

**“‘MALE CHAUVINISM’ IS UNDER ATTACK FROM
ALL SIDES AT PRESENT”: *ROBERTS V. UNITED
STATES JAYCEES*, SEX DISCRIMINATION,
AND THE FIRST AMENDMENT**

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INTRODUCTION

The connection between gender equality and the First Amendment brings to mind potent imagery about twentieth-century constitutional interpretation. In the late 1980s, then-Judge Ruth Bader Ginsburg explained that, well into the twentieth century, “except for the franchise[,] . . . the Constitution remained an empty cupboard for people seeking to promote the equal status and stature of men and women under the law.”¹ Ginsburg observed that the Warren Court, in 1960s cases such as *Hoyt v. Florida*,² “held the baseline set by the Supreme Court in the 1870s”³ in *Bradwell v. Illinois*.⁴ *Bradwell* includes Justice Joseph P. Bradley’s infamous concurring opinion where he appealed to “divine ordinance” and “the nature of things” to explain man’s role as “woman’s protector and defender” and woman’s “destiny and mission . . . [to be] wife and mother” rather than hold “occupations of civil life,” such as the practice of law.⁵ Upholding a Florida law that granted *only* women an absolute exemption from jury service, *Hoyt* noted “the enlightened emancipation of women from the restrictions and protections of bygone

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1. Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 *LAW & INEQUALITY* 17, 18 (1988).

2. 368 U.S. 57 (1961).

3. Ginsburg, *supra* note 1, at 19.

4. 83 U.S. (16 Wall.) 130 (1873).

5. *Id.* at 141 (Bradley, J., concurring).

years” but asserted that “woman is still regarded as the center of home and family life.”⁶

The Court’s approach to the Equal Protection Clause began to change in 1971 when the “conservative” Burger Court took the “modestly revolutionary” step of critically examining and striking down gender-based classifications.⁷ As a pioneering litigator, Ginsburg played a key role in the familiar story of this new, generative power of the Equal Protection Clause: her efforts led to the Court’s adoption of the intermediate scrutiny test to dismantle discriminatory laws based on archaic and overbroad stereotypes about the “relative needs and capacities of the sexes.”⁸

Does an “empty cupboard” aptly capture the First Amendment as a resource for advancing “the equal status and stature of men and women under the law”?⁹ Or does a more troubling picture apply: that, as historically interpreted, the First Amendment has been a roadblock to gender equality? Certainly, some have lodged this critique of First Amendment jurisprudence concerning freedom of speech. Ninety years ago, Justice Oliver Wendell Holmes, Jr., in dissent, asserted the imperative of “attachment” to the constitutional principle of “free thought—not . . . for those who agree with us, but freedom for the thought that we hate,” which subsequently became a frequent justification for protecting hateful speech.¹⁰ In 2017, after observing that “speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful,” Justice Alito quoted Justice Holmes: “The proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”¹¹

Over thirty years ago, in *American Booksellers Ass’n v. Hudnut*,¹² Judge Frank Easterbrook similarly appealed to the First Amendment’s distinctive protection of an absolute right to “propagate” even hateful opinions, as he struck down an Indianapolis anti-pornography civil rights ordinance drafted by Catharine MacKinnon and Andrea Dworkin.¹³ In words that still startle for their almost perverse delight in conceding the costs of First Amendment absolutism and protecting hateful speech, Judge Easterbrook accepted the legislation’s premise—that “depictions of subordination [of women] tend to perpetuate subordination,” which leads to many negative consequences in

6. *Hoyt*, 368 U.S. at 61–62.

7. Ginsburg, *supra* note 1, at 18–19.

8. *Craig v. Boren*, 429 U.S. 190, 197–98 (1976); *see also* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (describing the Court’s historical application of the Equal Protection Clause); Wendy W. Williams, *Ruth Bader Ginsburg’s Equal Protection Clause: 1970–80*, 25 COLUM. J. GENDER & L. 41, 41–43 (2013). This “gender revolution” in constitutional law impacts the story told in this Article, but is not its primary focus.

