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Freedom of Association After *Roberts v. United States Jaycees*

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COMMENTS

FREEDOM OF ASSOCIATION AFTER *ROBERTS V. UNITED STATES JAYCEES*

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The decision of the U.S. Supreme Court in *Roberts v. United States Jaycees*,[1] upholding a Minnesota ruling which requires the Minnesota Jaycees to admit women as full members, ended one controversy but marked only the beginning of a far larger one. It was predicted by many that *U.S. Jaycees* would answer the question of whether private associations with restrictive membership policies were vulnerable to state anti-discrimination laws or were constitutionally protected. It did not. Instead, while rejecting the Jaycees' constitutional claims, the Court established a comprehensive framework for analyzing future claims of associational freedom that contains a number of subjective elements inviting litigation. In view of the significance of the *U.S. Jaycees* analysis to a wide range of cases involving private associations, the case can fairly be called "a landmark." It is, however, less a "landmark" in the sense of marking a turning point in the development of the law than in the sense of being a point of orientation. The principal purpose of this Article is to explore the implications of *U.S Jaycees* for other associations with restrictive membership policies, and to propose ways to reduce some of the uncertainty engendered by the decision.

The Jaycees' road to the Supreme Court began in 1974 when the Minneapolis chapter of the nonprofit organization, in defiance of the national organization's bylaws which limit membership to young men between the ages of eighteen and thirty-five,[2] began admitting women as regular members.[3] The St. Paul chapter followed suit the

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

2. Article 4-2 of the bylaws establishes the following requirement for regular membership:

> Young men between the ages of eighteen (18) and thirty-five (35), inclusive, of Local Organization Members in good standing in this Corporation shall be considered Individual Members of this Corporation (unless the ages for membership shall have been changed by the State Organization Member as hereinafter permitted by By-Law 4-4.A.).

United States Jaycees v. McClure, 709 F.2d 1560, 1562 (8th Cir. 1983) (footnote omitted), *revd. sub nom.* Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984).

3. 104 S. Ct. at 3247.

next year. In December 1978, when the president of the national organization advised the two chapters that a motion to revoke their charters would soon be considered, members of both chapters filed charges of sex discrimination with the Minnesota Department of Human Rights.[4]

The complaints alleged that the Jaycees' policy of excluding women violated the Minnesota Human Rights Act, which provides in part:

> It is an unfair discriminatory practice:
>
> To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, or sex.[5]

In 1979, a Department hearing examiner concluded that the Jaycees was "a place of public accommodation" within the meaning of the Act and that the organization's exclusion of women as regular members constituted an "unfair discriminatory practice."[6] The Jaycees were ordered to desist from imposing any sanctions on any Minnesota affiliates for admitting women.[7] A subsequent Minnesota Supreme Court decision agreed with the examiner's conclusion that the Jaycees was "a place of public accommodation."[8]

Meanwhile, the national organization had filed suit in federal court seeking to enjoin enforcement of the Minnesota Human Rights Act. The Jaycees alleged that application of the Act would violate the organization's constitutional rights of free speech and association.[9] After trial, the district court entered judgment in favor of the state officials,[10] but that decision was overturned by a divided Court of Appeals for the Eighth Circuit.[11] The court of appeals found that application of the statute to the Jaycees would be "a direct and substantial" interference with the organization's right to select its members guaranteed by the first amendment, and that the state's interest

4. 104 S. Ct. at 3248.

5. MINN. STAT. § 363.03(3) (1982).

6. Minnesota v. United States Jaycees, No. HR-790-014-GB (Minn. Office of Hearing Examiners for the Dept. of Human Rights, Oct. 9, 1979), *reprinted in* Appellants' Jurisdictional Statement at A-93 - A-130, Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) (mem.) [hereinafter cited as Jurisdictional Statement].

7. Minnesota v. United States Jaycees, No. HR-790-01G-6B, *reprinted in* Jurisdictional Statement at A-108.

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

9. 104 S. Ct. at 3248.

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

11. 709 F.2d 1560.

in eliminating discrimination was not sufficiently compelling to outweigh this interference.[12] The national organization subsequently revoked the charter of the St. Paul chapter.[13]

Minnesota's appeal was considered by only seven members of the U.S. Supreme Court.[14] (Chief Justice Burger and Justice Blackmun did not participate. Burger was chapter president of the St. Paul Jaycees in 1935, while Blackmun is a former member of the Minneapolis Jaycees.[15]) Justice Brennan wrote an opinion for the Court which reversed the Eighth Circuit. Justice O'Connor filed a concurring opinion, and Justice Rehnquist concurred in the judgment. There was, to the suprise of many, no dissent.

I. The Tension Between Associational Freedom and Equality

In conflict in *U.S. Jaycees* were two well-established American principles: associational freedom and equality. It is a conflict the Supreme Court has seen before in other contexts. In cases involving challenges to the application of anti-discrimination legislation in the areas of housing,[16] employment,[17] education,[18] and access to commercial establishments,[19] the Court has consistently rejected claims of an associational freedom to discriminate. Indeed, as the ACLU points out in its amicus brief filed in the *U.S. Jaycees* case, "an unbounded freedom to dis-associate would cripple the guarantees of equality contained in the Constitution and our Civil Rights statutes, since every ban on discrimination would be checkmated by an assertion of individual autonomy phrased as a claim of associational freedom."[20]

It would be a mistake, however, to suggest that the Court's disposition of earlier cases involving claims of associational freedom made *U.S. Jaycees* an easy case. Two facts made it a very hard case. First, the societal interest in equality is less strongly implicated in the

12. 709 F.2d at 1572.

13. Minneapolis Star & Tribune, July 4, 1984, at 11A, col. 1.

14. 104 S. Ct. at 3257.

15. Minneapolis Star & Tribune, July 4, 1984, at 10A, col. 4.

16. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

17. Hishon v. King & Spalding, 104 S. Ct. 2229 (1984); Railway Mail Assn. v. Corsi, 326 U.S. 88 (1945).

18. Runyon v. McCrary, 427 U.S. 160 (1976).

19. Tillman v. Wheaton-Haven Recreational Assn., 410 U.S. 431 (1973).

20. Brief Amicus Curiae of American Civil Liberties Union at 12, Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984).

denial of the intangible benefits of membership in a voluntary association than in previous cases involving the denial of employment, education and housing. Second, the associational freedom at stake, the right of an association to define its own membership, is fundamental to a conception of a pluralistic free society.[21] Widespread recognition of the relative strength of the associational interest at stake is suggested by the fact that until recently virtually all anti-discrimination legislation either has contained, or has been interpreted to contain, exceptions for private associations.[22] Only in the past few years has the push for racial and sexual equality been sufficiently strong to thrust states into this sphere of human activity. Even today, most state anti-discrimination laws continue to exempt the membership practices of private associations from governmental intrusion,[23] and some of those states (such as Minnesota) which have extended their laws to reach private associations have done so with great trepidation.[24]

The tension between associational freedom and equality is one aspect of the larger tension between egalitarian, rights-oriented liberalism and communitarianism. Rights-oriented liberalism assumes that each individual has a personal set of interests and goals. It seeks a neutral legal framework which assures each individual an equal opportunity to pursue interests and goals as free moral agents. Because a person's worth is measured not by his attachments but rather by the choices he makes, the expansion of individual rights, through such means as state anti-discrimination statutes, is regarded as un-

21. The Jaycees in their brief contended that "[f]ew cases in this Court's history have so deeply involved the shape and character of the private sector." Brief of Appellee United States Jaycees at 49, Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) [hereinafter cited as Appellee's Brief]. Judge Arnold, writing for the Eighth Circuit, also was convinced that the associational interest involved was a strong one: "This kind of assertion of state power . . . goes to the heart of the kind of association that plaintiff has had and desires to continue . . . ." 709 F.2d at 1571.

