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Board of Directors of Rotary International v. Rotary Club of Duarte: Redefining Associational Rights

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I. INTRODUCTION

In *Board of Directors of Rotary International v. Rotary Club of Duarte*,[1] the Supreme Court held that California could require Rotary clubs to admit women into membership.[2] The Court's holding confirms that a state's compelling interest in eradicating sex discrimination may outweigh freedom of association claims by private club members.[3]

Rotary followed the heavily criticized *Roberts v. United States Jaycees*[4] opinion, in which the Supreme Court held that Minnesota could force the all-male Jaycees organization to accept women as full voting members.[5] *Jaycees* was criticized not for its result, but for its inadequate definition of the contours of the right of association.[6] *Rotary* responded by clarifying the contours and limits of this right.

This note explains how *Rotary* illuminates the analytical

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1. 107 S. Ct. 1940 (1987).

2. *Id.* at 1948. California's Unruh Civil Rights Act provides, in part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL CIV. CODE § 51 (West 1982). The Unruh Act, like other state public accommodation laws, guarantees freedom from discrimination in access to facilities defined as "public accommodations," or "business establishments." For an in-depth study of California's Unruh Act, see Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. REV. 443 (1983). *See generally* Survey, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 290-91 (1978).

3. *Rotary*, 107 S. Ct. at 1948; *see* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984); 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); Cousins v. Wigoda, 419 U.S. 477, 489 (1975); American Party v. White, 415 U.S. 767, 780-81 (1974); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960). In each of these cases the Court enunciated a "compelling interest/least restrictive means" test: The right of association may be limited by state regulations necessary to serve a compelling interest unrelated to the suppression of ideas.

4. 468 U.S. 609 (1984).

5. *Id.* at 629.

6. For a discussion of *Jaycees* and the critical response to it, see *infra* notes 18-31 and accompanying text.

framework for evaluating whether associational rights of private clubs exempt such clubs from state anti-discrimination laws. Section II briefly discusses the Court's focus on the two prongs of associational rights—"expressive association" and "intimate association." Section III discusses *Rotary* and shows how the Court narrows the "intimate association" category to exempt only close family type relationships from discrimination laws. Although private groups may be small and selective, they probably will not fall within the intimate association exemption. The only way most private groups may be exempted from state discrimination laws is through the "expressive association" framework. Under this framework, the controlling factor in the Court's analysis is the group's objective or purpose. If a group's purpose is tied to traditionally protected first amendment rights, or if the purpose is significantly impaired by forcing non-discrimination, the group may be exempt from discrimination laws. Finally, Section IV of the note discusses the impact of *Rotary* on other associations, focusing on the Boy Scouts of America.

II. The Law of Freedom of Association Prior to Rotary

Prior to *Rotary*, the Supreme Court developed the following two tests for determining whether a group was constitutionally exempt from discrimination laws: "expressive association" and "intimate association."

A. Expressive Association

Although the United States Constitution does not explicitly guarantee the freedom of expressive association, the Supreme Court has held that this associational right is derived by implication from the first amendment rights of free speech, free press, assembly, and petition.[7] Freedom of association was first for-

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7. *See* U.S. Const. amend. I, which provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."

Although the first amendment does not explicitly guarantee "freedom of association," the philosophical underpinnings of that freedom are traceable to political theorists who influenced the thinking of the founding fathers and whose beliefs are well expressed by de Tocqueville: "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. Therefore, the right of association seems to me by nature almost as inalienable as individual liberty." A. de Tocqueville, Democracy in America 178 (G. Lawrence trans. 1966); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984); Hishon v. King & Spalding, 467 U.S.

mally recognized as a constitutional right in 1958 in *NAACP v. Alabama*.[8] In *NAACP*, the state of Alabama tried to compel the NAACP to reveal the names and addresses of its members. The Supreme Court unanimously held that compelled disclosure of the organization's membership lists would impair the ability of NAACP members to express their collective voice, thus abridging the members' constitutional rights—their "freedom to engage in association for the advancement of beliefs and ideas."[9] Since *NAACP*, " '[f]reedom of association' has been little more than a short-hand phrase used by the Court to protect traditional first amendment rights of speech, and petition as exercised by individuals in groups."[10]

In addition, the Court has held that the first amendment protects "corresponding right[s] to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[11] Furthermore, the freedom to as-

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69, 78 (1984); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-909, 932-933 (1982); Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981); *In re* Primus, 436 U.S. 412, 426 (1978); Abood v. Detroit Board of Education, 431 U.S. 209, 231 (1977); NAACP v. Button, 371 U.S. 415, 431 (1963); NAACP v. Alabama, 357 U.S. 449, 462 (1958). The above cases address what has become termed by the Court as freedom of "expressive association." This freedom is derived from the first amendment freedoms. The freedom of "intimate association," on the other hand, has its origins in the first amendment, but the Court has placed that right within a "zone of privacy" created also by the third, fourth, and fifth amendments. *See generally* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

8. 357 U.S. 449 (1958).

9. *Id.* at 460. The Court declared: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* (citations omitted).

10. Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. REV. 1, 1 (1977). In Norwood v. Harrison, 423 U.S. 455, 470 (1973), the Court stated that "invidious private discrimination may be characterized as a form of association protected by the first amendment, but it has never been accorded affirmative constitutional protection." Therefore, when a claim to an associational right does not involve an explicit first amendment right, countervailing compelling state interests can override the associational interests. In *NAACP v. Alabama*, because the state did not demonstrate a sufficiently compelling interest or "controlling justification" for the harm that would result from the compelled disclosure, the members' consitutional right to freedom of association prevailed. *See NAACP v. Alabama*, 357 U.S. at 466.

11. *Jaycees*, 468 U.S. at 622. The Court gives credence to what has been referred to as communitarian values. Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878, 1881 (1984). Conflicts involving freedom of association rights illustrate the more fundamental conflict between associational freedom and equality, which is really "one aspect of the larger tension between egalitarian, rights-oriented liberalism and communitarianism." *Id.*

To the communitarian, an individual's source of identity comes not so much

sociate with certain persons "plainly presupposes a freedom *not* to associate with other persons."[12]

B. Intimate Association

In 1965 the Court expanded its view of freedom of association by extending protection to certain intimate relationships.[13] The Court found that freedom of intimate association grows out of the "penumbra"[14] of the Bill of Rights which "afford[s] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."[15] When a group claims freedom of

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> 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, concentrate power in the state, and at the same time reduces the vitality and diversity of public life. 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.

Id. at 1882.

12. *Jaycees*, 468 U.S. at 623 (emphasis added) (citing Abood v. Detroit Board of Education, 431 U.S. 209, 234-235 (1977)). In Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where the all-white lodge refused to serve a black guest, the discriminatory practice was challenged on equal protection constitutional grounds because the fourteenth amendment directly prohibits state and federal governments from supporting discrimination. Discriminatory practices may also be challenged on state statutory grounds. This is where the state public accommodations laws come into play. These statutes limit rights to discriminate according to the states' "countervailing interests" in providing equal accommodations to its citizens. Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 Sw. L.J. 237, 238 (1982).

The equal access rational is also used to uphold antidiscrimination laws in the context of housing, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); education, Runyon v. McCrary, 427 U.S. 160 (1976); and employment, Hishon v. King & Spalding 467 U.S. 69 (1984). In *Hishon*, the Supreme Court required a law firm to grant partnership to a qualified woman; the law firm's constitutional claim of right to freely choose its partners was found subordinate to employment discrimination laws. *Hishon*, 467 U.S. at 75.

13. *See* Griswold v. Connecticut, 381 U.S. 479 (1964).

14. *See id.* at 483-84.

15. *Jaycees*, 468 U.S. at 618. The intimate relationships to which the Court has accorded protection include: "marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives." *Rotary*, 107 S. Ct. at 1945-1946 (citing Zablocki v. Redhail, 434 U.S. 374, 383-386 (1978); Carey v. Population Services International, 431 U.S. 678, 684-686 (1977); Moore v. City of East Cleveland, 431 U.S. 494, 503-504 (1977); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925)). Family and other intimate relationships are protected because these associations are characterized by "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Jaycees*, 468 U.S. at 620. In *Jaycees*, the Court added:

intimate association, the Court considers factors that "include size, purpose, policies, selectivity, congeniality and other characteristics that in a particular case may be pertinent."[16] The Court acknowledges that making specific determinations "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[17]

C. *Freedom of Intimate and Expressive Association under* Jaycees

In *Jaycees*, the Court articulated the two aspects of freedom of association previously discussed—"freedom of expressive association" and "freedom of intimate association."[18] Regarding freedom of intimate association, the Court in *Jaycees* held that "several features of the Jaycees clearly place the organization outside of the category of relationships worthy of this kind of constitutional protection"[19] because "the local chapters of the Jaycees are large and basically unselective," and their activities frequently involve "the participation of strangers."[20]

After dismissing the intimate association argument, the Court addressed the Jaycees' freedom of "expressive association" argument and concluded that requiring the Jaycees to admit women was an abridgment of this right.[21] The Court, how-

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> Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that 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. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Id. at 619 (citations omitted).

16. *Id.* at 620.

17. *Id.* (citation omitted).

18. *Id.* at 617-18.

19. *Id.* at 620.

20. *Id.* at 621.

21. *Id.* at 623. The Court reasoned that:

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

Id. See supra note 11 for a discussion of the communitarian values expressed by the Court.

ever, added that the right to associate for expressive purposes is not absolute, and that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[22]

The Court held that the state's interest was compelling—the Minnesota Human Rights Act "reflects the State's strong historical commitment to eliminate discrimination and assuring its citizens equal access to publicly available goods and services."[23] This commitment, the Court concluded, was unrelated to the suppression of beliefs or ideas and was not achievable through less intrusive means.[24] Because the Jaycees failed to show the Act would impose "any serious burdens on the male members' freedom of expressive association," or would "impede the organization's ability to . . . disseminate its preferred views," the Court ruled that the Jaycees would have to admit women into membership.[25]

Jaycees spurred mixed emotions. The case was criticized for engendering uncertainty and controversy in the associational rights arena.[26] According to commentators, *Jaycees* left "unsettled the question of whether other private, single-sex organizations will be allowed to continue their discriminatory practices."[27] One critic asserted that the Court's definition of

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22. *Jaycees*, 468 U.S. at 623 (citations omitted).

23. *Id.* at 624.

