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For Blacks Only: TheAssociational Freedoms of Private Minority Clubs

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"The right of association is a very personal right and anyone who tells you that you must associate with someone is sticking his nose where it does not belong."\(^1\)

**Introduction**

Private clubs have long played an important role in the social environment of this nation.\(^2\) The policies of these clubs "evolved from the members who formed them, in keeping with the social customs of the times."\(^3\) The unfortunate result was the establishment of private clubs owned and operated by whites who employed racially discriminatory membership policies.\(^4\) The advent of the civil rights movement and the passage of both federal\(^5\) and state\(^6\) laws aimed at

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\(^3\) *Id.* at 28.

\(^4\) *See id.*

\(^5\) Title II of the Civil Rights Act of 1964 is the basic federal statute guaranteeing equal access to public accommodations. *See 42 U.S.C. § 2000a (1970).*

\(^6\) The role of state public accommodations acts ("PAAs") is discussed at *infra* Part III(A).
eradicating discrimination against African-Americans in public accommodations gave courts ammunition with which to invalidate such policies. Those courts were nevertheless left with the conundrum of how to apply such laws to clubs that claimed a shield of constitutional protection. In response, the Supreme Court developed an elaborate framework within which courts weigh the associational freedoms of clubs against the compelling nature of a governmental interest in eliminating discrimination. 7

In recent decades, however, the traditional image of discrimination has shifted; the nation has seen a trend toward the formation of private clubs by African-Americans employing racially discriminatory admission policies to keep out whites. 8 This upsurge will likely force courts to confront the issue of whether anti-discrimination laws enacted to provide equal rights for African-Americans can be invoked by whites seeking admittance to all-minority clubs.

This Note analyzes the conflict between the freedom of expressive association enjoyed by private African-American groups and public accommodation laws. Part I illustrates the most recent example of this problem—a suit brought by a white woman excluded from a meeting held by the United African Movement, a private all-black club. Part II outlines the framework established by the Supreme Court to be used by courts in dealing with issues of associational freedom. Part III analyzes the substance of the constitutional protection African-American clubs may invoke in defense of their race-based policies. Finally, Part IV applies the framework prescribed by the Supreme Court, comparing the states' interest in eradicating discrimination with clubs' associational freedom.

7 See New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) (holding that the application of a human rights law to a private club was not an unconstitutional infringement on the rights of club members); Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) (deciding that a private organization was covered by the language of a California Civil Rights Act prohibiting discrimination on the basis of sex or race); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (determining that Minnesota Human Rights Act, prohibiting discrimination on the basis of sex, was applicable to a private, male-only club).

I. BACKGROUND

A. The United African Movement

The United African Movement ("UAM") was borne of the political and racial uproar following the allegations of rape and kidnapping made by Tawana Brawley in 1988. The men who had brought the allegations to light and stood behind Brawley as her most vocal supporters were swept up in a maelstrom of controversy. These "masterminds of the Tawana Brawley hoax"—Rev. Al Sharpton, one of the nation's most bellicose civil rights leaders, Alton Maddox, Jr., a black nationalist who served as Brawley's attorney, and C. Vernon Mason, Maddox's longtime assistant—were largely discredited by lingering accusations that they had in fact masterminded and carried out the fraudulent incident to stir up racial animus. These three civil rights activists formed the UAM later that year in an effort to maintain their position in the African-American community while attempting to regain a portion of the ground their cause had lost because of the Brawley fiasco.

The UAM was founded in honor of Marcus Garvey, "an advocate for the creation of 'a separate Black nation.'" In order to further its goal of providing African-Americans "sanctuary... from persons who harbor racial animus toward Africans," the UAM es-

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9 Brawley alleged that she was kidnapped by a group of six white men as she stepped off a school bus, then raped and beaten in the woods. Brawley was found four days later covered in feces with racial epithets written across her chest. See Michael H. Cottman, Race-Sex Attack Enrages a Town, NEWSDAY, Dec. 20, 1987, at 15.


11 The grand jury investigating the Brawley case eventually concluded that there was no evidence to support Brawley's charges. See No Evidence of Cops' Role in Rape: Report, NEWSDAY, Apr. 9, 1988, at 4. Steven Pagones, a New York prosecutor who was publicly named by Maddox as being "involved in the Brawley rape," brought a $75 million lawsuit for defamation of character and intentional infliction of emotional distress. See Will Haygood, In the Shadows of Doubt: Lawyer's Suit Revives Lingering Questions, Pain in Tawana Brawley Case, BOSTON GLOBE, Feb. 16, 1997, at A1. Pagones was later awarded $345,000 in compensatory and punitive damages. See Tawana Brawley Must Pay $155,000 to Man She Accused, SEATTLE TIMES, Oct. 11, 1998, at A20. In a later ruling, Brawley was ordered to pay Pagones $5000 in compensatory damages and $180,000 in punitive damages.

12 Today, the UAM is directed by Maddox, with Sharpton and Mason having resigned their posts in the early 1990's due to ideological differences. See Peter Noel, Attorneys At War: Alton Maddox and C. Vernon Mason Are Prohibited from Practicing Law, but No One Can Silence Their Rage, THE VILLAGE VOICE, Dec. 3, 1996, at 41.

13 New York City Comm'n on Human Rights v. United African Movement, No. MPA95-0851/PA95-0031, at 4 (N.Y.C.C.H.R. June 30, 1997) (recommended decision and order) (citation omitted). Garvey was the founder of the Universal Negro Improvement Association and has been dubbed by at least one commentator to be "the most influential African-American leader in the years following World War I." CLARENCE PAGE, SHOWING MY COLOR: IMPOLITE ESSAYS ON RACE AND IDENTITY 134 (1996).

14 Whelan, supra note 10, at A12 (quoting Alton Maddox).
pouses a "non-assimilationist" doctrine. The group, formed "to lift African people from the cycle of dependency on European largess and whims," considers this philosophy essential. To accomplish this lofty goal, the UAM has been active on several fronts, asserting itself as the mouthpiece of a large percentage of the African-American community. Through organized public demonstrations and rallies, the UAM has involved itself as a major player in virtually every racial incident occurring in New York City over the last decade. The UAM also has endorsed political candidates and, in several instances, has proposed its own candidates for local offices.

The focus of the UAM's activities is its weekly meetings at the Slave One Theater in New York City, a cavernous hall decorated with portraits capturing the atrocities of American slavery and celebrating African-American heroes from the past. The meetings' "free exchange of African-centered ideas," offer a variety of African-American ideologies and politics ranging from the inflammatory racial rhetoric of Khallid Muhammed to lectures on Egyptian civili-

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16 Id.
17 The group has been dubbed "the CNN of the ghetto." Noel, supra note 12, at 41 (citations omitted).
18 Perhaps the group's most controversial move was its support for Anton McCray, one of the African-American youths charged in connection with, and later convicted of, the infamous "Central Park Jogger Rape." The UAM gathered funds in excess of $23,000 to post bail for the defendant. See Park Rape Suspect McCray Out On Bail, NEWSDAY, Dec. 9, 1989, at 16. The remaining $2000 needed to pay Anton McCray's $25,000 bail was donated directly by the UAM. See id.; see also Timothy Clifford, Mom: If Guilty, He Should Be Punished but 'I Know ... He Didn't Do It,' NEWSDAY, Apr. 26, 1989, at 5 (describing the racial overtones involved in the case). The UAM later petitioned for, and was denied, friend-of-the-court status in the case. See Jim Dwyer, 'Selective' Healing and More on Death, NEWSDAY, Aug. 6, 1990, at 2.
20 The "Slave One" moniker was chosen to "represent a background of enslavement shared by persons of different races." New York City Comm'n on Human Rights v. United African Movement, No. MPA95-0851/PA95-0031, at 5 (N.Y.C.C.H.R. June 30, 1997) (recommended decision and order). Since the Southgate incident described below, infra Part IB, the UAM has conducted its meetings at a Masonic temple, a "private" lodge under New York law, thereby making the group's segregated meetings legal. See Peter Noel, No Whites Allowed: Inside the United African Movement, THE VILLAGE VOICE, Mar. 18, 1997, at 30.
21 See Noel, supra note 20 (describing the Slave One Theater).
22 Whelan, supra note 10, at A12.
23 Muhammed, the self-proclaimed "flaming tongue," is best known for his falling out with the Nation of Islam and its leader, Louis Farrakhan, over blatantly anti-Semitic remarks made by Muhammed. See DINESH D’SOUZA, THE END OF RACISM 401 (1993). His speeches at the Slave One, unsurprisingly, were of the same racial tenor. For example, Muhammed once
zation given by the octogenarian historian John Henrik Clarke.\textsuperscript{24} The former site of UAM meetings has been described by one observer this way: "The Slave [One Theater] was a ‘90’s version of the soapbox, that street lectern from which Harlem’s ample supply of black nation-

alists, preachers, and politicians kept alive the African institution of communal self-criticism and launched searing protests against the ill-
treatment of blacks dating back to the 1930s."\textsuperscript{25} 

The role the UAM meetings play within the local African-

American community can best be summed up by Mr. Muhammed himself, who described them as "the blackest thing happenin’ on a Wednesday night."\textsuperscript{26} In order to maintain this atmosphere of "in-
your-face Afrocentrism"\textsuperscript{27} at the meetings, the UAM maintained a strict "blacks-only" admission policy.\textsuperscript{28} As Mr. Muhammed once told a Slave One audience, "[y]ou can bring anybody here you want to as long as they look like us . . . . [T]his house is for the descendants of slaves."\textsuperscript{29} 

\section*{B. The Case Against the UAM}

In July 1994, the UAM scheduled noted Harvard theologian Cornel West, a well-known author and advocate of racial integration and tolerance,\textsuperscript{30} as a speaker at its weekly meeting.\textsuperscript{31} Due to West’s prominence and national recognition, the UAM advertised his appearance over the radio in the preceding days.\textsuperscript{32} These advertisements piqued the curiosity of Minoo Southgate, a self-styled “advocacy 

...
journalist" with a reputation of harassing black activists.³³ Aware of
the UAM's admission policies, Southgate went to the Slave One to
hear West only after she was assured by a UAM telephone operator
that she would be admitted.³⁴ Upon arrival, however, Southgate, who
is of Iranian and Jewish descent, was immediately asked to leave be-
cause, as she was told, "[t]his place is only for African people' . . . .
'Caucasians are not allowed here."³⁵ Southgate was barraged with
anti-Semitic threats, and eventually forced to leave without hearing
the lecture.³⁶

Southgate immediately filed a complaint with the New York
City Human Rights Commission (the "Commission") claiming that
the UAM's "blacks-only" policy violated the New York City Human
Rights Law (the "New York Act").³⁷ The provision at issue reads:

It shall be an unlawful discriminatory practice for any per-
son being the . . . provider of public accommodation be-
cause of the actual or perceived race, creed, color . . . of any
person directly or indirectly, to refuse, withhold from or
deny to such person any of the accommodations, advan-
tages, facilities or privileges thereof . . . .³⁸

The New York Act defines "provider of public accommodation"
as "providers . . . of goods, services, facilities, accommodations, ad-
vantages or privileges of any kind, and places, . . . where goods,
services, facilities, accommodations, advantages or privileges of any
kind are extended, offered, sold, or otherwise made available."³⁹
"Private" clubs are not within the scope of the New York Act, but the
New York Act states a club will not be considered "private if it has
more than four hundred members, provides regular meal service and
regularly receives payment for dues, fees, use of space, facilities,
services, meals, beverages directly or indirectly from or on behalf of
non-members for the furtherance of trade or business."⁴⁰

In its investigation of Southgate's complaint, the Commission
sent three "testers," two Caucasian men and an African-American
woman, to attend two separate weeknight meetings at the Slave One;

³³ See id. For example, Southgate has in print referred to Maddox as a "courtroom ter-
rorist." Id. at 7.
³⁴ See id.
³⁵ Id. at 8.
³⁶ See id.
³⁷ See Whelan, supra note 10, at A12.
³⁹ Id. § 8-102(9).
⁴⁰ Id.
the woman was admitted while both men were verbally harassed and denied admission. 41

Fueled by these results, Southgate and the Commission 42 filed suit against the UAM seeking $100,000 punitive damages, the maximum allowed under the New York Act as well as an injunction requiring the UAM to conduct its meetings in a manner consistent with the Act's definition of a "private event" either by ceasing to issue announcements for the meetings in the media, or by specifying in those announcements that the forums are for UAM members only. 43 In June 1997, the Senior Administrative Judge of the New York Commission on Human Rights ruled that the UAM had in fact illegally discriminated against Southgate because of her race, thereby entitling her to $2000 in compensation for mental anguish. 44 The UAM was also ordered to pay the City of New York $5000 in civil penalties. 45 Finally, the judge ordered the UAM to conduct its weekly meeting in a manner consistent with the New York Act's definition of "private." 46

II. THE RIGHT TO DISCRIMINATE

A. Defining Freedom of Expression: The Roberts Trilogy

Although it is not expressly recognized in the Constitution, the Supreme Court has long acknowledged a right to freedom of association. In NAACP v. Alabama ex rel. Patterson, 47 its first extensive discussion of that right, the Court stated:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably en-


44 See id. at 35. The $2000 award was later amended to $5000. New York City Comm'n on Human Rights v. United African Movement, No. MPA95-0851/PA95-0031, at 2 (N.Y.C.C.H.R. Sept. 24, 1997) (decision and order). Southgate called the fine ""puny"" and stated that the ruling ""sends the message that some victims of discrimination are less equal than others."" Whelan, supra note 10, at A12.