22. The Civil Rights Act of 1964 exempts from its public accommodation sections all clubs and similar institutions "not in fact open to the public." 42 U.S.C. § 2000a(e) (Title II) (1982). For discussion of an attempt to apply the Civil Rights Act to a private association, see, *e.g.*, Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974). As for the states, it was reported in 1970 that each of the 37 states which had enacted public accommodation statutes "exempted private clubs either specifically or through restricted definitions of public accommodations." Comment, *Discrimination in Private Social Clubs: Freedom of Association and Right of Privacy*, 1970 DUKE L.J. 1181, 1182 (footnotes omitted). Most attempts to apply public accommodation statutes to private associations have failed. *See, e.g.*, Schwenk v. Boy Scouts of America, 275 Or. 327, 551 P.2d 465 (1976).

23. *But see* note 97 *infra*.

24. *See, e.g.*, United States Jaycees v. McClure, 305 N.W.2d 764, 771 (Minn. 1981) (limiting the application of the law to "public" organizations — like the Jaycees — but not to "private" organizations — like the Kiwanis). Three justices on the Minnesota Supreme Court dissented from the holding that the Jaycees was a "public accommodation" within the meaning of the statute. 305 N.W.2d at 774.

qualified moral and political progress.[25]

On the other hand, the communitarian sees a cost in egalitarianism. To the communitarian, an individual's source of identity comes not so much from individual choices as from the communities of which the individual is a part — family, church, trade union, social club, political party, city or nation. 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.[26] The rights-oriented liberal is likely to respond that the communitarian view, with its emphasis on preserving the traditions and obligations of intermediate communities, is a virtual invitation to prejudice.

The controversy presented in *U.S. Jaycees* provided the Court with an opportunity to address in a fundamental way the tension between associational freedom and equality — the tension between the communitarian and liberal views of the world. To its credit, the Court demonstrated its appreciation of the competing values and ethics involved.

Justice Brennan's opinion for the Court identified the concern that lies at the heart of the communitarian ethic. He wrote, "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State."[27] Brennan was writing about personal relationships (especially the family), but his observation has validity as well when applied to somewhat less personal, larger associations such as churches and political parties. At another point in his opinion, Brennan notes that some form of legal protection might be necessary to preserve societal benefits derived from private associations: "According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[28] Clearly, this is not a Court ready to permit an obsessive legislative concern for equality to accomplish unwittingly the destruction of the private associations which enrich public life. Moreover, as another passage makes clear, Brennan rec-

25. For a penetrating exposition of egalitarian, rights-oriented liberalism, see J. RAWLS, A THEORY OF JUSTICE (1971).

26. For discussions of communitarianism and critiques of liberalism, see, *e.g.*, M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) or A. MACINTYRE, AFTER VIRTUE (1981).

27. 104 S. Ct. at 3250.

28. 104 S. Ct. at 3252.

ognizes that the associational freedom involved in *U.S. Jaycees* is no minor matter: "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."[29]

As one would expect from a justice who has consistently demonstrated his credentials as an egalitarian, rights-oriented liberal, Brennan also fully understands, and stresses in his opinion, the importance of equality in access to opportunities. He describes Minnesota's goal of "assuring its citizens equal access to publicly available goods and services" as a compelling state interest "of the highest order."[30] Brennan offers two justifications, one intrinsic and one instrumental, for valuing equality so highly. Discrimination, he says, "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."[31]

A confrontation between egalitarian and communitarian values, such as that posed in *U.S. Jaycees,* might have been expected to produce a sharply divided court. Liberal justices could be predicted to vote to uphold the anti-discrimination statute, whereas conservatives on the Court, who generally share communitarian views, might be predicted to be sympathetic to the Jaycees' position. There was no sharp division on the Court, however; the case was decided without a dissenting vote. Justice O'Connor's complaint in a concurring opinion that the test adopted by the majority was "both over-protective of activities undeserving of constitutional shelter and under-protective of important First Amendment concerns" is the only indication of disagreement.[32]

The Eighth Circuit Court of Appeals, a court in which dissent is a rarity,[33] split sharply in *U.S. Jaycees.* A petition to rehear en banc the split decision of a three-judge panel upholding the Jaycees' constitutional claim was denied by an equally divided vote.[34] How did a case which provoked such disagreement on the court of appeals produce a unanimous decision in the Supreme Court? The answer may lie in the Supreme Court's unique ability to simultaneously an-

29. 104 S. Ct. at 3252.

30. 104 S. Ct. at 3253.

31. 104 S. Ct. at 3253.

32. 104 S. Ct. at 3257 (O'Connor, J., concurring). *See* text at notes 86-94 *infra.*

33. Between January 1, 1982 and June 30, 1984, dissenting opinions were filed in only 6.7% of the reported panel decisions of the Eighth Circuit Court of Appeals. D. Linder, Dissent in the Eighth Circuit: A Study of Judges and Judging (uncompleted manuscript).

34. Order Denying Petition for Rehearing en banc (Aug. 1, 1983), *reprinted in* Jurisdictional Statement, *supra* note 6, at 131 app.

nounce and severely circumscribe a constitutional principle. It is the Supreme Court which is the principal expositor of constitutional law, and that role sometimes presents opportunities for compromise in the Court which are not open to courts which primarily decide constitutional cases, not make constitutional law. Whether the limiting language in Justice Brennan's opinion was bought with the votes necessary to forge a majority opinion is a matter of pure speculation.[35] Nonetheless, it is interesting to observe that under the test propounded by the Court, it is likely in many future cases where *U.S. Jaycees* is the most significant precedent that the balancing of associational freedom and equality will produce an opposite result.

