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# The Trouble with Jaycees

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## COMMENTARY

### THE TROUBLE WITH *JAYCEES*

Neal E. Devins\*

*Roberts v. United States Jaycees*<sup>1</sup> presented the Supreme Court with an opportunity to clarify both the constitutional rights of associations and the nature of a state's interest in preventing sex discrimination. After the Supreme Court's July 1984 determination that Minnesota could force the then all-male Jaycees to open their membership rolls to women,<sup>2</sup> the manner in which state antidiscrimination laws may impinge on associational practices still remains a mystery. This commentary will highlight various ambiguities in *Jaycees*—ambiguities that will permit states, associations, and courts to utilize the *Jaycees* opinion to further their preferences.

That *Jaycees* raises more questions than it answers is not a surprising or unique phenomenon. Court decisions concerning the ability of the state to limit individual choice to further some collective end are frequently idiosyncratic.<sup>3</sup> *Jaycees* is such a case. On one hand, Minnesota sought to prohibit Jaycees members from determining with whom they would and would not associate. On another hand, Jaycees' practices were antithetical to Minnesotans' shared belief in sexual equality. In resolving this conflict, the Court crafted an opinion especially suited to the quasi-commercial nature of the Jaycees organization.

The United States Jaycees is a tax-exempt nonprofit corporation with ap-

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The views expressed in this commentary are those of the author and do not necessarily reflect the views of the Commission on Civil Rights.

1. 104 S. Ct. 3244 (1984).

2. Shortly after the *Jaycees* decision, the organization amended its bylaws to permit women to join as full members. See N.Y. Times, Aug. 17, 1984, at A8, cols. 1-2 (late ed.).

3. The Supreme Court's abortion decision is perhaps the best example of the phenomenon. According to Harvard law professor Laurence Tribe: "[N]othing in the Supreme Court's opinion provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability, particularly when a legislative majority chooses to regard the fetus as a human being from the moment of conception . . ." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 927 (1978). See also Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 925 n.41 (1973).

proximately 295,000 regular members in 7,400 local chapters.<sup>4</sup> The organization's purpose is to provide its members "with opportunity for personal development and achievement and an avenue for intelligent participation . . . in the affairs of this community, state and nation."<sup>5</sup> Towards this end, Jaycees involve themselves in a variety of community service endeavors. Those activities both benefit the community and help members develop leadership training skills. On occasion, the Jaycees adopt positions on issues of local or national concern. For example, the Jaycees opposed socialized medicine; supported the 18-year-old vote; supported the withdrawals of American troops from Vietnam; and supported the economic policies of the Reagan administration.<sup>6</sup>

Jaycees membership, at the time of trial, was limited to young men between the ages of eighteen and thirty-five.<sup>7</sup> The Jaycees actively sought new members and never denied membership to an eligible male applicant. Women could participate in most Jaycees' activities as associate members. Women, however, could not vote, serve as officers, or receive service awards for their work as associate members.<sup>8</sup>

At issue in *Jaycees* was the applicability of Minnesota's public accommodations statute<sup>9</sup> to the Minneapolis and St. Paul chapters of the national Jaycees organization. Those chapters, in violation of the national organization's by-laws, admitted women as regular members. In December 1978, after being advised that their charters might be revoked, the Minneapolis and St. Paul chapters filed sex discrimination charges with the Minnesota Department of Human Rights.<sup>10</sup>

Minnesota, like 37 other states,<sup>11</sup> has enacted public accommodations statutes, the reach of which extends beyond federal prohibitions of discrimination on the basis of race, religion, or national origin.<sup>12</sup> In October 1979, a

4. Brief of Appellee, *The United States Jaycees* at 2-3, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984).

5. *Id.* at 2 (quoting article 2 of Jaycees' bylaws).

6. *Id.* at 4-5.

7. *Id.* at 3 (quoting article 4 of Jaycees' bylaws).

8. Appellants' Brief at 11-12, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984).

9. The Minnesota statute provides, in part, that it is an unfair discriminatory practice "[t]o deny any person full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sex." MINN. STAT. § 363.03(3) (1982).

10. 104 S. Ct. at 3248.

11. See Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1897 n.97 (1984); see generally Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978).

12. 42 U.S.C. § 2000a (1982). The federal statute also exempts private clubs. For a discussion of the federal private club exemption, see Burns, *The Exclusion of Women from Influ-*

state hearing examiner concluded that the Jaycees had violated that law.<sup>13</sup> The Jaycees challenged that decision in federal district court, claiming that application of the public accommodations statute would interfere impermissibly with the organization's rights of free speech and association. The district court upheld the state's position.<sup>14</sup> The court stated that "[w]hile the Jaycees has a right to believe that its organization should only advance the interests of men, its practice of excluding women from equal benefits does not enjoy [affirmative constitutional] protection."<sup>15</sup>

A divided panel of the United States Court of Appeals for the Eighth Circuit reversed that decision in June 1983.<sup>16</sup> Concluding that "[i]f the [Minnesota] statute is upheld, the basic purpose of the Jaycees will change,"<sup>17</sup> the appellate court held that the state's interest in eradicating sex discrimination was outweighed by the Jaycees interest in free speech and association.<sup>18</sup> Central to the appellate court's ruling were determinations that some of the Jaycees activities "fall within the narrowest view of First Amendment freedom of association"<sup>19</sup> and that the record did not indicate that membership in the Jaycees was "the only practicable way for a woman to advance herself in business or professional life."<sup>20</sup>

The Supreme Court reversed. First, although ruling that there was an independent right to intimate association, the Court concluded that the Jaycees—a quasi-public organization—could not invoke that associational privilege.<sup>21</sup> In so holding, the Court suggested that this right was limited to such "highly personal relationships" as one's immediate family.<sup>22</sup> The Court was mute on the question of whether an organization more private than the Jaycees but more public than the family could invoke this right to "intimate association." Second, the Court ruled that the expression rights of restrictive associations are limited to issues connected with that association's

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*ential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321, 377-80 (1983).