46 See id.

hanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.

In the wake of Patterson, however, courts seemed to have difficulty grappling with and defining this right which was, at best, "amorphous." The result was a system of jurisprudence wherein courts interpreted "association" as "little more than a shorthand phrase used . . . to protect traditional first amendment rights of speech and petition as exercised by individuals in groups."

The Supreme Court, in a trilogy of cases, took significant steps during the 1980s towards dissipating the mists of uncertainty surrounding the status of associational freedom. In Roberts v. United States Jaycees, the Court reviewed the application of the Minnesota Human Rights Act prohibiting discrimination on the basis of sex in "places of public accommodation" to local chapters of the Jaycees, a group in which full membership was available only to males. The Roberts Court, in an opinion by Justice Brennan, established the framework for interpreting the freedom of association as being composed of two separate elements: the "freedom of intimate association and [the] freedom of expressive association." The Court subsequently employed this two-tiered approach in Board of Directors of

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48 Id. at 460 (citations omitted).
49 See Cornerstone Bible Church v. City of Hastings, 740 F. Supp 654, 663 (D. Minn. 1990) (holding that a local zoning ordinance did not violate the freedom of association), rev'd on other grounds, 948 F.2d 464 (8th Cir. 1991) (reversing summary judgement on the issues of free speech, free exercise, equal protection and due process).
50 Reena Raggi, An Independent Right to Freedom of Association, 12 HARV. C.R.-C.L. L. REV. 1 (1977) (arguing that in the cases since Patterson, the Court, in various instances, has given very different interpretations of the freedom of association, resulting in a very narrow conception of the right). Compare United States Dep't of Agric. v. Moreno, 413 U.S. 528, 541 (1973) (Douglas, J., concurring) ("[B]anding together is an expression of the right of freedom of association that is very deep in our traditions."), with Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (holding that a local zoning ordinance prohibiting three or more persons from living together "involves no 'fundamental right' guaranteed by the Constitution, such as . . . the right of association.") (citations omitted).
52 See id. at 612-18.
53 Id. at 618. One commentator has characterized the freedom of association as having "at least three separate aspects": first, the right to "associate to achieve economic or other goals that are unconnected to any fundamental constitutional right;" second, the "freedom to associate . . . connected to the fundamental right to privacy;" third, a "right to associate for the purpose of engaging in types of activity expressly protected by the first amendment" analogous to the Court's "expressive freedom." 4 R. ROTUNDA, ET AL., TREASURY ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.41, at 200-01 (1993).
Rotary International v. Rotary Club.\textsuperscript{54} At issue in Rotary was the application of California's Unruh Civil Rights Act\textsuperscript{55} which, like the Minnesota Human Rights Act, provided that "[a]ll persons . . . are free and equal, and no matter what their sex, [or] race . . . are entitled to the full and equal accommodations, advantages, facilities, privileges . . . in all business establishments."\textsuperscript{56} In both cases, the organizations involved were found to be within the language of the applicable statutes,\textsuperscript{57} and in both cases, the organizations claimed that enforcement of anti-discrimination acts would impinge on their freedom of association. The Supreme Court held, in each of these cases, the application of the states' PAAs to be constitutional, thereby eradicating the organizations' exclusive membership policies.\textsuperscript{58}

In New York State Club Ass'n v. City of New York,\textsuperscript{59} the final case in the Roberts trilogy, a consortium of private clubs sought a judgment declaring New York City's Human Rights Law, which prohibited any discrimination by "any 'place of public accommodation, resort or amusement,'" to be unconstitutional.\textsuperscript{60} The reach of the law's anti-discrimination provisions extended 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."\textsuperscript{61} Like the Jaycees and the Rotary Club, these private clubs argued that application of this anti-discrimination law would unconstitutionally infringe upon their right of freedom of association. Focusing on the definition of "expressive association" employed in Roberts, the New York State Club Court held that application of the law to the "private clubs" was not an unconstitutional infringement the rights of club members.\textsuperscript{62}

1. Intimate Association\textsuperscript{63}

The framework established by this trilogy of cases has become the default method of analysis for analyzing freedom of association

\textsuperscript{54}481 U.S. 537 (1987).
\textsuperscript{56}Rotary, 481 U.S. at 541 n.2 (citations omitted).
\textsuperscript{57}See id. at 549-50; see also Roberts, 468 U.S. at 629-31.
\textsuperscript{58}See Rotary, 481 U.S. at 549; Roberts, 468 U.S. at 628-29.
\textsuperscript{59}487 U.S. 1 (1988).
\textsuperscript{60}Id. at 4 (citations omitted).
\textsuperscript{61}Id. at 6 (citations omitted).
\textsuperscript{62}See id. at 13-15.
\textsuperscript{63}The focus of this Note is on the "expressive association" prong of the Roberts framework. For a more detailed analysis of the freedom of intimate association, see Edith M. Hoffmeister, Comment, Women Need Not Apply: Discrimination and the Supreme Court's Intimate Association Test, 28 U.S.F. L. Rev. 1009 (1994). See also Neal E. Devins, The Trouble with Jaycees, 34 Cath. U. L. Rev. 901, 908 (1985).
As defined by the Roberts Court, the freedom of intimate association serves to protect "certain intimate relationships" from undue state intrusion; such "highly personal" associations "foster diversity and act as critical buffers between the individual and the power of the state." This dimension of association is based on the premise that "the Bill of Rights . . . must afford the formation and preservation of certain kinds of highly personal relationships" and some degree of protection against governmental interference. The types of personal commitments protected under this right, which include marriage, childbirth and cohabitation with one's relatives, "have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." In essence, freedom of intimate association is an extension of the right of privacy. While the precise contours of this privacy protection have never been expressly drawn, several objective factors have been specifically identified by the Court as benchmarks to be used in determining whether an association is sufficiently personal to warrant constitutional protection, including size, selectivity, purpose and policies—qualities which help identify associations which are "likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." Thus, this "intrin-

64 See, e.g., Marshall v. Allen, 984 F.2d 787, 799 (7th Cir. 1993) (applying the two-tiered Roberts analysis); Adkins v. Board of Educ., 982 F.2d 952, 955-56 (6th Cir. 1993) ("The Supreme Court has not backed away from its holding in Roberts. Rather, the existence of a constitutional right to freedom of association was reaffirmed in [Rotary]."); In re Grand Jury Proceeding, 842 F.2d 1229, 1234-35 (11th Cir. 1988) (applying the tests outlined in Roberts).
65 Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984); see also 4 R. ROTUNDA ET AL., supra note 53, § 20.41, at 250-51 (arguing that "[t]he rationale for protecting these relationships could provide a basis for active judicial review of laws restricting the ability of persons to enter into highly personal associations such as prohibitions on prisoner marriages and visitation rights") (citation omitted).
66 Roberts, 468 U.S. at 618.
67 See Zablocki v. Redhall, 434 U.S. 374, 383-86 (1978) (invalidating a statute which required residents with children that they were under an obligation to support to obtain court approval to remarry).
69 See Moore v. City of East Cleveland, 431 U.S. 494, 504-06 (1977) (overturning a conviction for violations of a city ordinance limiting the occupancy of a single family dwelling to members of the "family" on "due process" grounds). But see Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (refusing to apply the constitutional protection of intimate association to a group of students living together).
70 Roberts, 468 U.S. at 618-19.
71 See generally Devins, supra note 63, at 903-10 (discussing the constitutional connection between the fundamental rights of privacy and association).
72 See Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987) ("We have not attempted to mark the precise boundaries of [freedom of intimate association].").
73 See id. at 546; Roberts, 468 U.S. at 620.
74 Roberts, 468 U.S. at 620; accord Louisiana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1493 n.15 (5th Cir. 1995).
sic" feature of constitutionally protected association is available to "a broad range of human relationships."\textsuperscript{75}

2. Expressive Association

The second flavor of constitutionally protected associational right recognized by the Roberts trilogy is the "freedom of expressive association." The Court recognized the "close nexus" between freedom and assembly upon which expressive association is founded as early as the Patterson decision.\textsuperscript{76} As defined by the Roberts Court, this freedom entails the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."\textsuperscript{77} Rather than being an extension of free speech, this "instrumental" aspect of the freedom of association is an "implicit . . . corresponding right [to the First Amendment] to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."\textsuperscript{78} This umbrella of constitutionality protects the expressive rights of associations not only against "heavy-handed frontal attack[s], but also from being stifled by more subtle governmental interference."\textsuperscript{79} Courts have invoked this ideal to protect expressive groups formed to advocate minority points of view\textsuperscript{80} as well as non-minority organizations advocating the right to be free from intrusion by minority groups.\textsuperscript{81}

\textsuperscript{75} Roberts, 468 U.S. at 620.

\textsuperscript{76} See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."); South Boston Allied War Veterans Council v. City of Boston, 875 F. Supp. 891, 914 (D. Mass. 1995) ("The First Amendment right of expressive association merges the rights of speech and assembly to serve vital interests in our democracy.").

\textsuperscript{77} Roberts, 468 U.S. at 618.

\textsuperscript{78} Id. at 622; see also Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments."); William P. Marshall, Discrimination and the Right of Association, 81 NW. U. L. REV. 68, 77 (1986) ("Limiting the right of expression to the cries of a lone speaker hardly would promote the interchange of ideas envisioned in the first amendment [sic].").


\textsuperscript{80} See NAACP v. Button, 371 U.S. 415, 419-20, 429 (1963) (rejecting a Virginia ban on lawyer solicitation aimed at the NAACP and the NAACP Defense Fund because, for the NAACP, litigation was a "form of political expression"); Patterson, 357 U.S. at 453 (stating that expressive freedom gave the NAACP the right to refuse to disclose membership records to state officials).

\textsuperscript{81} See South Boston Allied War Veterans Council, 875 F. Supp. at 915-17 (holding that making the issuance of a parade permit to a veterans' group conditional upon the inclusion of a gay and lesbian group violated the veterans' rights of expressive association).
3. Freedom from Association

A corollary right presupposed by the freedom of association and thus encompassed within this net of constitutional protection is the freedom not to associate. This "negative counterpart" to the "positive right" of freedom of association was first clearly explicated by the Supreme Court in dealing with a state statute that allowed for the establishment of "agency shop arrangements" in which both union and non-union employees were compelled to pay union dues as a condition of their employment. In Abood v. Detroit Board of Education, the Court held that workers may constitutionally prevent the union from using portions of those "dues" to contribute to political candidates and to express unrelated political views. The Abood Court stated:

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Within the framework of developing its two-tiered analysis of associational freedom, the Roberts Court gave a very broad scope to this language by stating simply, "[f]reedom of association... plainly presupposes a freedom not to associate." Based on the Roberts analysis, the freedom not to associate has become a vital factor in the analysis not simply of issues of compelled payments, but rather of all First Amendment claims of expressive association, an expansive approach which has been followed by a majority of courts. Indeed, as Laurence Tribe has written, "freedom of association would prove an empty guarantee if associations could not limit control over their de-

82 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-26, at 1014 (2d ed. 1988).
83 See Abood, 431 U.S. at 211-14.
85 See id. at 234-37.
86 Id. at 234-35 (citation omitted).
87 Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (citing Abood, 431 U.S. at 234-35) (emphasis added). The Roberts Court interpreted the Abood holding in the context of its discussion of unconstitutional governmental infringements on an association's right of expressive association. In its view, Abood's forced payments for unrelated political views was analogous to the forced inclusion of unwanted members in an organization, the clearest example of such disallowed infringement. See id.
88 See, e.g., New York State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988) (recognizing the right of associations to "exclude individuals who do not share the views that the club's members wish to promote . . . ").
cisions to those who share the interests and persuasions that underlie the association’s being.” 88

**B. Limiting Expressive Association**

1. Evidentiary Standard

The freedom of expressive association, while very broad in its scope, is subject to several important limitations. First, for a group to claim such constitutional protection, it must meet the high evidentiary standard established in *NAACP v. Alabama ex rel. Patterson* 90 and *Buckley v. Valeo*. 91 Under this standard, an association has the obligation of proving that the harm it suffered as the result of an infringement upon its associational rights amounts to something more than mere speculation.