II. THE ANALYSIS IN *U.S. JAYCEES*

Justice Brennan identifies two distinct constitutional sources of protection for associational freedom: the first amendment (implicit in the right to engage in expressive activities) and the fourteenth amendment (as a fundamental aspect of privacy).[36] Brennan refers to the first amendment justification for protecting association as "instrumental"; the due process clause justification he refers to as "intrinsic."[37] While the existence of the two separate sources of protection was understood by some of the lawyers participating in the *U.S. Jaycees* litigation, it is remarkable how rarely the basic distinction appeared in briefs and other litigation documents. The most charitable explanation for the omission is that one of the two sources of protection — the zone of privacy found to exist in the due process clause of the fourteenth amendment — was seen as offering so little hope of protecting the membership policies of a 295,000-member organization that it did not warrant discussion.[38] Justice O'Connor agrees with that assessment in her concurring opinion.[39]

Although the less relevant of the two senses of "freedom of association" to the Jaycees' litigation, the scope of protection afforded by the due process clause for "certain intimate human relationships"[40]

35. For speculation that it was, see Will, *Jaycees: Consorting With the Ladies?,* Detroit News, July 8, 1984, at 13-A, col. 4.

36. 104 S. Ct. at 3249.

37. 104 S. Ct. at 3249.

38. For further discussion of the right of privacy as a source for protection of associational freedom, see, *e.g.,* Karst, *Freedom of Intimate Association,* 89 YALE L.J. 624 (1980); Comment, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy,* 1970 DUKE L.J. 1181; Comment, *Association, Privacy and the Private Club: The Constitutional Conflict,* 5 HARV. C.R.-C.L. L. REV. 460 (1970).

39. 104 S. Ct. at 3257 (O'Connor, J. concurring).

40. 104 S. Ct. at 3249.

has important implications for other private associations with discriminatory membership policies. Brennan identifies as falling under the constitutional shelter of the fourteenth amendment those associations which involve "deep attachments and commitments" of an intensely personal sort — associations in which are shared not only ideas and experiences, but also the "distinctly personal aspects of one's life."[41] Obviously, the association at the very center of Brennan's conception of protected associations is the family. Supreme Court decisions which have protected associational freedom as an intrinsic element of personal liberty have generally done so in situtations where the state has intruded upon personal decisions bearing critically on family lives — marriage,[42] childbirth,[43] the rearing and education of children,[44] and cohabitation with one's relatives.[45]

If the protection afforded associational freedom by the due process clause were specifically limited to family relationships, it would hardly deserve the attention received in Brennan's opinion. Privacy protection, although having its strongest force in situations involving governmental intrusion into family decisions, reaches other relationships which share the characteristics that make family life deserving of protection. Brennan lists some of these characteristics. They include "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[46] In the next paragraph, Brennan adds the purpose and policies of the association, as well as "congeniality," to the list of factors relevant to a determination of whether constitutional protection of "intrinsic" associational freedom is appropriate.[47]

Brennan declines to identify associations other than the family which may meet his standards for privacy protection, although he seems to suggest a sliding scale of protection for associations ranging from the family, which will be protected from a wide variety of state incursions, to associations in which personal attachments are highly attenuated (such as General Motors or the Jaycees), and for which

41. 104 S. Ct. at 3250.

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

43. Carey v. Population Servs. Intl., 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965).

44. Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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

46. 104 S. Ct. at 3250.

47. 104 S. Ct. at 3251.

no privacy protection is available.[48] Located between the family and General Motors on Brennan's spectrum are a great number of associations with privacy claims of varying strengths.

It will be for future cases to flesh out the implications of the intrinsic sense of associational freedom, but some private associations have a number of characteristics listed in *U.S. Jaycees,* and therefore apparently have relatively strong privacy claims. A four-couple bridge club or a college fraternity or sorority, for example, may satisfy Brennan's criteria of relative smallness, selectivity, seclusion and congeniality. To the extent these associations' "purposes" might include sharing "personal aspects of one's life," the match would be fairly complete. Presumably then, an interference with such an association might be vulnerable to constitutional attack. For example, a state university regulation prohibiting single-sex organizations would be constitutionally suspect as applied to college fraternities or sororities. State regulation of private bridge clubs, although a wildly implausible prospect, probably would be of even more dubious constitutionality. But whether the fourteenth amendment's zone of privacy would afford protection for large-membership, single-sex social organizations, such as the Elks or Moose, is open to serious question.[49]

Putting to a side the constitutional underpinnings of the fourteenth amendment's zone of privacy, judicial willingness to protect highly personal relationships is easily understood. The explanation lies in the weakness of the asserted state justification for regulation. With the exception of *Roe v. Wade*[50] and its progeny, virtually all of

48. 104 S. Ct. at 3250-51.

49. Prior to *U.S. Jaycees,* the Supreme Court had not considered the attempt of a state to directly regulate the membership of a private association. The issue had been discussed, however, in various concurring and dissenting opinions. For example, in a dissent joined by Justice Marshall, Justice Douglas (in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)), stated:

> My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be.

407 U.S. at 179-80.

The issue was also discussed in the concurring opinion of Justice Goldberg, joined by Warren, C.J., and Douglas, J., in Bell v. Maryland, 378 U.S. 226 (1964):

> 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.

378 U.S. at 313.

50. 410 U.S. 113 (1973) (protection of fetal life).

the Court's decisions recognizing a constitutionally protected zone of privacy are cases where the state's interest was remarkably weak.[51] The probability of judicial protection of private discrimination, as well as the improbability of state regulation, increases when the association in question has the characteristics identified by Brennan 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.

The Jaycees' claim under the first amendment was taken considerably more seriously than its privacy claim. It is in its discussion of associational freedom as an implicitly protected first amendment right that the greater significance of *U.S. Jaycees* lies. It is also this discussion which spurred a concurring opinion by Justice O'Connor identifying serious problems with the majority's approach.

Although the word "association" appears nowhere in the first amendment[52] (or anywhere else in the Constitution), a right to associate has long been recognized as necessary to safeguard those activities specifically protected by the first amendment — religion, speech, assembly, petition for grievances.[53] Obviously, neither political parties nor organized religion could flourish without association.

Of the many possible forms governmental interference with free association may take, one of the most troublesome is interference with the internal organization or affairs of a group. The Court has in the past not hesitated to invalidate interference of this type.[54] It is precisely this type of interference at issue in *U.S. Jaycees.* Justice Brennan appreciates the serious intrusion presented by a regulation which forces an organization such as the Jaycees to accept members it does not desire: "Such a regulation may impair the ability of the original members to express only those views that brought them to-

51. *See, e.g.,* Moore v. City of East Cleveland, 431 U.S. 494, 500 (1977) (ordinance which would prevent grandmother from living with grandsons justified by city as means of preventing overcrowding and parking congestion); Griswold v. Connecticut, 381 U.S. 479 (1965) (claim of a married couple of a privacy right to use birth control was upheld against a state claim that it could restrict the use of contraceptives by all residents, including married persons, as a means of discouraging promiscuity); Meyer v. Nebraska, 262 U.S. 390 (1923) (privacy right of parents to direct the education of their children was upheld against a claim by Nebraska that it could prohibit the teaching of German in nonpublic schools as a means of promoting the "Americanization" of young children).

52. U.S. CONST. amend. I.

53. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1 (1976); United Mine Workers v. Illinois State Bar Assn., 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963).