13. 104 S. Ct. at 3248. The Minnesota Supreme Court affirmed that ruling, *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981). Since state supreme court interpretations of state statutes are binding, the applicability of the Minnesota statute to the Jaycees was not an issue before the United States Supreme Court.

14. *United States Jaycees v. McClure*, 534 F. Supp. 766, 774 (D. Minn. 1982).

15. *Id.* at 770.

16. *United States Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983). Following the appellate court decision, the national Jaycees revoked the charter of the St. Paul Chapter. *Minneapolis Star & Tribune*, July 4, 1984, at 11A, col. 1.

17. *United States Jaycees v. McClure*, 709 F.2d at 1571.

18. *Id.* at 1576.

19. *Id.* at 1569.

20. *Id.* at 1573.

21. 104 S. Ct. at 3249-52.

22. *Id.* at 3250.

restricted practices.<sup>23</sup> For the Jaycees, the Court concluded that these rights were de minimis since the Jaycees had not spoken out on "gender-related issues."<sup>24</sup> Third, and finally,<sup>25</sup> the Court found compelling Minnesota's interest in the eradication of sex discrimination.<sup>26</sup> Since gender classifications are not subject to strict scrutiny equal protection review,<sup>27</sup> it was uncertain whether the Court would consider compelling the state's interest in eradicating sex discrimination. At the same time, *Jaycees* provides little guidance as to whether a stronger freedom of speech claim would outweigh that interest, for the Court merely balanced the Jaycees' de minimis right to expression against the state's compelling interest in ending sex discrimination.<sup>28</sup>

This commentary will explore the Court's ruling on these three issues. Special attention will be devoted to two matters, namely, the contours of the right to intimate association and the appropriateness of employing a balancing test to judge the scope of permissible state intrusions on protected expression. On both matters, the Court made a clear departure from prior Court rulings. Moreover, the "standards" adopted by the Court are so malleable as to permit patently inconsistent readings of *Jaycees* by associations, states, and courts.

With respect to association, prior Court rulings left open the question of whether "freedom of association" was an independent constitutional right.<sup>29</sup> But, *Jaycees*' recognition of a right to "intimate association" is an unsatisfactory answer to this question for "intimate association" can be as narrow as the family and as broad as anything more private than the Jaycees.<sup>30</sup>

Equally (if not more) troublesome is the Court's adoption of a balancing test to determine whether the Jaycees' protected expression was outweighed by state nondiscrimination objectives. Prior Court rulings clearly require

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23. *Id.* at 3254-55.

24. *Id.* at 3255.

25. *Jaycees* also raised questions of overbreadth and void-for-vagueness. 104 S. Ct. at 3255-57. Since these issues are fact specific to Minnesota's "public accommodations" statute, these matters will not be discussed in this commentary. For some sense of the reach of Minnesota's statute, "[W]hen asked by Justice O'Connor in oral argument whether the aggressive marketing techniques of the Girl Scouts would make the Scouts a 'public accommodation' under Minnesota laws, Richard L. Varco, Jr., Minnesota's Special Assistant Attorney General, concluded that it would." Linder, *supra* note 11, at 1899 n.103 (citing 52 U.S.L.W. 3785-86 (May 1, 1984)).

26. 104 S. Ct. at 3253.

27. See, e.g., *Heckler v. Mathews*, 104 S. Ct. 1387 (1984); *Califano v. Webster*, 430 U.S. 313 (1977); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

28. 104 S. Ct. at 3255 ("even if the enforcement of the Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes.").

29. See *infra* notes 39-53 and accompanying text.

30. See *infra* notes 70-71 and accompanying text.

state infringements on protected speech to be the least restrictive means available to satisfy some compelling state interest.<sup>31</sup> The balancing test reduces this state burden, thereby paving the way for government-imposed limitations on first amendment rights.<sup>32</sup> Moreover, *Jaycees* restricts the free speech rights of restrictive associations by demanding that a nexus exist between restrictive practices and protected speech.<sup>33</sup>

Overall, *Jaycees* raises more questions than it answers. And those questions that it does answer seem to be the byproduct of unsatisfactory constitutional analysis. This commentary will demonstrate the truth of these propositions. Section I will address the Court's right to "intimate association" holding. Section II will explore the "expressive association" ruling.

