Rotary International v. Rotary Club of Duarte: Redefining Associational Rights*, 1988 B.Y.U. L. REV. 141.

73. 481 U.S. at 544.

74. *Id.* at 545. See McGovern, *supra* note 23, at 134; Note, *Rotary International v. Duarte: Limiting Associational Rights to Protect Equal Access to California Business Establishments*, 19 PAC. L.J. 399, 421-22 (1988). But see Note, *supra* note 72, at 152-53.

75. 481 U.S. at 547 n.6.

76. In disposing of the Jaycees' argument that the Minnesota Human Rights Act was unconstitutionally overbroad, the Court noted that the Minnesota Supreme Court, in construing the Act, refused to analogize the Jaycees to other private organizations like the Kiwanis. *Roberts v. United States Jaycees*, 468 U.S. 609, 630-31 (1984).

sociation.⁷⁷ The Court, however, reaffirmed the fact-specific nature of the freedom of association analysis and declined to speculate on the extent to which the first amendment protects the associational rights of organizations other than the Rotary Clubs. As Justice Powell noted, "Whether the 'zone of privacy' established by the First Amendment extends to a particular club or entity requires a careful inquiry into the objective characteristics of the particular relationships at issue."⁷⁸

New York State Club Association v. City of New York

The Court decided *New York State Club Association v. City of New York*⁷⁹ just one year after *Rotary*. Commentators anticipated that the case would delineate more clearly the boundaries of the constitutional rights afforded to smaller private clubs.⁸⁰ The case involved a constitutional challenge to New York City's PAA.⁸¹ The Court examined the law on its face, with freedom of association playing a small role in the inquiry. The Court rejected the challenge quickly, noting that the record before the Court "contain[ed] no specific evidence on the characteristics of any club covered by

77. See *Private Clubs: Round Two at the High Court*, *supra* note 4, at 30.

78. *Id.* See Marshall, *supra* note 1, at 69, for comment on the fact-specific nature of the freedom of association inquiry.

79. 108 S. Ct. 2225 (1988). All nine Justices joined parts I, II, and III of the opinion. Justice Scalia did not join part IV, which analyzed the equal protection challenge to the exemption to the New York City PAA. He filed a separate opinion concurring in part and concurring in the judgment. Justice O'Connor also filed a separate concurring opinion, in which Justice Kennedy joined. *Id.* at 2237.

In 1984 New York City amended its PAA for the purpose of prohibiting discrimination in private clubs that exhibit certain indicia of public accommodations. The amendment to Local Law 63 extended the PAA to clubs with more than 400 members that provide regular meal service and regularly allow nonmembers to pay for use of the facilities. *Id.* at 2228 (citing NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986)).

80. One commentator predicted:

This case gives the Court the opportunity to clarify its two previous rulings on the delicate balance between state efforts to eliminate discrimination against citizens and the individual citizen's protected freedom to associate and exclude. The previous cases have avoided many of the difficult issues because of the extreme size of the organizations involved. The crucial issue here is whether small, private clubs of exclusive membership require a different analysis.

James, *Do Private Clubs Have a Right to Exclude?*, 9 PREVIEW OF UNITED STATES SUPREME COURT CASES 253, Feb. 26, 1988.

81. 108 S. Ct. at 2230.

the Law.”⁸² The Court assumed that not all of the clubs covered by the PAA would be constitutionally protected.⁸³ Additionally, the Court refused to find that the statute violated the constitutional rights of “any club, let alone a substantial number of them.”⁸⁴

The framing of the cause of action as a facial challenge enabled the Supreme Court to avoid applying freedom of association to private groups more intimate or expressive than the Jaycees or Rotary Clubs. Despite two later decisions, the *Jaycees* test remains the only useful constitutional reference point in the conflict between freedom of association and state equal access laws.

MODERN ANTIDISCRIMINATION LEGISLATION

Historically, state rather than federal public accommodation acts have been the most effective tool to fight discrimination.⁸⁵ States initially enacted such acts to fill the gap created when the Court in 1882 struck down the first federal PAA in the Civil Rights cases.⁸⁶

82. *Id.* at 2234.

83. *Id.*

84. *Id.* at 2235.

85. Note, *supra* note 3, at 287; Note, *supra* note 1, at 1050.

The modern federal PAA applicable to private entities is Title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000(a) (1982 & Supp. IV 1986). Congress enacted this law pursuant to the fourteenth amendment and article I, § 8, which granted Congress plenary power to regulate interstate commerce. Note, *supra* note 3, at 219-20. Title II prohibits discrimination or segregation on the basis of race, color, religion or national origin, 42 U.S.C. § 2000(a)(a); discrimination based on gender, however, is not prohibited. *See id.* The purpose of the statute was to end invidious discrimination, particularly that based on race. Note, *supra* note 3, at 224. The reach of Title II to places of public accommodation has been extremely broad. *See, e.g., Brown v. Loudoun Golf and Country Club, Inc.*, 573 F. Supp. 399 (E.D. Va. 1983) (golf club); *International Soc’y for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Auth.*, 532 F. Supp. 1088 (N.J. 1981), *aff’d*, 691 F.2d 155 (3d Cir. 1982) (sports stadium). Essentially, any organization that can possibly have an effect on interstate commerce is within the reach of the statute. Note, *supra* note 3, at 221-23. An exemption to Title II exists, however: “private club or other establishment not in fact open to the public.” 42 U.S.C. § 2000(a)(e). To prevent use of the “private club” designation as a shield against enforcement of the antidiscrimination mandate, courts have construed the private club exemption narrowly. Note, *supra* note 3, at 223.

For an informative, if pointed, summary of private club exemption cases, 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, 377-84 (1983); *see also* Note, *Private Social Clubs*, *supra* note 10, at 1181-82; Note, *supra* note 28, at 436-37; Comment, *supra* note 10, at 351.

86. Note, *supra* note 3, at 238-40.

Even with today's expansive interpretation of the commerce clause, Congress has been loath to extend the federal PAA beyond racial discrimination.⁸⁷ Moreover, the federal law generally is limited in application to traditional places of public accommodation, such as restaurants and hotels.⁸⁸ Commentators have speculated that federalism and a reluctance to intrude into traditional areas of state competence underlies this hesitancy by Congress to expand the scope and reach of the federal PAA.⁸⁹

State PAA's are often broader than the federal PAA in the types of discrimination prohibited.⁹⁰ In addition to prohibiting discrimination based on race, creed, color, religion, and national origin, state PAA's often include prohibitions against discrimination on the basis of sex,⁹¹ handicap,⁹² marital status,⁹³ age,⁹⁴ sexual orientation,⁹⁵ personal appearance,⁹⁶ and class.⁹⁷

Any recent broadening of the types of discrimination prohibited in the PAA's has not spurred significantly the integration of previously exclusionary groups; most of the discrimination at issue involves gender. In recent years, courts have achieved the integration of private clubs by broadening the meaning of "place of public ac-

87. Note, *supra* note 1, at 1052; *see also* Burns, *supra* note 85, at 375-76.

88. Note, *supra* note 1, at 1052; *see also* Burns, *supra* note 85, at 375.

89. Note, *supra* note 1, at 1052.

90. Note, *supra* note 3, at 260-61; *see also* Note, *supra* note 1, at 1052-53.

91. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-64 (West 1986); IDAHO CODE § 18-7301 (1987); R.I. GEN. LAWS § 11-24-2 (Supp. 1981); TENN. CODE ANN. § 4-21-501 (1985).

92. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-64 (West 1986); D.C. CODE ANN. § 1-2501 (1987); R.I. GEN. LAWS § 11-24-2 (Supp. 1981); S.D. CODIFIED LAWS ANN. § 20-13-23 (1987).

93. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-64 (West 1986); D.C. CODE ANN. § 1-2501 (1987); N.Y. EXEC. LAW § 296(2)(a) (McKinney 1982); VA. CODE ANN. § 2.1-715 (1987).

94. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-64 (West 1986); D.C. CODE ANN. § 1-2501 (1987); R.I. GEN. LAWS § 11-24-2 (Supp. 1981); TENN. CODE ANN. § 4-21-501 (1985).

95. *See, e.g.*, CAL. CIV. CODE § 51 note on sexual preference (West Supp. 1989); D.C. CODE ANN. § 1-2501 (1987); N.Y. EXEC. LAW § 296 note on sexual preference (McKinney Supp. 1989).

96. The District of Columbia prohibits discrimination based on personal appearance. D.C. CODE ANN. § 1-2501 (1987).

97. Massachusetts includes this category. MASS. GEN. LAWS ANN. ch. 272, §§ 92A, 98 (West Supp. 1988).

commodation." Many clubs that were outside the definition of PAA are now characterized as a place of public accommodation.⁹⁸

The definition of what constitutes a place of public accommodation is unsettled.⁹⁹ Limits the United States Supreme Court imposed on that definition have been based on statutory construction, not constitutional interpretation.¹⁰⁰ Consequently, states may adopt a broader definition of places of public accommodation than that of Title II.¹⁰¹ Each state may, for the most part, adopt its own definition of place of public accommodation.¹⁰² The Constitution does not mandate a private club exemption, and fewer than half the states exempt private clubs from their PAA.¹⁰³ An organization may be "public" for the purposes of the PAA of one state and "private" for the purposes of the PAA in another state.¹⁰⁴

The statutory construction placed on a state PAA is subject to several variables. State courts rely heavily on the legislative intent behind the enactment of the PAA to determine its application.¹⁰⁵ State judges, however, can be sure of neither the legislative motive behind the definition of the phrase "place of public accommodation"¹⁰⁶ nor the ultimate goals of the antidiscrimination mea-

98. See Linder, *supra* note 10, at 1881; McGovern, *supra* note 23, at 123; Note, *Private Social Clubs*, *supra* note 10, at 1181-82; Note, *supra* note 3, at 240-43; Note, *supra* note 1, at 1047-48.

99. State decisions often turn on this issue. In *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities*, the Commission ruled that for purposes of the Connecticut PAA, the BSA was a "place of public accommodation." 204 Conn. 287, 295, 528 A.2d 352, 357 (1987). The Connecticut Superior Court overturned this statutory construction on appeal. *Id.* at 291-92, 528 A.2d at 355. Finally, the Connecticut Supreme Court upheld the trial court decision, but applied a different construction to the PAA. *Id.* at 298, 528 A.2d at 358. See also Note, *supra* note 3, at 240.

100. Note, *supra* note 3, at 240. See also Note, *supra* note 1, at 1053.

101. McGovern, *supra* note 23, at 122-23; Note, *supra* note 14, at 1070 n.104; Note, *supra* note 3, at 240; Note, *supra* note 1, at 1052-53.

102. Note, *supra* note 3, at 240-42; Note, *supra* note 1, at 1052-56.

103. Note, *supra* note 3, at 250-51. But cf. Note, *Private Social Clubs*, *supra* note 10, at 1181-82 (as of 1970 all states with PAA's had explicitly or tacitly exempted private clubs).

104. Compare *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976) (BSA held "private" under Oregon's PAA) with *Curran v. Mount Diablo Council of Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 468 U.S. 1205 (1984) (BSA held "public" under California's PAA). For a further discussion of inconsistencies among state PAA's, see Note, *supra* note 3, at 250-52.

105. Note, *Public Accommodation Statutes: Is Ladies' Night Out?*, 37 MERCER L. REV. 1605, 1616-19 (1986).

106. See *supra* note 99.

sure.¹⁰⁷ For example, some PAA's begin with a legislative statement of purpose, making the judiciary's job relatively simple; other PAA's are silent as to intended scope and purpose, relying on case law to fill in the blanks.¹⁰⁸

A second variable in the statutory interpretation of PAA's is the "compound structure" of some state statutes.¹⁰⁹ One commentator has argued that if a legislature drafts a PAA as all-inclusive, covering employment and housing discrimination along with public accommodation discrimination, the state judiciary will place a "sliding scale of importance" on possible violations regardless of the legislative intent.¹¹⁰ As a consequence, judges in states with compound discrimination statutes will be less likely to find PAA violations than will judges in states that have separate public accommodation, housing, and employment laws.¹¹¹

The final variable in construction of state PAA's is the presence or absence of express language defining various terms.¹¹² Like an express statement of purpose, express definitions of terms relieve a judge of second-guessing statutory meaning and provide uniformity of decision making within a state.¹¹³ Even with express definitions, however, state judges may ignore the definitional language and use their own methodology of construction.¹¹⁴

The precision with which a legislature defines "place of public accommodation" determines the scope of an antidiscrimination statute.¹¹⁵ The most precise definition is an exact listing of places where discrimination is prohibited.¹¹⁶ The least precise definition is the "general definition,"¹¹⁷ which prohibits discrimination in "all

107. Note, *supra* note 105, at 1616-17.

108. *Id.*

109. *Id.* at 1618. For a general discussion of the drafting of state PAA's, see Note, *supra* note 3, at 240-43.

110. Note, *supra* note 105, at 1618.

111. This result follows because "[t]he importance of a male not being able to buy a drink, attend a basketball game, or get his car washed for the same price as a female pales in comparison to someone not being able to obtain housing or employment because of his or her race or sex." *Id.*

112. *Id.* at 1618-20.

113. *Id.* at 1618.

114. *Id.* at 1618-20.