24. *Id.*

25. *Id.* at 626-27. The Court recognized "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." *Id.* at 626 (citations omitted). The Court was also persuaded by the argument that leadership training and business contacts are benefits and advantages to which women should have equal access. *Id.*

26. Some of the uncertainty resulted from the Court's reference to the Minnesota Supreme Court's suggestion that Kiwanis clubs, because of their formal selective criteria for choosing its members, were outside the scope of the state's public accommodations law. *Id.* at 630. However, in *Rotary* the Supreme Court, clarified the earlier reference; the Court explained that the reference was made to refute "the Jaycees argument that the Minnesota statute was vague and overbroad," and that the Court had "not consider[ed] whether the relationship among members of the Kiwanis Club was sufficiently intimate or private to warrant constitutional protection." *Rotary*, 107 S. Ct. at 1947 n.6.

27. Note, Roberts v. United States Jaycees: *Impact on Sex Discrimination in Private Organizations*, 20 NEW ENG. L. REV. 831, 852 (1984-1985); *see also* Note, Roberts v. United States Jaycees: *Discriminatory Membership Policy of a National Organization Held Not Protected By First Amendment Freedom of Association*, 34 CATH. U.L. REV. 1055, 1074 (1985).

"intimate association" was insufficient because *Jaycees* could be interpreted as either limiting such associations to familial relationships or to anything more private than the Jaycees.[28] There were even intimations that cases following *Jaycees* could turn the clock back for womens' rights.[29] Another critic called the case plain "bad law"—alleging that the Court's balancing approach failed to "adequately [capture] the competing values."[30]

Despite the criticism, some scholars argue that *Jaycees* has proven successful because it provided the necessary foundation for the results in *Rotary*—an approach which "protect[s] the constitutional guarantees of equality in society and in the economic marketplace, without interfering with important free association values."[31]

III. THE ROTARY OPINION

Rotary grew out of a dispute between Rotary International (R.I.) and one of its local chapters over admitting women into the organization. R.I. is a nonprofit corporation organized to provide a means for business and professional men to offer "humanitarian service" to the world.[32] The international organization is comprised of nearly 20,000 chapters in 157 countries, with a total of about one million members.[33] Membership in R.I. is limited to males and is obtained by invitation only.[34] Women are

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28. *See* Note, Roberts v. United States Jaycees: *How Much Help For Women?*, 8 HARV. WOMEN'S L.J. 215, 230 (1985).

29. *See* Note, *Constitutional Law—Freedom of Association—Sex Discrimination—Associations and Societies—Enforcement of the Minnesota Human Rights Act to Require the United States Jaycees to Accept Women as Regular Members Does Not Violate its Male Members' Freedom of Association, and the Act is Neither Unconstitutionally Vague nor Overbroad*—Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984), 53 U. CIN. L. REV. 1173, 1191 (1984).

30. Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106, 117 (1986).

31. Los Angeles Daily Journal, May 26, 1987, at 24, col. 4 (quoting John Nowak). *Jaycees* has also been described as a "landmark" case for its analysis which is applicable to a "wide range of cases involving private associations." *See* Linder, *supra* note 11, at 1878.

32. *Rotary*, 107 S. Ct. at 1942 (quoting Rotary Manual of Procedure 7 (1981)).

33. Appeal from the Court of Appeal of the State of California Second Appellate District, Appellant's Brief at 7, *Rotary*, 107 S. Ct. 1940 (1987) [hereinafter Appellant's Brief].

34. *Id.* Each Rotarian is a member of a local chapter; the chapters then are members of the International organization. *Id.* Individual nominees for membership are screened by a "classification system," which "ensures 'that each Rotary Club includes a representative of every worthy and recognized business, professional, or institutional activity in the community.'" *Rotary*, 107 S. Ct. at 1943 (quoting 2 Rotary Basic Library, Club Service 67-69 (1981)). After the classification committee determines that the candi-

allowed only to attend meetings, give speeches, receive awards and wear the Rotary lapel pin.[35]

In 1977, a local chapter of R.I. in Duarte, California admitted three women as full voting members to its chapter.[36] Subsequently, R.I. informed the chapter that it was violating R.I.'s constitution and ordered the Duarte chapter to expel its women members.[37] The Duarte chapter refused to comply with R.I.'s order and therefore R.I's board of directors revoked the Duarte club's charter.[38]

After unsuccessfully appealing to R.I., the Duarte Club and its female members filed suit in the California Superior Court for the County of Los Angeles, alleging that R.I.'s revocation of its chapter violated the Unruh Civil Rights Act.[39] The Board of Directors of R.I. opposed application of the California statute to their organization, contending that Rotary's selective membership policy and its unique male "fellowship and camaraderie" sufficiently distinguished it from other civic organizations such as the Jaycees.[40] The trial court held for R.I., ruling that neither R.I. nor the Duarte Club qualified as "business establishments" for the purposes of the Unruh Act," and thus were not subject to its anti-discrimination impact.[41]

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date's business or profession is an "open" classification, the International by-laws suggest that a membership committee evaluate "the candidate from a standpoint of character, business and social standing, and general eligibility." Appellant's Brief, *supra* note 33, at 7-8 (citing 2 Rotary Basic Library, Club Service 29-32 (1981)). If the candidate is approved by the classification and membership committees and the board approves the canididate, the nominees name is presented to the members, and if "there is no written objection received by the board within 10 days the candidate becomes a member." *Id.* at 8. If there is an objection from a member of the club concerning a candidate's admission, then the club's Board of Directors make the final determination. *Rotary*, 107 S. Ct. at 1943.