## I. FREEDOM OF ASSOCIATION AS AN INDEPENDENT CONSTITUTIONAL RIGHT

### A. The Dilemma of Association

Whether "freedom of association" is a free standing constitutional right is a vexing issue. Values of communitarianism and pluralism, which are part and parcel of American culture, support the existence of such a right.<sup>34</sup> As Alexis de Tocqueville observed: "Americans of all ages, all stations in life, and all types of dispositions are forever forming associations . . . of a thousand different types, religious, moral, serious, futile, very general and very limited, immensely large and very minute."<sup>35</sup> And many of the associations we Americans form have exclusionary membership policies.<sup>36</sup> For the most part, antidiscrimination laws take into account the important role that private associations play in our lives and limit their coverage to distinctly public entities. Yet, as was the case with Minnesota, public accommodations laws can extend to not-for-profit, civic-minded associations.<sup>37</sup> Moreover,

31. See *infra* note 75 and accompanying text.

32. See *infra* note 100 and accompanying text.

33. See *infra* notes 90-92 and accompanying text.

34. See generally Linder, *supra* note 11, at 1880-82, 1901-03.

35. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 485 (G. Lawrence trans. 1966). De Tocqueville also commented that "[t]he most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together." *Id.* at 178.

36. For a partial listing of such organizations, see Linder, *supra* note 11, at 1897 n.95; Brief of Conference of Private Organizations as Amicus Curiae in Support of Affirmative at 2-11, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984); Brief for Appellee United States Jaycees at 46-48, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984). Some "private" all-male associations, such as the Benevolent and Protective Order of the Elks and the Loyal Order of the Moose, have well over a million members. Other restrictive associations include the Prince Hall Masonry (black males), Hadassah (Jewish females), P.E.O. Sisterhood (all females), and the National Association of Women's Clubs (black females).

37. The Boy Scouts and Rotary International, for example, have been involved in litiga-



government is not limited from seeking to extend antidiscrimination laws to private associations.<sup>38</sup> Such government action might well be supported by another value central to our culture, the concern for ensuring equality of opportunity; for the right to association clearly implies a right to nonassociation.

Private associations, without doubt, can seek to limit the reach of government when government policy interferes with such well-established rights as freedom of speech or freedom of religion.<sup>39</sup> Aside from protecting the collective exercise of enumerated constitutional rights, private groups stand on much more tenuous grounds. In *Jaycees*, the Court was squarely presented with an opportunity to delineate the rights of private associations qua private associations.<sup>40</sup>

On one side, the Jaycees argued "that the right of association and its necessary corollary—the right of nonassociation—is in itself a fundamental liberty."<sup>41</sup> To support this claim, the Jaycees pointed to language in Supreme Court rulings<sup>42</sup> characterizing the right to association as "among our most

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tion challenging their membership restrictions under state public accommodations laws. *Curran v. Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 104 S. Ct. 3574 (1984); *Rotary Club v. Board of Directors of Rotary Int'l*, 2d Civ., No. B001663 (Cal. Ct. App. 2d Dis.) (appeal pending).

38. In New York City, for example, an ordinance was approved recently that extends public accommodations laws to a club that "has more than 400 members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, service, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." N.Y. Times, Sept. 11, 1984, at A1, col. 2 (late ed.).

39. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577-79 (1980) (freedom of speech and press ensure that public and press cannot be prohibited from attending murder trial); *NAACP v. Button*, 371 U.S. 415 (1963) (litigation viewed as a form of advocacy entitled to first amendment protection). See generally Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977).

40. Prior to *Jaycees*, the Court had opportunities to address this issue. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), a group of students unsuccessfully challenged a zoning ordinance prohibiting occupancy of a dwelling by more than two unrelated persons. The Court, in rejecting the students' claim, did not even recognize that the "association" rights of students were involved in the case. *Id.* at 9. At the same time, the Court, by ruling that "the town practice did not implicate freedom of association," implicitly ruled that there existed such a right. See Raggi, *supra* note 39, at 23-25 (suggesting that the village's interest in community stability was a compelling associational right). One other case where the issue of an independent right to association was raised was *Garcia v. Texas State Bd. of Medical Examiners*, 384 F. Supp. 434 (W.D. Tex. 1974), *aff'd mem.*, 421 U.S. 995 (1975). *Garcia* approved limitations placed on a consumer-controlled health maintenance organization. See *id.* at 440. Since the Supreme Court did not issue a formal opinion in *Garcia*, its action is of limited precedential significance.

41. Brief of Appellee, The United States Jaycees at 17, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984).

42. *Id.* at 17-18.

precious freedoms;"<sup>43</sup> as "an inseparable aspect of the 'liberty' assured by the Due Process Clause;"<sup>44</sup> as "a right which, like free speech, lies at the foundation of a free society;"<sup>45</sup> and as being shared "in common with [explicit] constitutional guarantees."<sup>46</sup>

On the other side, the state of Minnesota alleged that freedom of association "is a derivative right whose existence the Court has sometimes deemed necessary in order to protect the collective exercise by individuals of enumerated first amendment rights . . . ."<sup>47</sup> Dispositive of this issue, Minnesota contended, were a group of Supreme Court rulings dismissing the freedom of association claims of racially discriminatory private schools and labor unions.<sup>48</sup> For example, in *Runyon v. McCrary*,<sup>49</sup> the Court held that the federal antidiscrimination laws prohibit the operation of one-race private schools. Although recognizing "that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable,"<sup>50</sup> the Court ruled that "while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.'"<sup>51</sup>

The Jaycees and the State overstate their positions. Prior to *Jaycees*, the Court had neither validated or nullified "association" as an independent constitutional protection. Where the Court has invoked "association," it "has been little more than a shorthand phrase used . . . to protect traditional first amendment rights of speech and petition as exercised by individuals in groups."<sup>52</sup> Where "association" has been rejected, the Court effectively ruled that the government's compelling interest in racial nondis-

43. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (Ohio's ballot access requirements invalidated as improper interference with rights of minority political parties).

44. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (NAACP not obligated to disclose its membership list because of interference with right to pursue beliefs or ideas).

45. *Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (Arkansas statute requiring public school teachers to file a list of organizations of which they were a member improperly interferes with freedom of thought).

46. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (discussed *supra* note 39).

47. Appellants' Brief at 15, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984).

48. See, e.g., *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) (state aid to racially discriminatory private schools barred by equal protection guarantee); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945) (state can prohibit labor unions from denying membership to any individual on the basis of race, sex, or creed).

49. 427 U.S. 160 (1976).

50. *Id.* at 176.

51. *Id.* (quoting *Norwood v. Harrison*, 413 U.S. at 470).

52. *Raggi, supra* note 39, at 1.



crimination outweighed any countervailing constitutional right.<sup>53</sup> Thus, despite numerous allusions to "association" in prior cases, the Supreme Court was writing on a clean slate when it addressed the association claims in *Jaycees*.

### B. *Jaycees and the Right of Intimate Association*

The tone of *Jaycees* is such that the Court would have us believe that freedom of association is a well-established substantive concept, not a misnomer. The Court speaks so definitively about "constitutionally protected 'freedom of association'"<sup>54</sup> that it seems hard to believe there ever existed controversy concerning this right. At the outset of its analysis, the Court speaks categorically of two types of association recognized in past decisions. One is the variety of association connected with the exercise of enumerated constitutional rights, which the Court labels expressive association.<sup>55</sup> The other is concerned with the choice "to enter into and maintain certain intimate human relationships."<sup>56</sup> Labelled the "freedom of intimate association," this category of rights appears to be some type of independent right to association.

The Court's discussion of intimate associational rights is premised on the belief that "the Bill of Rights . . . must afford the formation and presentation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."<sup>57</sup> Although noting that associations, by "cultivating and transmitting shared ideals and beliefs[,] . . . foster diversity and act as critical buffers between the individual and the power of the State,"<sup>58</sup> the Court ultimately adopts a quite narrow view of this "independent" right to association. By emphasizing the "highly personal relationships" dimension of association, the Court effectively transforms the "right of association"<sup>59</sup> into an extension of the right of privacy.

The Court talks in terms of the "individual [who] draw(s) much of [his] emotional enrichment from close ties with others."<sup>60</sup> In fact, to "suggest

53. In *Runyon*, what "has never been accorded affirmative consideration protections" is "invidious private discrimination," not "freedom of association." 427 U.S. at 176. See *supra* notes 41-43; see also *infra* note 102.

54. 104 S. Ct. at 3249.

55. *Id.*

56. *Id.*

57. *Id.* at 3250.

58. *Id.*

59. For the Court: "[Such relationships] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our consideration scheme." *Id.* at 3249.

60. *Id.* at 3250.

some relevant limitations" on this right, the Court refers to decisions concerned with "the creation and sustenance of the family."<sup>61</sup> Association extends beyond one's immediate family, however. The Court recognizes so much; although constitutionally protected "intimate associations" are "distinguished by such attributes as relative smallness, a high degree of selectivity in decision to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."<sup>62</sup> In determining whether government action infringes on this right of association, the *Jaycees* Court argues that "a careful assessment [must be made] of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."<sup>63</sup>

Under this definition of associational rights, the Court found that such protections do not extend to the Jaycees. Central to this Court ruling was the fact that (1) the Jaycees admit (and openly solicit) all male applicants between the ages of 18 and 35,<sup>64</sup> and (2) women and other nonmembers already participate in a substantial portion of Jaycees activities.<sup>65</sup>

The Court's analysis of this independent right to association issue is troublesome. Most significantly, the Court misplaces its reliance on privacy decisions to serve as a foundation for an independent right of association. Values underlying the right of privacy are distinct from those communitarian concerns that underlie society's interest in protecting the right of association. "Communitarians worry that anything which erodes intermediate forms of community, such as antidiscrimination legislation, concentrates power in the state, and at the same time reduces the vitality and diversity of public life."<sup>66</sup> Although privacy concerns associated with familial relationships are an important part of communitarianism,<sup>67</sup> privacy is more narrowly focused on the rights of individuals qua individuals.<sup>68</sup> In *Jaycees*, the Court did little more than pay lip service to communitarian concerns; it spoke of private associations as "critical buffers between the individual and

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61. *Id.*

62. *Id.*

63. *Id.* at 3251. The Court further noted that "factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.*

64. *See id.* at 3247, 3257.

65. *Id.* at 3251.

66. Linder, *supra* note 11, at 1882.

67. For example, there is a close fit between the right of parents to direct their children's education and communitarian concerns of diversity and limited government. *See Devins, A Constitutional Right to Home Instruction?*, 62 WASH. U.L.Q. 435 (1984).

68. 104 S. Ct. at 3250. In another portion of the opinion, the Court noted that "protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity . . . ." *Id.* at 3252.

the power of the State," but used cases that "attend the creation and sustenance of a family"<sup>69</sup> to exemplify associational relationships.