115. Note, *supra* note 3, at 241-43.

116. *Id.*

117. *Id.* at 242.

business establishments of every kind whatsoever."¹¹⁸ The advantage of the general definition is that courts have more leeway to interpret the inclusiveness of the definition. The disadvantage is that the general definition is vague and cannot adequately alert either the exclusive association or the excluded party of the potential success of a challenge under the PAA.¹¹⁹

In the months following the *Club Association* decision, states and municipalities nationwide have embarked on an activist effort to integrate single sex private groups. Municipalities and states that are considering antidiscrimination measures aimed at private clubs or that already have instituted such measures in the wake of *Club Association* include: Annapolis, Boise, Reno, Buffalo, Chicago, Detroit, St. Louis, Washington, D.C., Boston, San Francisco, Los Angeles, Sacramento, California, Ohio, and Kentucky.¹²⁰

Race is generally no longer an overt barrier to private club membership;¹²¹ therefore, most of the new ordinances are directed at all-male clubs. In addition to direct bans on discriminatory policies, an indirect form of leverage that many governments use is the threat of revocation of a private club's liquor and food license.¹²² Cities or municipalities issue liquor licenses according to local rules; and the licenses represent a strong bargaining chip.¹²³

The authority of the states and cities to enforce their PAA's is grounded in the legitimate exercise of reserved police power,¹²⁴ jus-

118. See, e.g., Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1982 & Supp. 1989).

119. Note, *supra* note 3, at 243. The author advocates a middle ground position: a list with qualifying language not limiting the definition to the items on the list. This approach "offers both flexibility and guidance." *Id.*

120. *Boise to consider ban on private club bias*, U.P.I. Regional News, Sept. 19, 1988; *Club Votes to Allow Women*, U.P.I. Domestic News, Sept. 16, 1988; *State Senate Passes Bill That Targets Bias in Private Clubs*, L.A. Times, Aug. 13, 1988 at 1-24, col. 1; *Nevada Newsbriefs*, U.P.I. Regional News, June 30, 1988; *Rights panel wants private clubs open to all in Kentucky*, U.P.I. Regional News, June 29, 1988; *Group wants Ohio lawmakers to guarantee women's rights to join clubs*, U.P.I. Regional News, June 23, 1988; *Some Mourn End To All-Male Bastions; Cities Hail Ruling*, A.P. Domestic News, June 21, 1988.

121. See *supra* note 8.

122. See, e.g., *State Senate Passes Bill That Targets Bias in Private Clubs*, *supra* note 120, at 1-24, col. 1. Loss of state funding may also be used as leverage. Note, *Rotary International v. Duarte*, *supra* note 74, at 410-11. For general discussions of various leverage devices that can be used to integrate private clubs, see Burns, *supra* note 85, at 398-406; Note, *supra* note 28, at 444-49; Note, *supra* note 3, at 272-86.

123. Burns, *supra* note 85, at 398-99.

124. Note, *supra* note 1, at 1053.

tified by the compelling state interest in eradicating arbitrary and invidious discrimination.¹²⁵ Like the freedom of association, however, the police power of state governments is not absolute. The *Jaycees* test limits the power of federal and state governments to integrate an organization.¹²⁶ The problem lies in identifying the groups that may legitimately seek protection under the umbrella of freedom of association.

THE PROBLEM

Until recently, the balance of power between antidiscrimination laws and discriminatory private clubs weighed heavily in favor of the clubs. Today the situation has changed, and the balance of power has shifted to the side of the excluded.¹²⁷ Through a combination of vaguely drafted PAA's and overzealous integration strategies, many private clubs are forced to change their membership practices even though they are arguably protected by the *Jaycees* test.

The strategy used to integrate the Woman's National Democratic Club in Washington, D.C., is an example. Based on Washington's antidiscrimination law, activists threatened to file suit against the Woman's National Democratic Club and two other all-female private clubs. Rather than bear the costs of litigation, the Woman's National Democratic Club agreed to allow men to become full voting members. The Young Women's Christian Association (YWCA) faces similar pressure nationwide.¹²⁸

125. See *supra* note 1 and accompanying text.

126. See *supra* notes 40-70 and accompanying text; see also Note, *supra* note 1, at 1053.

127. See *supra* notes 120-22 and accompanying text; and Note, *supra* note 1, at 1047-48. See also *Ruling Is Greeted With Praise from Women and Silence from Clubs*, N.Y. Times, June 21, 1988, at A19, col. 1; *Club Doors Are Open, But Women Draw Back*, N.Y. Times, Sept. 14, 1988, at C1, col. 5.

128. The threat of litigation works to extort clubs into changing their membership practices for two reasons: first, the cost of litigation and second, the possibility of losing. Very few clubs can afford to litigate through the appellate level. In addition, the party seeking to integrate often seeks attorneys fees. Finally, becoming embroiled in a bitter legal dispute over the right to discriminate is not the sort of publicity most clubs desire. See *Y.W.C.A. Resists Admission of Men*, N.Y. Times, July 12, 1988, at A22, col. 1; *Private Club Review Asked*, Wash. Post, July 6, 1988, at B5, col. 2; *Two women's clubs threatened with discrimination suit*, U.P.I. Regional News, July 5, 1988; see also *supra* notes 6-8 and accompanying text.

The strategy of threatening to sue, or actually filing suit against private clubs would be less objectionable if it worked to end invidious discrimination. Too many of these legal actions, however, are harassing, frivolous, and do nothing to advance civil rights. The integration of the YWCA, the Woman's National Democratic Club, and the Boy Scouts of America (BSA) is a pyrrhic victory for those desiring to abolish the stigma of exclusion. The practical advancement for the excluded groups is equally hollow—the goods and services uniquely available to men joining the YWCA does not sensibly justify the abridgement of the YWCA's right to choose its members.

More important, integration achieved through the threat of litigation may also work to deny a private club its constitutional rights. The impracticality of defending a constitutional right in court does not diminish the importance of the right, or the importance of the denial of the right. Yet some private groups are unjustly forced to relinquish their constitutional right to freedom of association.

The application of the *Jaycees* test to the BSA demonstrates that this problem is not conjecture.¹²⁹ State courts have forced the BSA to change its longstanding policy and, thus, its character. The following hypothetical demonstrates that the BSA deserves protection from state encroachment on its membership practices.¹³⁰

129. Several individuals have challenged the exclusionary practices of the BSA. See *Curran v. Mount Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 468 U.S. 1205 (1984) (excluding a homosexual from becoming an adult leader); *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987) (excluding a woman from becoming scoutmaster). See also *They're All Good Scouts*, L.A. Times, Feb. 19, 1988, at 2-6, col. 1; *Boy Scouts' About-Face Is Hailed as a Step Forward*, L.A. Times, Feb. 14, 1988, at 1-2, col. 1; *Scout mom sues over male-only policy*, U.P.I. Regional News, Oct. 5, 1987.

130. But see *Quinnipiac Council, Boy Scouts of America, Inc.*, 204 Conn. 287, 528 A.2d 352 (1987). In response to the BSA's argument that freedom of association protected its right to exclude certain groups from positions of adult leadership, the court replied:

Although we need not reach those constitutional issues today, we note that those arguments have little merit in light of the United State Supreme Court's recent decisions In both cases [*Jaycees* and *Rotary*] the Supreme Court held that even if a public accommodation law infringes slightly on the constitutional rights of expressive association, that infringement is justified because such statutes serve a compelling state interest in eliminating discrimination.

Id. at ___, 528 A.2d at 356 n.5 (citations omitted).