35. *Rotary*, 107 S. Ct. at 1943. Rotary also sponsors organizations called Interact and Rotaract which allow young women between 14 and 28 years of age to join. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* The Duarte Club sought to enjoin Rotary International from revoking its charter. *Id.* at 1944.

40. Appellant's Brief, *supra* note 33, at 10.

41. *Rotary*, 107 S. Ct. at 1944. *See supra* note 2 for the partial text of the Unruh Act. The trial court concluded that business benefits such as business tax deductions for Rotary expenses are incidental to the principle purposes of the organization, and that the "clubs do not provide their members with goods, services, or facilities." *Rotary*, 107 S. Ct. at 1944. The trial court was persuaded that

> to require Rotary International pursuant to the Unruh Act to offer its membership to women (as well as to the entire public indiscriminately) would inflict severe, irreparable, and unconscionable harm upon Rotary and the associa-

The California Court of Appeals reversed, holding that Rotary clubs are business establishments for purposes of the Act, and thus could not discriminate against women.[42] The court also concluded that "the admission of women into the local Rotary Club of Duarte would [not] cause the downfall of the District or International or seriously interfere with Rotary's objectives."[43] R.I. was ordered to reinstate the Duarte Club and was enjoined from enforcing the organization's gender requirement against the Duarte Club.[44]

The Supreme Court affirmed the injunction, holding that R.I.'s freedom of association rights were outweighed by the state's interest in eliminating discrimination.[45] The Court set the stage for its discussion by stating that *Jaycees* "provides the framework for analyzing" the *Rotary* case.[46] The Court first examined R.I.'s freedom of intimate association argument, and then its expressive association argument.

A. Freedom of Intimate Association

Because *Jaycees* did "not mark the potentially significant points on [the intimate association] terrain with any precision,"[47] R.I. believed that it was sufficiently different from the Jaycees to be protected under the "intimate association" test.[48] In analyzing R.I.'s freedom of intimate association argument, the Court first acknowledged that freedom to carry on private relationships is a "fundamental element of liberty protected by the Bill of Rights,"[49] and then outlined those relationships that tra-

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tional rights of its members without commensurate or any substantial resulting economic benefit to women or the public.

Appellant's Brief, *supra* note 33, at 3 (emphasis omitted).

42. 178 Cal. App. 3d 1035, 1065, 224 Cal. Rptr. 213, 231 (1986). R.I's businesslike structure and publishing activities combined with the fact that business concerns are a motivating factor in joining local clubs, convinced the appellate court to hold that R.I. was not exempt from the reach of the Unruh Act. *See id.* at 1054, 224 Cal. Rptr. at 227.

43. *Id.* at 1060, 224 Cal. Rptr. at 228.

44. *Id.* at 1067-68, 224 Cal. Rptr. at 232-33. Although R.I. was denied a rehearing by the California Court of Appeals, and its petition for review was denied by the California Supreme Court, the United States Supreme Court granted certiorari. *Rotary*, 107 S. Ct. at 1945.

45. *Rotary*, 107 S. Ct. at 1948.

46. *Id.* at 1945.

47. *Roberts v. United States Jaycees*, 468 U.S. at 620.

48. Appellant's Brief, *supra* note 33, at 18.

49. *Rotary*, 107 S. Ct. at 1945.

ditionally have been protected.[50] Such relationships include families and other particularly personal or private associations. The Court said that the relevant factors for determining whether a group is protected include "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship."[51] R.I. argued that its clubs are small on the average (46 members per club), that its admissions process is very selective and that fellowship for the purpose of concentrated community service is important to the accomplishment of its overall objectives.[52] R.I. asserted that the "relevant tests set forth in [*Jaycees*] are fully met," and therefore Rotary Club "members are entitled to freedom of intimate association."[53]

The Court, however, disagreed, reiterating that relationships protected as intimate associations "presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.' "[54] According to the Court, R.I. would not be afforded constitutional protection as an intimate association if it was not found to be an intensely personal, private association that provided the kind of interpersonal relationships found in family life.[55] The Court held that "the relationship among Rotary Club members is not the kind of intimate or private relationship that warrants constitutional protection,"[56] because (1) the size of the clubs range from 20 to 900 members, (2) there is no upper limit on the number of members per chapter, and (3) the individual chapters are encouraged to regularly introduce new prospects.[57] The clubs also conduct much of their business among different visitors each week and seek coverage of their meetings in local newspapers; essentially, the organizations, "rather than carrying on their activities in an atmosphere of privacy, seek to keep their 'windows and doors open to the whole

50. *Id.* at 1945-46; *see supra* note 15.

51. *Id.* at 1946 (citing *Jaycees*, 468 U.S. at 620).

52. Appellant's Brief, *supra* note 33, at 15.

53. *Id.*

54. *Rotary*, 107 S. Ct. at 1946 (quoting *Jaycees*, 468 U.S. at 619-620).

