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FROM PRIVATE CLUBS TO PARADES: HOW ACCOMMODATING ARE STATE LAWS?

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I. INTRODUCTION

When a group or individual is denied access to a place of public accommodation, it may file a claim alleging discrimination in violation of state or federal law. Each state has its own law or laws prohibiting discrimination in places of public accommodation.[1] Title II of the Civil Rights Act of 1964, is the federal counterpart of state public accommodation law, prohibiting discrimination in places of public accommodation on the basis of "race, color, religion, or national origin."[2] State anti-discrimination laws may be broader than Title II in at least two respects. First, they may define "a place of public accommodation" more broadly. Secondly, they may prohibit discrimination on grounds of gender, disability, or sexual orientation in addition to race, color, religion, or national origin. The statutes enumerate many "places" as examples of places of public accommodation.[3] The typical list includes such venues as hotels, restaurants, and movie theaters.[4] When a "place" is not listed, is not of the type listed, or does not have a fixed physical location, courts have had more difficulty ascertaining whether the place or, in some instances, the conduct in question is covered by the statute. An additional source of confusion and the focal point of much litigation is the private club exemption conferred by statute.[5] Many states have expanded their definition of "public accommodation" to further their goal of eliminating discrimination, often reaching into the realm of what might once have been considered private.

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1. *See, e.g.*, 775 ILL. COMP. STAT. ANN. 5/5-102 (West 1993); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 1990); N.Y. EXEC. LAW § 296(2) (McKinney 1993); *see also* Lisa Gabrielle Lerman and Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 242-43 (1978).

2. 42 U.S.C. § 2000a (1994).

3. *See* Lerman & Sanderson, *supra* note 1, at 243.

4. *See id.* at 243 (stating that the statutes are intended to "cover places offering food and drink, lodgings and entertainment, as well as retail establishments and state facilities").

5. *See, e.g.*, 775 ILL. COMP. STAT. ANN. 5/5-103 (West 1993); N.Y. EXEC. LAW § 292(9) (McKinney 1993).

The U.S. Supreme Court has heard four cases involving state public accommodation laws in the last ten years.[6] Three of those cases involved inquiries into whether membership organizations may properly be classified as places of public accommodation under the applicable state law without infringing on members' First Amendment rights.[7] In the fourth case, the Supreme Court considered whether state public accommodation law was properly applied to prohibiting discrimination in South Boston's St. Patrick's Day Parade.[8] This article will briefly summarize the standards set forth by the Supreme Court in determining when a private club or organization is subject to state anti-discrimination law, review several cases that have sought to apply the Supreme Court's standards, and discuss the Supreme Court's decision involving South Boston's St. Patrick's Day Parade.

II. SUPREME COURT STANDARDS

Three Supreme Court cases provide guidelines for reviewing public accommodation laws that would bring some private clubs within the definition of a place of public accommodation. In all three cases, the Court has recognized the states' compelling interest in eradicating invidious discrimination as superior to the slight infringement on the First Amendment rights of club members.[9]

A. *The Jaycees and Rotary Club*

Both *Roberts v. United States Jaycees*[10] and *Board of Directors of Rotary International v. Rotary Club*[11] involved claims of gender discrimination. The Jaycees and the Rotary Clubs allowed women to participate in their organizations in a variety of capacities, but neither club

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6. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995); New York State Club Assoc. Inc. v. New York City, 487 U.S. 1 (1988); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

7. *See New York State Club Assoc.*, 487 U.S. at 11; *Rotary*, 481 U.S. at 546; *Roberts*, 468 U.S. at 612.

8. *See Hurley*, 515 U.S. at 557.

9. *See New York State Club Assoc.*, 487 U.S. at 18; *Rotary*, 481 U.S. at 549; *Roberts*, 468 U.S. at 628.

10. 468 U.S. 609 (1984).

11. 481 U.S. 537 (1987).

would admit women to full membership.[12] Local chapters of each organization filed discrimination claims against the national organization, claiming that their policies violated state law.[13] The Jaycees maintained it was not a "place of public accommodation"[14] and the Rotary Club maintained that it was not a "business establishment[ ]"[15] as defined by state law. In other words, the clubs argued that because they were private, they were not subject to state anti-discrimination laws.

Most of the Court's opinion in *Roberts* was dedicated to an inquiry into whether the state law, as applied to the Jaycees, abridged the constitutionally protected right to freedom of association of existing club members. The Court identified two types of freedom of association, that involving personal liberty (intimate association), and that involving the right to associate for the purpose of engaging in activities protected by the First Amendment (expressive association).[16]

B. *The Intimate Association Test*

In *Roberts*, the Court identified the following factors to be considered in determining whether an organization's freedom of intimate association has been abridged by state anti-discrimination laws: "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."[17] These factors, according to the Court, should be employed in "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association" and to assess "where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[18]

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12. *See Roberts*, 468 U.S. at 609; *Rotary*, 481 U.S. at 541. The Jaycees limited regular membership to men between the ages of 18 and 35. Women were admitted as associate members but could not vote, hold local or national office, or participate in certain leadership and training programs. *Roberts*, 468 U.S. at 609. The Rotary Club did not admit women to membership but allowed them to "attend meetings, give speeches, and receive awards." *Rotary*, 481 U.S. at 541.