54. *See, e.g.,* Democratic Party v. Wisconsin, 450 U.S. 107 (1981); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Cousins v. Wigoda, 419 U.S. 477 (1975).

gether."[55] Justice O'Connor sees the threat to first amendment values as even larger. She writes, "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[56] According to O'Connor, any state interference with the membership policies of an expressive association "violates the most basic guarantee of the First Amendment — that citizens, not the government, control the content of public discussion."[57]

The approaches to defining a first amendment associational freedom proposed by Justices Brennan and O'Connor differ substantially both in their focus and in their implications for other associations with restrictive membership policies. In one important respect they agree: both are capable of affording meaningful protection for associational freedom. Either approach could be considered a rejection of a basic argument made by Minnesota and others in support of enforcement of anti-discrimination laws. They had argued that acts of discrimination could not be considered "pure expression," and therefore that a law prohibiting the exclusion of an identified class from an association should be subjected only to the balancing test adopted by the Court in *United States v. O'Brien*.[58] Under the *O'Brien* test, the existence of an important state interest unrelated to the suppression of speech should be sufficient to sustain the statute.[59] Whether the Brennan or the O'Connor analysis is used in future cases, states seeking to interfere with the restrictive membership practices of expressive associations will have to show more than merely an "important" interest.

The critical difference between the approaches of Brennan and O'Connor can be summarized easily. Brennan would balance an association's claim, no matter how strong it might be, against the interest supporting the state intrusion.[60] O'Connor, on the other hand, would uphold an association's claim against a state anti-discrimination statute once she was assured that the association qualified as an "expressive association."[61] The other major difference relates to the

55. 104 S. Ct. at 3252.

56. 104 S. Ct. at 3258 (O'Connor, J., concurring).

57. 104 S. Ct. at 3258 (O'Connor, J., concurring).

58. 391 U.S. 367 (1968). For Minnesota's argument that it need not show that its statute is supported by a compelling state interest, see Appellant's Brief at 15-22, Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984).

59. 391 U.S. at 376-77.

60. 104 S. Ct. at 3252.

61. 104 S. Ct. at 3258 (O'Connor, J., concurring).

factors relevant to each Justice's analysis. For Brennan, a number of factors must be weighed.[62] For O'Connor, the analysis is more straightforward, focusing almost exclusively on whether the activities of the association are predominantly expressive or commercial.[63] Thus in the case of the Jaycees, an organization which falls on the "commercial" side of O'Connor's dichotomy, the first amendment claim fails. Conversely, Brennan and the majority see a first amendment right of the Jaycees as "plainly implicated,"[64] but the Jaycees lose on the balancing test. The involvement of the Jaycees in a variety of civic, charitable, lobbying, and fundraising activities is enough to trigger Brennan's first amendment analysis; O'Connor demands more.

Brennan invokes a test which has seen wide application in first amendment case law. The Minnesota anti-discrimination law may be applied to the Jaycees if it serves a "compelling state interest, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[65] What is noteworthy about Brennan's test in *U.S. Jaycees* is that while the formulation may be the same as in other first amendment contexts, the test as applied seems substantially less speech-protective than in previous cases.[66]

The two significant inquiries in *U.S. Jaycees* concern the strength of Minnesota's interest in applying its anti-discrimination statute to the Jaycees and whether enforcement of the statute represents the least restrictive means of achieving those interests. No serious contention is made that the Minnesota Act is aimed at the suppression of speech, and Brennan dismisses the suggestion that discriminatory membership policies are themselves "symbolic speech" deserving of first amendment protection.[67]

With few exceptions, insistence that a state demonstrate a com-

62. 104 S. Ct. at 3250-51. The factors to be weighed would include the degree to which the exclusion from membership adversely affects the excluded class and the interests of the state, the degree to which the adverse impact of the restrictive membership policy on state interests could be reduced through measures open to the state, the degree to which application of the anti-discrimination law to the association's membership policies would affect the expressive activities of the association, and the degree to which the membership policies of the association are selective. Each of these factors is considered in greater detail in the text which follows.

63. 104 S. Ct. at 3259 (O'Connor, J., concurring).

64. 104 S. Ct. at 3252.

65. 104 S. Ct. at 3252.

66. *See, e.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976); Wisconsin v. Yoder, 406 U.S. 205 (1972).

67. Justice Brennan characterizes any claim that the admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are prohibited from voting as "attenuated at best." 104 S. Ct. at 3255.

pelling state interest to support a regulation has in the past meant that the regulation could not withstand constitutional scrutiny. Only for Justice Powell has "compelling" sometimes not seemed to mean "compelling."[68] Nonetheless, in *U.S. Jaycees* five justices of the Supreme Court are convinced that Minnesota has a compelling interest in seeing to it that women may become full members of the Jaycees. In particular, Brennan says that the state's compelling interest lies in "[a]ssuring women equal access to such goods, privileges, and advantages" as the Jaycees may have to offer its members.[69] The Minnesota Supreme Court, in holding the public accommodation law applicable to the Jaycees, found that, "[l]eadership skills are 'goods', [and] business contacts and employment promotions are 'privileges' and 'advantages.' "[70] Brennan accepted Minnesota's conclusion that valuable goods and privileges could come from membership in the Jaycees.

Brennan's focus on state interests poses serious analytical problems. For example, Brennan seems to require a determination as to whether guaranteeing equal access to the particular organization challenging the statute serves a compelling interest. If the Jaycees promised to develop the leadership skills of their members, but failed to deliver, presumably no compelling state interest would be served by ensuring access to women, and the organization's constitutional claim would be upheld. Well-run organizations would appear to be vulnerable to anti-discrimination laws; poorly run organizations appear safe. Moreover, by stressing the goods and services of the Jaycees and their economic importance to women, Brennan also raises questions about the status of an all-male or all-female organization which is only one of several organizations to offer a particular set of goods or services. What if there were an all-female organization in the Twin Cities, or one open to both sexes, which was as well-connected in the business world as the Jaycees and which offered the same leadership training and other privileges that the Court viewed as so beneficial to women? Is it really of "compelling" importance that each sex have equal access to *every* organization offering valuable privileges?[71]

68. See, *e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 355-79 (1978), in which Justice Powell found the state university's interest in a diverse student body to be compelling enough to justify preferential treatment in admissions for minority students.

69. 104 S. Ct. at 3254.

70. United States Jaycees v. McClure, 305 N.W.2d 764, 772 (Minn. 1981).

71. Judge Arnold, writing for the Eighth Circuit, was much less willing to accept Minnesota's asserted interest at face value. Arnold pointed out that the record failed to demonstrate "that membership in the Jaycees was the only practicable way for a woman to advance herself

Brennan's opinion might have presented fewer analytical problems if the state interest had been described in a more general way: ensuring all persons equal access to the goods and privileges that come with membership in private associations.[72] Surely, however, Brennan recognized that labelling that interest "compelling" would allow states to apply their anti-discrimination laws to every association from the Girl Scouts to the Moose to the Sons of Norway. Such a proposition plainly could not command the support of a majority on the Court.