*Application of the Jaycees Test to the BSA**Freedom of Intimate Association and the BSA*

The Supreme Court in *Rotary* indicated that groups other than the family merited constitutional protection under the freedom of intimate association.¹³¹ Unfortunately, the vague "size," "selectivity," and "purpose" intimacy gauges¹³² the Court promulgated in *Jaycees* make application to other groups difficult. Regarding size, the BSA numbers close to five million worldwide.¹³³ Most activity among the boys is centered, however, around the "Patrol," which is usually limited to eight boys.¹³⁴ The "troop," typically comprising three or four Patrols,¹³⁵ is headed by a Scoutmaster.¹³⁶ Because of the size criterion of the Court's test, the strength of a Boy Scout troop's intimate protection claim remains uncertain. The membership ceiling will always hover at thirty, which is larger than the smallest Rotary groups. The largest Rotary clubs, on the other hand, reached more than 900 members.¹³⁷

Selection to the BSA is based on three prerequisites. A prospective Scout must (1) be a boy between ages 11 and 17 inclusive, (2) find a Scout troop, and (3) "understand and intend to live by" the rules and signs of Scouting.¹³⁸ On the one hand, the BSA al-

131. See *supra* note 74 and accompanying text.

132. See *supra* note 53 and accompanying text.

133. R. PETERSON, *THE BOY SCOUTS: AN AMERICAN ADVENTURE* 221 (1984). This figure includes all adult members as well as offshoots such as Cub Scouts, Explorer Scouts, and Webelos. *Id.*

134. W. HILLCOURT, *THE OFFICIAL BOY SCOUT HANDBOOK* 12 (9th ed. 1986).

135. *Id.* at 20.

136. BOY SCOUTS OF AMERICA, *THE OFFICIAL SCOUTMASTER HANDBOOK* 59 (7th ed. 1986) [hereinafter *HANDBOOK*].

137. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987). See *supra* note 54 and accompanying text.

138. W. HILLCOURT, *supra* note 134, at 10-11. The rules and signs of Scouting include:

(1) Scout Oath or Promise

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

Id. at 27.

most never denies membership to a boy of proper age. Additionally, the BSA rarely ejects boys for failing to intend to live by the rather well-developed system of ideals. On the other hand, the fact that the group is built on a shared belief system to which boys pledge allegiance generates a bond among them.¹³⁹ Whether the BSA's actual selectivity toward its young members would meet the *Jaycees* test, then, is unclear.

(2) Scout Law

A Scout Is: Trustworthy. Loyal. Helpful. Friendly.
Courteous. Kind. Obedient. Cheerful. Thrifty.
Brave. Clean. Reverent.

Id. at 31.

(3) Scout Motto

Be Prepared.

Id. at 42.

(4) Scout Slogan

Do a Good Turn Daily.

Id. at 44.

(5) Scout Sign, Scout Salute, and Scout Handclasp

(illustrations and descriptions omitted)

Id. at 46-47.

(6) Scout Badge

(esoteric symbols and discussion omitted)

Id. at 48.

(7) Outdoor Code

As an American, I will do my best to—
Be clean in my outdoor manners.
Be careful with fire.
Be considerate in the outdoors.
and
Be conservation-minded.

Id. at 54.

139. For support of this proposition, see generally sources cited *infra* note 158 (discussing bonds among fraternity members).

How selective the BSA is toward its Scoutmasters is also unclear. A central committee made up of adult Scout leaders asks individuals to volunteer to be Scoutmasters.¹⁴⁰ An "old boy" Scout network that brings qualified individuals to the attention of the committee probably facilitates this system.¹⁴¹

Tangible skills as well as intangible personal qualities are needed for Scoutmaster competency:

You should develop a good coach-counselor relationship with each Scout. Every boy in the troop should be able to talk freely with you. This is being able to express one's real feelings, not just talking about the weather and ball games.

You should see yourself as a coach and counselor, as well as an expert in axmanship and tent pitching.¹⁴²

The BSA acknowledges that, despite an official commitment to the metaphysical agenda of the program, most boys join Scouting to go camping and have fun.¹⁴³ Scoutmasters divide a troop into Patrols partly on the basis of personal friendship and choices among the boys.¹⁴⁴ Patrol solidarity is strongly encouraged through the adoption of Patrol names and Patrol calls—for example, a "Screaming Eagle Patrol" has a corresponding scream.¹⁴⁵ Each Patrol has its own flag,¹⁴⁶ emblem,¹⁴⁷ boy leader,¹⁴⁸ meetings,¹⁴⁹ and camping trips,¹⁵⁰ and during troop meetings, the Patrols compete against each other in various games and contests.¹⁵¹ These activities are highly personal, and the ties they induce are also personal, as opposed to commercial or professional. Even the uniform, which

140. HANDBOOK, *supra* note 136, at 59-60.

141. *Id.* The troop committee starts with a list of men connected with the institution sponsoring the troop, typically churches, civic groups, or fraternal organizations. W. OURSLER, *THE BOY SCOUT STORY* 117 (1955).

142. HANDBOOK, *supra* note 136, at 24.

143. *Id.* at 160.

144. *Id.* at 67.

145. W. HILLCOURT, *supra* note 134, at 12-14.

146. *Id.* at 14.

147. *Id.*

148. *Id.* at 16; HANDBOOK, *supra* note 136, at 44.

149. W. HILLCOURT, *supra* note 134, at 17; HANDBOOK, *supra* note 136, at 87.

150. W. HILLCOURT, *supra* note 134, at 17-18; HANDBOOK, *supra* note 136, at 72.

151. HANDBOOK, *supra* note 136, at 86.

sets the Boy Scout apart from the crowd of "civilian" peers, serves to strengthen ties.¹⁵²

The ties of the adult Scoutmaster to the approximately thirty boys in his charge are probably different in kind and degree from the ties among the boys themselves. Nevertheless, part of the Scoutmaster's duty is to become "intimately involved" in both the camping activities and the "individual boys": "You are friend, counselor, and inspirational leader to every boy in the troop. The better you know each individual boy in the troop, the more valuable his Scouting experience will be."¹⁵³

The extent to which others are excluded from important parts of the troop relationship is unclear.¹⁵⁴ Apparently, no activity is so sacrosanct that it is off-limits to nonmembers; for instance, visitors are allowed to attend troop meetings if they are not disruptive to the proceedings.¹⁵⁵ The Supreme Court has not clarified the meaning of the seclusion inquiry, and comparisons between the Jaycees and the BSA on this point are difficult.¹⁵⁶ The BSA may not have any formal rules concerning the exclusion of nonmembers from its camping trips simply because nonmembers are generally not interested in attending. Anyone may purchase *The Official Boy Scout Handbook*, but only those officially registered can purchase the uniform.¹⁵⁷ As in the military, wearing of the uniform may well qualify as a critical symbol of the exclusive aspect of the relationship.