13. *See Roberts*, 468 U.S. at 614-15; *Rotary*, 481 U.S. at 541.

14. *Roberts*, 468 U.S. at 616 (quoting MINN. STAT. § 363.03 (1982)).

15. *Rotary*, 481 U.S. at 541-42. California's anti-discrimination statute, the Unruh Civil Rights Act, CAL. CIV. CODE ANN. 51 (West 1982), prohibits discrimination "in all business establishments of every kind whatsoever."

16. *See Roberts*, 468 U.S. at 619.

17. *Id.* at 620.

18. *Id.*

Neither the Jaycees nor the Rotary Club qualified for constitutional protection under the Court's intimate association test.[19] The organizations are large; the Jaycees have over 295,000 members[20] and the Rotary Club over 900,000.[21] Thus, both organizations failed the small-size component of the intimate association test, notwithstanding the fact that some local Rotary chapters had as few as twenty members.[22] In each case, the Court further considered that both the Jaycees and the Rotary Club actively recruited members, had few membership requirements, other than age or sex, and frequently conducted business in the presence of strangers.[23] Thus, in terms of selectivity, policy, and congeniality, these organizations were far from the most intimate end of the Court's spectrum of personal relationships and not entitled to constitutional protection on grounds of intimate association.

C. *Expressive Association*

In *Roberts*, the Court began its analysis of the right to expressive association by stating, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[24] The Court recognized that requiring the Jaycees and the Rotary Club to admit women as full members infringed on the male members' freedom of association.[25] Nevertheless, the Court held that this infringement was justified because it served the states' "compelling interest in eradicating discrimination against its female citizens."[26] Furthermore, the infringement as applied to both the Jaycees and Rotary Club was slight because it did not affect the purposes, goals, or viewpoints of either organization (which were both civic and business attenuated), particularly as women were already involved in most aspects of the organizations.[27]

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19. *See Roberts*, 468 U.S. at 621; *Rotary*, 481 U.S. 546.
20. *See Roberts*, 468 U.S. at 613.
21. *See Rotary*, 481 U.S. at 540.
22. *See id.* at 546.
23. *See Roberts*, 468 U.S. at 613; *Rotary*, 481 U.S. at 540.
24. *Roberts*, 468 U.S. at 622.
25. *See id.* at 623; *Rotary*, 481 U.S. at 549.
26. *Roberts*, 468 U.S. at 623; *See Rotary*, 481 U.S. at 549.
27. *See Roberts*, 468 U.S. at 623; *Rotary*, 481 U.S. at 549.

D. *The New York State Club Association*

In *New York State Club Association v. New York City*,[28] the Court applied the standards of *Roberts* and *Rotary* to a New York City anti-discrimination amendment that limited the types of clubs that would fall within the private club exemption.[29] The amendment extended anti-discrimination provisions to any "'institution, club or place of accommodation [that] has more than four hundred 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.'"[30]

The Court upheld the constitutionality of the amendment holding that the clubs affected were sufficiently large in size and significantly "'commercial' in nature" that they were not places of intimate association.[31] Furthermore, the Court did not find that the amendment offended the clubs' rights of expressive association because it does not prevent a club from "exclud[ing] individuals who do not share the views that the club's members wish to promote."[32]

In *Roberts*, *Rotary*, and *New York State Club Association*, the Supreme Court weighed the states' compelling interest in eradicating discrimination very heavily against members' rights to association. In each case, the Court supported a states' interest in offering women and minorities equal access to business opportunities,[33] opportunities that are often fostered in clubs such as the Jaycees, Rotary, and the dining clubs covered by the New York City amendment.

III. APPLYING THE STANDARDS

The impact of the Supreme Court's decisions in *Roberts*, *Rotary*, and *New York State Club Association* is evident in several recent state court decisions. Before these decisions, some lower courts were reluctant to hold that membership organizations, such as the Jaycees, were places of public accommodation.[34] The Massachusetts court, for example, held that

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28. 487 U.S. 1 (1988).

29. *See id.* at 11-14.

30. *Id.* at 6, (quoting N.Y. CITY ADMIN. CODE § 8-102(9) (1986)).

31. *See id.* at 12.

32. *Id.* at 13.

33. *See Roberts*, 468 U.S. at 625-26; *Rotary*, 481 U.S. at 549; *New York State Club Association*, 487 U.S. at 7.