A more helpful description of the state interest involved in *U.S. Jaycees* might have adopted the distinction made by Justice O'Connor between predominantly commercial and predominantly expressive organizations. States could be regarded to have a compelling interest in ensuring equal access to associations which have "enter[ed] the marketplace of commerce in any substantial degree."[73] On the other hand, a state would not have a compelling interest in ensuring access to associations predominantly engaged in expressive activities, such as churches, political parties, or the Sons of Norway. Had Brennan identified the state interest in terms of the commercial-expressive dichotomy, major differences between the majority opinion and O'Connor's concurring opinion would have been avoided.[74]

Nonetheless, other problems with the Brennan analysis remain. Most significantly, if Minnesota's interest in the anti-discrimination statute truly were compelling and if, as Brennan concludes, the statute represents the means of achieving its objective least restrictive of first amendment freedoms,[75] what is the point in an extended discus-

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in business or professional life." He noted that Minnesota did not prove that there was not available to women "similar organizational experience in other clubs or associations" which could have been of "similar or greater help." 709 F. 2d at 1573. According to the Jaycees, the all-female Minneapolis Junior League, confined to women under 40, "has been a potent force in the community for decades, far surpassing the Jaycees in [influence]." Brief for Appellees, *supra* note 22, at 32.

72. It is at least plausible to assume that society benefits whenever the informative experiences — be they social, political, or otherwise — of its citizens involve interaction with members of the opposite sex. Arguably, the more common experiences are had by people of opposite sexes, the less likely it is that either sex will be the victim of sexual stereotyping.

73. 104 S. Ct. at 3259 (O'Connor, J., concurring).

74. There is one difficulty with identifying Minnesota's compelling interest as ensuring equal access to commercial associations. It is not at all obvious that equality of access to expressive associations may not be just as important. Are the benefits of membership in the Boy Scouts (predominantly expressive) less important than the benefits of membership in the Jaycees (predominantly commercial)?

75. Judge Arnold in his opinion below found that Minnesota failed to use the least restrictive means of accomplishing its goal. Specifically, Arnold suggested that state employees could be instructed not to join the Jaycees, state tax concessions could be withdrawn, and employer contributions to the Jaycees could be prohibited. 709 F.2d at 1573. It was suggested in an

sion of whether the expressive activities of the Jaycees will be affected by the admission of women as full members? A determination that the statute was supported by a compelling interest and employed least restrictive means should end the matter. Apparently, Justice Brennan felt compelled to make the wholly implausible argument that not only did application of the Minnesota statute represent the least restrictive means of ensuring equal access to the Jaycees' goods and privileges, but that it presented *no serious burden at all.*[76]

Brennan disputes the finding of the Eighth Circuit that the admission of women members to the Jaycees is likely to cause "some change in the Jaycees' philosophical cast."[77] A suggestion that the admission of blacks to the Ku Klux Klan would not change the organization's philosophical cast would be laughable. One need not engage in racial stereotyping to predict that blacks would tend to have different views on racial issues than would most K.K.K. members.[78] The impact on the expressive activities of the Jaycees resulting from the admission of women would be far less dramatic, but no less certain.

Justice Brennan observes that most of the positions taken by the Jaycees over the years have nothing to do with sex.[79] Unfortunately, the fact that Brennan chose to stress that point suggests that the Jaycees might have won their case if only they had taken a strong position against the Equal Rights Amendment. Should the degree to which an organization has involved itself with women's issues determine whether it can gain constitutional protection for its exclusion of women? Justice O'Connor is correct in her conclusion that "[w]hether an association is or is not constitutionally protected in the

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amicus brief that Arnold's analysis "ignores the Minnesota legislature's implicit determination that nothing works to end discrimination in public accommodation like banning discrimination in public accommodations." Brief for Community Business Leaders as Amicus Curiae at 13, Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984).

76. 104 S. Ct. at 3254-55.

77. 709 F.2d at 1571.

78. This is almost certainly true, although admittedly blacks who would choose to join the K.K.K. may not reflect the views of most blacks. Many reasons could be hypothesized for blacks joining the K.K.K., the most plausible of which might be the belief that by so doing, the organization could be destroyed.

The effect that state regulation of the internal rules of an association may have on the ideology of that association is also exemplified in state "open primary" laws. These laws have allowed Republicans to vote in Democratic primaries — and vice versa. The election results in open primaries might be perceived as better or worse than those that would have occurred in a closed primary, but they are certainly different. On several occasions, members of one party have voted in an opposition primary with the express purpose of helping to nominate the most beatable candidate.

79. 104 S. Ct. at 3255.

selection of its membership should not depend on what the association says or why its members say it."[80]

Moreover, the majority is wrong to dismiss the possibility that the admission of women would affect the content of the Jaycees' speech activities as based "solely on unsupported generalizations about the relative interests and perspectives of men and women" and on "sexual stereotyping."[81] Perhaps the example which best illustrates the majority's error is made in the Jaycees' brief:

> The basic issue in this case [*U.S. Jaycees*] 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.[82]

More generally, however, the prediction that the votes of female Jaycees members will not, in all cases, reflect the votes of male members is not merely "sexual stereotyping." Whether an excluded class be members of an occupational group, a geographic region, race, religion, or sex, that common characteristic shared by members of that class will at least in small measure affect the perspective of group members. The experiences of women in American society today, *as a group*, differ in significant ways from the experiences of men *as a group*. Polling results support the prediction that gender does indeed correlate with certain attitudes toward issues ranging from abortion to war and peace.[83]

The significance to the majority's analysis of the membership-message connection is somewhat unclear. Justice O'Connor interprets the majority opinion to condition first amendment protection on the organization's "making a 'substantial' showing that the admission of unwelcome members 'will change the message communicated by the group's speech.' "[84] Maybe. The majority only obliquely addresses the issue. Had the Jaycees made the "far more substantial" showing that admission of women would change the content of the organization's speech, Brennan suggests that he still may have found the statute's effect to be "no greater than is neces-

80. 104 S. Ct. at 3258 (O'Connor, J., concurring).

81. 104 S. Ct. at 3255. In observing that these "[unsupported] generalizations may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees," Brennan seems to concede the possibility that the views of women and men, as groups, may sometimes diverge. But Brennan refuses to "rel[y] uncritically on such assumptions . . . [i]n the absence of a showing far more substantial than that attempted by the Jaycees." 104 S. Ct. at 3255.

82. Appellee's Brief, *supra* note 21, at 21.

83. *Id.*

84. 104 S. Ct. at 3257 (O'Connor, J., concurring).

sary to accomplish the State's legitimate purposes."[85]

O'Connor's analysis has the distinct advantage of making the whole matter of a membership-message connection irrelevant. At the same time, her approach avoids creating any incentive for an association to take positions opposite to those thought to be favored by a group excluded from membership. For O'Connor, the critical inquiry was straightforward, though not necessarily clearcut: are the Jaycees a "commercial association" or an "expressive association"?