Overall, the relationship between a Scoutmaster and the members of his troop exhibits more qualities of constitutionally protected intimacy than those in the Jaycees, the Rotary Clubs, or the New York clubs. Based on size, selectivity, seclusion from others, and congeniality, the Boy Scout troop falls closer to the family end

152. The uniform "shows that you belong It also helps build team spirit in your patrol and your troop." W. HILLCOURT, *supra* note 134, at 51.

153. HANDBOOK, *supra* note 136, at 20.

154. Other branches of Scouting, including the Explorers and Cub Scouts, allow participation by women. Only the Boy Scouts exclude women from adult leadership positions. R. PETERSON, *supra* note 133, at 200-02.

155. See HANDBOOK, *supra* note 136, at 80.

156. See *supra* note 54 and accompanying text.

157. HANDBOOK, *supra* note 136, at 330.

of the intimacy spectrum than to the large business organization end.¹⁵⁸

The Court has applied the freedom of intimate association sparingly in the past, however. Constitutionally protected associations have always involved some sort of sexual or familial link.¹⁵⁹ Granting constitutional protection to the BSA under the freedom of intimate association would entail a radical expansion of its application. Yet commentators have argued that college fraternities and eating clubs would receive constitutional protection under an intimacy claim;¹⁶⁰ and in many ways fraternities are comparable to the BSA.¹⁶¹ The actual selectivity of the BSA toward its Scoutmasters and its exclusion of nonmembers might be decisive in an intimacy claim.

Freedom of Expressive Association and the BSA

In the first articles of incorporation the BSA filed in 1910, the stated purpose of the organization was "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are in common use by Boy Scouts."¹⁶²

From the very beginning the self-proclaimed purpose of the BSA has been more than simply tying knots and pitching tents, although these too are a part.¹⁶³ Rather, the BSA seeks to inculcate virtue into the lives of young boys through the media of Scouting rules and activities.¹⁶⁴ In the explication of the "Scout Oath"¹⁶⁵ in *The Official Boy Scout Handbook*, the BSA claims that the Scout law:

158. For a similar argument concerning college fraternities, see Rumsey, *supra* note 28, at 477-78; Note, *Freedom of Association: The Attack on Single-Sex College Social Organizations*, 4 YALE L. & POL'Y REV. 426, 433-36 (1986).

159. *But see supra* note 74 and accompanying text.

160. Rumsey, *supra* note 28, at 478; Note, *supra* note 158, at 434.

161. Both are small locally and large nationally; both practice gender exclusion "for its own sake."

162. R. PETERSON, *supra* note 133, at 32.

163. W. HILLCOURT, *supra* note 134, at 9.

164. *Id.*

165. *See supra* note 138.

fits you as a boy. It will fit you just as well when you become a man—for a real man is everything the Scout Law stands for.

. . . .

You owe it to yourself, your country, and your God to develop your body, to train your mind, to strive to be a boy and man of high character.

. . . By taking part enthusiastically in all activities of patrol and troop, by learning the skills that Scouting has to offer, by living up to the ideals of Scouting, you will become the man you want to be.¹⁶⁶

The underlying didactic thrust of the BSA is stated simply in *The Official Scoutmaster Handbook*: "The purpose of the Boy Scouts of America is to help boys become honorable men."¹⁶⁷ One literary critic and historian has said of *The Official Boy Scout Handbook*:

this handbook is among the the [sic] very few remaining popular repositories of something like classical ethics, deriving from Aristotle and Cicero. . . . The constant moral theme is the inestimable benefits of looking objectively outward and losing consciousness of self in the work to be done

. . . .

. . . In the current world of Making It and Getting Away with It, there are not many books devoted to associating happiness with virtue.¹⁶⁸

The Official Scoutmaster Handbook proclaims that "[e]very Boy Scout activity and design strives toward the three aims of Boy Scouting: (1) building character, (2) fostering citizenship, and (3) developing mental, moral, and physical fitness."¹⁶⁹

The proliferation of the ideals of Boy Scouting, which contain doctrinaire elements of the civic/political,¹⁷⁰ the ethical,¹⁷¹ and the religious,¹⁷² and their expression in the BSA's activities, is pro-

166. W. HILLCOURT, *supra* note 134, at 491.

167. HANDBOOK, *supra* note 136, at 98.

168. P. FUSSELL, *THE BOY SCOUT HANDBOOK AND OTHER OBSERVATIONS* 6-7 (1982).

169. HANDBOOK, *supra* note 136, at 99.

170. See W. HILLCOURT, *supra* note 134, at 37, 395-449.

171. *Id.* at 27-44, 54-59, 514-26.

172. *Id.* at 41, 492.

tected under the first amendment.¹⁷³ Justice O'Connor recognized this possibility in *Jaycees*: "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."¹⁷⁴

The Official Scoutmaster Handbook outlines eight "methods,"¹⁷⁵ terms of art that are "essential to the success of the program."¹⁷⁶ One of the eight methods is the teaching of the "Ideals" of Scouting—the Scout Oath, Law, Motto and Slogan—which "all matters of conduct are measured against."¹⁷⁷ A second essential method is "Adult Male Association."¹⁷⁸ *The Official Scoutmaster Handbook* explains the importance of adult male association:

Boys learn from the example of their adult leaders. In his quest for manhood, every boy needs contact with men he can copy. The Scoutmaster and his assistants provide a masculine image of the Boy Scout program. Providing good examples of manhood is one of the methods of Scouting.

Boys tend to copy whatever models are available to them, and some may not be really good models. As Scoutmaster, you provide an example of what a man should be like. Your role as a friend, coach, and leader to Scouts is a most important part of Scouting.¹⁷⁹

The Scoutmaster is a critical component in the transmission of the BSA's constitutionally protected expression. "The Scoutmaster is the key to good scouting. The troop is molded in his image."¹⁸⁰

173. In its discussion of first amendment protection of the *Jaycees*, the Court acknowledged that the *Jaycees* do engage in constitutionally protected activity: "[T]he *Jaycees* regularly engage in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment. . . ." *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984).

174. *Id.* at 636 (O'Connor, J., concurring). Actually, Justice O'Connor compared the Boy Scouts to the relatively "easy" case of the *Jaycees*, which O'Connor described as predominantly commercial and hence undeserving of first amendment protection. *Id.* at 638-40. O'Connor's implicit textual reference to the Boy Scouts is made clear in a footnote. *Id.* at 636 n.*. See Linder, *supra* note 10, at 1899 & n.104.

175. HANDBOOK, *supra* note 136, at 104-08.

176. *Id.* at 109.

177. *Id.* at 104.

178. *Id.* at 107.

179. *Id.*

180. *Id.* at 18.

One qualification for becoming a Scoutmaster is a "lifetime of experience" that the Scoutmaster brings to the role. *The Official Scoutmaster Handbook* notes that "[y]ou have been a boy, and if you remember what it was like, you will understand boys better."¹⁸¹ Women, by definition, cannot fulfill this qualification for Scoutmaster. The exclusion of women, based on this factor, is not arbitrary.