34. *See, e.g.*, United States Jaycees v. Massachusetts Commission Against Discrimination, 463 N.E.2d 1151 (Mass. 1984).

the Jaycees were not subject to the state's anti-discrimination law because a membership organization is not a "place" within the statute's definition of a place of public accommodation.[35] The Supreme Court's decision in *Roberts* did not directly address the definitional issue but its holding would suggest that such analysis should be abandoned.[36]

These decisions have also encouraged courts to find that clubs that are not open to the public, and therefore private in some sense, are sufficiently public for purposes of applying anti-discrimination laws. In *Warfield v. Peninsula Golf & Country Club*,[37] *Concord Rod & Gun Club, Inc. v. Massachusetts Commission Against Discrimination*,[38] and *Frank v. Ivy Club*,[39] three state courts stretched the definitions of their anti-discrimination statutes to prevent gender discrimination in a country club, a local gun club, and a University eating club, respectively. At least one court upheld a definition of public accommodation that includes the facilities of a private club.[40] Another court held that withholding favorable tax treatment from a club that practiced gender discrimination did not violate the club members' First Amendment Rights.[41]

The Supreme Court standards are not intended to consume all private clubs within the definition of public accommodation and while courts have condemned discriminatory practices, they have recognized the need to maintain the vitality of the club members' First Amendment rights. Several courts have found that certain clubs were sufficiently intimate to meet the Supreme Court standards.[42]

A. *When Private Is Sufficiently Public*

The California state courts have addressed several cases involving gender discrimination in private clubs. In *Warfield v. Peninsula Golf and*

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35. *See id.* at 1159.

36. *But see* Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993) (holding that the Boy Scouts is not a place of public accommodation), *cert. denied*, 510 U.S. 1012 (1993).

37. 896 P.2d 776 (Cal. 1995).

38. 524 N.E.2d 1364 (Mass. 1988).

39. 576 A.2d 241 (N.J. 1990), *cert. denied*, 498 U.S. 1073 (1991).

40. *See* Benevolent and Protective Order of Elks of the United States v. Reynolds, 863 F. Supp. 529 (W.D. Mich. 1994).

41. *See* State v. Burning Tree Club, Inc., 554 A.2d 366 (Md. 1989).

42. *See* Louisiana Debating and Literary Assoc. v. City of New Orleans, 42 F.3d 1483 (5th Cir. 1995); Pacific Union Club v. Superior Court, 283 Cal. Rptr. 287 (Ct. App. 1991), *rev'd denied*, 1991 Cal. LEXIS 4540 (Sept. 26, 1991).

Country Club,[43] the Supreme Court of California held that a country club constituted a business establishment within the meaning of the state public accommodation statute and was, therefore, subject to anti-discrimination law.[44] Warfield was a divorcee who was awarded proprietary membership in the club as part of her divorce settlement.[45] She claimed that the club violated the California public accommodation act, known as the Unruh Civil Rights Act (Unruh Act)[46] when it terminated her membership and excluded women from proprietary membership in the club.[47]

To determine whether the Unruh Act was applicable to the club, the court applied the intimate association test.[48] The court examined the club's size (700 members plus their spouses and children) and the degree of membership control over the governance of the organization (only half the members were proprietary members with authority to govern and select new members), but placed particular emphasis on the access to the club by nonmembers.[49] The court reasoned that by allowing nonmembers access to the club's golf and tennis pro-shops and by permitting nonmembers to use its facilities for a fee, the club operated as "the functional equivalent of a commercial caterer or a commercial recreational resort—classic forms of 'business establishments,'" and could not discriminate on the basis of gender.[50]

Nevertheless, the court took pains to clarify that the Unruh Act would not govern those relationships that were truly private (i.e. continuous, personal, and social).[51] This clarification was borne out in the appellate

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43. 896 P.2d 776 (Cal. 1995).

44. *See id.* at 798.

45. *See id.* at 782.

46. The California public accommodation statute, otherwise known as the Unruh Civil Rights Act, CAL. CIV. CODE ANN. 51(West 1982) states that:

> 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, privileges, or services, in all business establishments of every kind whatsoever.

47. *See Warfield*, 896 P.2d at 782.

48. *See id.* at 798.

49. *See id.* at 792.

50. *Id.* The court also concluded that the club received direct and indirect financial benefits from the activities conducted on its premises by nonmembers (which included golf and tennis tournaments, wedding receptions, and fashion shows) in the form of dues and fees that were less than would have been required in the absence of the income obtained from the nonmembers. *See id.* at 779, 793.

51. *See id.* at 790.

decision, *Yeaw v. Boy Scouts of America.*[52] In *Yeaw*, the court held that Boy Scout troops may lawfully exclude females from membership because the Boy Scouts is not a business establishment for purposes of the Unruh Act.[53] The court reasoned that the eleven-year-old female plaintiff sought membership in a troop and that a troop "has no commercial attributes whatsoever."[54] The court emphasized that relationships within a troop are "personal and social."[55]

The *Yeaw* court distinguished this case from the California Supreme Court's decision in *Isbister v. Boys' Club of Santa Cruz, Inc.*[56] The Boys' Club of Santa Cruz rejected the applications of girls solely on the basis of gender.[57] The Supreme Court of California held that the Boys' Club was a business establishment under the Unruh Act because its facilities, which included a swimming pool, snack bar, gymnasium, and craft and game areas, qualified as a place of public amusement and because it opened its doors to the entire youth population with the only condition that its users be male.[58] Consequently, the *Isbister* court held that girls could not be excluded from the club.[59] According to the *Yeaw* court, the Boy Scouts organization differs significantly from the Boys' Club in two ways. First, the Scouts through their Constitution, By-Laws, Scout's Oath, and Scout law, are selective in their membership.[60] The Boys' Club, on the other hand, had no selective criteria and was open to all boys.[61] Second, the Scout's organization was not dependent on a place or physical facilities but emphasized the "quality of relationships among members,"[62] whereas the Boys' Club was primarily a physical site, similar to a place of public accommodation.[63]