III. The Commercial Association — Expressive Association Dichotomy

Justice O'Connor would divide all associations into two groups: commercial associations and expressive associations. Only "minimal" constitutional protection would be given to the freedom of commercial association.[86] For expressive associations, on the other hand, the first amendment would "give substance to the ideal of complete protection."[87] Under the O'Connor view of "all or nothing" protection for association, which side of the expressive-commercial line an association falls on is the question of central importance.

O'Connor recognizes that associations can be placed along a spectrum running from the purely expressive at one pole to the purely commercial at the other. She readily admits that few associations occupy either pole. Even a predominantly expressive association, such as the Republican Party, the American Lutheran Church or Common Cause, is likely to engage in many nonexpressive activities. There are dues to be collected, office equipment to be purchased, coffee to be served and halls to be rented. It is equally true that a predominantly commercial association, such as General Motors, the United Auto Workers, or the National Association of Broadcasters, will engage in some incidental protected speech, such as advertising or lobbying. The result, as O'Connor admits, is that the standard for determining which associations have a first amendment right to control their membership cannot be "articulated with simple precision."[88]

Justice O'Connor's standard for distinguishing between expres-

85. 104 S. Ct. at 3255.

86. 104 S. Ct. at 3258 (O'Connor, J., concurring). O'Connor recognizes, of course, that commercial *speech* is entitled to a substantial degree of constitutional protection, but she notes that a state would be free "to impose any rational regulation on the commercial transaction itself." For example, "[a] shopkeeper has no constitutional right to deal only with persons of one sex." 104 S. Ct. at 3258.

87. 104 S. Ct. at 3259 (O'Connor, J., concurring).

88. 104 S. Ct. at 3259.

sive and commercial associations certainly is no model of "simple precision" — or precision of any sort. Twice in her opinion O'Connor suggests that classification of an association will turn on whether or not the association's activities are "predominantly" expressive.[89] Apparently classification would therefore require looking at all of an association's activities and determining whether more than half of the association's efforts were devoted to commercial activities such as recruitment and collection of dues, or whether "expressive" activities such as ritual, worship, debate, or lobbying occupied most of the members' time. At another point in her opinion, however, O'Connor suggests that even a predominance of expressive activities may not save an association from the label "commercial." O'Connor states that once an association "enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."[90] The Jaycees, whose national officers devote over eighty percent of their time to recruitment,[91] may well be "commercial" under either formulation of the standard.[92] For other organizations, such as the Kiwanis or Rotary, the question of which formulation is chosen could determine whether their single-sex membership policies will receive constitutional protection.

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89. 104 S. Ct. at 3259.

90. 104 S. Ct. at 3259.

91. 104 S. Ct. at 3261.

92. Perhaps this is why O'Connor says that the Jaycees present a "relatively easy case for application of the expressive-commercial dichotomy." 104 S. Ct. at 3261. The Jaycees strongly object to the label "commercial." In its amicus brief, the Conference of Private Organizations, of which the Jaycees is a member, states: "[I]f the U.S. Jaycees is merely a commercial business, it hardly would have expended hundreds of thousands of dollars in litigation fees, in courts throughout the country, defending its purpose and right not to engage in the allegedly lucrative 'sale' of memberships to women." Brief of Conference of Private Organizations as *Amicus Curiae* in Support of Affirmance at 12-13, Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) (footnote omitted) [hereinafter cited as Brief of Conference of Private Organizations].

Judge Arnold, in his opinion for the Eighth Circuit, also considered and rejected describing the Jaycees as a commercial association:

> The Jaycees does not simply sell seats in some kind of personal-development classroom. Personal and business development, if they come, come not as products bought by members, but as by-products of activities in which members engage after they join the organization. These activities are variously social, civic, and ideological, and some of them fall within the narrowest view of the First Amendment freedom of association.

709 F.2d 1569.

The expressive activities of the Jaycees include the adoption of resolutions on a number of political issues. These resolutions include support of a balanced budget, "voluntary prayer in American schools," and the economic development of Alaska. The national organization has also taken stands in favor of the draft, the ratification of the Panama Canal Treaty, and President Reagan's economic policies. It has opposed "socialized medicine," federal funds for teachers' salaries, and pornography. 709 F.2d at 1569-70.

Two major criticisms might be made of an approach in which a line is drawn at a more-or-less arbitrary point and everything on one side of the line is declared fully protected while everything on the other side is left basically unprotected. Both criticisms concern what happens near the line.

One criticism relates to the fact that two associations, concededly similar in relevant respects, are subject to highly disparate treatment when they fall close to, but on opposite sides of, the line between expressive and commercial associations. This criticism, while not entirely without merit, is easily defended. *All* line-drawing requires the acceptance of arbitrary distinctions at the margins, whether it be a legislatively drawn line between 20- and 21-year-old consumers of alcoholic beverages or a judicially drawn line between "predominantly" expressive associations and *almost*-predominantly expressive associations.

The other criticism concerns the fact that dichotomous treatment under the law often causes individuals or institutions to alter their behavior in such a way as to receive the more favorable classification.[93] Associations seeking constitutional protection for their restrictive membership policies will learn from the Jaycees' mistakes and modify their activities. Associations will cease referring to members as "customers" and membership as the "product" they are selling. Awards will no longer be given to members selling the most memberships. More organizational time will be devoted to taking positions on public issues or engaging in other expressive activities.[94] A demurrer is the appropriate response to this criticism. No obvious social evil flows from modifications of associational behavior of this sort (in fact, it might be a social good). However, to the extent superficial changes (for example, in the choice of words used in a recruitment brochure) might produce a different classification, the criticism does reflect upon the appropriateness of some of the criteria used to classify associations as expressive or commercial.

On balance, the O'Connor approach seems to enjoy several distinct advantages over the majority approach. It leaves no doubt about the power of the state to ensure equal access to commercial

93. For example, tax laws which deny favorable tax treatment to associations which engage in lobbying activities have prompted organizations such as the Sierra Club to reorganize in such a way as to retain favorable tax treatment for those activities which are legally entitled to it. *See* I.R.C. § 501(c)(1982).

94. The Jaycees' practices of referring to memberships as "products," rewarding the recruitment success of individual members, and devoting so much of its efforts to recruitment, were cited by O'Connor as reasons for finding the Jaycees to be commercial. 104 S. Ct. at 3261.

opportunities. It is more responsive to communitarian concerns in that the organizations most important to the cultivation and transmittal of shared ideals and beliefs will be more fully protected against intrusion. It is more predictable, more straightforward, and more likely to produce incentives for positive action than the majority approach.