9. Ginsburg, *supra* note 1, at 18.

10. *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

11. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (quoting *Schwimmer*, 279 U.S. at 655 (Holmes, J., dissenting)). The Court held unconstitutional the Patent and Trademark Office’s refusal to register “The Slants” as a band’s trademark, finding that the term might be seen as demeaning to Asian Americans. *Id.* The band’s evident aim was to “reclaim” the slur and help “drain its denigrating force.” *Id.* at 1751.

12. 771 F.2d 323 (7th Cir. 1985).

13. *Id.* at 328.

women's daily lives in the home, at work, and "on the streets."¹⁴ But, he insisted, "this simply demonstrates the power of pornography as speech."¹⁵ Such speech is protected, just as are "racial bigotry, anti-semitism, violence on television, [and] reporter's biases," which influence society and generally can only be rebutted by other speech in "the popular culture."¹⁶ Any other approach would make government the "great censor and director of which thoughts are good for us."¹⁷ To be sure, some feminists who opposed the ordinance warned of governmental censorship and asserted that women's freedom and equality require robust protection of speech.¹⁸ Today, feminist legal scholars and activists attempt to navigate regulation of hateful online speech and activity without running into the roadblock of hallowed First Amendment protection for "the thought that we hate."¹⁹

Still yet, consider the First Amendment as "the proverbial double-edged sword."²⁰ Privacy scholar Anita Allen finds that First Amendment privacy doctrines concerning associational privacy (or freedom of association) and "privacies of religion, thought, and intellect"²¹ have been used both to advocate for "progressively liberal social change"²² and to preserve "social stasis" and oppose government "interfer[ence] with traditional practices merely for the sake of progressive ideas about marriage, family, social life, or citizenship."²³ Whether used by progressive liberals or social conservatives, First Amendment privacy doctrines prove "an attractive but perilous weapon."²⁴

This Article considers the relationship between gender equality and freedom of association. Freedom of association has a complex relationship to the important goals of furthering gender equality and nondiscrimination. As I have argued elsewhere, freedom of association—freedom to join and

14. *Id.* at 328–29.

15. *Id.* at 329.

16. *Id.* at 330.

17. Challenging these premises falls outside the scope of this Article, but, arguably, recent neuroscience studies demonstrating a link between hateful and dehumanizing speech about out-groups and prejudice and lack of empathy might warrant reconsideration of this "absolute right," particularly as exercised on the internet and in politics. See Richard A. Friedman, *The Neuroscience of Hate Speech*, N.Y. TIMES (Oct. 31, 2018), <https://www.nytimes.com/2018/10/31/opinion/caravan-hate-speech-bowers-sayoc.html> [<http://perma.cc/8FUL-ZFTK>].

18. Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), reprinted in *SEX, MORALITY, AND THE LAW* 199, 210–11 (Lori Gruen & George E. Panichas eds., 1997) (recognizing that "freedom and socially recognized space" for the "range of feminist imagination and expression in the realm of sexuality [that] has begun to find voice" would be at risk from laws like the ordinance, which constrict freedom of speech).

19. *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting). See generally DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014).

20. Anita L. Allen, *First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 J. CONST. L. 885, 887 (2012).

21. *Id.* at 886.

22. *Id.* at 900.

23. *Id.* at 886. Allen focuses on First Amendment privacy doctrines, including "associational privacy" and "privacies of religion, thought, and intellect." *Id.*

24. *Id.*

participate in the myriad groups of civil society—“contributes to liberal democracy by affording oppositional space to ‘enclaves of protected discourse and action,’ which allows social actors to seek to correct injustices by bringing about change.”²⁵ Freedom of association protects spaces in civil society in which members of groups may challenge an unjust status quo and also find mutual support. For example, historical and modern women’s organizations played and continue to play an important role in the gender equality movement.²⁶