55. *Id.*

56. *Id.*

57. *See id.*

world.' "[58] As a result, the Court held R.I. did not qualify for protection under the "intimate association" analysis.[59]

B. *Freedom of expressive association*

Even though R.I. did not meet the "intimate association" test, it could still claim exemption from the Unruh Act if it met the "expressive association" test. The Court began its freedom of expressive association analysis by stating that the "First Amendment implies 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.' "[60] "Impediments," therefore (such as broadly interpreted public accommodations statutes), "to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment."[61]

In *Rotary*, the Court said that the right to associate for expressive purposes is a derivative right, applicable when it aids in the exercise of an express first amendment right.[62] Therefore, if R.I. was to be exempted from California's broadly interpreted Unruh Act, it would be required to demonstrate some substantial infringement on its exercise of express first amendment rights. If no direct first amendment infringement was found, the Court would balance the organization's asserted interest, or purpose (R.I.'s fostering of male fellowship through service) against the state's interest in eliminating discrimination.[63]

In considering R.I's interests, the Court looked for a nexus between the organization's espoused purpose and the need for

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58. *Id.* at 1947 (quoting 1 Rotary Basic Library, Focus on Rotary 60-61 (1981)).

59. *Id.*

60. *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. at 622).

61. *Id.* (quoting Hishon v. King & Spalding, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring) (citing NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958))).

62. *Id.*

63. If R.I. had any other expressive associational purpose, it certainly was still in a weaker position than the Jaycees. The Jaycees were probably not confident that the Court would consider its expressive activities as substantial, or sufficiently burdened by admitting women, and therefore pleaded protection as an intimate association even though the group did engage in public expression, taking stands on "political, economic, cultural, and social affairs." *Roberts v. United States Jaycees*, 468 U.S. at 626. It is difficult to determine or calculate any burden on political expression by admitting women; and indeed, the Jaycees made no such showing. *Id.* at 627. On the other hand, it was R.I.'s policy not to take positions on public or political issues. *Rotary*, 107 S. Ct. at 1947.

constitutional protection of expression.[64] R.I's claim would not be upheld unless it could demonstrate that a significant purpose or objective would be adversely affected by admitting women.[65] R.I. asserted that "fellowship in service [was] the principal purpose"[66] of the organization and contended that continuing its male-only status was necessary to maintain the worldwide delicate balance and cooperative integrity upon which the organization thrives.[67] Although the Court recognized that R.I.'s service activities were protected indirectly by the first amendment, it concluded that requiring R.I. to admit women would not substantially alter or disrupt the noble purposes of the organization.[68] The Court said that even if there were some "slight infringement," the interference would be justified by the "State's compelling interest in eliminating discrimination against women."[69]

IV. Impact of *Rotary*

The Court in *Rotary* dispelled the clouds of uncertainty after *Jaycees* by essentially closing the "intimate association" door on most non-familial associations. Whether large, single-sex

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64. *See Rotary*, 107 S. Ct. at 1947-48.

65. *Id.* at 1947.

66. Appellant's Brief, *supra* note 33, at 21.

67. *Id.* at 16.

68. *Rotary*, 107 S. Ct. at 1947. The Court pointed out that the Unruh act

> does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, goodwill, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross-section of the community. Indeed, by opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross-section of community leaders with a broadened capacity for service.

Id. The Court also noted that in 1980 the U.S. Department of Commerce in its Statistical Abstract of the United States 400 (1986), reported that women "make up 40.6 percent of the managerial and professional labor force in the United States." *Id.* at 1947 n.7.

69. *Id.* at 1947 (citation omitted). R.I. asserted international humanitarian service as its objective and tried to justify its discriminatory membership policy by its sensitive balancing of diverse international interests. Appellant's Brief, *supra* note 33, at 11. Appellee's responded by arguing that the courts reject the notion that foreign nations can compel the non-enforcement of civil rights acts. Appellee's Brief at 49, *Rotary*, 107 S. Ct. 1940 (1987) (No. 86-421) (citing Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1277 (9th Cir. 1981)). In *Fernandez* it was held that a company could not refuse to hire a woman as director of international operations simply because South American customers would not do business with a woman. Title VII of The Civil Rights Act of 1964 was the statute at issue. *Fernandez*, 653 F.2d at 1277. There was no such federal statute at issue in *Rotary*, but the Court concluded that R.I.'s international interests did not outweigh California's compelling interest in eliminating sex discrimination. *Rotary*, 107 S. Ct. at 1948.

social organizations, such as the Kiwanis or Elks can be afforded protection as "intimate associations" is no longer, as commentators once asserted, "open to serious consideration."[70] Consequently, the freedom of "expressive association" is now essentially the only available avenue for non-family type groups seeking constitutional protection.

Courts employing the refined "expressive association" framework should focus on "whether the organization's discriminatory criteria relate to its advocacy."[71] An organization should be required to show a direct relation between membership exclusion and the organization's *purpose*.[72] *Rotary* indicates that courts should protect the group's expressive interests. To determine whether a group's expressive interests are protected courts will balance competing interests—the state's interest in promoting equal access[73] and eliminating damaging affects of invidious discrimination[74] against expressive interests of the private club. If a group's purpose is tied to the advancement of beliefs and ideas and would be significantly disrupted if forced to function nondiscriminately, constitutional protection should be warranted. "If no expression is advanced by the organization's exclusion of certain groups, then [the] justification for constitutional protection collapses."[75]

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70. *See* Linder, *supra* note 11, at 1889.

71. *See* Marshall, *Discrimination and the Right of Association*, 81 NW. U.L. REV. 68, 80 (1986).