IV. THE IMPLICATIONS OF *U.S. JAYCEES*

The long-term implications of *U.S. Jaycees* are potentially enormous. Most directly affected, of course, are the thousands of private associations in the United States which restrict membership on the basis of sex, race, religion or some other characteristic arguably forbidden by state public accommodation statutes.[95] Some of these associations, including the Boy Scouts and Rotary International, are involved in litigation arising under public accommodation statutes.[96] The decision in *U.S. Jaycees* is likely to spawn more litigation as other states, perhaps encouraged by Minnesota's success, attempt to apply their public accommodation statutes to associations with discriminatory membership policies.[97]

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95. Some private all-male associations include the Benevolent and Protective Order of Elks (1.6 million members), the Loyal Order of the Moose (1.3 million members), the Knights of Pythias, the Improved Order of Red Men, the Lions Club, the Optimist Club, and the Rotary Club. Other associations with restrictive membership policies include Knights of Columbus (male Catholics), Prince Hall Masonry (black males), Hadaassah (Jewish females), B'nai B'rith Women (Jewish females), the National Association of Women's Clubs (black females), P.E.O. Sisterhood (all females), and the General Federation of Women's Clubs (all females). In addition, many of the over 1,000 members of the National Club Association have policies which restrict membership on the basis of race, sex or religion. Brief of Conference of Private Organizations, *supra* note 92, at 2-11. This list is by no means exhaustive.

96. *See, e.g.,* Curran v. Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed,* 52 U.S.L.W. 3936 (U.S. June 26, 1984) (No. 83-1513)(holding that California's Civil Rights Act prohibits Boy Scouts from expelling member because of homosexuality); Rotary Club of Duarte v. Board of Directors of Rotary Intl., 2d Civ. No. BO01663 (Cal. Ct. App. 2d Dis.) (injunction sought preventing Rotary from enforcing its by-laws that restrict membership to males).

97. At least 38 states and many cities now have public accommodation laws which prohibit discrimination on the basis of sex. Minneapolis Star & Tribune, July 4, 1984, at 10A, col. 1.

Future targets of local public accommodation laws are likely to be the discriminatory membership policies of private local clubs. A New York City Council panel has approved a bill, certain to become law, which defines as a public accommodation a club that "has more than 400 members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." N.Y. Times, Sept. 11, 1984, at 1A, col. 2. Religions and benevolent organizations are exempted by the bill which, according to a lawyer for the New York State Club Association, might affect 30 or 40 institutions. Lois Whitman, general counsel of the City's Commission on Human Rights expects the constitutionality of the law to be tested: "It's not going to be a breeze. We expect that it's going to be challenged." N.Y. Times, Sept. 11, 1984, at B7, col. 3.

Whether a local public accommodation law aimed at private clubs could be constitutionally enforced in a particular instance cannot be determined without a close examination of the

National associations with restrictive membership policies are faced with a choice. They may continue their discriminatory membership policies in the hope that either states will refrain from applying public accommodation statutes against them or, if enforcement is attempted, that they will be able to defend themselves successfully in court. Immediately after the decision in *U.S. Jaycees* was announced, spokespersons for at least two national associations with all-male membership policies expressed confidence that their policies would receive the constitutional protection withheld from the Jaycees.[98] Although it is probably too early to say for certain, this may suggest that *U.S. Jaycees* will not result in a large number of associations voluntarily abandoning discriminatory membership policies.

The other option associations have is to do just that: to seize *U.S. Jaycees* as an opportunity to reconsider the purpose and value of a policy of excluding a particular class of persons, and then move to open up membership. At least with respect to sex classifications, one might guess — in view of the rapid rise in the public's sensitivity to the consequences of gender-based discrimination — that many associations will choose that course. Still, it is interesting to note that after women were admitted as members by its Minneapolis and St. Paul chapters, the national membership of the Jaycees continued to vote overwhelmingly to retain its all-male membership policy. In 1975, members voted down a proposal to open membership to women by a margin of about ninety percent to ten percent.[99] However, the vote was dramatically different six weeks after the decision in *U.S. Jaycees* was announced, when the Jaycees finally amended their bylaws to allow the admission of women as full members.[100]

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membership policies and activities of the private club against which the ordinance is to be applied. Justice Brennan's discussion of the "privacy" claim of associational freedom suggests that a club with 400 or more members is unlikely to find privacy protection available. The success of a first amendment based claim of associational freedom will depend upon analysis of factors discussed in *U.S. Jaycees:* whether the club is selective and whether expressive activities constitute a significant part of the club's functions.

98. Minneapolis Star & Tribune, July 4, 1984, at 10A, cols. 3-4 (statements of David Park, general counsel for the Boy Scouts of America, and Dr. Carlos Canseco, president of Rotary International).

99. Jurisdictional Statement, *supra* note 6, at 99 app. A proposal to allow individual chapters to set their own policies on female membership also lost. The vote on that proposal was 78% against, 22% in favor. *Id.*

100. N.Y. Times, Aug. 17, 1984, at A8, cols. 1-2. The proposal to allow the admission of women was approved on August 16, 1984 at the Jaycee's National Convention by a vote of 5,372 to 386, with 77 abstentions. Jaycees President Tommy Todd said of the vote that it was an "opportune time" to set "a direction for others to follow."

The twelve-year legal fight to retain its restrictive membership policies had cost the Jaycees approximately one million dollars. *Id.*

Two organizations with single-sex policies were singled out for considerable discussion in the briefs, oral arguments, and written opinions arising from the *U.S. Jaycees* litigation: the Kiwanis and the Boy Scouts.[101] The attention given the Kiwanis resulted from a suggestion by the Minnesota Supreme Court that that organization, unlike the Jaycees, would not constitute a "public accommodation" under Minnesota law.[102] The Boy Scouts, and to a lesser extent the Girl Scouts and Cub Scouts, received attention because everyone — except Minnesota's counsel in oral argument[103] — seemed anxious to assure the Scouts that their single-sex membership policy was not in serious jeopardy.[104]

The Kiwanis International Organization, with 300,000 members in 7,750 local chapters,[105] is about as unselective in its membership requirements as the Jaycees.[106] In fact, because the Kiwanis has no upper age limit for membership, more men are eligible for membership in the Kiwanis than in the Jaycees. The Minnesota Supreme Court's determination that the Jaycees, but not the Kiwanis, is a "public accommodation" persuaded the Eighth Circuit to declare that the Minnesota statute was void for vagueness.[107] The vagueness challenge was rejected by the Supreme Court in what was probably the least interesting portion of the *U.S. Jaycees* opinion.[108] What is

101. For references to the Kiwanis, see, *e.g.*, 104 S. Ct. at 3256; 709 F.2d at 1577-78, 1582; 534 F. Supp. at 773; 305 N.W.2d at 771.

102. 305 N.W.2d at 771.

103. When 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 law, Richard L. Varco, Jr., Minnesota's Special Assistant Attorney General, concluded that it would. 52 U.S.L.W. 3785-86 (May 1, 1984).

104. In her opinion, O'Connor questioned whether Minnesota's law could be applied to Scouts: "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." 104 S. Ct. at 3259-60. A footnote to the above-cited remark makes reference to the handbooks of the Girl Scouts and the Boy Scouts. 104 S. Ct. at 3260 *n.**.

105. 709 F.2d at 1577.