Although not explicitly mentioned in the First Amendment, freedom of association underlies and facilitates enumerated First Amendment rights: freedom of speech, the free exercise of religion, and freedom of assembly.²⁷ Freedom of association has a complex relationship with securing free and equal citizenship and, particularly, gender equality. It is indeed double-edged, as illustrated by *Roberts v. United States Jaycees*.²⁸ In *Jaycees*, even as the Court elaborated upon the values advanced by the freedom of association, it upheld the application of Minnesota’s public accommodations law to the U.S. Jaycees’s exclusion of women from regular membership despite the Jaycees’s freedom of speech and association claims.²⁹ In doing so, it affirmed the state’s compelling interest in preventing the distinct harms of invidious discrimination in “the distribution of publicly available goods, services, and other advantages.”³⁰ Both aspects of *Jaycees* live on: in party briefs and judicial rulings, it is a frequent reference for the First Amendment’s protection of freedom of association and for the state’s compelling interest in prohibiting invidious discrimination, even in the face of First Amendment claims.³¹ *Jaycees* has been criticized by both conservative and liberal political and legal theorists, who argue that the Court insufficiently protected the Jaycees’s associational rights at the expense of

25. JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 111 (2013) (quoting Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 46, 58 (Seyla Benhabib ed., 1996)).

26. See, e.g., PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 94–117 (1984) (describing efforts of the Black women’s club movement, the National Association of Club Women); Claudia Center, “Boys Keep Out!”: *Historical and Legal Perspectives on the Contributions of All-Female Organizations to Sex Equality*, 8 WIS. WOMEN’S L.J. 1, 1–3 (1992) (discussing the nineteenth-century women’s club movement and twentieth-century efforts).

27. See NAACP v. Alabama, 357 U.S. 449, 460 (1957).

28. 468 U.S. 609 (1984).

29. *Id.* at 622–23.

30. *Id.* at 628.

31. Curiously, however, legal scholars have comparatively neglected *Jaycees*, as measured by the cases that find their way into the various collections of “law stories” or “rewritten opinions” projects. It is not included in any of West’s “Law Stories,” including those for which it seems a good candidate (for example, the volumes on civil rights, constitutional law, First Amendment, and women and the law). Similarly, Cambridge University Press’s “Feminist Judgments” series of rewritten U.S. Supreme Court opinions has not included it so far.

constitutional democracy and pluralism and overestimated the impact of the Jaycees's membership policies on women's equal citizenship.³²

Many take it for granted that, today, discriminating against women *as women* in the marketplace is illegal and morally wrong. Studying the *Jaycees* litigation over the reach of public accommodations law reveals parties wrestling over that reach and over the force of the race-sex analogy. One striking contrast is the different ways that the parties and their amici invoked *NAACP v. Alabama*³³ and compared or contrasted the NAACP and the Jaycees.

Part I begins with the Supreme Court's recognition of the freedom of association as first articulated in *NAACP v. Alabama*. It shows how, in the context of race discrimination, some key civil rights victories have enlisted claims of the freedom of association, while some other victories have prevailed against such claims. Those precedents set the foundation for the Court's decision in *Jaycees*, which concerned gender discrimination. Part II focuses on the role of *Jaycees* in drawing an analogy between the harms of gender discrimination and sexual-orientation discrimination and on the limits of freedom of association claims in both contexts. It highlights how parties and amici in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*³⁴ relied on *Jaycees* to connect race and sex discrimination to sexual-orientation discrimination. In *Masterpiece Cakeshop*, the petitioner—a baker who refused to create a wedding cake for a same-sex couple—argued that the application of Colorado's public accommodations law to him violated his right to free exercise of religion and impermissibly compelled his creative expression.³⁵ I focus in particular on the arguments made by the National Women's Law Center, an amicus in support of the respondents. Part III returns to *Jaycees* and examines the arguments made by the parties and their amici regarding the evident conflict between promoting sex equality—women's full participation in society—and protecting freedom of association. What was at stake for women in being excluded from full membership in organizations, like the Jaycees and all-male private clubs, that provided members “an entree to the ‘Old Boys Network’”?³⁶ What was at stake for the Jaycees and similar organizations in a climate in which (as one amicus put it) “‘Male chauvinism’ is under attack from all sides”?³⁷

32. See, e.g., John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010); George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 35, 60–61 (Amy Gutmann ed., 1998). See generally Nancy Rosenblum, *Compelled Association*, in FREEDOM OF ASSOCIATION, *supra*, at 75.

33. 357 U.S. 449 (1958).

34. 138 S. Ct. 1719 (2018).

35. *Id.* at 1726.