The Supreme Court decided in *Jaycees* that freedom of expressive association was abridged when a group's message was altered or diluted by the forced inclusion of another group.¹⁸² The BSA considers the adult male association the Scoutmaster provides to be crucial to the program's success. Adult male association would be diluted by the inclusion of women Scoutmasters. Similarly, the reduction in gender-specific shared experiences would diminish the Scoutmaster's effectiveness. The BSA's constitutionally protected expression would consequently be altered or diluted by the forced inclusion of women Scoutmasters.

Additionally, the BSA considers adherence to its ideals by both the Scouts and the Scoutmaster crucial to its success.¹⁸³ For example, in its explication of the last phrase of the Boy Scout Oath, "Morally Straight," *The Official Boy Scout Handbook* advises that "[w]hen you live up to the trust of fatherhood your sex life will fit into God's wonderful plan of creation. Fuller understanding of wholesome sex behavior can bring you lifelong happiness."¹⁸⁴

The oblique reference to "wholesome sex behavior" in *The Official Boy Scout Handbook* is explained more fully in *The Official Scoutmaster Handbook*. Within the section "Sex Curiosity," which is a part of *The Official Scoutmaster Handbook* called "Individual Behavior Problems,"¹⁸⁵ the BSA states that:

Incidents of sexual experimentation that may occur in the troop could run from the innocent to the scandalous. They call for a private and thorough investigation, and frank discussion with those involved. It is important to distinguish between

181. *Id.* at 15.

182. See *supra* notes 55-59 and accompanying text.

183. HANDBOOK, *supra* note 136, at 104.

184. W. HILLCOURT, *supra* note 134, at 526.

185. HANDBOOK, *supra* note 136, at 126.

youthful acts of innocence, and the practices of a homosexual who may be using his Scouting association to make contacts. A boy of 15 or so cannot be assumed to be acting out of innocence. Assist him in securing professional help.¹⁸⁶

The Scoutmaster is charged with the duty of discouraging homosexual conduct among his Scouts, such conduct being unwholesome sexual behavior. To be an avowed homosexual is to assert that a homosexual lifestyle is a political and moral right.¹⁸⁷ This stance is antithetical to the ideals of Scouting and to the role of the Scoutmaster. The forced inclusion of an avowedly homosexual leader would alter or dilute the constitutionally protected expression of the BSA. Consequently, the BSA could meet the second prong of the *Jaycees* freedom of association test.

The BSA and Public Accommodations Acts: Balancing Freedom Against Equality

Assuming that the expressive association protects the BSA, the protection must still be balanced against the state's interest in eradicating invidious discrimination. In *Roberts v. United States Jaycees*,¹⁸⁸ the Supreme Court held that Minnesota had a compelling interest in assuring equal access to the goods and services the Jaycees provided.¹⁸⁹ Specifically, the Court listed leadership skills, business contacts, and employment promotions as intangible goods denied to women by the discriminatory practices of the Jaycees.¹⁹⁰

Some commentators argue that mere denial of goods and services by private organizations may not always constitute a compelling state interest.¹⁹¹ Under the *Jaycees* balancing test, unless the loss to the excluded group is significant, the state's interest may not be compelling.¹⁹²

186. *Id.* at 134.

187. See *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal. App. 3d 712, 723-24, 195 Cal. Rptr. 325, 332 (1983), *appeal dismissed*, 468 U.S. 1205 (1984).

188. 468 U.S. 609 (1984).

189. See *supra* notes 63-70 and accompanying text.

190. 468 U.S. at 626.

191. See, e.g., *Linder*, *supra* note 10, at 1887; *Marshall*, *supra* note 1, at 93.

192. See *Marshall*, *supra* note 1, at 93.

The probability of judicial protection of private discrimination, as well as the improbability of state regulation, increases . . . primarily because the public consequences of the private discrimination become ever more attenuated. The decision of the Elm Street Saturday Night Poker Club not to admit black members, although perhaps morally reprehensible, hardly threatens significant state interests.¹⁹³

Two types of association trigger a compelling state interest by their exclusionary practices:¹⁹⁴ (1) entities that "traditionally have served as a forum for professional interaction,"¹⁹⁵ such as the Jaycees, the Rotary Clubs, and private urban men's clubs and (2) "prestigious country clubs and other social organizations,"¹⁹⁶ not only because of the business contacts provided but because of their value as indicators of professional and social status.¹⁹⁷

For example, in *Curran v. Mount Diablo Council of Boy Scouts*,¹⁹⁸ the plaintiff claimed that the BSA provides "considerable financial value to its members in admission to institutions of higher learning, in employment, and in advancement in the business world."¹⁹⁹ Although business deals and "networking" may occur during Boy Scout Jamborees, no one could seriously maintain that the goods and services the BSA provided even remotely resemble those found in Rotary Club meetings or a Bohemian Club retreat.²⁰⁰ Such an argument becomes *reductio ad absurdum*: "Even a bridge club in which little is related other than tasteless jokes may occasionally spawn a business arrangement. Yet, as this

193. Linder, *supra* note 10, at 1887.

194. See Marshall, *supra* note 1, at 94. For a discussion of analytical problems in the Jaycees compelling state interest test, see Linder, *supra* note 10, at 1890-91.

195. Marshall, *supra* note 1, at 94.

196. *Id.*

197. *Id.* Memberships in private urban men's clubs may also act as proof of status. For discussion of the intangible goods and services provided by all-male clubs, see generally Burns, *supra* note 85, at 325-43; Rhode, *Association and Assimilation*, 81 Nw. U. L. Rev. 106, 120-21 (1985); Note, *Private Social Clubs*, *supra* note 10, at 1186-90; Note, *supra* note 28, at 417-20.

198. 147 Cal. App. 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 468 U.S. 1205 (1984).

199. *Id.* at 718, 195 Cal. Rptr. at 328.

200. See, e.g., Burns, *supra* note 85, at 334-43 (discussing San Francisco's Bohemian Club as a gathering place of the rich and powerful).

example illustrates, it surely overstates the equal access interest to characterize it as compelling with respect to every organization."²⁰¹

The Supreme Court also found a compelling state interest in preventing the "stigmatizing injury" that results from exclusion based on "archaic and overbroad assumptions about the relative needs and capacities of the sexes."²⁰² Like the denial of goods and services, the stigma exclusionary practices create varies according to the circumstances.²⁰³ Not every exclusion is pejorative, and the Court has found no stigmatizing injury in cases of nonpejorative exclusion.²⁰⁴ Further, not every pejorative exclusion creates a stigmatizing injury strong enough to trigger a compelling state interest; otherwise, a *reductio ad absurdum* situation would again result. The seriousness of the stigma is subjective and may depend on which side of the fence one is standing.²⁰⁵

201. Marshall, *supra* note 1, at 93.

202. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984).