In *Patterson*, the Court reviewed an order by the state of Alabama requiring the NAACP to produce records including the names and addresses of all its members and agents. 92 The NAACP, fearing governmental harassment and restriction, refused to comply, arguing that the order violated its First and Fourteenth Amendment rights. 93 In ruling that enforcement of the government’s order would constitute a restraint on the NAACP’s right of expressive association, the Court stated that the organization had “made an *uncontroverted showing* that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” 94

Eighteen years later, in its review of the constitutionality of the Federal Election Campaign Act (the “Campaign Act”), the Supreme Court stated that “[t]he strict test established by *Patterson* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.” 95 At issue in *Buckley* were provisions of the Act which obligated political com-
mittees and candidates to keep detailed records of contributions and expenditures, and to file quarterly reports disclosing the names and addresses of campaign contributors and amounts contributed. Holding that no violation of political candidates’ expressive freedom had been shown, the Court stated: “[N]o appellant in this case has tendered record evidence of the sort proffered in [Patterson]. Instead, appellants primarily rely on ‘the clearly articulated fears of individuals, well experienced in the political process.’”

Thus, based on the evidence before the Court, any suggestion that First Amendment rights had been violated would have been “highly speculative.”

Under this standard, in order for governmental action to be deemed “harmful” or in violation of a group’s expressive association, it must be intrusive, and have an actual impact on the group’s exercise of its First Amendment freedoms. Courts have recognized at least two different types of “harmful” impact: (1) governmental action that may have a detrimental effect on the group’s message, or (2) action that may deter individuals from associating with the organization.

As pointed out by the Roberts Court, such governmental action may take several forms, including “impos[ing] penalties or with-hold[ing] benefits from individuals because of their membership in a disfavored group, . . . require[d] disclosure of the fact of membership in a group seeking anonymity, [and] interfere[nce] with the internal

96 See id. at 62-63. The Campaign Act defined “‘political committee’ . . . as a group of persons that receives ‘contributions’ or makes ‘expenditures’ of over $1000 in a calendar year.” Id. at 62.
97 Id. at 71 (citation omitted).
98 See id. at 70; see also Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654, 664 (D. Minn. 1990) (reaffirming the Patterson/Buckley burden of proof in claims of expressive association), rev’d on other grounds, 948 F.2d 464 (8th Cir. 1991).
99 See Salvation Army v. Dep’t of Community Affairs, 919 F.2d 183, 200 (3d Cir. 1990) (“Roberts also made clear that the government action must not only be ‘intrusive,’ but must have an actual, rather than speculative, impact on the group in its exercise of . . . expression.”).
100 See id. at 200-01.
101 See, e.g., Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981) (holding that a Wisconsin election law binding a national party to honor primary results, even though such results were reached in manner contrary to national party rules, violated the associational freedom of the Democratic Party); South Boston Allied War Veterans’ Council v. City of Boston, 875 F. Supp. 891, 914 (D. Mass. 1995) (holding that city could not issue parade permit conditional upon allowing gay and lesbian group to participate because doing so would “confuse and mute the Veterans’ message”); Invisible Empire of the Knights of the KKK v. Mayor of Thurmont, 700 F. Supp. 281, 289 (D. Md. 1988) (holding that city could not impose a nondiscrimination condition on the grant of a parade permit because doing so would “change the primary message” of the parade entry).
102 See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63 (1958) (“[W]e think it apparent that compelled disclosure of . . . membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.”).
organization or affairs of the group.”

The clearest example of such “internal interference,” as noted by the Roberts Court, is “a regulation that forces the group to accept members it does not desire.” Courts have had several opportunities to review the invasive impacts of governmental action on associations. While the majority of disputed governmental actions have been direct attacks on expressive freedom, indirect restraints may also be held unconstitutional, but only if such actions “directly and substantially’ interfere with [a group’s] ability to associate by ‘order[ing]’ people not to associate or ‘prevent[ing]’ their ability to do so or ‘burden[ing]’ their ability to do so ‘in any significant manner.’”

In Roberts, the Jaycees argued that compelled inclusion of women as full-fledged members in compliance with Minnesota’s Human Rights Act would work an unconstitutional suppression of its freedom of expressive association. In evaluating the effect such inclusion would have on the Jaycees, an all-male organization, the Court found that the group had “failed to demonstrate that the Act imposes any serious burdens on the male members’ freedom of expressive association.” While it recognized that the association indeed enjoyed a “freedom not to associate” with certain individuals of its choice, the Court focused on the activities in which the Jaycees participated, a substantial part of which consisted of “political, economic, cultural, and social affairs.” These activities, according to the Court, would in no way be impeded by the inclusion of women. “The Act require[d] no change in the Jaycees’ creed . . . and it impose[d] no restrictions on the organization’s ability to exclude indi-

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104 Id. at 623; see also William Buss, Discrimination by Private Clubs, 67 WASH. U. L.Q. 815, 844 (1989) (“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 that it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.”)
105 See, e.g., Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989) (holding that restrictions within the California Elections Code governing the organization and composition of the governing bodies of political parties, limiting terms of office, and requiring the rotation of committee chairs between residents of Northern and Southern California constituted a “burden [on] the associational rights of political parties”); cf. Salvation Army v. Dep’t of Community Affairs, 919 F.2d 183 (3d Cir. 1990) (holding that provisions of New Jersey Rooming and Boarding House Act of 1979, granting residents of such facilities certain rights, including the right to privacy and to practice the religion of their choice, does not alter the Salvation Army’s “message”); Pathfinder Fund v. Agency for Int’l Dev., 746 F. Supp. 192, 196 (D.D.C. 1990) (“[A] First Amendment violation is not found if governmental action has merely made it somewhat more difficult for domestic organizations to associate with the organizations of their choice.”).
108 Id. at 626.
109 Id. (citations omitted).
viduals with [differing] ideologies. . . .”

Moreover, while women could not participate as full members under existing rules, the Jaycees in fact allowed women to participate in Jaycees-sponsored auxiliary groups. “Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.”

Three years later, in *Board of Directors of Rotary International v. Rotary Club,* the Court relied on its *Roberts* decision to hold that forced inclusion of women into local chapters of the Rotary Club, in compliance with California’s Civil Rights Act, did not violate that group’s freedom of expressive association. The *Rotary* Court justified its conclusion on the fact that such inclusion “does not require [Rotary Club members] to abandon their basic goals . . . . Nor does it require them to abandon their classification system or admit members who do not reflect a cross section of the community.” In essence, the compelled inclusion of women in the Rotary Club did not alter the group’s purpose in any fundamental way.

2. Narrow Definition of “Association”

A second means by which courts limit the freedom of expressive association is by giving a narrow definition to “association.” The purpose of the First Amendment protections of free speech and expressive association is, in its broadest sense, to protect the marketplace of ideas. Many courts, however, have drawn a distinction between groups that qualify as “associations” merely in a literal sense, and those that are associations “for the advancement of beliefs and ideas.” The Supreme Court has recognized that while expressive association may be inferred from a variety of activities other than talking or writing, such “kernels of expression” as may be found in
even the most mundane of human relationships, do not necessarily imply constitutional protection under the First Amendment. Courts have accordingly refused to recognize as "expressive associations" casual encounters between teenagers in dance halls and casual conversation between friends or acquaintances. By drawing such distinctions, courts prevent "constitutionally protected expression" from becoming redefined as "the totality of expression."

3. Narrow Definition of "Public Accommodations"

Finally, a court can limit the constitutional protection they grant to a group’s "associational freedoms" by its interpretation of the "public accommodations" language in a given anti-discrimination law. If an organization is not within the realm of those to be regulated by PAAs, then it can be distinguished as a "private" club, leaving questions about the extent of its expressive purpose moot. Illustrative of the issue is the ongoing battle over the inclusion of groups such as homosexuals and atheists into the Boy Scouts of America ("BSA"). In Welsh v. Boy Scouts of America, a prospective Boy Scout was denied admission to the BSA because he refused to affirm his belief in God in violation of the Boy Scout oath. This would-be Scout argued his exclusion violated Title II of the Civil Rights Act of 1964 which prohibits discrimination in "any place of public accommodation." Focusing on the delineation of entities within Title II’s jurisdiction, the court ruled that the phrase "public accommodation" includes only entities which "(1) serve[] the public’ and (2) may be classified as an ‘establishment,’ ‘place,’ or ‘facility.'" Under this definition, the BSA was held not to be such a "place of public accommodation" because it lacked the required connection to a "par-

\[119\] See id. at 24-25 (upholding a city ordinance restricting admission to certain dance halls to persons between the ages of 14 and 18).
\[120\] See Swank, 898 F.2d at 1251 ("Casual chit-chat between two persons or otherwise confined to a small social group is ... not protected. Such conversation is important to its participants but not to the ... objectives, values, and consequences of the speech that is protected by the First Amendment.").
\[121\] See id.
\[123\] 993 F.2d 1267 (7th Cir. 1993).
\[124\] See id. at 1268. The Boy Scout Oath states, in pertinent part: "On my honor, I will do my best to do my duty to God ... ." Id.
\[125\] Id. (quoting 42 U.S.C. § 2000a(a) (1988)).
\[126\] Entities that qualify as "place of public accommodations" for the purpose of Title II protection include: "... establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; ... places of exhibition or entertainment; [and] other covered establishments." 42 U.S.C. § 2000a(b) (1988).
\[127\] Welsh, 993 F.2d at 1269 (quoting 42 U.S.C. § 2000a(b) (1988)).
ticular facility." An angry dissent blasted the majority’s interpretation of Title II as “stingy and narrow.”

Stingy or not, this same approach was employed by the Supreme Court of Kansas in Seabourn v. Coronado Area Council, Boy Scouts of America in defining “public accommodations” as the term appears in the Kansas Act Against Discrimination (“KAAD”). In Seabourn, the court upheld the BSA’s rejection of an individual’s registration to serve as an adult leader on grounds that he was an atheist. The court expressly rejected a “broad, expansive” definition of “public accommodations” within the scope of the KAAD, holding that any such definition “divorcing ‘public accommodations’ from business establishment or business purpose . . . is not the law in Kansas.” Thus, the BSA failed to qualify as a “public accommodation” under this section because it “has no business purpose other than maintaining the objectives and programs to which the operation of facilities is merely incidental.”