36. See Brief Amicus Curiae of the National Organization for Women et al. in Support of Reversal, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 226, at *19 [hereinafter Brief Amicus Curiae of NOW].

37. Amicus Curiae Brief of Rotary International, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 236, at *36.

Part IV briefly returns to the present day and asks whether the old boys network that presented such a vexing barrier to women's economic and career mobility is simply a relic of the past or has continuing potency. Part IV concludes by comparing some present-day controversies over freedom of association and gender equality to those fought out in *Jaycees*.

I. FREEDOM OF ASSOCIATION VERSUS FREEDOM FROM DISCRIMINATION:
NAACP v. ALABAMA AND *JAYCEES*

The U.S. Supreme Court first recognized the freedom of association in *NAACP v. Alabama*, which powerfully exemplifies the importance of protecting space for challenging the status quo. In the late 1950s, the NAACP successfully challenged an Alabama law that would have required disclosure of its rank-and-file membership list.³⁸ Doing so would have exposed its members to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”³⁹ Protecting the group's membership list meant that African American members could create community, organize, and strategize without fear of reprisal simply for belonging to the NAACP.⁴⁰

On the other hand, some key civil rights victories have involved prevailing *against* freedom of association claims. Two famous examples in the context of race discrimination are *Norwood v. Harrison*⁴¹ and *Runyon v. McCrary*.⁴² In *Norwood*, the Court held that Mississippi could not provide textbooks to “virtually all white” private schools that racially discriminated. In often-quoted language, it stated: “Although the Constitution does not proscribe private bias, it places no value on discrimination Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protection.”⁴³ In *Runyon*, the Court held that applying 42 U.S.C. § 1981, which prohibits racial discrimination in contracts, to white-only private schools did not violate parents' or children's freedom of association.⁴⁴ Echoing *Norwood*, the Court explained that *NAACP v. Alabama*'s principle that freedom of association protects “effective advocacy of [controversial] public and private points of view”⁴⁵

38. *NAACP v. Alabama*, 357 U.S. 449, 466 (1958).

39. *Id.* at 462.

40. See Allen, *supra* note 20, at 902 (describing *NAACP v. Alabama* as “an important precedent available to other African Americans stymied by threats, intimidation, and opportunistic applications of state law”). To my knowledge, there is no precise counterpart to *NAACP v. Alabama* with respect to gender equality. I have not been able to find a case in which the Court protected the associational freedom of an organization dedicated to advancing gender equality against a state law threatening it in some way.

41. 413 U.S. 455 (1973).

42. 427 U.S. 160 (1976).

43. *Norwood*, 413 U.S. at 457, 469–70.

44. *Runyon*, 427 U.S. at 168, 175–76.

45. *Id.* at 175 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

does not extend to “the *practice* of excluding racial minorities” from educational institutions.⁴⁶

In the context of gender equality, *Jaycees* is a key example of when freedom of association claims did not defeat governmental efforts to end discrimination. The Court cited *NAACP v. Alabama* in elaborating the First Amendment’s protection of freedom of association for purposes of political expression but concluded that, although some of the Jaycees’s activities implicated this right, it was not an “absolute” right and could be infringed to “serve compelling state interests.”⁴⁷ Citing *Runyon*, the Court stated that even if Minnesota’s law “incidental[ly] abridge[d]” the Jaycees’s protected speech, its discriminatory membership practices were not constitutionally protected.⁴⁸

The Court directly analogized the effects of sex-based discrimination to those of race-based discrimination. The Court reaffirmed that the “fundamental object” of Title II of Civil Rights Act of 1964 “was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”⁴⁹ The *Jaycees* Court added: “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.”⁵⁰

Jaycees provided the analytical framework for the Court, later in the 1980s, to uphold the application of state or municipal public accommodations laws prohibiting gender discrimination to large business-oriented men’s associations, despite claims of freedom of association.⁵¹ Decades later, it remains a staple in arguments that state antidiscrimination laws reflect the government’s compelling interest in ending invidious discrimination. Conversely, some nongovernmental groups have successfully enlisted *Jaycees* to dispute that governmental interest or the proper reach of state public accommodations laws.⁵²

II. THE PLACE OF *JAYCEES* IN THE *MASTERPIECE CAKESHOP* LITIGATION

Jaycees reasons by analogizing different forms of discrimination. Such arguments appeared in *Masterpiece Cakeshop v. Colorado Civil Rights*

46. *Id.* at 176; see *Norwood*, 413 U.S. at 470.

47. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984).

48. *Id.* at 628.

49. *Id.* at 625 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964)). In *Heart of Atlanta Motel, Inc. v. United States*, the Court upheld Title II, the public accommodations provision of the Civil Rights Act of 1964, against a myriad of constitutional claims (although not a freedom of association one) brought by a motel operator. 379 U.S. 241, 244, 258–62 (1964) (detailing and rejecting the motel operator’s Article I, Fifth Amendment, and Thirteenth Amendment claims).

50. *Jaycees*, 468 U.S. at 625.

51. See *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 11–12 (1988); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (“[*Jaycees*] provides the framework for analyzing the appellants’ constitutional claims.”).

52. See generally, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995).

Commission, in which petitioner Jack Phillips, the owner of Masterpiece Cakeshop, argued that compelling him to bake a wedding cake for a same-sex couple, Charlie Craig and David Mullins, violated his free exercise of religion and compelled his creative expression.⁵³

In defending the application of Colorado's public accommodations law against Phillips, the respondents—Craig, Mullins, and the Colorado Civil Rights Commission (CCRC)—and their amici enlisted *Jaycees* to argue that, just as the Court there compared the evils of race discrimination to those of sex discrimination, the Court here should compare the harms of race and sex discrimination to those of sexual-orientation discrimination. As amici, the National Women's Law Center (NWLC) and thirty-nine additional organizations made that argument but also discussed the importance of public accommodations law for fostering gender equality itself.⁵⁴ The NWLC asserted that, if the Court accepted Phillips's First Amendment arguments, it would undermine such laws both for women and for other protected groups.⁵⁵ The NWLC's amicus brief provides a doorway for this Article's consideration of the relationship between gender equality and the First Amendment and the tensions around the freedom of association.

A. From Race to Sex to Sexual Orientation: The Government's Interest in Ending Discrimination

After the Supreme Court granted certiorari, nearly 100 amicus briefs offered various arguments concerning whether the application of the Colorado Anti-Discrimination Act (CADA) to Phillips's refusal to create a wedding cake for Craig and Mullins, on the basis of his sincere religious beliefs about marriage, violated his First Amendment rights to the free exercise of religion or freedom of speech.⁵⁶ Hotly contested in the numerous briefs was whether there was an appropriate analogy between refusals of service based on a customer's race and refusals based on a customer's intended marriage partner.⁵⁷ Was there, as respondents and their amici

53. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1726 (2018).

54. Brief of the National Women's Law Center and Other Groups as *Amici Curiae* in Support of Respondents at 1–6, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) [hereinafter Brief *Amici Curiae* of the NWLC] (describing the thirty-nine organizations as “committed to obtaining economic security and equality for women”).

55. *Id.* at 16–22, 32–38.

56. *See No. 16-111*, SUP. CT. U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-111.html> [<https://perma.cc/6JAJ-YGJF>] (last visited Apr. 10, 2019). By my count, there were forty-five amicus briefs filed in support of petitioner, forty-six in support of respondents, and four in support of neither party—or ninety-five in all. *See id.* Phillips did not make a freedom of association argument. *See generally* Brief for Petitioners, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

57. *Compare* Brief of *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents at 2–3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (drawing a direct parallel between the denial of service by Phillips to Craig, Mullins, and Mullins's mother and the denial of service at a barbecue to three African American customers in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) (per curiam)), with Brief of *Amici Curiae* Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. in

argued, a similar deprivation of dignity when the basis of discrimination was sexual orientation, and was the governmental interest as compelling? Or, as an amicus for Phillips argued, were the concerns that motivated Title II simply “not present here”?⁵⁸ In defending CADA, the respondents and their amici enlisted *Heart of Atlanta Motel, Inc. v. United States*,⁵⁹ along with *Newman v. Piggie Park Enterprises*.⁶⁰ In *Newman*, the Court characterized as “patently frivolous” an objection by a white restaurant owner that Title II violated his free exercise of religion by compelling him to serve Black customers, contrary to his religious beliefs about segregation.⁶¹