The court further observed that the public accommodation statute specifically exempted organizations such as the Boy Scouts and Girl Scouts which were authorized, created, or chartered by federal law for the express

52. 64 Cal. Rptr. 2d 85 (1997).
53. *Id.* at 85-86.
54. *Id.* at 89.
55. *Id.* at 86, 92.
56. 707 P.2d 212 (Cal. 1985).
57. *See id.* at 215.
58. *See id.* at 217.
59. *See id.* at 224.
60. *See Yeaw*, 64 Cal. Rptr. 2d at 91.
61. *See Isbister*, 707 P.2d at 217.
62. *See Yeaw*, 64 Cal. Rptr. 2d at 92.
63. *See id.* at 91.

purpose of promoting the character development of a single sex.[64] By this reference, the court implies that such an exemption is imperative because it was the intent of the legislature to capture under the statute all organizations that categorically excluded the opposite gender.[65] This implication underscores the intended breadth of such statutes and lends support to the interpretation of the public accommodation statute with respect to the boys' swimming club in *Isbister*.[66]

The Supreme Judicial Court of Massachusetts (SJC) addressed gender discrimination in *Concord Rod & Gun Club, Inc. v. Massachusetts Commission Against Discrimination*.[67] The club in this case involved an all male organization formed to promote the proper use of hunting equipment, assist the enforcement of game laws, and encourage a positive relationship between sportsmen and their community.[68] When a female applicant was denied full membership, the Massachusetts Commission Against Discrimination (MCAD) argued that the gun club was a place of public accommodation, resort, or amusement as defined by the state public accommodation law[69] and as such was required to admit the applicant.[70]

Unlike the *Warfield* case, where the court focused on the access of nonmembers, the SJC found the gun club's selectivity for membership to be the determinative factor in the intimate association test.[71] Aside from requiring applicants to reside in or near the town in which the gun club was located, the only other prerequisites were that the applicant be male, over twenty-one years of age, and eligible for a Massachusetts sporting

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64. *See id.*

65. *See id.*

66. Particularly, that the legislature intended the statute to be interpreted in the broadest manner reasonably possible.

67. 524 N.E.2d 1364 (Mass. 1988).

68. *See id.* at 1365-1366.

69. *See id.* at 1365 (citing the Massachusetts Public Accommodation Law, MASS. GEN. LAWS ANN. ch. 272 § 98 (1990)) stating in pertinent part:

> All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons.

Ch. 272 § 92A defines a place of public accommodation, resort, or amusement as:

> any place whether licensed or unlicensed, which is open to and accepts, solicits, the patronage of the general public and, without limiting the generality of this definition, whether or not it be [a facility identified in the statute to which the public traditionally has access].

70. *See Concord Rod & Gun Club, Inc.*, 524 N.E.2d at 1365.

71. *See id.* at 1367.

license.[72] The court concluded that these limitations actually represented a "total absence of genuine selectivity," which in turn dictated a finding of publicness.[73]

Another example of a judicial stretch to reach an allegedly private entity can be found in *Frank v. Ivy Club*.[74] In *Frank*, a female undergraduate student at Princeton University alleged that the Ivy Club and two other male-only eating clubs had discriminated against her in violation of the New Jersey Law Against Discrimination (LAD).[75] In response to the clubs' defense that they were private and therefore exempt from LAD, the court affirmed the Civil Rights Division's finding that the clubs lacked a distinctly private character because of their close connection to the University.[76] Specifically, the court concluded that where a place of public accommodation and an entity that deemed itself private shared a symbiotic relationship, and the entity provided an essential service not provided by the public accommodation, the entity forfeited its "'private'" character and became subject to the laws against discrimination.[77] In short, the clubs lost their private identity through their association with the University which itself was a place of public accommodation.[78] To reinforce its conclusion, the court reviewed the legislative intent of LAD, which was to eradicate discrimination in educational institutions.[79]

A Michigan case indicates that courts may be willing to uphold legislation that involves even direct intervention in private club policies. In *Benevolent and Protective Order of Elks v. Reynolds*,[80] the United States District Court for the Western District of Michigan upheld the constitutionality of a new amendment to its public accommodation law that granted equal access to all adult members of a private club to its facilities.[81] The amendment included in its definition of public accommodation, private club facilities, such as a club's food and beverage

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72. *See id.* at 1366.

73. *Id.* at 1367.

74. 576 A.2d 241 (N.J. 1990).

75. *See id.* at 244.

76. *See id.* at 256.

77. *Id.* at 257 (quoting Hebard v. Basking Ridge Volunteer Fire Company, 395 A.2d 870 (N.J. Super Ct. App. Div. 1978)).

78. *See id.*

79. *See id.* at 260.

80. 863 F. Supp. 529 (W.D. Mich. 1994).