*Jaycees'* reliance on privacy decisions is more than ill-suited. It suggests that, rather than recognizing an independent right to association, the Court viewed constitutionally protected association as merely the collective exercise of the right to privacy. The trouble with this equation is that the right to privacy, unlike freedom of religion or freedom of speech, does not lend itself to collective exercise. Such illogical deductions somehow seem appropriate in *Jaycees*, however. By referring only to Court decisions regarding family relationships as guideposts to determining the contours of independent association, the *Jaycees* Court fails to make the necessary connection between familial and nonfamilial relations. Instead, the Court speaks obliquely in terms of a "broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State."<sup>70</sup>

What then are the contours of this independent right to association? Other than stating that the *Jaycees* cannot make such a claim, the Court provides no information useful to determining the boundaries of this right. Granted, the Court does note "factors that may be relevant"<sup>71</sup> to such a determination. But the Court does not hint at the relative importance of any factor, nor does it indicate whether its list of possibly relevant factors is exclusive. The Court thereby accords itself plenary authority to determine, on an ad hoc basis, what associations will be accorded the constitutional protection of association. On this count, *Jaycees* does little more than cloud the controversy regarding independent constitutional rights for private associations.

## II. FREEDOM OF ASSOCIATION AS A BYPRODUCT OF FREEDOM OF SPEECH

Supreme Court decisions clearly recognize the collective expression of protected first amendment activities.<sup>72</sup> As stated by Justice Harlan: "Freedom of expression embraces more than the right of the individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective."<sup>73</sup> In the context of

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69. *Id.* at 3250.

70. *Id.* at 3251.

71. *Id.*

72. See generally L. TRIBE, *supra* note 3, at 700-10.

73. *NAACP v. Button*, 371 U.S. 415, 452 (1963) (Harlan J., dissenting on other grounds) (majority concludes that NAACP tactics in bringing a lawsuit are a form of protected expression).

groups with readily identifiable political, social, or religious purposes, application of this principle is relatively straightforward. But with the Jaycees, a quasi-commercial, civic organization which occasionally speaks out on political issues, the transformation of protected individual speech to protected group speech is quite another matter.

Enforcement of the Minnesota law, by restructuring the Jaycees membership, represents a serious and substantial disruption of the internal affairs of the Jaycees.<sup>74</sup> Since government infringements on expressive association can be justified only "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,"<sup>75</sup> it would seem that the state could prevail under one of two circumstances, namely, if Minnesota's interest in the eradication of sex discrimination satisfied the "compelling interest—least restrictive means" standard or if the Jaycees' protected speech interests were *de minimis*. In *Jaycees*, the Court indicated that the Minnesota law could be justified on either of these grounds.

#### A. The Jaycees' Interest in Protected Speech

The dilemma of determining what degree of free speech protection should be accorded to a hybrid association, such as the Jaycees, was resolved by viewing as protected only that speech which was logically connected with the organization's restrictive practices.<sup>76</sup> For example, the Ku Klux Klan could invoke the first amendment in refusing to admit blacks or Jews since

74. See, e.g., 104 S. Ct. at 3252 ("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.").

75. *Id.* See also *Brown v. Socialist Workers' 74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982); *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). As shall be demonstrated, the *Jaycees* Court did not utilize this test. See discussion *infra* notes 98-100.

76. See 104 S. Ct. at 3254-55. Because of her belief that this approach "accords insufficient protection to expressive associations and places inappropriate burdens on groups claiming the protection of the First Amendment," Justice O'Connor wrote separately on this issue. *Id.* at 3257 (O'Connor, J., concurring in part and concurring in the judgment). For Justice O'Connor, "[w]hether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it." *Id.* at 3258. Instead, Justice O'Connor argued that first amendment speech protections should be bestowed only on associations "predominantly engaged in protected expression." *Id.* at 3259. Otherwise, predominantly commercial organizations could shield restrictive membership policies by taking positions on public issues while predominantly expressive associations might be unduly subject to antidiscrimination laws. *Id.* at 3258-59. Justice O'Connor's general concern is well taken. See *infra* notes 85-89. At the same time, her absolutist approach goes too far, for quasi-commercial associations should be accorded limited first amendment protections. See *infra* notes 100-02. For a more favorable analysis of Justice O'Connor's concurrence, see Linder, *supra* note 11, at 1894-97.

much of the Klan's protected speech is directed at blacks or Jews. With reference to the Jaycees' gender-based restrictions, the Court held that no basis exists "for concluding that admission of women as full voting members will impede the organization's ability to engage in . . . protected activities or disseminate its preferred views."<sup>77</sup> Consequently, the Court ruled that the "Jaycees have failed to demonstrate that the [Minnesota statute] imposes any serious burden on the male members' freedom of expressive association."<sup>78</sup>

The Jaycees sought to support their expressive speech claim on several related grounds. First, as an abstract proposition, the Jaycees asserted that a gender-gap exists. The group boldly claimed that "it is to be expected that men and women will diverge even on issues that have no gender content on their surface."<sup>79</sup> Second, the Jaycees argued that it has spoken out on issues directly related to its restrictive practices, such as military conscription.<sup>80</sup> Third, noting that the admission of women members might impact on decisions regarding both the selection of public policy issues that the organization will take positions on and the nature of those positions, the Jaycees argued that female membership might affect its position on such "blatantly gender related" issues as the Equal Rights Amendment and abortion.<sup>81</sup> Moreover, the Jaycees noted that its legal defense of its all-male membership

77. 104 S. Ct. at 3254. This conclusion parallels the state's contention that "the Jaycees can point to no organizational goal to which women cannot and do not aspire, no organizational function which women cannot perform, and no organizational position regarding which sex mandates a point of view." Appellants' Brief at 22, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984).