72. The Supreme Court has said that when first amendment rights are at stake, the purpose, intent or motive of the party is examined to find "conduct that is an associational aspect of expression." *In re* Primus 436 U.S. 412, 438 n.32 (1978) (quoting Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 2 (1964)). The Court in *In re* Primus upheld a fundamental first amendment right—freedom of association for the purpose of obtaining access to the courts. *Id.* at 426. Under *Rotary* also, where an association's objective is to advance certain beliefs or ideas, and those efforts would be thwarted if forced to operate in a nondiscriminating manner, the group is more likely to be granted first amendment protection.

73. Where discrimination affects access to publicly available opportunities (i.e. housing, education, and employment) compelling state interests are raised. *See supra* note 12.

74. The Supreme Court has noted that invidious discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts v. United States Jaycees*, 468 U.S. at 625.

75. Marshall, *supra* note 71, at 80. In *Rotary*, the Court found that the state intrusion would not substantially harm the organization. Marshall has pointed out one way to preserve the private club's constitutional rights, while still sustaining the constitutional values underlying the state's compelling interests, is through minimal interference with the organization's internal operations. Under his analysis the intrusion goes too far if it threatens the organization's existence—the potential complete extinguishment of its

Rotary will have a great impact on many organizations. The groups most likely to raise equal access concerns and therefore "least likely to have a protectable constitutional interest," include "civic, eating, service, athletic, and country clubs."[76] Indeed, the greatest impact will be on civic service organizations whose single-sex identities are not fundamental to their purposes of professional advancement and civic improvement.[77]

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member's constitutional rights. *Id.* at 104. This is a result that the courts should be careful to prevent. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); Buckley v. Valeo, 424 U.S. 1 (1976) (compelling first amendment associational rights exempt political parties from disclosure requirements). Thus, it would follow, that although an organization may be nonpolitical, it could still persuasively argue that because forced nondiscrimination has seriously threatened the organization's "viability," or has become "potentially fatal" to the group, it should be exempted from anti-discrimination requirements." Marshall, *supra* note 71, at 104.

Marshall adds that where an organization affects economic opportunity or exercises political power, then intrusion by the state is more justified, because the possibility of causing the failure of the organization is minimized—the members are less likely to leave the organization against their "economic and political self-interest." *Id.* In clubs such as R.I. and other civic service organizaitons where "public-service" and economic (professional or business) advancement motivate membership, the state is unlikely to cause the organization to *close* its doors by requiring it to *open* its doors to women.

One constitutional law professor has described the present state of associational rights in these terms:

> The more clearly an organization speaks to political ideologies or is religious in its activities, or the more its activities are related to voting, to petitioning the government, or to traditionally intimate or interfamilial activities, then the greater protection it will receive against government intrusions or state laws attempting to control its membership requirements.

Los Angeles Daily Journal, May 26, 1987, at 1, col. 2 (quoting William Van Alstyne, Duke University School of Law).

76. Marshall, *supra* note 71, at 84.

77. Organizations which are presumably in this class include Kiwanis International (men), Lions Club (men), National Exchange Club (men), Optimist International (men), Pilot Club International (women), Quota Club International (women), and Zonta International (women). *See* 1 ENCYCLOPEDIA OF ASSOCIATIONS, 941-42 (19th ed. 1985). The Supreme Court has "recognized that the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as will as tangible goods and services." *Rotary*, 107 S. Ct. 1940, 1948 (1987) (citing *Jaycees*, 104 S. Ct. 624, 626 (1984)). Even fraternal organizations such as the Benevolent Order of Elks International if not expressly exempted from the public accomodations laws could be affected because "male identity" may not be found to be fundamental to its "benevolent" purposes. *See* 1 ENCYCLOPEDIA OF ASSOCIATIONS 11316 (19th ed. 1985).

The above mentioned organizations are also then likely to be the target of anti-discrimination legislation. For example, New York City exempts from its public accommodations law " 'any institution, club, or place of accommodation which . . . is in its nature distinctly private.' " New York State Club Assn., Inc., v. City of New York, 69 N.Y.2d 211, 212, 505 N.E.2d 915, 916 (1987), *prob. juris. noted*, 108 S. Ct. 62 (citing NEW YORK CITY, N.Y., ADMIN. CODE § 8-107(2)).

> [T]he City Council enacted Local Law No. 63, which states that a club 'shall not be considered in its nature distinctly private if it (1) has more than four

On the other hand, organization's that demonstrate a significant purpose tied to gender are likely to be protected. The Boy Scouts of America (B.S.A.) is a prime example of a group whose purpose is tied to the advancement of certain ideas (related to gender), and whose "disruption of purpose" argument could be successful under the *Rotary* framework. The purpose of the B.S.A. is to provide for boys, not only training in citizenship and leadership, but also role models by which the boys can chart their lives at a crucial point in their physical and emotional maturity.[78]

In *Curran v. Mount Diablo Council of the Boy Scouts of*

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hundred members, (2) provides regular meal service, and (3) 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.'

Id. at 212, 505 N.E. 2d at 916 (citing NEW YORK CITY, N.Y., ADMIN. CODE § 8-102(9)).