81. *See id.* at 531, 534. The amendment in question was the Michigan Elliott-Larsen Civil Rights Act (MELCRA) of 1976, Pub. Act No. 453, MICH. STAT. ANN. § 3.548(301, 302, 302a), *amended by* Pub. Act No. 70 (1992).

facilities or services.[82] The court recognized that the Michigan Legislature adopted the amendment to eliminate certain "exclusionary and restrictive" practices of private clubs, such as "restricting the times when spouses, typically wives . . . could use certain club facilities, generally the golf course."[83] The statute also required that private clubs make "[a]ll classes of membership . . . available without regard to race, color, gender, religion, marital status, or national origin."[84]

The Elks interpreted the statute to require them to admit women, without consideration of whether it was a private club within the statutory exemption and sought a judgment declaring the amendment unconstitutional as a violation of its rights to intimate and expressive association.[85] The court upheld the constitutionality of the statute, reasoning that the amendment applied to regulation of facilities within a private club, but did not affect a case-by-case analysis of whether the Elks, or any other club, could claim private club exemption from the general definition of a place of public accommodation.[86] Since the Elks do not admit women, the amendment had no effect on equal access to lodge facilities, at least with respect to women. The court did not interpret club facilities to include access to membership, but only access to facilities by existing club members.[87]

The elimination of discriminatory membership policies has been achieved not only through state public accommodation statutes but also by the withdrawal of favorable tax treatment. In *State v. Burning Tree Club, Inc.*,[88] the court held that it was not a violation of intimate association rights to withhold a favorable tax status from the club.[89] The club's lands were assessed at full value because the club's men-only membership policy violated a statute which granted favorable assessment of land owned by private country clubs only if their membership policies did not discriminate.[90] Members of the club challenged the assessment, claiming that the statute violated their right to intimate association under the U.S. Constitution.[91] The court in *Burning Tree Club*, applied the intimate association test set out in *Roberts*, but it also reviewed the decisions of

82. *See Reynolds*, 863 F. Supp. at 531.

83. *Id.*

84. *Id.* at 533, *quoting* MELCRA § 3.548(302a).

85. *See id.*

86. *See id.* at 534.

87. *See id.* at 533.

88. 554 A.2d 366 (Md. 1989).

89. *See id.* at 386, 387.

90. *See id.* at 370.

91. *See id.* at 370.

Concord Rod and Gun Club and *Isbister*.[92] Unlike the *Isbister* and *Concord Rod and Gun Club* courts which emphasized selectivity, the court in *Burning Tree Club* relied primarily on size as its basis for finding no intimate association.[93] Referring to the New York Club Association case where the 400 member threshold subjected clubs to public accommodation statutes, the court found that the Burning Tree Club, which had a membership size of 440 did not suggest intimate association.[94] Furthermore, because the denial of tax benefits was not based on beliefs or association but on acts and practices of discrimination, the law does not have the effect of punishing or prohibiting the exercise of associational rights, but instead is only refusing to subsidize discriminatory activities.[95] In other words, even assuming such rights exist, there is no entitlement to a government subsidy of such rights.

B. *When Private Is Sufficiently Intimate*

In *Louisiana Debating and Literary Ass'n v. City of New Orleans*,[96] the court found that the club members had a constitutionally protected right of intimate association.[97] In this case, the Human Relations Commission alleged that the Louisiana Debating and Literary Association as well as three other exclusive clubs had violated the City of New Orleans public accommodation statute.[98] Specifically, the City argued that the clubs were not private because, despite their long history and exclusivity, they controlled business in the community and that the clubs' business was really business.[99] The court, however, found that in order to challenge the distinctly private status of the clubs, the City had to prove more than the fact that a club might advance business.[100]

Although the Fifth Circuit court applied the *Roberts* intimate association test, it came up with a result contrary to the decisions previously discussed. The first factor the court considered was the size of

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92. *See id.* at 380.

93. *See id.* at 379-80.

94. *See id.* at 379.

95. *See id.* at 382.

96. 42 F.3d 1483 (5th Cir. 1995).

97. *See id.* at 1486.

98. *See id.* Chapter 40c of the City of New Orleans Code prohibits discrimination by a public accommodation because of race, color, creed, religion, national origin, ancestry, or unreasonably because of age , sex, sexual orientation, physical condition, or disability. NEW ORLEANS CODE 40c-50, et seq. (1991).

99. *See Lousiana Debating and Literary Ass'n*, 42 F.3d at 1488.

100. *See id.* at 1494.

the clubs which the court characterized as "relatively small" despite the fact that the membership of the largest club was 600.[101] This conclusion is in direct contrast to the approach taken by the *Burning Tree Club* court which determined that the club membership size of 440 was sufficient grounds to reject an intimate association argument.[102]

Size, however, was only one factor considered by the court in determining the clubs' private status. The court found that the clubs' rules against the discussion or transaction of business on their premises was indicative of the purely social purpose of the clubs.[103] Furthermore, the clubs maintained a rigorous screening process for new applicants, were managed and controlled by local members, and severely limited the access of nonmembers to their facilities.[104] This combination of factors led the court to place the clubs in a position far from the Jaycees and the Rotary club and closer to the most intimate of associations on the spectrum of personal attachment.[105]

The members of the Pacific Union Club were also granted First Amendment protection because they met the requirements of the intimate association test.[106] In *Pacific Union Club v. Superior Court*, the California Court of Appeals described the club as one of the most exclusive clubs in the country, noting its purely social purpose, restricted membership size, lack of recruitment of new members, rigorous admissions process, including numerous personal interviews to assess the applicant's congeniality, exclusion of nonmembers from functions, and strictly private membership list.[107] Based on these characteristics, the court concluded that "[t]he Club is more than sufficiently intimate to be located within that portion of the associational . . . continuum deserving of constitutional protection."[108]

In *Pacific Union Club*, the state's Franchise Tax Board (Board) sought disclosure of the club's guarded membership list to investigate whether members had improperly deducted club dues and expenditures.[109] The law

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101. *See id.* at 1497.