203. Marshall, *supra* note 1, at 94-99.

204. *Id.* Marshall cites as an example of nonpejorative, nonstigmatic exclusion the case of *United Jewish Orgs. v. Casey*, 430 U.S. 144 (1977). That decision allowed legislative gerrymandering for the purpose of benefitting blacks; the Court found no stigmatic injury to whites. Marshall, *supra* note 1, at 95 n.160. Apparently, when the excluded party is in a position of "strength" vis-a-vis the excluding party, no stigma attaches to the exclusion. "Such an exclusion," Marshall says, "may be perceived as simply neutral or irrelevant to the excluded group." *Id.* at 95. Likewise, Deborah Rhode notes that:

separation imposed by empowered groups carries different symbolic and practical significance than separation chosen by subordinate groups. Given this nation's historic traditions and cultural understandings, the exclusion of men from women's liberation groups or garden clubs no more conveys inferiority than the exclusion of whites from black associations or Protestants from Jewish social organizations. Nor does such exclusivity serve to perpetuate existing disparities in political or economic power.

Rhode, *supra* note 197, at 122. But see note 205 *infra* for the contention that discrimination against men is harmful to both sexes.

205. Marshall, *supra* note 1, at 94-99. The academic community does not enjoy unanimity on this issue, at least with regard to pejorative gender exclusion. See Note, *supra* note 105, at 1620-21. One possible method of avoiding the problem of proving damages in sexual discrimination claims is to treat arbitrary sex discrimination as "per se injurious"; it reinforces harmful stereotypes, damaging the victim as well as the state and the general public. *Id.* at 1621. Under this view, the state's interest alone is sufficient injury; particular injury to the claimant is unnecessary. Any exclusion based on gender is pejorative, including, for example, lower drink prices for women on "Ladies Night" in bars. The price differential would "foster[] outdated notions of sexual inequality," which are "harmful to both men and women." *Id.* Deborah Rhode argues that sex discrimination works a symbolic "deprivation of personal dignity." The stigmatizing injury is not so much to the individual but to the gender as such in society: "Relegating females to separate dining rooms, separate entrances,

The stigmatizing injury to homosexuals denied leadership positions in the BSA is significant. The exclusion is based exactly on the "archaic and overbroad assumptions" that the Court is attempting to dispel. In this case, the BSA assumes that homosexuals lack moral fitness.²⁰⁶ However, this assumption may draw support from *Bowers v. Hardwick*,²⁰⁷ which the Court decided two years after *Jaycees*. The Court's zeal in eradicating stigmatizing injury to historically disadvantaged groups appears to stop short of protecting homosexual conduct.²⁰⁸ The BSA's assumption regarding the moral fitness of homosexuals rests on firm constitutional grounds, at least for the present.

The Court considers the prevention of stigmatizing injury to women to be a compelling state interest.²⁰⁹ Arguably, the exclusion of women from leadership positions in the BSA, however, does not work as great an injury toward women as it does homosexuals. The exclusion of a black male, or a handicapped male, or a homosexual male from the BSA creates a stigmatizing injury. No one would think less of a woman, however, because of her exclusion from the BSA.²¹⁰ The exclusion of women from the BSA is not based on pejorative assumptions regarding a woman's fitness, as it would with a black, handicapped, or homosexual male. The exclusion is based on the alleged benefits of occasional exclusive associations with one's own gender,²¹¹ a concept that mainstream America would not necessarily construe as pejorative.²¹²

or separate organizations is an affront to individual integrity and self-worth [T]hese symbols of inferiority, once perceived and internalized as such, often can become self-perpetuating." Rhode, *supra* note 197, at 121-22. Rhode's argument leaves little room for a pejorative gender-based exclusion of women that does *not* raise a compelling state interest. For further discussion of this issue, see Burns, *supra* note 85, at 332-34; Marshall, *supra* note 1, at 97-99.

206. See *supra* notes 183-87 and accompanying text.

207. 478 U.S. 186 (1986). The Supreme Court compared private adult consensual sodomy to adultery and incest. *Id.* at 195-96.

208. *Id.*

209. See *supra* notes 63-70 and accompanying text.

210. For a discussion of nonstigmatizing exclusions, see *supra* note 204 and accompanying text.

211. See *supra* notes 175-81 and accompanying text.

212. The Court gave great weight to the opinion of mainstream America on pejorative assumptions in *Hardwick*. 478 U.S. at 192-94.

The BSA should receive greater protection from the freedom of expressive association than from intimate association. The BSA is more expressive than the Jaycees or Rotary Clubs, the nexus between the message and the exclusionary practice is stronger, and the state interest in integrating the BSA is weaker.²¹³ One commentator, in fact, named the Girl Scouts as an organization to which the application of state PAA's "plainly could not command the support of a majority on the Court."²¹⁴ At least one member of the Court would not uphold the validity of a state PAA applied to the BSA.²¹⁵ Clearly, then, the BSA has at least an arguable chance of prevailing under the freedom of expressive association.²¹⁶

A POSSIBLE SOLUTION

To avoid harassing litigation and infringement on the constitutional rights of protected groups, state and local legislatures need to draft the definition of public accommodation as precisely as possible. The legislature must first have an idea of what type of organization it seeks to integrate through its PAA. Second, the legislature must somehow convey that idea to judges, to discriminatory organizations, and to the excluded.

From a policy standpoint, exactly which groups should be the targets of PAA's is not an easy issue to resolve.²¹⁷ No less difficult, perhaps, is the task of identifying groups that are deserving of protection under the *Jaycees* test without having to apply a fact-specific inquiry to every discriminatory group in the Nation. Yet both categories of line drawing—distinguishing groups that are targets of policy and distinguishing groups that are deserving of constitutional protection—need to be reflected, to a degree useful for judges and affected parties, in every state and local PAA.

213. See *supra* notes 60-70 and accompanying text.

214. Linder, *supra* note 10, at 1891.

215. Justice O'Connor would not apply the state PAA to the BSA. See *supra* note 174 and accompanying text.

216. But cf. Easterbrook, *supra* note 10, at 108-10. Easterbrook asserts that the first amendment "probably does fall short of protecting the associational freedom of the Jaycees (or the Boy Scouts or the Boys' Clubs), at least if the Court's characterization of the Jaycee's activities is accurate." Easterbrook does believe, however, that his Lockean natural rights approach to the Constitution would grant a "plausible" claim of protection to the Jaycees, the BSA, and the Boys' Clubs. *Id.* at 109-10.

217. See *supra* notes 203-05 and accompanying text.

A clear and express statement of purpose²¹⁸ and a qualified-list definition of public accommodation²¹⁹ are both useful guides for judges and affected parties. These two methods are not exhaustive, however, of successful line drawing techniques legislatures use. The PAA at issue in *New York State Club Association v. City of New York*²²⁰ is an example of a well-drafted, creative response to specifically identified problems.²²¹ The amendment to Local Law 63²²² has a lengthy, express statement of purpose: to advance the "business, professional and employment opportunities"²²³ of women and minorities by prohibiting discrimination in groups "where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed."²²⁴ To that end, the City of New York drafted an amendment to its definition of public accommodation that prohibits discrimination in clubs possessing certain quantitative characteristics: more than 400 members, regular meal service, and regular receipt of admission payments by nonmembers.²²⁵ The statute offers an exemption from this three-prong test to benevolent orders and religious corporations, such as the Catholic War Veterans, the Loyal Order of Moose, and the Knights of Columbus.²²⁶ These groups are exempted because the legislature did not find that business activity was prevalent among them.²²⁷

218. See *supra* note 108 and accompanying text.

219. See *supra* notes 115-19 and accompanying text.

220. 108 S. Ct. 2225 (1988).