In contrast to this narrow approach, a significant number of courts dealing with the BSA have adopted a broader interpretation of “public accommodations.” Most recently, in Dale v. Boy Scouts of America, a New Jersey appeals court expressly rejected the Welsh mode of analysis. In Dale, the court was faced with the issue of whether the New Jersey Law Against Discrimination’s (“LAD”) prohibition on discrimination in “places of public accommodation” barred the BSA from expelling an adult leader on grounds that he was a practicing homosexual. After reviewing the Welsh/Seabourn approach, the court stated, “[w]e reject the narrow interpretation given by Welsh to ‘place of public accommodation’ . . . . Applying Welsh’s view that Title II applies only to a ‘place’ would frustrate our goal of eradicating ‘the cancer of discrimination’ in New Jersey.” Under this interpretation, the BSA qualifies as a “public accommodation” and, therefore, is subject to the anti-discrimination requirements imposed by the LAD because it “invites the ‘public at large’. . . [and] offers accommodations which ‘have many attributes in common

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129 Welsh, 993 F.2d at 1279 (Cummings, J., dissenting).
130 891 P.2d 385 (Kan. 1995).
131 See id. at 406.
132 Id. (quoting KAN. STAT. ANN. § 44-1002(h) (1993)).
133 Id.
135 See id. at 274.
136 Id. at 279.
with" the activities deemed to be educational or recreational under the LAD.\footnote{Id. at 280, 282. Several other courts have adopted this expansive definition as well. See, e.g., Quinnipiac Council, BSA v. Comm'n on Human Rights and Opportunities, 528 A.2d 352, 358 (Conn. 1987) (interpreting PAAs under Connecticut law to include "the discriminatory conduct and not the discriminatory situs of an enterprise which offers its services to the general public"); Curran v. Mount Diablo Council of the BSA, 147 Cal. App. 3d 712, 727-33 (Cal. Ct. App. 1983) (interpreting the "all business establishments whatsoever" language of California's Unruh Civil Rights Act to include the BSA), dismissed for want of final judgment, 468 U.S. 1205 (1984). On remand, however, the California Supreme Court reversed course, holding that the BSA was not a "business establishment" as defined by the Unruh Act. See Curran v. Mount Diablo Council of the BSA, 952 P.2d 385 (Cal. 1998).}

In reviewing the applicability of New York's Human Rights Act to the United African Movement, the City of New York Commission on Human Rights recognized that the UAM's weekly meetings were "'considered by many to be the premiere marketplace in this country for the free exchange of African-centered ideas.'"\footnote{Id. at 13 (quoting United States Power Squadrons v. State Human Rights App. Bd., 452 N.E.2d 1199, 1204 (N.Y. 1983)).} As such, the Commission stated that "'[t]here is no dispute that UAM is an organization that is 'in its nature distinctly private,' . . . and therefore not subject to [the New York Act].'"\footnote{Id. at 11 (citations omitted).} Nevertheless, the Commission found the UAM's weekly meetings to constitute a "public accommodation" and thus to fall within the purview of the New York Act on two grounds. First, UAM failed to exercise any exclusivity or selectivity beyond a "skin test" in admitting individuals to its forums.\footnote{See id. at 13-14 ("This [skin] test demonstrates that admission was easy, and virtually unrestricted, for anyone who was of African descent.").} These two "hallmarks of a 'distinctly private' event" dictate that organizations, to be exempted from the New York Act's definition of "public accommodation," must demonstrate that they are "organized 'solely for the benefit of its members.'"\footnote{Id. at 17 (citation omitted).} Secondly, the UAM made open invitations soliciting "the public's interest and participation in the forums, without regard to UAM membership. Specifically, the phrase 'Admission is free' [as used in sample UAM advertisement examined by the Commission] implies that the forum is open to all who wish to attend, without limitation."\footnote{Id. at 14.} In the words of the judge, the UAM, "'[h]aving made [these] 'choices,' . . . [is] subject to the provisions of the Code which prohibit race discrimination—regardless of the fact that they are organized by a 'distinctly private' organization and held on private property and paid for by private funds.'"\footnote{Id. at 13 (citations omitted).} By conditioning its holding on the public nature of the UAM's activity rather than its connection to any physical facility or its "distinctly
private' appearance, the Commission, like the Dale court, adopted an expansive approach to New York City's PAA. In doing so, the Commission subjected the UAM to the provisions of the New York Act, thus putting at severe risk its race-based admission policies.

C. Compelling Governmental Interests

The Roberts test does not, however, dictate that "in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution."144 In fact, the Supreme Court has made it very clear that the freedom of expressive association, while a fundamental constitutional right, is in no way absolute.145 A court's finding that a group's right to expressive association has clearly been infringed upon by governmental action, or "harmed" as discussed above, does not end judicial inquiry into the issue. Under the Roberts test, such governmental "[i]nfringements . . . 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."146 In other words, any restrictive governmental action must be "narrowly tailored" to meet its objective.147 Thus, upon a finding that a governmental action has impinged upon an association's right to expressive association, a court is left with two tasks. First, it must determine the extent to which the interest of the state in taking such an action is "compelling." Secondly, it must then consider whether that interest is trumped by the group's own interest in protecting its First Amendment rights.

I. Recognizing "Compelling" Interests

Associational rights may best be thought of as existing on a continuum ranging from "the least protected form of association ... to  

144 New York State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988).
145 See Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) ("The right to associate for expressive purposes is not . . . absolute."); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (stating that the right of association may be limited by state regulations necessary to serve a compelling interest unrelated to the suppression of ideas).
146 Roberts, 468 U.S. at 623; see also Buckley, 424 U.S. at 25 ("Even a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."). (citations omitted); Sanitation and Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 997 (2d Cir. 1997) ("Even regulations that substantially infringe upon [the right of expressive association] will pass constitutional muster if they serve compelling government interests unrelated to the suppression of ideas and those interests cannot be achieved through less restrictive means.").
147 See 4 ROTUNDA ET AL., supra note 53, § 20.41, at 250; see also Sanitation and Recycling Indus., 107 F.3d at 997 ("'Precision of regulation must be the touchstone' in the First Amendment context.") (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
The factor distinguishing the rights of groups located at different points along this spectrum is the degree to which governmental infringement upon them must be "compelling" in order to be deemed constitutional. For example, at the "most protected" end of the continuum, we would likely find the associational rights of groups formed for strictly political or expressive purposes and those based on highly personal relationships. At the opposite, or "least protected," end would be situated the associational rights of purely commercial groups. To illustrate this idea, imagine a large boycott: if held for political purposes, it "may receive significant first amendment protection, . . . [while if organized] for the purposes of maintaining a preferred economic position for one's business or union," the demonstration is likely to receive very little protection. Thus, a court's evaluation of the nature of the associational freedom determines how much deference should be given to the competing governmental interest. While no strict guidelines have been set as to what criteria should be employed in determining whether a state interest is "compelling," the judiciary has recognized a variety of such interests, ranging from "[m]aintaining a stable political system" to "combating [sic] crime, corruption and racketeering."

2. Identifying a Standard of Review

Once an interest has been deemed "compelling," courts are split on the standard to be applied in determining whether the governmental action at issue is "narrowly tailored." A majority of courts and commentators have characterized the Roberts holding as a "balancing

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148 4 ROTUNDA ET AL., supra note 53, § 20.41, at 254; see also Elks Lodges No. 719 (Ogden) and No. 2021 (Moab) v. Dep't of Alcoholic Beverage Control, 905 P.2d 1189, 1195 (Utah 1995) ([T]he history of First Amendment jurisprudence regarding the right of free association indicates first that . . . it is . . . a right which exists on a continuum of protection.").
149 See 4 ROTUNDA ET AL., supra note 53, § 20.41, at 254.
150 See id.
152 See 4 ROTUNDA ET AL., supra note 53, § 20.41, at 250.
153 Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 226 (1989). In Eu, the Court recognized as compelling state interests the "fostering an informed electorate" as well as "preserving the integrity of its election process." Id. at 228, 231; see also Tashjian v. Republican Party, 479 U.S. 208, 217 (1986) (holding that stated governmental interests—"ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government"—were not sufficiently substantial); Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 124-25 (1981) (holding that state interests in "preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters" did not justify infringements upon political party's associational freedoms).
154 Sanitation and Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 998 (2d Cir. 1997).
of interests" test. The first step employed in this approach is to examine the extent to which the governmental action at issue actually infringes upon, or causes "actual harm to, the group's freedom of expressive association. Next, a court will assess the "value" of the group's First Amendment claims. Finally, with the two competing interests identified and evaluated, a court will weigh those interests against one another with an eye toward the question of whether there are any comparable means by which the governmental interest may be met without injuring the group's associational freedoms.

Typical of this type of analysis is the district court's reasoning in *South Boston Allied War Veterans Council v. City of Boston.* There, the court ruled that the issuance of a parade permit, conditioned upon allowing the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") to participate, unconstitutionally infringed upon the associational rights of the veterans group seeking the permit. The city's interest behind the permit rule, the eradication of discrimination against homosexuals, was recognized as both valid and compelling.

One of parade's organizing themes, however, was a protest of judicial decrees forcing the veterans to include the homosexual association in its 1993 parade. Thus, the burden on the veterans' associational

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155 See, e.g., Roberts v. United States Jaycees, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring) (characterizing the majority holding as a "balancing-of-interests test"); Invisible Empire of the Knights of the KKK v. Mayor of Thurmont, 700 F. Supp. 281, 289 (D. Md. 1988) (stating that the Supreme Court has engaged in "a balancing analysis in examining the various rights involved in expressive association cases"); Elks Lodges No. 719 (Ogden) and No. 2021 (Moab) v. Dep't of Alcoholic Beverage Control, 905 P.2d 1189, 1197-98 (Utah 1995) (weighing interests at issue in compliance with the Roberts test); Deborah L. Rhode, *Association and Assimilation,* 81 Nw. U. L. Rev. 106, 116 (1986) (interpreting Roberts as prescribing a balancing test); Marshall, *supra* note 78, at 72 ("The Roberts Court employed a balancing test in reaching its decision.").


157 See id. at 915-16. The *South Boston* court, however, placed a disclaimer on its use of the word "value": "It should be clearly recognized, however, that "the balancing of interests test . . . does not require or permit the court to assess the validity or value of the views the Veterans seek to express." Id. at 913.


159 See id. at 914 ("The Massachusetts statute . . . . 'plainly serves compelling state interests of the highest order.'") (quoting Roberts, 468 U.S. at 624).

160 See id. at 894-95. The procedural history of the GLIB's struggle for inclusion in the veterans' St. Patrick's Day parade is complex. In short, the GLIB applied and was denied a permit to march in the 1993 parade. The GLIB filed suit against the veterans, claiming that the veterans had violated the state's anti-discrimination law. The GLIB's original claim was finally resolved by the Supreme Court's ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995). The *Hurley* decision reversed the Massachusetts' high court's ruling in its holding that the City of Boston had violated the veterans' First Amendment rights by requiring the inclusion of the GLIB in the 1993 parade. In the intervening years, however, the veterans, based on the state court's ruling, decided to cancel the 1994 parade rather than allow the GLIB to march under the then-unreviewed state court rulings in favor of the GLIB. The 1995 parade, which took place three months before the Supreme Court issued its *Hurley* decision, was organized with both a traditional theme of community celebration and a theme unique to that year's parade: protest of the state courts' pre-GLIB rulings with respect to
rights would have been substantial if inclusion was enforced in 1995, while the effect on the GLIB of not being allowed to march, although genuine, would be minimal. The court, however, did not end its inquiry there. In weighing the two interests, the court found that the GLIB had an alternative means of achieving its goals through a second parade organized by its group. Therefore, under a “balancing of interests” test, compelled inclusion of the GLIB in the veterans’ 1995 parade was deemed to be an unconstitutional infringement on the First Amendment rights of the veterans.

On the other hand, a significant minority of courts and commentators interpret the Roberts holding as dictating a “strict scrutiny” standard. Use of the term “strict scrutiny” as the means of analyzing governmental infringements on the freedom of expressive association springs from the Roberts progeny’s recognition that such a freedom is “fundamental.” Upon examination, however, the difference between these two modes of analysis seems to be little more than semantics. The strict scrutiny test, as applied in the context of expressive association, places the burden of proof on the government to demonstrate that “(1) the state action serves a compelling state interest which (2) cannot be achieved through means significantly less restrictive of one’s associational freedom.” While courts may employ differing terms of art in describing their analysis, the legal consequences are the same: once a governmental action has been deemed to substantially burden a group’s First Amendment right to association, that action will be deemed constitutional only if the action is shown to serve a compelling governmental interest which can not be met by a less restrictive means. At least one commentator has seen these two tests as different incantations of the same analysis, describing the method used as “structured balancing—the well known
'strict scrutiny' test.' For its part, the Supreme Court has never employed either of these two terms of art to describe its analysis of associational freedom issues.