78. 104 S. Ct. at 3254. Curiously, to support this proposition, the Court cited its decision in *Hishon v. King & Spalding*, 104 S. Ct. 2229 (1984). The *Hishon* Court, in ruling that law firm partnership decisions are not immune from title VII employment discrimination actions, rejected the law firm's claim that application of title VII would infringe on constitutional rights of expression or association. Although the *Hishon* Court was correct in holding that the large commercial King and Spalding firm "has not shown how its ability to fulfill [protected] . . . function[s] would be inhibited by a requirement that it consider [a woman lawyer] . . . for partnership on her merits," *id.* at 2235, it is not readily apparent why the situation confronted by the quasi-commercial Jaycees would be viewed as analogous to that confronted by the strictly commercial law firm. As the *Jaycees* Court recognized, unlike the law firm, "a 'not insubstantial part' of the Jaycees' activities constitutes protected expression on political, economic, cultural, and social affairs." 104 S. Ct. at 3254.

79. Brief of Appellee, *The United States Jaycees* at 21, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984).

80. For the Jaycees:

[N]o group is as impacted by military conscription as young men between 18 and 35. The organized voice of young men on the draft is unquestionably of a different nature than the expression of women or older men and that voice has the right to be effectively expressed from a platform confined to young men.

*Id.* at 20.

81. See *id.* at 21. The Jaycees have not yet spoken on these issues. *Id.* It is possible,



policy was advocacy on a gender-related issue sufficient to trigger first amendment protection.<sup>82</sup>

The Supreme Court dismissed these claims because "the Jaycees rely solely on unsupported generalizations about the relative interests and perspectives of men and women."<sup>83</sup> Refusing to view such public policy issues as gender related without far more substantiation than the Jaycees offered,<sup>84</sup> the Court stated that the Minnesota law "requires no change in the Jaycees' creed of promoting the interests of young men."<sup>85</sup>

The majority's attempted debunking of the Jaycees' claim of protected expression is woefully inadequate. On one level, by refusing to "indulge in the sexual stereotyping" that views certain public policy issues as gender related without more substantial evidence of the gender relationship, the majority creates an onerous burden for *any* restrictive association seeking to demonstrate the nexus between its public policy positions and its restrictive practices.<sup>86</sup> For instance, since there is internal disagreement among blacks on the issue of school desegregation,<sup>87</sup> *Jaycees* could be interpreted to prohibit the formation of an all-black association concerned with the race and education issue. On another level, *Jaycees* would accord broad speech rights to restrictive associations that take positions on public policy issues demonstrably related to their restrictive practices.<sup>88</sup> With regard to the Jaycees,

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however, that had the Jaycees admitted women at that time, there would have been some public statement on these matters.

82. As stated in its brief, "[t]he basic issue in this case has been litigated by the Jaycees in numerous courts over the past decade at considerable expense; the presence of women voting members and officers would clearly have hindered the Jaycees' ability to devote its resources to this constitutionally protected advocacy." *Id.* at 21.

83. 104 S. Ct. at 3255. The Court thus rejected the Jaycees' abstract argument that the views of young men are distinct from those of young people. *See id.*; *see also supra* note 79.

84. To do so, according to the Court, would be impermissible sexual stereotyping. 104 S. Ct. at 3255.

85. *Id.* at 3254. This conclusion is similar to an argument advanced by the state in its brief. Responding to the Supreme Court's rejection of the parents' associational claim in *Runyon v. McCrary*, 427 U.S. at 161 (discussed *supra* notes 49-51 and accompanying text), the state argued: "Just as integration of the *McCrary* schools would not interfere with the racial philosophy or teaching at those institutions, so too will the integration of the Jaycees have no effect on participation by members of that group in . . . the positions articulated by that organization on public issues." Appellants' Brief at 22, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984). This analogy is off point. Unlike *Runyon* (where parents do not define the school's educational mission), Jaycee members have a hand in determining "the positions articulated by that organization on public issues." *Id.*

86. *Roberts*, 104 S. Ct. at 3255.

87. *See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Legislation*, 85 YALE L.J. 470, 471 (1976).

88. These concerns are also expressed in Justice O'Connor's concurrence. 104 S. Ct. at 3254-55. *See supra* note 76.

the Court would be compelled to accord the Jaycees broad speech rights if the organization had taken a position on any demonstrably gender related issue.<sup>89</sup>

Also, the Court was in error in concluding that the admission of women would not affect the content of the Jaycees' protected speech. Women and men differ on issues concerning the military and the economy, issues where the Jaycees endorsed the "male" perspective.<sup>90</sup> Moreover, by drastically altering the Jaycees' potential membership base, there is reason to suspect that the Jaycees' public policy positions might reflect the views of young people, rather than the interests of young men.