221. The O'Connor concurrence, in which Justice Kennedy joined, praised Local Law 63 for remaining sensitive to the constitutional issues at stake. The administrative proceedings involving enforcement of the law against a particular group provide a forum for freedom of association claims. Moreover, state courts have suggested that the three prongs of Local Law 63 are to be applied in concert with the *Jaycees* test. *Id.* at 2237 (O'Connor, J., concurring). See *infra* note 228.

222. See *supra* note 79.

223. 108 S. Ct. at 2230.

224. *Id.*

225. NEW YORK, N.Y., ADMIN. CODE § 8-102-(9) (1986).

226. NEW YORK, N.Y., LOCAL LAW No. 63 § 1, app. 15.

227. 108 S. Ct. at 2238 (O'Connor, J., concurring). In oral argument before the Court, Justice Scalia asked counsel for New York City to justify the exemption. One observer described corporation counsel's response:

[T]he City Council had aimed the law only at those private groups at the core of the problem: clubs serving as business institutions, yet keeping out women and minorities with "a very negative impact on the economic lives of those

New York City's law is a successful attempt to announce a clear policy goal and to draft responsive, bright-line measures implementing that goal. The law effectively lessens the chance of its misuse in harassing or frivolous lawsuits because both discriminatory groups and excluded parties can clearly understand the basis for the cause of action under the statute. Either a club has regular meal service or it does not; either it is the Knights of Columbus or it is not. Further, the New York City law gives a tacit nod to freedom of association by framing its policy goal in terms of commercial and business organizations and by specifically exempting organizations with an arguable claim to freedom of association. Groups such as the BSA are protected unless the state law is unclear, unsettled, or insensitive to freedom of association.²²⁸

In contrast to New York City's law stands the California Unruh Act, the basis for the action in *Rotary*.²²⁹ Called "the most broadly interpreted general definition of public accommodations,"²³⁰ the Unruh Act has no express statement of purpose,²³¹ no express definition of public accommodation,²³² and unlike California's Housing

excluded." The clubs the law covered were the only ones the city wanted to reach, . . . not "the Supreme Council of the Mystic Order of the Veiled Prophets of the Realm, or a local camp of the Modern Woodmen of America."

Denniston, *Long-Shot Strategy In Private Club Battle*, AM. LAW., May, 1988, at 119. New York City's legislature thus declined to target nonpejorative exclusions, or exclusions that work such little damage that they raise no compelling state interest. See *supra* notes 204-05 and accompanying text. Perhaps, too, the legislature was thinking about freedom of association.

228. Other commentators have praised Local Law 63 as well. Prior to the Supreme Court's review of the law, one author wrote that Local Law 63 is "specific enough to denote those organizations within its scope, while simultaneously retaining sufficient flexibility to assuage concerns as to the associational freedoms of groups that are distinctly private." Note, *Private Club Membership - Where Does Privacy End and Discrimination Begin?*, 61 ST. JOHN'S L. REV. 474, 499 (1987). Another author wrote that "[t]he three prongs of Local Law 63 close the gap in anti-discrimination laws whereby so-called 'private clubs' have been allowed to engage in invidious discrimination, and adequately address the legitimate First Amendment claims of truly private groups." McGovern, *supra* note 23, at 142.

229. CAL. CIV. CODE § 51 (West 1982). See *supra* note 71. The Act reads in pertinent part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Id.*

230. Note, *supra* note 3, at 242.

231. Note, *supra* note 105, at 1617.

232. See *supra* notes 105-19 and accompanying text.

and Employment Acts, the Unruh Act contains no exemptions.²³³ Judges construe the Unruh Act²³⁴ from the uniquely broad language²³⁵ of the statute.

One commentator wrote approvingly that

[t]he United States Supreme Court in *Rotary International* specifically held that application of the Unruh Act to a nonprofit service organization does not violate the first amendment. Therefore, the expansive phrase utilized by the California legislature is a legitimate and functional definition of a place in which antidiscrimination policy may operate.²³⁶

To the contrary, the Supreme Court in *Rotary* held that the Unruh Act did not violate Rotary International's right to freedom of association.²³⁷ The Supreme Court did not say the Unruh Act could not violate any other group's freedom of association challenge. The Court said just the opposite: "[W]e have no occasion in this case to consider 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."²³⁸ The Unruh Act trumped only the constitutional claim of Rotary International; this holding is not an endorsement of the Unruh Act's universal competency as a PAA.

The Unruh Act does not, in fact, provide a "legitimate and functional definition" of public accommodations. Indeed, the Unruh Act provides no definition; the legislature surrendered the job of carving out a definition to judges and to the adversary system. Additionally, the Unruh Act provides no specific guidance, no specific policy goal, and ignores entirely any freedom of association issues that might arise. Freedom of association, like the definition of public accommodation, is left to the state courts and to the affected

233. Note, *Rotary International v. Duarte*, *supra* note 74, at 414.

234. Note, *supra* note 105, at 1617.

235. Note, *Rotary International v. Duarte*, *supra* note 74, at 424.

236. *Id.* Another commentator concurs that the *Rotary* decision gave a general "stamp of approval" to broader definitions of public accommodations. McGovern, *supra* note 23, at 139.

237. 481 U.S. 537, 544-49 (1987). See *supra* note 71.

238. *Id.* at 547 n.6.

parties to infer.²³⁹ No organization is alerted to its possible inclusion by the vague language of the statute, so any exclusionary organization is a candidate for a lawsuit.

CONCLUSION

If the constitutional right to freedom of association protects the BSA, courts in California and Connecticut²⁴⁰ denied its rights. Moreover, the financially coerced decision to integrate nationally was premature. From one standpoint, this result does not matter. The BSA is not the NAACP, nor is it a nuclear family; and the abridgment of its associational freedom does not elicit the popular constitutional outrage involved in those cases. Further, the constituency of the BSA will probably not change greatly as a result of its legal defeats and its decision to integrate. Yet, as Douglas Linder wrote:

When the last all-women's private school is forced to close its doors, when the law no longer tolerates the existence of all-Norwegian or all-Catholic clubs, when the Boy Scouts and the Girl Scouts finally merge, even those of us calling ourselves egalitarians may stop to shed a tear or two for pluralism lost.²⁴¹

The forced integration of the BSA matters precisely because the integration of the BSA is trivial. Such a decision neither advances the political or moral rights of the formerly excluded, nor upholds the important goals of antidiscrimination legislation.

Paul Varela

239. See *Curran v. Mount Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 468 U.S. 1205 (1984).

240. See *supra* note 129.

241. Linder, *supra* note 10, at 1902.