The race-discrimination analogy, however, was not the only one invoked to support CADA. In upholding CADA’s application to Phillips, the Colorado Court of Appeals cited *Jaycees* along with race-discrimination precedents when it observed, “The Supreme Court has consistently recognized that states have a compelling interest in eliminating such discrimination and that statutes like CADA further that interest.”⁶² Before the U.S. Supreme Court, Craig, Mullins, and the CCRC enlisted *Jaycees* to support their argument that CADA was constitutional given the government’s “compelling interest”⁶³ in preventing the “unique evils” caused by acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages.⁶⁴

Their amicus, the NWLC, described *Jaycees* as a “lodestar case,” in which the Court held that the Jaycees’s objections to admitting women to full membership did not prevail against the state’s interest in preventing discrimination in “the public marketplace.”⁶⁵ The brief argued that the state’s interest was equally compelling in preventing discrimination based on sexual orientation and gender identity and that the Court should reject the Department of Justice’s contention in their amicus brief that race discrimination presented a special case.⁶⁶ The NWLC brief also sought to explain why ending pervasive discrimination against women in public accommodations in the marketplace was “fundamental” to women’s equality

Support of Petitioners at 27–28, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing that “[t]here is no LGBT analog here to the *Piggie Park* case” because there is no “bare refusal to serve LGBT customers”).

58. Brief for the States of Texas et al. as Amici Curiae in Support of Petitioners at 3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (“Public-accommodations concerns of past eras are not present here . . .”).

59. 379 U.S. 241 (1964).

60. 390 U.S. 400 (1968) (per curiam).

61. *Id.* at 402 n.5; see Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents, *supra* note 57, at 13.

62. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 293 (Colo. App. 2015), *rev’d*, *Masterpiece Cakeshop*, 138 S. Ct. 1719.

63. Brief for Respondent Colorado Civil Rights Commission at 23, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984)).

64. Brief for Respondents Charlie Craig and David Mullins at 37–39, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (quoting *Jaycees*, 468 U.S. at 628).

65. Brief Amici Curiae of the NWLC, *supra* note 54, at 18.

66. *Id.* at 5.

and to women's full participation in a free and equal society.⁶⁷ The brief argued that as state public accommodations laws expanded to include "sex" they helped to remove barriers to such full participation.⁶⁸ But, offering various real and hypothetical examples of refusals of goods, services, and employment opportunities, motivated by beliefs about women's proper roles, the brief cautioned that if the Court allowed the First Amendment to be a shield for sex discrimination by adopting expansive exemptions from such state laws, it could roll back such progress.⁶⁹ In other words, the brief made sex discrimination not merely of historical interest, but a live concern.

B. The Opinion: The Invisibility of Sex Discrimination

In Justice Anthony Kennedy's fifth and final majority opinion concerning the constitutional and civil rights of LGBT persons,⁷⁰ the Court's decision in *Masterpiece Cakeshop* seemed both to accept and express caution about the race analogy. The Court ultimately reversed the Colorado Court of Appeals because the CCRC showed hostility toward and "disparaged" Phillips's religious beliefs and revealed its bias by analogizing his beliefs to religious defenses of slavery and characterizing his invocation of freedom of religion as a "despicable piece[] of rhetoric" to justify discrimination.⁷¹ On the one hand, Kennedy stated, "The religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."⁷² On the other hand, Kennedy cited *Piggie Park* in explaining the "general rule" that *acting* on such objections was a different matter:

Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.⁷³

Joined by Justice Breyer in her concurrence, Justice Kagan read *Piggie Park* as illustrating the Court's longstanding jurisprudence that "a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait."⁷⁴ Justice Kagan's inclusion of "sex" in this list warrants comment. Title II does not include "sex." Rather, Title II's four prohibited categories are race, color, religion, and

67. *Id.* at 6.

68. *Id.* at 11–13.

69. *Id.* at 22, 32–36.

70. I should make clear that Justice Kennedy never used the acronym "LGBT" in these opinions; in *Masterpiece Cakeshop*, he refers to "gay persons" and "gay couples."

71. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1721, 1729 (2018).

72. *Id.* at 1727.

73. *Id.*

74. *Id.* at 1733 n.* (Kagan, J., concurring).

national origin. By comparison, most state public accommodations laws have expanded beyond such categories to include “sex.”⁷⁵

In the majority opinion, Justice Kennedy observed that Colorado adopted a public accommodations law in 1885 that guaranteed “‘full and equal enjoyment’ of certain public facilities to ‘all citizens,’ ‘regardless of race, color or previous condition of servitude.’”⁷⁶ Kennedy noted that, in 2007 and 2008, CADA was amended to add “sexual orientation” to the list of protected characteristics.⁷⁷ He skipped over when “sex” was added to the list, but NWLC’s brief filled in that blank, citing a 1969 amendment that added “sex” as a protected characteristic.⁷⁸ Evidently, Colorado was the first state to do so.⁷⁹

In *Jaycees*, the Supreme Court noted that Minnesota prohibited sex discrimination in 1973, nearly a century after it first adopted a statute prohibiting racial discrimination in public accommodations.⁸⁰ By enlisting *Piggie Park* as affirming a vendor’s general obligation to provide goods and services despite religious or other objections, both Kennedy and Kagan indicated the common, legitimate concerns of federal and state public accommodations law, despite the broader and evolving reach of the latter.

III. THE *JAYCEES* LITIGATION

In *Jaycees*, the Supreme Court considered the question of whether Minnesota reached too far in applying its relatively recent prohibition of sex discrimination in public accommodations to the Jaycees’s two-tiered membership practices. Young men between the ages of eighteen and thirty-five were eligible for full membership in the Jaycees; women and older men could be “associate members” who paid lower dues but could not “vote, hold local or national office, or participate in certain leadership training and awards programs.”⁸¹ Since the Jaycees defended this membership structure as necessary for its purposes, it bears quoting them. Founded as the Junior Chamber of Commerce in 1920, the Jaycees’s objective, as stated in its bylaws, was to pursue

such educational and charitable purposes as will promote and foster the growth and development of young men’s civic organizations in the United States, designed to inculcate in the individual membership of such

75. See Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 636 n.17 (2016).

76. *Masterpiece Cakeshop*, 138 S. Ct. at 1725 (quoting 1885 Colo. Sess. Laws 132–33).

77. *Id.*

78. Brief Amici Curiae of the NWLC, *supra* note 54, at 12.

79. Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. (forthcoming 2019) (manuscript at 27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3344715 [<https://perma.cc/7HRK-PZDH>].

80. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (explaining that such nineteenth-century state laws were in response to the Court’s 1883 opinion in the *Civil Rights Cases*, 109 U.S. 3 (1883), which invalidated a federal public accommodations statute (the Civil Rights Act of 1875), but noted the existence of state public accommodations laws that imposed “a variety of equal access obligations”).

81. *Id.* at 613.

organization a spirit of genuine Americanism and civil interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.⁸²

Contrary to established policies, two local Minnesota chapters in Minneapolis and St. Paul admitted women as full members.⁸³ Faced with sanctions and the threat of charter revocation by U.S. Jaycees—the organization’s national body—the chapters filed charges of discrimination with the Minnesota Department of Human Rights, arguing the sanctions imposed by the national body violated Minnesota’s public accommodations law.⁸⁴ In turn, U.S. Jaycees brought a federal lawsuit to prevent enforcement of the public accommodations law against the Jaycees, asserting First Amendment rights to free speech and association.⁸⁵ The federal district court in Minnesota ruled that Minnesota could apply its law to the Jaycees, but the Eighth Circuit reversed.⁸⁶