More troubling than the verity of the majority's characterization of the Jaycees protected speech as gender-neutral, the Court went too far in questioning the sincerity of the Jaycees' speech-related claims. As is the case with judicial inquiries into the sincerity of religious belief,<sup>91</sup> courts should not question the logical nexus between an association's protected speech and its restrictive practices. Aside from the possibility of committing error, the nexus between an association's protected speech and its restrictive practices need only make sense to the association's membership.<sup>92</sup>

Whether the Jaycees are entitled to have all of their activities protected by the first amendment is a matter distinct from the above considerations. The great bulk of the Jaycees' activities are unconnected to its occasional endeavors into areas of protected first amendment speech. Consequently, outside the context of such protected speech, there is no reason to permit the Jaycees to utilize the first amendment as a shield against antidiscrimination laws. At the same time, the Jaycees do serve as a distinct voice for young men on various issues of public concern. To balance these competing concerns, it would have been appropriate for the Court, on the one hand, to hold that the Jaycees cannot deny memberships to women on freedom of speech grounds and, on the other hand, to allow the Jaycees to limit the right to vote on public policy positions to the organization's male membership.

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89. *Jaycees* thus encourages organizations with restrictive membership policies to take positions on issues related to their restrictive practices.

90. Brief of Appellee, *The United States Jaycees* at 20, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984).

91. See, e.g., *Welsh v. United States*, 398 U.S. 333, 342-43 (1970); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

92. With reference to sincerely held religious belief, the Supreme Court recognized that: "Courts are not arbiters of scriptural interpretation. The narrow function of a reviewing court . . . is to determine whether . . . petitioner terminated his work because of an honest conviction that such work was forbidden by his religion." *Thomas v. Review Bd.*, 450 U.S. at 716.

*B. The State's Interest in the Eradication of Sex Discrimination*

The *Jaycees* Court ruled "that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."<sup>93</sup> In reaching this conclusion, the Court emphasized two factors: one that the Minnesota law "serves compelling State interests of the highest order" because sex discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life,"<sup>94</sup> and the other that the Jaycees' interest in expressive association is *de minimis*.<sup>95</sup> The Court thus balanced the state's interest against the Jaycees' interest, finding that "even if enforcement of the Act causes some incidental abridgement of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes."<sup>96</sup>

This "balancing approach" is a reformulation of the test traditionally applied in associational and other speech cases, namely, that any State infringement on protected speech can be justified only "by regulations adopted to serve compelling State interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms."<sup>97</sup> Applying this "compelling interest—least restrictive means" test, the Eighth Circuit had invalidated the Minnesota law, in part, because it found that the state objectives could be met by use of less restrictive means, "ways less direct and immediately intrusive on the freedom of association than an outright prohibition."<sup>98</sup> In reversing this ruling, the Supreme Court did not address this

93. 104 S. Ct. at 3253. The Court also indicated that the State's interest in ensuring equal access to public accommodations was compelling. For the Court, "[Minnesota's] expansive definition [of public accommodations] reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." 104 S. Ct. at 3254. It is interesting to note that, in its brief before the Court, Minnesota characterized its Human Rights Act as an attempt to effectuate "[t]he transcendent State goal . . . [of] ensur[ing] . . . equality of access to commercial activity . . ." Appellants' Brief at 26, *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984). Minnesota's reluctance to argue that its interest in the eradication of sex discrimination is compelling, perhaps, is a byproduct of the Supreme Court's unwillingness to view sex as a suspect classification. See *supra* note 27 and accompanying text.

94. 104 S. Ct. at 3253.

95. See *supra* notes 83-85 and accompanying text.

96. 104 S. Ct. at 3255.

97. *Id.* at 3252; see also *L. TRIBE, supra* note 3, at 703. The Court paid lip service to this standard, even acknowledging it as the governing standard at the outset of its expressive association analysis.

98. 709 F.2d at 1573. This line of reasoning improperly views the state's compelling interest as ensuring equal "leadership skills" training opportunities for women. The state's interest

issue because of the relative strength of the State's interest and weakness of the Jaycees' claim.

The Supreme Court's employment of such a balancing test, aside from deviating from well-settled precedent, raises numerous questions. Most significant, the test is potentially destructive of cherished first amendment rights. The balancing test, without doubt, is less onerous than the compelling interest standard to support government limitations on protected expression. Under it, government need not demonstrate that its interest is compelling or that its regulation is the least restrictive alternative to accomplish its ends. Instead, government need only show that its interest in a particular program outweighs the interests of groups affected by the program. Application of the test is also problematic because it justifies searching judicial inquiries into both the purposes of an association and the relationship of an association's restrictive practices to its purpose.<sup>99</sup>

The compelling interest test places a much higher value on the protection of individual liberties (exercised either by the individual or by the collective voice of a group of individuals). The balancing test, in contrast, accords much greater protection to government efforts designed to protect social norms. Although the government will not necessarily prevail if a balancing test is utilized,<sup>100</sup> the government stands a much better chance under it.