In response to this law 125 private clubs sought a judgment declaring the local law unconstitutional, arguing that the local law is inconsistent with state law, and that the law "violates its members' rights to privacy, free speech and association under the Federal Constitution." *Id.* at 216, 505 N.E.2d at 920. Given its holding in *Rotary*, the Supreme Court is likely to conclude as the court of appeals concluded—that the "law does not abridge the club members' freedom of intimate association." *Id.*

The New York City law, however, may be found to violate the expressive associational rights of some of the clubs expressly within the reach of the statute. A number of the clubs that the city wishes to hold subject to its anti-discrimination laws include clubs organized along national origin, religious, and ethnic lines. *Id.* at 213, 505 N.E.2d at 917. Religious organizations are protected by their express first amendment rights and the ethnic groups may be protected by their right that has been referred to as the right of "cultural association." Although cultural and ethnic associations are traditionally exempted from antidiscrimination legislation, cultural and ethnic associations whose purposes and interests are to preserve national and religious identities and communities could probably demonstrate a sufficiently defined "expressive associational" purpose tied to their discrimination and therefore garner constitutional protection under *Rotary*. The Court may determine that antidiscrimination laws that fail to exclude such cultural groups, are overbroad and therefore unconstitutional—the laws could be found to infringe upon the members' right of "cultural association"—affiliation that plays a crucial role in forming self identity. *See* Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 56 N.C.L. REV. 303, 339 (1986).

Many states also exempt the Boy Scouts of America (B.S.A.) from antidiscrimination laws. California, however, does not exempt the B.S.A. *See* CAL. CIV. CODE § 51 (West 1982). The analysis in the text which follows is derived from *Rotary*, and applied to the B.S.A., and may be applied to any organization whose discriminatory practices are fundamentally tied to its purpose.

78. The Boy Scouts of America submitted a Brief as *Amicus Curiae* and classified their organization as a type of group much like Rotary considering size and selectivity. *See* Brief of the Boy Scouts of America as *Amicus Curiae* in Support of Appellants Rotary International at 8, *Rotary*, 107 S. Ct. 1940 (1987) (No.86-421) [hereinafter B.S.A. *Amicus Curiae* Brief].

America,[79] the B.S.A.'s policy that only males who believe in the values of scouting should serve as scoutmaster was challenged. The court of appeals held that if plaintiff could prove the allegations of his complaint, the B.S.A. could not, under the Unruh Act, lawfully exclude homosexuals from the position of scoutmaster. The parties, however, postponed trial to obtain guidance by the *Rotary* decision.

Under *Rotary*, since the B.S.A. "hold[s] as one of its fundamental values that homosexual conduct is not moral,"[80] the B.S.A. should prevail because forcing a troop to allow a homosexual to serve as scoutmaster runs directly against the associational objectives which the scouts assert. While allowing a homosexual to serve as scoutmaster may not affect some objectives (i.e. teaching courtesy and cheerfulness), forcing such action infringes upon what the scouts hold to be a fundamental value, thereby abridging the group's rights of expressive association.[81]

The B.S.A. has been faced with litigation where plaintiffs have sought to force the B.S.A. to accept women as scoutmasters.[82] One of the published purposes of the B.S.A. is to provide

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79. 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 468 U.S. 1205 (1984).

80. B.S.A. *Amicus Curiae* Brief, *supra* note 78, at 3.

81. The B.S.A. could argue that it has adopted the belief that condemns homosexual practices, a belief which at least one Justice expressly recognized as a deeply rooted Judaeo-Christian moral and ethical standard. *See* Bowers v. Hardwick, 106 S. Ct. 2841, 2847 (1986) (Burger, C.J., concurring). In *Bowers*, the Court upheld sodomy laws against homosexual practices. *Id.* at 2846. Also, it could be argued that to apply anti-discrimination laws in such a way to the B.S.A. would seriously threaten the "viability" of the organization. *See supra* note 68.

82. *See* Pollard v. Quinnipiac Council, Boy Scouts of America, PA-SEX-37-3 (Conn. Comm. on Human Rights and Opportunities) (decision of hearing examiner, January 4, 1984), *vacated*, (Conn. Super. Ct. May 19, 1986), *affirmed*, 204 Conn. 287, 528 A.2d 352; Adamski v. Suffolk County Council of the Boy Scouts of America, P-S-73766-80 (N.Y. Div. of Human Rights).

In *Pallard*, the supreme court of Conneticut affirmed the trial court's decision and held that Pollard (the woman leader) was neither denied access to goods and services nor to an accomodation within the terms of the states public accomodation statute. *Id.* at 295, 528 A.2d at 360. *See generally*, CONN. GEN. STAT. § 53-35(a). The court reached the same conclusion that may well have been reached with an "expressive association" analysis discussed in the above text. The Conneticut court reasoned that because the woman was suing to "offer services" to the organization, that it should consider the state's employment discrimination legislation; in so doing, the court viewed that legislation's "express exception for a 'bona fide occupational qualification or need' as "significant." *Id.* (quoting CONN. GEN. STAT. § 46a-60(6)). The court stated that "[s]uch an exception would appear, prima facie, to be as relevant to voluntary services as it is to paid employment" *Id.*, and concluded that "[t]he absence of a statutory exception for a 'bona fide occupational qualification or need' in the text of §53-35(a) [Conneticut's public accom-

male role models after which young scouts who are just coming of age may pattern their lives.[83] Forcing the group to accept women as scoutmasters could be found to be antithetical to the achievement of this purpose. It may be argued that the B.S.A. is merely expressing its belief that a male role model is the more appropriate "teacher and transmitter of scouting values" for young boys in its organization.[84] The B.S.A., under *Rotary*, could argue that its purpose to provide male role models to young men would be significantly impaired if it were forced to accept women scoutmasters—essentially requiring the B.S.A. to "abandon" its associational purpose of providing male role models,[85] a result that the B.S.A. could be constitutionally protected against.[86]

Even the above assertions, however, are not without opposing argument. A plaintiff could argue persuasively that because a

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modation statute] is more consistent with a legislative intent to leave such practices to be regulated by statutes that address employment discrimination rather than by statutes directed to discrimination in public accommodations." *Id.* (quoting CONN. GEN. STAT. § 46a-60(6)).