In the case of the UAM, the Commission interpreted the Roberts framework as requiring a "balancing test" analysis. On Southgate's end of the scale, the judge ruled that "the interest of New York City in eradicating race discrimination unquestionably serves a compelling state interest." Furthermore, the Commission ruled that the embodiment of that interest, the New York City Human Rights Act, did not aim at the suppression of the organization's First Amendment right to free speech. On the side of UAM, the Commission expressly recognized a "nexus between [the UAM's] racially discriminatory membership policies and the group's message that Caucasians and people of African descent should not mix." As a "private membership organization," the judge found that "[i]mposing the Code's anti-discrimination provisions would dilute the message which they advocate." Despite this finding, however, the Commission held that application of the New York Act to the UAM would not unconstitutionally trample its First Amendment rights because Southgate did not seek to force integration of the UAM, but rather merely sought to compel the group to either suspend advertising for its meetings or attach a disclaimer to such ads notifying the public that its meetings are open only to UAM members. Through its advertising of the Cornel West lecture, the UAM, in the Commission's words, took on a "public nature" which subjected it "to certain legal obligations." The Commission did, however, recognize that a different result may have been in order had Southgate sought to compel the inclusion of whites: "This tribunal would concur with [the UAM's] argument of a constitutional violation if the relief sought by the Bureau required that UAM either admit Caucasians to its forums, or cease to organize its weekly events." In light of such a request by Southgate, however, "[a]ny other solution would disturb the legal

166 Buss, supra note 104, at 845 (describing this method of analysis as one "under which fundamental individual interests are subject to restriction on the basis of a compelling state interest furthered in the least restrictive manner").

167 See, e.g., Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 225 (1989) ("Because the ban burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest.").


169 See id.

170 Id. at 30.

171 Id.

172 See id. at 28-29.

173 Id. at 30.

174 Id. at 28-29.
equilibrium between [the UAM's] associational rights and the City's interest.\textsuperscript{175} 

III. DIFFERING INTERESTS: RACE-BASED ORGANIZATIONS & ANTI-DISCRIMINATION LAWS

A. The Right to Discriminate & Private Clubs

The societal push towards eradicating discrimination has resulted in the passage of numerous PAAs by states. While "the Constitution does not directly prohibit discrimination by those who are not state actors,"\textsuperscript{176} state law has sought to fill the gap\textsuperscript{177} through the use of these PAAs, specifically by prohibiting discrimination in public accommodations such as housing and education.\textsuperscript{178} These statutes were enacted for the purpose of "protecting the civil rights of historically disadvantaged groups . . . ."\textsuperscript{179} 

As stated by the Roberts Court, "acts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that government has a compelling interest to prevent . . . ."\textsuperscript{180} Under this interpretation of the states' role in the fight against discrimination, courts have almost unanimously found that the governmental interest in eradicating discrimination against historically disadvantaged groups in public accommodations to be very compelling.\textsuperscript{181} This judicial resistance against disparaging a

\textsuperscript{175} Id. at 30.
\textsuperscript{176} Marshall, supra note 78, at 68 (citations omitted).
\textsuperscript{177} The basic federal guarantee of equal access to public accommodations comes in Title II of the Civil Rights Act of 1964. However, Title II "does not touch significant areas of discrimination in public accommodations," hence the need for state PAAs. See Lerman & Sanderson, supra note 122, at 219.
\textsuperscript{178} See Marshall, supra note 78, at 68.
\textsuperscript{179} Ann M. Overbeck, Case Note, 53 U. CIN. L. REV. 1173, 1178 (1984); see also Roberts v. United States Jaycees, 468 U.S. 609, 625-26 (1984) ("Like many States and municipalities, Minnesota has adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct. This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both 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.") (citations omitted).
\textsuperscript{180} Roberts, 468 U.S. at 628.
\textsuperscript{181} See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 572 (1995) ("Provisions like [Massachusetts' anti-discrimination law] are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."); New York State Club Ass'n v. City of New York, 487 U.S. 1, 14 n.5 (1988) ("[I]t is relevant to note that the Court has recognized the State's 'compelling interest' in combating invidious discrimination."); Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987) (recognizing "the State's compelling interest in eliminating discrimination against women"); Roberts, 468 U.S. at 624 (finding that the Minnesota Human Rights Act aimed at the eradication of discrimination "plainly serves compelling state interests of the highest order"); South Boston Allied War Veterans Council v. City of Boston, 875 F. Supp. 891, 914 (D. Mass.
state’s anti-discrimination goals has held true even in cases where some degree of infringement on the group’s associational freedoms has occurred, regardless of whether the Court employed a “balancing” or “strict scrutiny” review of the governmental interest. In its review of the effects a non-discrimination law would have on an all-male organization, the Supreme Court in Board of Directors of Rotary International v. Rotary Club stated that “[e]ven if the Unruh Act does work some slight infringement on Rotary members’ right of expressive association, that infringement is justified because it serves the State’s compelling interest in eliminating discrimination against women.” The judiciary’s reluctance to rule against an anti-discrimination interest in favor of private organizations has led some commentators to argue that the Supreme Court has in fact established a “rebuttable presumption” in favor of such state interests.

One of the most troubling issues faced by courts in the last two decades has been the treatment of private clubs that maintain discriminatory admission policies. Therein lies, as Lawrence Tribe noted, “the ancient paradox of liberalism”: the conflict between freedom and equality. On one hand, the governmental interest in eradicating discrimination holds great weight in American courts. On the other hand, the associational rights of “private” clubs warrant substantial constitutional protection under the First Amendment. This intersection of freedoms was the issue faced by the Supreme Court in Roberts: a private club which accepted only men as full-fledged members sought to prevent the application of Minnesota’s PAA (the “Minnesota Act”), which prohibited discrimination based on factors


See, e.g., Roberts, 468 U.S. at 628 (“[E]ven if enforcement of the [Human Rights] Act causes some incidental abridgment of the Jaycees’ protected speech, that effect is no greater than is necessary to accomplish the State’s legitimate purposes.”); Elks Lodges No. 719 (Ogden) and No. 2021 (Moab) v. Department of Alcoholic Beverage Control, 905 P.2d 1189, 1195 (Utah 1995) (“[T]he state interest in prohibiting gender-based discrimination outweighs whatever associational interest, if any, the Elks or the Moose may have in maintaining state-licensed liquor clubs.”) (citation omitted).


Id. at 549 (emphasis added) (citation omitted).

See Buss, supra note 104, at 847-48 (arguing that “[Roberts] and its progeny may foreshadow an absolute rule in upholding the antidiscrimination interest”).

See Marshall, supra note 78, at 69 (describing this “inherent conflict” as “one of the most problematic areas in constitutional law”) (citation omitted); see also Buss, supra note 104, at 845 (“[A] private club may have a very strong constitutional claim of right to expressive association in precisely the same situation in which the state has a very strong justification to protect excluded individuals from commercial disadvantage. Thus, the collision forces a choice between two values that are comparable in magnitude but different in kind.”).

Private clubs are defined as “organizations not providing direct services to the general public.” Marshall, supra note 78, at 68.
including race and gender. The Court recognized as compelling the government’s interest in “eradicating discrimination.” Justifying its conclusion that any infringement on the Jaycees by the Minnesota Act was trumped by Minnesota’s interest, the Court stated:

[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection . . . . The Minnesota Act therefore ‘responds precisely to the substantive problem which legitimately concerns’ the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose.

B. Justifying Race-Based Organizations

On its face, the standard set forth by the Supreme Court would seem to close the door to the possibility of racially discriminatory organizations such as the UAM. But a careful reading of the Roberts holding makes clear that the state’s anti-discrimination interest prevailed not due to any absolute rule in favor of such an interest, but more likely because the Court, in weighing the conflicting interests, found “virtually nothing on the Jaycees’ side of the scale” to counterbalance the state’s interest. Fatal to its claim was the Jaycees’ inability to demonstrate how the inclusion of women would “impose[] any serious burdens on the male members’ freedom of expressive association.” In other words, the Jaycees were unable to rebut the Court’s presumption in favor of the state’s anti-discrimination interest.

Just as it has detailed the weight to be given to the interest behind PAAs, the Court has also made it clear that the compelling nature of that interest does not totally override an organization’s right to exclude certain individuals. Similar to the situation in Roberts, the

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189 Id. at 623.
190 Id. at 628-29 (citations omitted).
191 Id. at 628-29 (citations omitted).
192 See Buss, supra note 104, at 849.
193 See Buss, supra note 104, at 848-50; see also supra notes 90-115 and accompanying text (describing the evidentiary standard to be met by any group seeking protecting of its associational freedom).
Court in *New York State Club Ass'n v. City of New York* was faced with the issue of private clubs that employ discriminatory policies. The *New York State Club* Court took the opportunity not only to reaffirm its holding in *Roberts*, but also to explicate the impact of that holding on an organization's right to discriminate. According to the Court:

[i]f a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership.

In accordance with this holding, a state has a valid interest, expressed by way of its public accommodations law, which would allow for infringement on a group's associational freedom. However, on the flip side of that broad grant of power, an organization is still free to some extent to exercise its right to dissociate from certain individuals.

The Court, however, has never delineated the threshold point at which an organization's protection ends and the state's power to regulate begins. It seems clear, nonetheless, from the language of *New York State Club*, that any such discriminatory policy must be based on the message of the organization itself, rather than merely as a means of furthering, without cause, the systematic and prejudicial exclusion of members of historically disadvantaged groups.

In light of any guidance from the Supreme Court delineating the extent of these two valid competing interests, discriminatory policies against historically disadvantaged groups in private clubs would seem to be constitutionally valid on at least two grounds.

1. The Message and the Messenger Intertwined

First, the PAAs at issue in the *Roberts* trilogy were directed at associations in which commercial activity occurred. The goal underlying the PAAs was "to provide equal opportunity to minorities and women to participate in the business life of the community and to

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195 Id. at 13.
196 See Invisible Empire of the Knights of the KKK v. Mayor of Thurmont, 700 F. Supp. 281, 289 (D. Md. 1988); see also *Roberts*, 468 U.S. at 626 ("[In explaining its conclusion that the Jaycees local chapters are 'place[s] of public accommodations'... , the Minnesota court noted the various commercial programs and benefits offered to members and stated that '[l]eadership skills are "goods," [and] business contacts and employment promotions are "privileges" and "advantages"... . Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests.") (citation omitted).
expose them to the business contacts and activity which often occur at discriminatory clubs."197 Those state laws had minimal impact on the message and First Amendment rights of the complaining organizations. A distinction can be drawn between such commercially oriented groups upon which enforcement of a PAA has little or no effect, and those groups formed for, or actively engaged in, the communication of ideas. As to this latter set of organizations, the general principles outlined within the Roberts analysis are applicable, but its holding is inapposite. As one court has stated, "[The Roberts cases] do not stand for the proposition that the state may require noncommercial expressive associations to allow minorities to participate in expressive group activities."198

The Supreme Court has expressly recognized the difference between such "commercial" and "expressive" associations. In its New York State Club decision,199 the Court stated:

It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.200

Forcing a group which has staked its very existence on its racial, sexual or political makeup to include individuals who represent a view or stance in direct opposition to that of the organization works to both distort the group’s message and to dissuade others from associating themselves with the group.201 As stated by the Roberts Court:

There can be no clearer example of an [unconstitutional] 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.202

To illustrate the potential effect of a PAA on an expressive group, Professor Sally Frank gives the example of a "men’s rights organization which bars women because it was formed to give men an opportunity to discuss ways in which men are disadvantaged as

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197 Invisible Empire of the Knights of the KKK, 700 F. Supp. at 289.
198 Id.
200 Id. at 13.
201 See supra notes 100-06 and accompanying text.
males, and then to work to overcome those disadvantages." Under Frank's analysis, such a group would be afforded constitutional protection based on the close nexus between its expressed purpose and its bar on women. Similar protection would thus be available to groups who are organized around a race-based platform, such as a "campus African-American group" or "a Ku Klux Klan chapter."

As pointed out by Professor Frank, granting protection to such groups often compels the attitude expressed in the phrase, "I disapprove of what you say, but I will defend to the death your right to say it." In contrast, the discriminatory policies of groups organized for purely commercial or social reasons, e.g., a "women's breakfast club," lack the necessary connection to a First Amendment activity to receive constitutional protection. In other words, racial discrimination as organizational policy practiced by a purely expressive association would rank on the "more protected" end of the associational freedom continuum, whereas the same policy implemented by a commercial group would be placed towards the "less protected" end, thereby making it subject to more governmental infringement. In essence, the message communicated by an "expressive" group by way of its discriminatory policies is indistinguishable from the group itself.