If the Court had applied the compelling interest test, it would have reached the same conclusion. The Court recognized as compelling the State's interests both in the eradication of sex discrimination and in assuring equal access to public accommodations. Although denial of such government benefits as tax-exempt status would have served these interests,<sup>101</sup> neither of these interests would have been as effectively served as by full

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of ensuring equal access to public establishments is much broader, however. Consequently, the fact that women could acquire similar "leadership skills" through membership in the Junior League or some other nonrestrictive association does not undercut the state's interest in "equal access" nor does it make more likely the accomplishment of the state's objectives through less restrictive alternatives. Moreover, possible vagueness and overbreadth problems associated with the Minnesota law do not undercut this state interest, for the state's interest in "equal access" surely applies to restrictive associations such as the Jaycees.

99. These problems are analogous to those caused by the Court's nexus requirement between restrictive practices and protected speech. See *supra* notes 90-92 and accompanying text.

100. Cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents can exempt their teenage children from compulsory schooling laws because the parents' interest in religious liberty outweighs state interest in education). In other religious liberty cases, the Court has adopted the compelling interest-least restrictive means standard. See, e.g., *Thomas v. Review Bd.*, 450 U.S. at 708. This compelling interest test does not address questions such as the extent to which the government program infringes upon religious practice or whether the religious liberty interest is so strong as to override a compelling state interest.

101. See *supra* note 98 and accompanying text.

implementation of the Minnesota statute. Moreover, the Court suggested that no constitutional protection should be accorded to the Jaycees' right to expressive association, for "like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection."<sup>102</sup>

### III. CONCLUSION AND RECOMMENDATIONS

This commentary has been rather critical of the Court's reasoning in *Jaycees*. In my view, *Jaycees* is an unhelpful and easily manipulable precedent. The Court, although speaking as if the contours of the independent right to association were well settled, did not articulate any concrete guidelines for the resolution of future association claims.<sup>103</sup> Instead, the *Jaycees* Court came perilously close to hinging associational interests on the right to privacy—a right ill-suited for the communitarian concerns of association.<sup>104</sup>

The Court's "freedom of expressive association" analysis is equally flawed. The nexus requirement between restrictive practices and protected speech is capable of unsavory application.<sup>105</sup> Moreover, this nexus test improperly invites searching judicial inquiries into the purposes and practices of private associations.<sup>106</sup> Also inviting such judicial scrutiny is the Court's apparent adoption of a balancing test to review state infringements of protected speech.<sup>107</sup> Unlike the traditional "compelling interest—least restric-

102. 104 S. Ct. at 3255. In my view, this statement is patently erroneous. Although various state interests might override an association's right to expression, that right still exists. The state must meet its obligation under the "compelling interest—least restrictive means" test. The proposition advanced in *Jaycees* has its roots in the Court's 1973 decision, *Norwood v. Harrison*, 413 U.S. at 468-70. In *Norwood*, the Court, in contrasting why religious freedom values support the validation of state efforts to aid parochial schools while freedom of association values do not justify the approval of state aid to discriminatory private schools, remarked:

[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

413 U.S. at 469-70.

This language is in conflict with the interpretation of *Norwood* proffered by the *Jaycees* Court. In *Norwood*, the Court merely held that the Constitution "places no [affirmative] value on discrimination [associated with freedom of association]" sufficient to override countervailing equal protection clause concerns. *Id.* at 469. For this reason, the *Norwood* Court contrasted the situation it faced from the state aid to parochial school issue, where religious liberty interests might outweigh establishment clause prohibitions. *See id.* at 468.

103. *See supra* notes 70-71 and accompanying text.

104. *See supra* notes 60-69 and accompanying text.

105. *See supra* notes 87-92 and accompanying text.

106. *See supra* notes 91-92 and accompanying text.

107. *See supra* notes 96-100 and accompanying text.



tive means" test that focuses on the nature of the state interest and appropriateness of state's enforcement mechanism—the balancing test places great emphasis on the association's practices, thereby calling into question the purposes and practices of private associations. The balancing test is also troublesome because it reduces the state's burden in justifying government-imposed limitations on first amendment rights.<sup>108</sup>

For me, first amendment rights are paramount. I would prefer to limit the state's role as equalizer than risk greater infringements on individual liberty. I am thus especially troubled by the uncertain future of *Jaycees*.

At the same time, I feel that Minnesota did not exceed its authority by requiring that public accommodations open their doors to women. That many of the Jaycees' activities qualify it as a public accommodation, I do not question. Jaycees' functions associated with the development of leadership skills in either a commercial or community service setting are undeserving of first amendment association or speech protections. Since these activities overwhelmingly dominate the Jaycees, I find appropriate Minnesota's requirement that Jaycees membership be open to women. With respect to statements made by the Jaycees on public issues, however, I think that the Court is in error. Although the predominantly commercial Jaycees might be without a constitutional right to prohibit women from leadership training, the Jaycees should be able to limit participation in the establishment of public policy positions to men. Males between the ages of eighteen and thirty-five might well have a distinct voice, especially on such issues as conscription and abortion.

The *Jaycees* Court did not pay attention to this voice. Rather, it viewed the Jaycees as a civic-minded Dale Carnegie training school. Such an attitude corresponds to the Court's application of a balancing test and its imposition of a restriction-message nexus requirement. For me, these two innovations of the *Jaycees* Court portend long-term limitations on the so-called "right to expressive association." *Jaycees* thus is a dangerous precedent for proponents of individual liberty. Since I place myself in that camp, I find *Jaycees* a most troubling decision.

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108. See *supra* note 100 and accompanying text.