106. The membership requirements of the Kiwanis International read in relevant parts:

> Section 4. *Active Membership*
> a. The active membership of this club shall consist of men of good character and community standing residing or having other community interests within the area of the club.
> b. The active membership of this club shall be composed of a cross section of those who are engaged in recognized lines of business, vocation, agriculture, institutional or professional life; or who having been so engaged, shall have retired. The number of members in any one given classification shall not exceed twenty percent (20%) of the total active membership.

709 F.2d at 1578.

107. 709 F.2d at 1578.

108. 104 S. Ct. at 3255-57. The Court viewed the Minnesota Supreme Court's distinction between the Jaycees and the Kiwanis as making the statute more — not less — definite. The distinction also was seen as undercutting the Jaycees' argument of unconstitutional over-

interesting, however, is Brennan's hint that he, too, thinks that the difference between the Jaycees and the Kiwanis might be significant enough to qualify the latter organization's membership policy for constitutional protection.[109] Brennan concludes that the record indicates that the Kiwanis is a private group that chooses its members on the basis of "specific and selective criteria."[110] Legal scholarship has been justly criticized for reading undue significance into offhand or ambiguous passages in Supreme Court opinions, and it would certainly be reckless to conclude from a brief reference to the Kiwanis that the principle enunciated in *U.S. Jaycees* is so narrow as to apply *only* to the Jaycees, but one can hear the sighs of relief from attorneys for single-sex organizations.

Brennan's reference to the selectivity of the Kiwanis as a possible ground for affording constitutional protection is susceptible to two possible interpretations. The first is that selectivity provides a basis for finding the Kiwanis to be an association protected under a fourteenth amendment privacy rationale. Only in discussing "freedom of association" as a fundamental aspect of personal liberty was the selectivity of an association specifically identified as a relevant factor,[111] yet an organization with the size and purpose of the Kiwanis seems an unlikely candidate for privacy protection. The other interpretation is that selectivity is also relevant to analysis of a freedom of association claim under the first amendment. Although selectivity arguably makes an association less commercial under the analysis used by Justice O'Connor, why it should matter to Brennan is less clear. The Brennan analysis focused on the interest of the state in ensuring equality of access to association membership and on whether a change of membership would affect the content of the association's message.[112] Neither inquiry seems directly to implicate the selectivity of membership criteria.

The inconsistencies and ambiguities in *U.S. Jaycees* may in one sense serve the Court well. The Court has kept its options open. Should it choose to do so, *U.S. Jaycees* could be extended to uphold the application of anti-discrimination statutes to organizations as di-

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breadth because the limited construction of the statute reduced the risk that the statute would be applied to a substantial amount of protected conduct.

109. 104 S. Ct. at 3256.

110. 104 S. Ct. at 3256. Brennan's characterization of the Kiwanis membership policy as "selective" is questionable. *See* note 106 *supra.* It could, however, hardly help but be more selective than the Jaycees' membership policy. No Jaycees membership applicant in Minnesota has ever been rejected. 305 N.W.2d at 771.

111. 104 S. Ct. at 3250-51.

112. 104 S. Ct. at 3252-55.

verse as the Rotary International, the Girl Scouts, the Elks, or the Sons of Norway. More probably, language in the opinion will be used by courts to limit application of anti-discrimination statutes to a handful of organizations which employ the Jaycees' unusually aggressive recruitment policies. In view of the uncertainties about the *U.S. Jaycees* analysis and the fact that three justices remain to be heard from on the issues presented, a crude analysis of the decision may well be the best analysis. The Jaycees is not primarily a social group, its membership policies are very unselective, and expressive activity is of relatively minor importance to the organization. A future case where any of those three factors is not present would be a different case with a very good likelihood of producing a different result.

V. FREEDOM OF ASSOCIATION

Americans have long been recognized as "the world's greatest joiners." In the early nineteenth century, Alexis de Tocqueville wrote: "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."[113] Although the reasons Americans join associations are as bewildering in their variety as the associations which they join, for many there is one overriding reason for joining. An association can help restore an individual's self-identity and self-confidence, attributes which are continually eroded by the anonymity, change and pace of life in our complex society. A social association buttresses one's sense of identity simply by offering a place to go "where everybody knows your name; and they're always glad you came."[114] Associations with more of a political orientation strengthen the sense of identity of individual members by offering the opportunity to have an impact on public policy far beyond that available to them as individuals — in a democracy it is difficult for a person to achieve anything alone.[115]

De Tocqueville viewed "freedom of association" as so fundamental as to have a source in natural law:

> The 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.

113. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 485 (G. Lawrence trans. 1966).

114. Portnoy & Angelo, *Theme From "Cheers" (Where Everybody Knows Your Name)*, at 3 (Pamela Schultz big note color me series ed. 1983).

115. Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1, 12-13 (1977).

> Therefore the right of association seems to me by nature almost as inalienable as individual liberty.[116]

In a nation where no significant public question is without its constitutional implications, it is not surprising that the "freedom of association" has emerged as the rallying cry. Those who find the Constitution to reflect to an unacceptable degree the ethics of right-oriented liberalism see in "freedom of association" a protection directed to their concerns with the communal dimension of society.[117]

The threat of egalitarianism substantially diminishing the cultural richness and pluralism of American society has grown in recent years. Whatever cultural richness and pluralism might come from allowing racial discrimination in housing, employment, education, and access to commercial establishments was easily outweighed by its cost to human dignity. All decent people understood this. Most men would also willingly sacrifice a degree of associational freedom in order to provide women with the same economic opportunities that they have long enjoyed. When, however, a state acts to prohibit private discrimination which does not reflect a mean-spiritedness toward the excluded group, the cost may be too much to pay. 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.

It is important to realize that nothing strikes closer to the heart of American pluralism than a law which tells an association who it must accept as a member. The power to change the membership of an association is "the power to change its purpose, its programs, its ideology, and its collective voice."[118] It is a power so dangerous that it should not be exercised even in many situations where it is believed that discrimination practiced by an association is wrong. As Judge Arnold of the Eighth Circuit Court of Appeals stated in his opinion in *U.S. Jaycees,* "[I]f, in the phrase of Justice Holmes, the First Amendment protects 'the thought that we hate,' it must also, on occasion, protect the association of which we disapprove."[119]

The result in *U.S. Jaycees* was probably correct. The Minnesota Supreme Court had found that the Jaycees functioned as a place of public accommodation, and that finding was entitled to some defer-

116. DE TOCQUEVILLE, *supra* note 113, at 178.

117. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 701 (1978).

118. Appellee's Brief, *supra* note 22, at 13.

119. 709 F.2d at 1561.

ence. The Jaycees is not the type of association central to the communitarian ethic, and the admission of women to that organization will not significantly diminish cultural richness and pluralism. Moreover, the commercial nature of many of the Jaycees' activities made its case for recognition of the principle of associational freedom particularly weak. For the next association threatened with enforcement of a state anti-discrimination law, *Roberts v. U.S. Jaycees* provides little reason to despair of securing constitutional protection.