102. *See Burning Tree Club, Inc.*, 554 A.2d at 379.

103. *See Louisiana Debating and Literary Ass'n*, 42 F.3d at 1495-96.

104. *See id.* at 1496-97.

105. *See id.* at 1497-98.

106. *See* Pacific-Union Club v. Superior Court, 283 Cal. Rptr. 287, 297 (Ct. App. 1991), review denied, 1991 Cal. LEXIS 4540 (Sept. 26, 1991).

107. *See id.* at 289.

108. *Id.* at 296.

109. *See id.* at 288. Although the club was widely reputed to discriminate on the basis of gender, the court had no evidence of such discrimination and so proceeded on the grounds of age discrimination, which the club concededly practiced. *See id.* at 289.

bans such deductions by members of clubs that discriminate.[110] The court agreed with the club that disclosure of its membership list would have a chilling effect on its members, because by virtue of membership, they could be subject to random tax audits.[111] The court did not find the Board's goal of unearthing possible illegal tax deductions sufficiently compelling to override the club's right of privacy.[112]

The discriminatory policies of clubs have also been upheld on the basis that the membership did not constitute a public accommodation within the language of the state statute. In *Maine Human Rights Commission v. Le Club Calumet*,[113] the Human Rights Commission challenged the Franco-American club male-only admission policy as a violation of the Maine Human Rights Act (MHRA).[114] The court held, however, that since the membership was never an advantage or privilege offered to the general public, the membership standing by itself was not a public accommodation which would prevent the club from discrimination against women.[115]

The club's only requirements for membership were that the applicant be male, have a family name of French origin, submit an application signed by three members, provide a birth certificate, and pay a forty dollar fee.[116] In short, having met all other criteria, women were categorically excluded from membership on the basis of gender. Substantively, these requirements may be analogized to the Jaycees or the Rotary Club as well as the boys' swimming club in *Isbister* and the club in *Concord Rod and Gun Club*, yet the court failed to perform the intimate association test. Had the test been applied, its size (over 800 members) and its lack of selectivity would have been sufficient to find no right of intimate

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110. *See id.* at 290. The California Revenue and Taxation Code provides, in part, that business deductions "shall not be applicable to expenses incurred by a taxpayer with respect to expenditures made to . . . a club which restricts membership or the use of its services or facilities on the basis of age, sex, race, religion, color, ancestry or national origin." CAL. REV. & TAX CODE § 17269(a) (West Supp. 1994). Club members received a notice informing them of this tax provision with their monthly statement. *See Pacific Union*, 283 Cal. Rptr. at 290.

111. *See Pacific Union*, 283 Cal. Rptr. at 296.

112. *See id.* at 298-99.

113. 609 A.2d 285 (Me. 1992).

114. *See id.* at 286. The Maine Human Rights Act, 5 MRSA § 4592(1) (Supp. 1991) prohibits discrimination in places of public accommodation. A place of public accommodation is defined in section 4592(1) as any establishment which in fact offers its goods, facilities or services to, or accepts patronage from the general public. *See id.*

115. *See Maine Human Rights Commission*, 609 A.2d at 287.

116. *See id.* at 286.

association.[117] That this reasoning contradicts that of the Supreme Court does not seem to trouble the Supreme Judicial Court of Maine which merely stated that "under different circumstances[,] membership in a club could constitute an advantage or privilege."[118] In doing so, the court's decision circumvents the legislative purpose in enacting the statute which was to avoid discrimination solely on the basis of gender.

IV. THE SOUTH BOSTON PARADE

A. *Background*

In 1992, a group of individuals formed the Irish-American, Gay, Lesbian and Bisexual Group of Boston (GLIB), for the express purpose of marching in South Boston's annual St. Patrick's-Evacuation Day Parade.[119] The South Boston Allied War Veterans Council and John J. "Wacko" Hurley (the organizers), refused to grant the group permission to participate.[120] GLIB successfully sought a court order, mandating their inclusion in the Parade and the group marched without incident in the 1992 Parade.[121] In 1993, the organizers sought a Parade permit that would not compel the inclusion of GLIB. GLIB filed suit against the organizers, claiming discrimination and seeking a permanent injunction against such discriminatory conduct. GLIB claimed that the organizers violated Massachusetts law, which prohibits discrimination based on sexual orientation in the admission to or treatment in any place of public accommodation, resort, or amusement.[122] The Superior Court granted the permanent injunction which was upheld by the state's highest court.

B. *The Supreme Judicial Court of Massachusetts' Opinion*

1. A Place of Public Accommodation:

In *Irish-American Gay, Lesbian and Bisexual Group v. City of Boston*,[123] the Supreme Judicial Court of Massachusetts (SJC) had to

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117. *See id.* at 286.