The Supreme Court has not yet had the opportunity to review the applicability of a non-discrimination law to a purely expressive, racially exclusive group, such as the UAM. However, the majority of commentators and the few courts who have dealt with the issue have upheld the organization's right to discriminate in the face of a valid PAA. In Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont, the Ku Klux Klan ("KKK") applied for a permit to parade on a city's streets for the purpose of recruiting new

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204 Id.
205 Id. at 61 (attributed to Voltaire) (citation omitted).
206 Id. at 60.
207 See supra notes 148-52 and accompanying text (discussing the continuum of associational rights).
208 See Frank, supra note 203, at 59 ("The Supreme Court has not yet decided a case in which a quasi-private club was sued for discrimination and was able to establish a genuine connection between its discrimination and its expressive activities. When such a case arises, the organization's freedom of expressive association claims will be much harder to reject").
209 See Buss, supra note 104, at 848 ("[C]lubs can rebut the presumption in favor of the state's compelling antidiscrimination interest by either an actual evidentiary showing . . . that the excluded group has a discrete, identifiable and different position on some issue of concern to the club . . . "; see also Frank, supra note 203, at 60 ("Organizations formed to advance gender- or race-based interests might successfully withstand legal challenge by linking membership discrimination to their political goals.").
members and showing the group’s support of the “Just Say No to Drugs” program.\textsuperscript{212} The town, which had no codified procedure for granting such permits, denied both the KKK’s initial application and its subsequent request for a permit based on the group’s racially discriminatory policies.\textsuperscript{213} The court was faced with the issue of “whether the Town [could] constitutionally impose a nondiscrimination condition on the KKK parade.”\textsuperscript{214} While recognizing \textit{Roberts} as providing the proper standard of review in associational freedom claims, the court seized upon the language of \textit{New York State Club} discussing purely expressive clubs.\textsuperscript{215} As interpreted by this court, the proper analysis prescribed by the \textit{Roberts} trilogy requires an examination of “the connection between membership and the message.”\textsuperscript{216}

The KKK, as described by the court, is a group “organized for specific expressive purposes” that “desires to convince others of the need for segregation of the races and to send the message of white supremacy.”\textsuperscript{217} Forcing such a group to allow minorities to march with them would “destroy” and “change the primary message which the KKK advocates.”\textsuperscript{218} In short, they would be made to be hypocrites.\textsuperscript{219} With reference to the other side of the balancing scale, the court stated:

The Town’s interest here . . . is somewhat less compelling than the states’ interests in the club cases. Black and non-gentile persons here are not being denied the opportunity to gain business contacts and skills. They are merely being denied the right to march in a private group’s parade. This is entirely proper . . . .\textsuperscript{220}

Recognizing that “[i]f ever there was a case where the membership and the message were coextensive, it is here,” the \textit{Invisible Em-
pire court held that the nondiscrimination clause would work an un-
constitutional infringement on the associational rights of the KKK.221

The UAM "is a private membership organization established for
the purpose of engaging in the expressive activity of espousing Pan-
African views."222 First Amendment activities undertaken by the
UAM, in the form of weekly forums are directly focused on the fur-
thering of Pan-African ideals.223 The group’s bar on the admission of
whites constitutes a means by which the group strives to further its
message. Accordingly, the City of New York Human Rights Com-
mission expressly recognized the “nexus between [the UAM’s] ra-
cially discriminatory membership policies and the group’s message
that Caucasians and people of African descent should not mix . . . .
In sum, race bears upon the views the group espouses.”224 Under
the described analysis, the existence of such a “nexus” between the
group’s exclusionary policies and its First Amendment activities dic-
tates that the forced inclusion of whites would serve to distort and
mute the group’s symbolic message. The UAM, like the KKK in In-
visible Empire, would be made to be “hypocrites.”225 Thus, the
UAM’s racially discriminatory policies must be protected against
governmental anti-discrimination acts as a constitutional exercise of
the group’s expressive association.

2. The Right of “Cultural Association”

A second haven of constitutional protection for racially discrimi-
natory groups may be found in the notion of “cultural association.”
According to William Marshall, the question to be addressed in deal-
ing with such clubs under this argument is not whether the associ-
tional rights of members have been violated by a governmental in-
fringement. Rather, the true issues at play are whether an interest ex-
ists in favor of a subgroup of society to form their own organization
and whether that interest is of such a compelling nature as to justify
the club’s discriminatory policies in the face of state anti-discrim-
ination laws.226 Such a “right of cultural association” would not de-
pend on a group’s status as commercial or expressive, or on the des-
ignation of its association as intimate or expressive, but rather upon a

221 See id.
MPA95-0851/PA95-0031, at 30 (N.Y.C.C.H.R. June 30, 1997) (recommended decision and
order).
223 See discussion supra Part I(A).
MPA95-0851/PA95-0031, at 30 (N.Y.C.C.H.R. June 30, 1997) (recommended decision and
order).
225 See Invisible Empire of the Knights of the KKK, 700 F.Supp. at 289.
226 See Marshall, supra note 78, at 84.
clearly identifiable interest "in associating to preserve national and religious identities and communities."227 Unlike the protection outlined in New York State Club and Invisible Empire, a group seeking constitutional haven for discriminatory policies under a right of cultural association would not bear the burden of proving a connection between such policies and its First Amendment activities. Rather, such an organization would be required only to demonstrate that it was built around its members' cultural values, arguably a lesser burden.228 For example, in Roberts, this theory would allow for the existence of a bar on membership to women because men, as the organizers of the Jaycees, hold a constitutional right to associate as men, regardless of whether the group’s principal functions are distinctively "male." Unfortunately for this discussion, the Supreme Court has never directly addressed this issue.229

Arguments in favor of recognizing such a right to cultural association rest on three constitutionally significant ideals: self-identity, communitarianism and pluralism.230 First, according to Marshall, constitutional protection is warranted for such groups "because of the 'crucial' role cultural affiliation plays in forming self-identity."231 The importance of the relationship between cultural affinity and self-identification is employed to "analogize cultural association to the constitutionally protected associational rights within families, . . . . [which] represent 'primordial' aspects of self."232 Thus, exclusion of certain groups based on cultural affinity rather than on purely capricious choice is of the same constitutional import as the bonds between an individual and the "primordial," thus warranting constitutional protection.233 Under this theory, it is the "preservation of the essential elements of self, not of freedom of choice" which forms the basis of this protection.234 Communitarianism, the second basis for Marshall’s

227 Id. at 84-85.
228 According to Marshall, this is the biggest failing point in recognizing the right to cultural association. Granting constitutional license to the discriminatory actions of any group merely because it draws its boundaries along cultural lines raises two problems. First, what criteria are appropriate in determining whether a country club, for example, is Irish or African-American? See id. at 90-91. Second, even if such a determination can be made, should an "Irish country club" be granted constitutional protection based on its cultural identity where its principal activities are in no way related to such identity, e.g., tennis or golf? See id. In the absence of Supreme Court precedent resolving these questions, Marshall suggests that to avoid these problems, any standard for "cultural protection" should closely parallel the test employed in analyzing expressive association. That is, the organization should have to demonstrate a clear connection between its cultural identity and its discriminatory policies. See id.
229 According to Marshall, this is the case because such groups are traditionally exempted from state anti-discrimination legislation. See id.
230 See id. at 86-87.
231 Id. at 86 (quoting Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. REV. 303, 308 (1986)).
232 Id. 86-87.
233 See id. at 86-87.
234 Id. at 87.
theory, views societal subgroups as "buffers against the expansion of governmental power." Marshall argues that the Roberts Court explicitly recognized the promotion of "cultural diversity" as a valid basis for protecting expressive association. Finally, pluralism stresses "the value of preserving cultural entities . . . as an end in itself." According to Marshall, pluralism is recognized as a basis for expressive association because it "allows the development and advancement of diverse perspectives and thereby enhances the national debate."

As noted previously, the City of New York Commission on Human Rights ruled that the UAM "is a private membership organization established for the purpose of engaging in the expressive activity of espousing Pan-Africanist views." Under the analysis proposed by Marshall, the UAM's discriminatory policies warrant constitutional protection because the group embodies the three ideals developed within the "right to cultural association." First, the principle driving the formation of the UAM, "removing from all persons of African ancestry all badges of slavery and all vestiges of colonialism," is necessarily a function of self-identity for its African-American members. Just as a family unit provides shelter for its members, the UAM offers its members "a 'sanctuary' from racism" for its members. This communal sense of refuge from society's racial bias and hatred is a "primary bond" which serves to tie together the many individuals who make up the UAM's body politic. The UAM, as a group of black individuals, is, in the words of Owen Fiss, "viewed as a group; [who] view themselves as a group; [and whose] identity is in large part determined by membership in the group . . . ."

Secondly, under the rubric of communitarianism, the UAM as mentioned above acts as "sanctuary" for African-Americans against the discrimination they endure at the hands of the white majority. In turn, such sanctuary provides the African-American community with a forum to express "Pan-African" ideals, values that frequently are viewed by society in general with fear and suspicion. In

235 Id.
236 See id. The Supreme Court has stated that the protection of "[associational rights are] especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).
237 Marshall, supra note 78, at 88.
238 Id.
239 Id.
241 Id. at 4.
242 See id.
243 Owen Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107, 148 (1976), quoted in Marshall, supra note 78, at 86.
other words, the UAM "foster[s] diversity and act[s] as [a] critical buffer between [its members] and the power of the State." Finally, the weekly forums and demonstrations sponsored by the UAM serve to make the voice of black nationalism heard in the national debate over racial issues. In so doing, the UAM "enrich[es] the national culture," thus embracing the notion of pluralism. Therefore, because the UAM embodies the ideals of self-identity, communitarianism, and pluralism, its activities merit constitutional protection under the "right to cultural association."

IV. BLACK AND WHITE INTERESTS: A ROBERTS COMPARISON

A. An Organization's Right of Expressive Association

As previously discussed, the policy driving states to enact PAAs was the elimination of discrimination against historically disadvantaged groups. In fact, such laws "provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field" with the passage of the Civil Rights Act, a comprehensive body of law intended to sound the death knell for the nation's Jim Crow era of racial segregation. Today, these PAAs continue to play an essential role in filling the gaps left in federal anti-discrimination legislation. Given this background, it is not surprising that the overwhelming majority of lawsuits brought to enforce such laws have been brought by minority groups attempting to force open the doors of discriminatory organizations. Judicial decisions in these cases have been premised on the understanding that PAAs are instruments with which to protect African-Americans and other minorities from racial discrimination.

No matter how clear their legislative intent may seem upon investigation, the majority of state PAAs still are race-neutral on their face, prohibiting all discrimination based on race. Until the last few decades, this was an acceptable approach because the vast major-

245 Marshall, supra note 78, at 88.
246 See supra notes 177-85 and accompanying text (describing the role of PAAs in eradicating discrimination).
247 Roberts, 468 U.S. at 624 (citing Lerman & Sanderson, supra note 122, at 239).
248 See Lerman & Sanderson, supra note 122, at 239; Joshua A. Bloom, Comment, The Use of Local Ordinances to Combat Private Club Discrimination, 23 U.S.F. L. REV. 473, 474 (1989) ("Title II is notable in that it does not expressly prohibit discrimination on the basis of sex. Many state anti-discrimination statutes have filled the void, however, and do expressly prohibit discrimination on the basis of sex.") (citation omitted).
249 See Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987) (concluding that California's Unruh Act "plainly serv[es]" an interest in assuring equal access to women) (citation omitted); Roberts, 468 U.S. at 624-25 (stating that Minnesota's Human Rights Act was enacted to eliminate discrimination against African-Americans and, as later amended, women).
250 See Lerman & Sanderson, supra note 122, at 240-86 (discussing the drafting of modern PAAs).
ity of racially exclusive clubs were owned and/or operated by whites, making a court's duty to distinguish the "discriminated" from the "discriminator" an easy one. In the decades since the end of governmentally sanctioned racial discrimination, however, the nation has seen a proliferation of associations organized to serve the communal and cultural interests of African-Americans.25 In order to maintain their cultural identities, many of these groups, such as the UAM, have instituted policies that exclude whites from obtaining full membership. In such situations, the historical mirror has become inverted, pitting African-Americans in the role of discriminating against whites solely because of their race. If the current tenor of race relations in America is any indication, the future of racial discrimination litigation holds an onslaught of claim brought by whites against such racially discriminatory black organizations. Unfortunately, Southgate's claim is a harbinger of things to come.