83. B.S.A. *Amicus Curiae* Brief, *supra* note 78, at 3.

84. *Id.*

85. In *Rotary*, a significant rationale for upholding the Unruh Act's application to Rotary Clubs was that the Act did not require the club to "abandon their basic goals of humanitarian service." *Rotary*, 107 S. Ct. at 1947. It should also be noted that the B.S.A. must demonstrate a "significant infringement." In *Rotary*, a "slight infringement" was not sufficient to outweigh the state interest in eliminating unjustified discrimination. *Id.*

86. Justice O'Connor appears to agree. In her concurring opinion in *Jaycees*, Justice O'Connor recognized that the Boy Scouts engage in protected expressive association and stated that "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." *Roberts v. United States Jaycees*, 468 U.S. at 636 (O'Connor, J., concurring). *Rotary's* emphasis on the association's purpose in its "expressive association" analysis also addresses concerns voiced by Justice O'Connor in her concurring opinion in *Jaycees*. In that opinion Justice O'Connor suggests that a better way to analyze associational claims is by a commercial/noncommercial distinction: if a group is predominantly commercial or business oriented then it should be afforded less protection. *Id.* at 635. O'Connor concedes that such distinctions cannot be easily articulated and that it is impossible to exist as an association without some commercial characteristics—thus making some line drawing necessary. *Id.* at 636. Justice O'Connor's approach, however, is criticized for being

> overbroad because it protects discrimination wholly removed from the expressive goals of the organization. Presumably, a noncommercial advocacy organization such as "Save the Whales" would, under [Justice O'Connor's] approach, be entitled to exclude black females even though the exclusion has nothing to do with the positions that the organization maintains.

Marshall, *supra* note 71, at 79. Focusing on purpose, however, as The Court does in *Rotary*, minimizes arbitrary line drawing by examining the specific expressive activity on a case-by-case basis.

state legislature intended the state's accommodations law to be interpreted in the broadest sense reasonable, any establishment open to serving the public (such as the B.S.A.) comes under the law. Therefore all citizens are entitled to full and equal accommodations.[87] However, if the "expressive association" category is going to have any application beyond express first amendment rights, the *Rotary* framework as applied to the B.S.A. serves as a good example of the analysis the Court could apply for extending constitutional protection.[88]

IV. CONCLUSION

Rotary clarifies factors that are important in defining the parameters of the law of association. The Court's analysis is an evaluation of the constitutionally guaranteed associational rights—both intimate and expressive. *Rotary* expressly limited intimate association protection to close family-type relationships. Therefore, most private organizations must seek protection under the expressive association umbrella. To merit expressive association protection, a group must show a strong nexus between its membership exclusion and its purpose or expressive interest. With such a showing, the expressive interests are likely to outweigh the states' interest in eliminating discrimination.

Although there may be concern that the movement towards equal rights is going too far and that decisions like *Rotary* are constricting the bounds of freedom of association, it is the Court's considerate balancing of competing interests that cause the *Rotary* decision to be applauded. The Court under its *Rotary* analysis is "able to protect the constitutional guarantees of equality in society and in the economic marketplace without in-

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87. In one anti-discrimination case, a boys' little league was ordered to admit girls as members. The court reasoned that although the organization stated as its purpose the development of "manhood," that term basically meant maturity of character, and ruled that "little girls are as appropriate prospects for developing character as are boys." National Org. for Women, Essex County Chapter v. Little League Baseball, Inc., 127 N.J. 522, 534, 318 A.2d 33, 39 (N.J. Super. Ct. App. Div.) *aff'd*, 67 N.J. 320, 338 A.2d 198 (1974).

88. Although *Rotary* serves to solidify and clarify the Court's approach to associational rights cases, the Court is careful to note that the decision does not "consider the extent to which the first amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country," and that judicial assessment of associational rights "requires a careful inquiry into the objective characteristics of the particular relationships at issue." *Rotary*, 107 S. Ct. at 1947 n.6.

terfering with important free association values."[89] The Court's balancing of the competing interests will allow states to combat sex discrimination and still preserve important traditional rights of association. Groups with expressive purposes justifying discrimination, such as the B.S.A., should be protected. As the Court outlines the contours of associational rights in *Rotary*, it is expounding not a "legal code," but a Constitution "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[90] Some may say that *Rotary* merely responds to a crisis—the exclusion of women from the professional and economic benefits that flow from membership in private service or business clubs. More important, however, than allowing women into Rotary Clubs, the Court recognizes that the people may, via state public accommodations laws, establish principles which "in their opinion, shall most conduce to their own happiness"—an idea on which much of the "American fabric has been erected."[91]

Robert N. Johnson

89. Los Angeles Daily Journal, May 26, 1987 at 1, col. 2 (quoting John Nowak).

90. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (emphasis in original).

91. Marbury v. Madison, 5 U.S. (1 Cranch) 87, 110 (1803).