118. *Id.* at 287.

119. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 557 (1995).

120. *See id.*

121. *See id.*

122. *See* MASS. GEN. LAWS CH. 272, § 98 (1986).

123. 636 N.E.2d 1293 (Mass. 1994), *rev'd sub nom.* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

determine whether the organizers of the South Boston parade were violating Massachusetts' public accommodation law.[124] The approach taken by the SJC was similar to that applied in cases assessing discrimination by private clubs.[125] The SJC determined that the Parade was clearly a place of public accommodation within the meaning of the statute, which includes "a boardwalk or other public highway" as well as "a place of public amusement, recreation, sport, exercise or entertainment."[126] The Parade qualified as a public place under either of these listed categories. The SJC maintained that not only was the physical site of the Parade public, but also the Parade was "public" in the sense that any group was welcome to participate.[127] The SJC focused to a great extent on the lack of selectivity employed by the Parade organizers in choosing participants.[128] This lack of selectivity was fatal to the organizers' claim of freedom of intimate association.

2. Freedom of Expression:

In *Roberts* and *Rotary*, the Court considered whether requiring the organizations to admit women as full members infringed on the club members' constitutional rights of freedom of expressive association.[129] In both cases, the court held that admitting women to the organizations did not intrude on the members' First Amendment rights to freedom of expression because including women did not alter the group's purposes or goals.[130] In considering the Parade organizers' rights to freedom of expression, the SJC concluded that there was no "expression" to be protected.[131] Due to the total lack of selectivity of Parade participants and sponsors, there was no message, common theme or speech, meriting consideration for constitutional protection.[132] In reaching this conclusion,

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124. *See Irish-American Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1294.

125. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); Concord Rod & Gun Club, Inc. v. Massachusetts Commission Against Discrimination, 524 N.E.2d 1364 (Mass. 1988).

126. *Irish-American Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1297-98.

127. *See id.*

128. *See id.*

129. *See Roberts*, 468 U.S. at 618; *Rotary*, 481 U.S. 537.

130. *See Roberts*, 468 U.S. at 621; *Rotary*, 481 U.S. 537.

131. *See Irish-American Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1300.

132. *See id.* at 1299-1300.

the SJC relied upon the findings of the trial judge which were based on evidence as well as a video tape of the 1993 Parade.[133]

The SJC briefly considered the outcome of similar litigation involving the St. Patrick's Day Parade held in New York City. In *New York County Board of Ancient Order of Hibernians v. Dinkins*, the Court held that the Parade was "a pristine form of speech" and the Hibernians could not be compelled to include the Irish Lesbian and Gay Organization whose message they did not endorse.[134] The SJC distinguished *Hibernians*, however, claiming that the NYC Parade had expressive content due to the selective admission process and rules adopted "to prevent parade participants from using that parade as a forum to express views inconsistent with the views of the Ancient Order of Hibernians or the Roman Catholic Church."[135] The SJC held that the South Boston Parade was not an expressive vehicle but rather a "civic, nonexpressive celebration"[136] and its organizers "could not cloak their discriminatory acts in the mantle of the First Amendment."[137]

The Parade organizers canceled the 1994 Parade rather than comply with the SJC's order to include GLIB among its participants.[138] On the Parade date a motorcade, displaying black flags traveled the Parade route in protest of the SJC's decision.[139] Although the Supreme Court did not hear the appeal until June of 1995, the 1995 St. Patrick's Day Parade went forward due to the intervention of the United States District Court of Massachusetts. Collateral estoppel did not preclude federal court consideration of constitutional issues involved in the 1995 case because the Parade organizers planned to include a protest to the SJC's decision as part of the 1995 Parade.[140]

The federal court held that the "sincere and significant protest" gave "the 1995 Parade the expressive purpose the courts of the Commonwealth previously found lacking . . . ."[141] The federal court held that the state could not compel the Parade organizers to include GLIB in the Parade

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133. *See id.* at 1299.

134. *See* New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358, 366 (S.D.N.Y. 1993).

135. *Irish-American Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1299.

136. *Id.* at 1299 n.19.

137. *Id.* at 1300.

138. *See* South Boston War Veterans Council v. City of Boston, 875 F. Supp. 891, 899 (D. Mass. 1995).

139. *See id.*

140. *See id.* at 911.

141. *Id.* at 895.

because to do so would violate their rights to associate for expressive purposes and to free speech.[142]

B. *The Supreme Court's Opinion*

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[143] the Supreme Court reversed the SJC's decision, holding that to force the organizers to include GLIB in their Parade infringed on their First Amendment right of free speech.[144] The Court rejected the SJC's conclusion that the Parade was not expressive and held that the Parade itself is a form of expression.[145] Neither the organizers' leniency in admitting parade participants, nor the variety of messages conveyed by the various contingents, nor the lack of a unified message defeated the expressive nature of the Parade.[146] "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[147]

The Supreme Court recognized the Massachusetts public accommodation law as a legitimate exercise of the state's attempt to eradicate discrimination,[148] but objected to the peculiar application of the statute to the conflict between GLIB and the South Boston Parade organizers.[149] The Court noted that there was no claim that the organizers discriminated against individuals of any sexual orientation who sought to march in a unit approved by the organizers.[150] Presumably, such a situation would be an appropriate instance for assessing discrimination under the public accommodation law. While the Parade was an event that took place in a public forum, the selection process itself was not a place of public accommodation, but rather an exercise of free speech or freedom of expression.[151]

The Court was concerned with protecting whatever message the Parade organizers chose to convey, however vague that message might be, as well as whatever message they chose not to convey. GLIB clearly had its own

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142. *Id.* at 920.