Any claim brought under a state's PAA seeking to protect the rights of whites against the discriminatory policies of African-American clubs will be evaluated under the Roberts framework. Neither Roberts nor its progeny suggest that a different approach must be used when dealing with "reverse discrimination." At first blush, such a race-neutral standard would seem to dictate that the right of expressive association held by all-black groups is no "stronger or weaker than the parallel claim of [white] clubs." Under this view, the strength of the right to discriminate proclaimed by the UAM is equal to that of the KKK, the race of the excluded being irrelevant.

The key to differentiating the effects of governmental action on all-white and all-black groups is the extent to which forced integration would impair the group's message. In accordance with the Roberts framework, governmental bodies acting in the name of eliminating discrimination will be deemed to have acted unconstitutionally only if they "seek to impose penalties or withhold benefits from individuals because of their membership, ... attempt to require disclosure of the fact of membership in a group seeking anonymity, [or] ... try to interfere with the internal organization or affairs of the group." Such infringements would violate a group's associational freedom because admission of unwanted individuals runs the risk of impairing

250 See supra note 8 and accompanying text.
251 Buss, supra note 104, at 853; see also Marshall, supra note 78, at 98 ("The state is not favoring whites over blacks; it is only requiring both groups to be treated equally. It is therefore irrelevant to equal access goals whether the membership exclusion is directed at an historically disadvantaged minority group.").
252 Roberts, 468 U.S. at 622-23.
the ability of the group’s original members “to express only those views that brought them together.”

In general, contemporary African-American organizations are established around the premise of protecting the rights of African-Americans against the racially biased actions of the white majority.

In essence, these groups are borne of rebellion against such racially discriminatory practices, i.e., their founding principles are necessarily race-specific. To be exclusionary is not a capricious choice on the part of these organizations; rather, it is a reflection of their very nature. For example, the UAM was established as a “sanctuary” from racism where people of African descent can convene “without any input from persons who harbor racial animus toward Africans.” The UAM’s “absolute refusal to allow Caucasians” in to its meetings is an extension of its overarching purpose, and a means by which the group is able to maintain its racial identity. Forcing the UAM and similar groups to admit members of the race it was established to provide protection against would be the ultimate distortion of the group’s message. All-white groups, on the other hand, do not, as a general matter, share this essential racial nature. To argue, for example, that an exclusionary golf course is somehow a reflection of the nature of whites is far from convincing. Their racially exclusive policies, then, do not spring from their “racial nature” but rather their historic desire to keep out social undesirables. These organizations, rather than acting as safe havens against bias, are in reality a modern-day reflection of the sort of racially discriminatory society federal and state legislation has sought to eliminate. As such, forced integration would be of much greater harm to an all-black club than to an all-white club; the all-black club would be forced to turn its back on its founding principles, while the all-white club would merely be inconvenienced. Accordingly, the associational freedoms claimed by all-white clubs should necessarily be more narrowly construed than those allowed to all-black associations.

253 Id. at 623.
254 Obviously, this will not be true of every group that decides to exclude whites from membership. For example, an African-American bowling team would be unable to justify its discriminatory practices based on its “black nature.” As outlined by the Roberts trilogy, the strength of a discriminatory club’s argument “depend[s] on the actual set of messages the club is engaged in advocating.” Buss, supra note 104, at 853.
256 Id. (citations omitted).
B. The Government’s Anti-Discrimination Interest

A court’s finding that the application of a PAA’s anti-discrimination regulations would wreak an unconstitutional infringement upon an all-black organization does not resolve the issue under Roberts. One must analyze the other side of the balancing test, that is, the state’s interest in eliminating discrimination. In this regard, the difficult question that courts will likely confront with increasing frequency in the coming years is whether a governmental interest in favor of eliminating discrimination against whites is of such a “compelling” nature as to justify significant infringement on the associational freedoms of exclusively black organizations. To analyze this question, it is necessary to focus on the two main rationales upon which protection from racial discrimination has been sanctioned: providing equal access and preventing stigma. By applying these justifications to both whites and blacks, it becomes clear that any interest against discrimination is of a much less “compelling” nature when used to justify infringement on an all-black association.

1. Equal Access

The “strongest state interest for regulating the associational choices of private clubs is assuring that excluded group members enjoy equal opportunity to tangible economic goods and services, including access to the commercial world of clients and contacts.”\(^{257}\) A “compelling state interest[] of the highest order,”\(^{258}\) the ideal of equal access to business contacts and training, grows out of the broader governmental interest in assuring unrestricted access to opportunities open to other segments of society. A basic tenet of civil rights jurisprudence, that of providing equal access to the advantages and opportunities offered in public accommodations, has been employed by the Supreme Court mainly to prohibit discrimination against historically disadvantaged groups (especially African-Americans) in public arenas such as housing\(^{259}\) and education.\(^{260}\) In fact, the whole history of race discrimination cases amounts to “a one-way model of desired access—blacks seeking the status and privilege accorded to whites . . . .”\(^{261}\) According to Laurence Tribe, this “one-way” jurisprudence has developed because “blacks [have] wished access to the dignity and power that went with roles which were the exclusive province of

\(^{257}\) Buss, supra note 104, at 852.


\(^{261}\) Tribe, supra note 82, §16-27, at 1569.
whites . . . ." To put a finer point on it, he adds "there were never any roles dominated by blacks to which whites wished access—because the only role ever exclusively occupied or even dominated by blacks was that of slave." The broad language employed by states in drafting their PAAs reflects the expansive scope of this interest. However, the broad range of protection guaranteed by these laws should not blur the original intention of these acts: the protection of society's minority groups. The Roberts Court made this point very clear, stating:

This expansive definition [of Minnesota's public accommodations law] reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.

When applied to private clubs, however, the argument in favor of equal access must be modified because such clubs, by their very nature, do not offer services to the general public. In the Roberts trilogy, the Supreme Court recognized that such private organizations, while not offering "public opportunities," do, however, offer special business skills and advantages that would be otherwise unavailable to the excluded group. The Roberts Court affirmed the lower court ruling that the "various commercial programs and benefits offered to [Jaycees] members" placed the group within the jurisdiction of Minnesota's public accommodations law because "[l]eadership skills are "goods," [and] business contacts and employment promotions are "privileges" and "advantages" . . ." In accordance with this expansion of the equal access rationale, the Court went on to hold that "[a]ssuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests." The application of a governmental interest in favor of equal access to business

262 Id. at § 16-27, at 1569 n.33 (emphasis added).
263 Id.
264 See Lerman & Sanderson, supra note 122, at 240-43 (discussing the principles behind the broad drafting of state PAAs).
265 See supra notes 177-85 and accompanying text.
267 See Marshall, supra note 78, at 92 ("The force of the equal access argument is initially less obvious when applied to the so-called 'private' organization.").
268 Roberts, 468 U.S. at 626 (quoting United States Jaycees v. McClure 305 N.W. 2d 164, 172 (Minn. 1981)); see also Marshall, supra note 78, at 92-93 ("The strength of the Roberts opinion . . . is its recognition that exclusion from private non-commercial organizations may deny equal access as well.").
269 Roberts, 468 U.S. at 626.
contacts (or "goods") provided by private organizations has become entrenched in the jurisprudence of associational freedoms.\textsuperscript{270}

At least one recent Supreme Court decision dealing with a disputed affirmative action program threatens to open up the door to claims brought by whites who have been excluded from a group (or from opportunities) solely because of their race. Such lawsuits have added a new dimension to the traditional \textit{Roberts} analysis. In \textit{Adarand Constructors, Inc. v. Pena},\textsuperscript{271} the Court reviewed a federal affirmative action program designed to provide highway construction contracts to disadvantaged business enterprises, contracts presumptively awarded on the basis of race.\textsuperscript{272} In attempting to give shape to the numerous holdings dealing with race-based affirmative action programs, the Court set forth "three general propositions with respect to governmental racial classifications."\textsuperscript{273} According to the Court, these three guidelines are:

First, skepticism: "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination." Second, consistency: "The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," \textit{i.e.}, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."\textsuperscript{274}

While the constitutionality of affirmative action programs obviously implicates constitutional questions beyond those dealt with in an associational freedom analysis, the adoption of \textit{Adarand}'s "consistency" principle could result in a correlative expansion of the

\textsuperscript{270} See, \textit{e.g.}, Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987) ("In \textit{Roberts} we recognized that the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services.") (citation omitted); Invisible Empire of the Knights of the KKK v. Mayor of Thurmont, 700 F. Supp. 281, 289 (D. Md. 1988) ("The state has a compelling interest in ensuring equal access to such advantages as business and professional opportunities and skills.") (citation omitted); \textit{see also} Frank, \textit{supra} note 203, at 38 ("When people are barred from those organizations, they are also barred from cultivating business opportunities, and from influencing policy through informal contact with policymakers. Being in the 'right' club can be crucial to one's career.") (citation omitted); Marshall, \textit{supra} note 78, at 92-94 (evaluating the validity of a state's interest in equal access as applied to private organizations); Rhode, \textit{supra} note 155, at 120-21 (arguing that, in the context of gender-exclusive clubs, "[t]he most direct harms involve lost opportunities for the social status, informal exchanges, and personal contacts that men's associations traditionally have provided").

\textsuperscript{271} 515 U.S. 200 (1995).

\textsuperscript{272} \textit{See id.} at 205-06.

\textsuperscript{273} \textit{Id.} at 223.

\textsuperscript{274} \textit{Id.} at 223-24 (citations omitted).
"equal access" interest in the favor of whites. Under the Adarand approach, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."\(^{275}\) In this view, exclusion alone justifies the invocation of the "equal access" principle, with the race of the excluded party playing no role in determining the "compelling" nature of that interest. Courts throughout the country have seized upon this ruling as the basis for overturning affirmative action programs that foster the inclusion of African-Americans and other minorities at the expense of whites.\(^{276}\) Broad application of this principle to the Roberts framework would expand the governmental interest justifying infringement on private groups on grounds of equal access to "any individual . . . [who] is disadvantaged . . . because of his or her race,"\(^{277}\) thus posing a serious threat to the constitutional protection presently enjoyed by minority clubs.

Justifying the inclusion of whites in all-black clubs on the basis of assuring equal access to goods and opportunities available only to club members rings hollow for two reasons. First, minority clubs generally will have a "less ample supply of goods and services and a lower level of power and influence to offer" whites.\(^{278}\) While this characterization may not be universally true, the cases upon which the equal access principle was established demonstrate that private groups in which minorities have fought to be included constitute highly organized social and fraternal networks of people who, in accordance with their historic status in society’s majority, have become privy to the type of business opportunities that excluded groups justi-

\(^{275}\) Id. at 224 (emphasis added); see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.").

\(^{276}\) See Messer v. Meno, 130 F.3d 130 (5th Cir. 1997) (reversing award of summary judgment to defendant employer on the issue of whether the challenged affirmative action program impermissibly discriminated against the white female plaintiff); Monterey Mechanical Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997) (holding that a statute which required general contractors to subcontract a percentage of work to subcontractors owned by women or minorities violated the Equal Protection Clause); Engineering Contractors Ass’n of S. Fla. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997) (affirming ruling that an affirmative action program requiring that race-, ethnic-, and gender-conscious measures be taken in awarding county construction projects violated equal protection guarantees); Hopwood v. Texas, 78 F.3d 952 (5th Cir. 1996), cert. denied 518 U.S. 1033 (1996) (holding that a state university law school’s admissions program violated the Equal Protection Clause).

\(^{277}\) Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 230 (1995); see also Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (holding that the standard of review for affirmative action programs “is not dependent on the race of those burdened or benefited by a particular classification”).

\(^{278}\) Buss, supra note 104, at 852; see also Herma Hill Kay, Private Clubs and Public Interests: A View from San Francisco, 67 WASH. U. L.Q. 855 (1989) (discussing the City of San Francisco’s legislative action with respect to sex segregation in private clubs, and the clubs’ response).
fiably envy. In contrast, African-American clubs which have sought constitutional sanction for their discriminatory policies do not, as of yet, offer such opportunities as would be enviable to whites. This is a function of the long-standing role blacks have been forced to play as societal "undesirables," discouraged from forming such clubs until recent years, and denied the opportunities to build social and economic connections themselves. This simple social reality is ignored by commentators who argue that it is society in general that is harmed by discrimination and who conclude, therefore, that equal access goals are equally as valid whether employed by the majority or minority race. However unfortunate, the fact remains that the business contacts that would be made available to whites were they included in an exclusively black organization are not so compelling as to justify such a substantial infringement on that group's First Amendment rights.

Secondly, under the Roberts framework, governmental infringements on a group's expressive association must be in pursuance of interests which can not be achieved through "means significantly less restrictive of associational freedoms." Assuming that a court finds such "compelling" contacts in an all-black club, the social advantage whites enjoy as the majority race in society would facilitate their ability to make those contacts through alternative means. On the other end of the scale, African-Americans seeking access to the vast network of business and social contacts established by white clubs over the course of decades, or even centuries, will have a comparably more difficult road to hoe. Under the "balancing test" analysis prescribed by the Roberts trilogy, this difference seems to tip the scale heavily in favor of all-black organizations resisting judicially mandated integration.


280 See Marshall, supra note 78, at 92, 97-98 ("From a purely equal access standpoint, both society and the individual are harmed when any person is denied access to opportunity on the basis of race or ethnic origin . . . . For this reason, a question necessarily arises whether the state has a greater interest in promoting one group's access over another's . . . . [By admitting whites into private all-black clubs,] [t]he state is not favoring whites over blacks; it is only requiring both groups to be treated equally. It is therefore irrelevant to equal access goals whether the membership exclusion is directed at an historically disadvantaged minority group.").

281 This is not to say, however, that African-American groups will be unable to obtain such desirable contacts with time. In fact, it can be argued that the current trend toward all-black clubs is a reflection of a change in the nation's racial climate which, in the long run, may make the "goods" held by such clubs equally as desirable as those held by historically all-white clubs.

2. Stigma

A second basis for states’ compelling interest in eradicating discrimination is the prevention of “stigma.” Exclusion from private clubs on the basis of race has the effect of perpetuating and lending societal legitimacy to the stereotypes and perceptions of inferiority upon which such discriminatory policies are based. The governmental interest in preventing race-based stigma was originally intended to benefit African-Americans who suffered the indignities of segregation. The compelling nature of this original judicial intent was made clear in Brown v. Board of Education, wherein the Supreme Court overruled the “separate but equal” doctrine in public schools. The Brown Court reasoned that the racial segregation of African-American schoolchildren “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” While the Court offered many rationales for its decision, the prevention of stigma was not only “[t]he most obvious,” but also “the most persuasive.” In the decades since Brown, this protection of African-Americans against social perceptions of inferiority has become established as a pillar of the Supreme Court’s civil rights jurisprudence.

The debate over the legitimacy of this rationale, however, is the subject of controversy among scholars. On one side, some commentators wholeheartedly embrace the Brown Court’s rationale of protec—

283 See Frank, supra note 203, at 36 (“Discrimination at any age also reinforces negative stereotypes about people.”). Furthermore, Frank also argues that discrimination in organizations reinforces stereotypes by fostering “an acceptance of discrimination.” Id.
285 See Plessy v. Ferguson, 163 U.S. 537 (1896).
286 Brown, 347 U.S. at 494. The Brown Court quoted at length the findings of the district court which stated, in pertinent part, “‘[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. . . . A sense of inferiority affects the motivation of a child to learn.’” Id. (citation omitted). Despite these findings, the district court held in favor of the segregated school system. See id. (citation omitted); see also Tribe, supra note 82, § 12-6, at 821 (“So it was that the Court invalidated segregation by law in public schools in Brown because that system unavoidably communicated a social message of black inferiority, regardless of the surface symmetry of the separate-but-equal concept . . . .”).
287 Tribe, supra note 82, § 16-15, at 1477.
288 See Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984) (“[G]ender discrimination deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life . . . . That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (“The Senate Commerce Committee made it quite clear that the fundamental object of Title II [of the Civil Rights Act of 1964] was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”) (citations omitted).
tion against social stigma. Laurence Tribe, for example, has written that "[r]acial separation by force of law conveys strong social stigma and perpetuates both the stereotypes of racial inferiority and the circumstances on which such stereotypes feed." According to Tribe, the Brown Court, having recognized the detrimental impact of such stigma, justified its holding "less in apartheid's mutual separation of the races than in its allowing one race to enjoy full communal life in society, while effectively ostracizing members of another race."

According to Tribe, the Brown Court, having recognized the detrimental impact of such stigma, justified its holding "less in apartheid's mutual separation of the races than in its allowing one race to enjoy full communal life in society, while effectively ostracizing members of another race." Opponents of this view, such as Ronald Dworkin, argue that "it is not true . . . that any social policy is unjust if those whom it puts at a disadvantage feel insulted." According to Dworkin, "[i]f segregation does improve the general welfare, even when the disadvantage to blacks is fully taken into account, and if other reason can be found why segregation is nevertheless unjustified, then the insult blacks feel, while understandable, must be based on misperception."

The more pressing question which courts will confront, as demonstrated in Southgate's claim against the UAM, is whether the exclusion of whites from all-black clubs brands whites with an analogous stigma, thus warranting their compelled inclusion in spite of the substantial impact it may have on the group's associational freedoms. The Supreme Court, however, has not yet had the opportunity to directly confront the issue of the constitutionality of applying public accommodations laws to black-only groups on grounds of stigma. At disparate times, however, the Court has given indications it may be unwilling to allow such a justification. In Regents of the University of California v. Bakke, Justice Brennan, in favor of upholding a medical school's set-aside program for the benefit of racial minorities, argued that excluding whites, "[u]nlike discrimination against racial minorities . . . does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is

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289 Tribe, supra note 82, § 16-15, at 1477.

290 Id.; see also Charles Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 424 (1960) ("[i]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated 'equally,' I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description. Here I must confess to a tendency to start laughing all over again."); Rhode, supra note 155, at 108 ("As a symbolic matter, exclusion of women, like that of racial minorities or religious minorities, carries a stigma that affects individuals' social status and self-perception.").


292 Id.; see also Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959) (criticizing the Brown Court's reliance on social science data).

significant likelihood that they will be treated as second-class citizens because of their color."  

The recent guidelines for interpreting affirmative action programs laid down in *Adarand*, however, seem to send a clear signal that the current Court is at least willing to entertain arguments in favor of integrating all-black clubs on grounds that exclusion stigmatizes whites. If, under the principles of "skepticism" and "consistency," racial exclusions are to be viewed through one analysis, regardless of the race of the party discriminated against, then the next logical step in an associational freedom analysis would be that the effects of the stigma must also be viewed independent of race. At least one court has applied the *Adarand* principles as dictating the recognition of a state’s interest in preventing harm to any individual’s personal dignity as “compelling.” The court in *South Boston Allied War Veterans Council v. City of Boston* analyzed the constitutionality of a city’s predicking the issuance of a parade permit to a veterans organization on its adherence to a non-discrimination law. Despite its holding that forcing the veterans to include a homosexual group in its parade would be an unconstitutional infringement of the veterans’ associational rights, the court still entertained the homosexual group’s argument that such inclusion was justified to prevent the “stigma” which would result from exclusion. The *South Boston* court stated:

Neither the Supreme Court, nor any other court, however, has addressed the issue of whether there is a compelling state interest in preventing discrimination which deprives a person of his or her individual dignity, but not of any publicly available goods, services, or opportunities for commercial or professional advancement . . . . This court assumes, however, that preventing the injury to individual dignity, or stigma, caused by exclusion from an organization or activity is a compelling state interest for the purpose of invoking the *Roberts* test.

The problem with allowing whites to trample the First Amendment rights of minority groups in the name of preventing stigma is the same as that created by allowing such integration on equal access

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294 *Id.* at 375 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part); see also *United Jewish Orgs. v. Carey*, 430 U.S. 144, 165-68 (1977) (upholding legislative gerrymandering to benefit blacks because such plan “represented no racial slur or stigma with respect to whites or any other race”).
296 *Id.* at 916.
grounds: it ignores the social reality of African-Americans' status as a historically disadvantaged minority. In the words of Deborah Rhode:

Separatism imposed by empowered groups carries different symbolic and practical significance than separatism chosen by subordinate groups. Given this nation's historic traditions and cultural understandings, the exclusion of men from women's liberation groups or garden clubs no more conveys inferiority than the exclusion of whites from black associations or Protestants from Jewish social organizations. Nor does such exclusivity serve to perpetuate existing disparities in political and economic power.\(^{297}\)

Allowing whites to utilize a "stigma" argument to force the integration of all-black clubs turns a blind eye to the fact that whites are firmly entrenched as society's overwhelming majority. As such, whites enjoy a social and economic advantage over African-Americans. Racially discriminatory policies upheld by all-white clubs are manifestations of this position of power.\(^{298}\) The exclusion of minorities from white private clubs carries an "implicit message of . . . unworthiness"\(^ {299}\) which reaffirms society's inclination to perceive minority groups as constituting an inferior class of persons. In turn, these policies encourage stereotyping and lead to further stigmatization of African-Americans. On the other hand, their respective positions in society dictate that the exclusion of whites from all-black groups is unlikely to stigmatize whites with similar perceptions of inferiority.\(^ {300}\) The exclusion of whites from minority clubs "is likely to . . . carry none of the stigmatizing insult" that has justified the enforcement of anti-discrimination laws in favor of African-Americans.\(^ {301}\) Furthermore, the fact that minority groups are centered around a single shared racial or cultural identity diminishes the weight of arguments that exclusion from such a group will attach any stigma because the "exclusion is more likely to be perceived as an attempt to promote its own identity rather than as a characterization of the excluded group as an inferior class."\(^ {302}\) The discriminatory policies enforced by African-American organizations constitute a means

\(^{297}\) Rhode, supra note 155, at 122.

\(^{298}\) See generally Somers, supra note 2, at 26 (describing the history of exclusive clubs in the United States).

\(^{299}\) Buss, supra note 104, at 852.

\(^{300}\) Id. ("Exclusion of majority members by minority groups is likely to hurt less and to carry none of the stigmatizing insult that accompanies exclusion of minorities with its implicit message of inferiority or unworthiness."); see also Marshall, supra note 78, at 98 ("Because of their long historical entrenched and dominance, neither whites nor possibly Christians are susceptible to pervasive stereotyping as social inferiors.").

\(^{301}\) Buss, supra note 104, at 852.

\(^{302}\) Marshall, supra note 78, at 98.
by which African-Americans alone seek to avoid the pervasive societal perceptions of inferiority, rather than mount a counterattack against whites. Allowing a segment of society to band together in protection of its heritage to the exclusion of others does not produce any of the stigmatization that anti-discrimination laws are intended to remedy. To equate the “stigma” claimed by excluded whites with the pervasive stigmatization and inferiority African-Americans have suffered since the birth of this nation is to equate one group’s hurt feelings with the other’s broken neck.

V. CONCLUSION

Under the framework provided by the Supreme Court in the Roberts trilogy, the First Amendment provides a constitutional shield of protection for the expressive association of a private club against governmental infringement. This protection, however, is subject to the compelling governmental interest in eliminating discrimination. Social realities dictate that the nature of this interest becomes strikingly less compelling when applied to force the inclusion of whites in all-black clubs than when employed to integrate all-white clubs.

Many commentators, including Southgate, decry such policies as no more than reverse discrimination. These naysayers, however, miss the point. The racially discriminatory policies employed by African-American clubs such as the United African Movement represent a means by which African-Americans seek not only to protect themselves from racial prejudice and bias, but rather to make heard the voice of the African-American community. As such, they represent a valid exercise of an organization’s freedom of expressive association, a fundamental right guaranteed by the First Amendment.

In the words of Justice William O. Douglas: “The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be.”

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303 See supra notes 283-88 and accompanying text.
304 See Whelan, supra note 10, at A12.
305 See id. (“Equality is a two-way street. All Americans should of course enjoy their First Amendment freedom of association . . . . But laws that bar racial discrimination should apply equally to whites and blacks alike. Perhaps Louis Farrakhan is listening.”).
† As always, all my love and appreciation go to my wife, Brittany, whose never-failing support has provided me with a constant source of strength.