143. 515 U.S. 557, 573 (1995).

144. *See id.* at 566.

145. *See id.* at 568.

146. *See id.* at 569.

147. *Id* at 569-70.

148. *See id.* at 572.

149. *See id.*

150. *See id.*

151. *See id.* at 573.

message to convey and the Court held that this message could not be forced upon the organizers.[152]

The Court reasoned that the organizers were in a position similar to that of newspaper editors, exercising "'editorial control and judgment' upon which the State can not intrude."[153] In *Miami Herald Publishing Co. v. Tornillo*,[154] a candidate for public office was criticized in the *Miami Herald* and sought to respond to the criticism.[155] Florida law required a newspaper to grant equal space to a political candidate criticized in the paper.[156] The Supreme Court struck down Florida's "right of reply" statute on the grounds that the editors' decision of what not to include in its newspaper was protected by the First Amendment right to freedom of the press.[157] Applying the reasoning of *Tornillo* to the Parade organizers, the Supreme Court stated that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[158]

GLIB contended that any infringement on the organizers' right to freedom of expression is not unconstitutional because, even conceding that the Parade is a form of expression, it is merely a "conduit" for speech and consequently the speaker's rights are not directly affected.[159] In making this argument, GLIB relied on the Court's recent decision in *Turner Broadcasting v. F.C.C.*[160] In *Turner*, the Court recognized that cable operators were engaged in speech but that regulation of such speech could fall short of unconstitutionality because the speech was content-neutral and the cable operator is merely a "conduit" for the speech of programmers.[161] The *Hurley* Court disagreed with GLIB's contention, maintaining that the

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152. *See id.* at 574. The Court noted that "GLIB's point (like the Council's) is not wholly articulate," but that the group "would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." *Id.*

153. *Id.* at 575 (quoting Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

154. 418 U.S. 241 (1974).

155. *See id.* at 243-44.

156. *See id.* at 244 (quoting FLA. STAT. 104.38 (1973)).

157. *See id.* at 258.

158. *Hurley*, 515 U.S. at 576.

159. *See id.* at 575 (quoting Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 655 (1994)).

160. 512 U.S. 622 (1994).

161. *See id.* at 645.

Parade involved speech itself.[162] The Court further distinguished the *Turner* case by emphasizing that viewers do not associate the messages conveyed by cable with the operators and programmers.[163] A cable network can easily identify itself and disclaim its endorsement of viewpoints conveyed.[164] A parade does not allow for similar disclaimers. The organizers do not customarily "disavow 'any identity of viewpoint' between themselves and the selected participants."[165] Finally, the Court emphasized that the risks and goals of regulating the cable industry are inherently distinct from those involving regulation of a Parade organizers' selection of participants.[166] Government regulation of the cable industry seeks to prevent a monopoly of the telecasting industry, not to silence a voice.[167] GLIB could not claim that the South Boston Parade organizers held a monopoly on expressing views connected with Irish ancestry, St. Patrick's Day, or any other message. GLIB could seek a permit of its own or seek to participate in other parades.

V. CONCLUSION

Both the South Boston Parade case and the private clubs cases involve issues of discrimination by excluding groups from participation in an organization. The membership selection process in private clubs has not been analyzed as an exercise of free speech while the selection process for the Parade was protected on those grounds. The distinction between the two processes rests to some extent on the unique manner in which groups are visibly organized to express a viewpoint in a parade. GLIB sought to march behind a banner as an identifiable group, conveying a message that could not be forced upon Parade organizers without violating their First Amendment rights to free speech. Although the Parade organizers were successful in excluding a group on the basis of sexual orientation, the decision neither disturbs an individual's right to claim discrimination based on sexual orientation nor supports categorical exclusion on the basis of sexual orientation where an organization's membership policy does not involve expression. In this sense, "sexual orientation" as a grounds for discrimination should be approached in a manner similar to "gender."

In cases involving private clubs, courts have repeatedly enforced state legislative goals by applying antidiscrimination statutes broadly,

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162. *See Hurley*, 515 U.S. at 576.

163. *See id.*

164. *See id.*

165. *Id.* (quoting Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980)).

166. *See id.* at 577.

167. *See id.*

recognizing a state's strong interest in eliminating discrimination and providing equal access to business opportunities for women and minorities. A club member's First Amendment right to freedom of association is not absolute and slight infringement of those rights may be justified to further the state's compelling interests. Clubs that are small, have rigorous qualifications on procedures for membership, strictly limit access to club facilities by nonmembers, and prohibit the discussion of business on club premises are those most likely to be protected as private and, therefore, not subject to state antidiscrimination laws.