Compared to the thousands of pages of arguments contributed by the parties and their numerous amici in *Masterpiece Cakeshop*, the amicus briefs filed in *Jaycees* form a modest pile. Eight amicus briefs filed on behalf of Roberts, the acting Commissioner of the Minnesota Department of Human Rights, urged the Supreme Court to reverse the decision of the Eighth Circuit.⁸⁷ Three amicus briefs filed on behalf of the Jaycees urged the Supreme Court to affirm.⁸⁸ This Part compares arguments about the following questions: (1) Are the Jaycees just like the NAACP, and does an organization’s purpose matter to whether it has a First Amendment right to freedom of association? (2) Are women excluded from full membership in the Jaycees like racial minorities excluded from all-white groups or spaces, and does a state have a similarly compelling interest in ending both forms of exclusion? (3) What would be the effects of a ruling requiring the Jaycees to change its membership policies, and what are the implications for other associations? To allude to this Article’s title, was “male chauvinism” indeed under attack as the Jaycees defended the legitimacy of devoting itself to advancing “the interests of young men only”?⁸⁹

82. *Id.* at 612–13.

83. *Id.* at 614.

84. *Id.* at 614–15.

85. *Id.* at 615.

86. *U.S. Jaycees v. McClure*, 534 F. Supp. 766, 774 (D. Minn. 1982), *rev’d*, 709 F.2d 1560 (8th Cir. 1983), *rev’d sub nom. Roberts v. U.S. Jaycees* 468 U.S. 609 (1984).

87. *See Jaycees*, 468 U.S. at 611 n.*.

88. *See id.*

89. *See infra* Part III.C.2–3.

A. Are the Jaycees Just Like the NAACP and Does It Matter for Purposes of the Reach of the Freedom of Association?

Both sides recognized the importance of *NAACP v. Alabama* but employed it in strikingly different ways. The Jaycees and their amici drew parallels between the Jaycees and the NAACP, arguing that, in both instances, public hostility toward an organization's purposes fortified the need for First Amendment protection. Minnesota and its amici rejected such parallels between an organization fighting race discrimination and one engaging in sex discrimination. They warned against turning freedom of association from a shield for political dissent into a sword.

1. Appellees and Their Amici: The Jaycees and the NAACP Are Similar

Both the Jaycees and Rotary International—a male-only club that filed an amicus brief supporting the Jaycees's position—insisted that the Jaycees were in a similar position to that of the NAACP in the 1950s, when the Court held that mandating disclosure of the NAACP's membership list in Alabama would infringe its constitutional freedom of association.⁹⁰ The Jaycees and Rotary compared the present hostility toward their men-only membership rules to that exhibited toward the NAACP in the 1950s. In doing so, Rotary insisted that freedom of association does not hinge on societal perceptions of a group's positions:

At the present time, male-only organizations such as the Jaycees and Rotary are encountering governmental and social hostility akin to that directed at the NAACP in the 1960's. However, it will not do to assert that because the male versus female discrimination practiced by such organizations is perceived as wicked, it is undeserving of constitutional protection. The First Amendment is both color-blind and gender-blind. Freedom of association and the other rights protected by that amendment are protected whether the group invoking the Constitution is perceived as "good" or "bad," "right" or "wrong." Constitutional liberties are guarded regardless of whose ox is being gored.⁹¹

The Rotary brief did not stop with this historical comparison. It suggested that the NAACP *remained* unpopular. In contesting the appellees' argument that invidious discrimination does not deserve First Amendment protection, Rotary suggested that the NAACP itself took invidious positions:

The aggressive policies of the NAACP on behalf of blacks have assuredly caused discontent, animosity, and, in the case of affirmative action programs, envy among many white Americans. But the fact that the NAACP restricts its activities to the advancement of the cause of blacks has not caused it to lose its First Amendment right.⁹²

90. *NAACP v. Alabama*, 357 U.S. 339, 446 (1958).

91. Amicus Curiae Brief of Rotary International, *supra* note 37, at *26–27.

92. *Id.* at *26 (citing the dictionary definition of "invidious" as "tending to cause discontent, animosity, or envy").

Rotary argued that, absent the unpopularity of the NAACP's positions, the Court would not have recognized their rights as requiring protection.⁹³ The Jaycees enlisted *NAACP v. Alabama* to argue that its socially disfavored purpose—promoting the interests of young men—should not affect its First Amendment rights.⁹⁴

So too, Rotary reasoned, the perception of “men-only organizations” as part and parcel of “male chauvinism” should not rob them of First Amendment protection:

The Court may take judicial notice that “male chauvinism” is under attack from all sides at present. Defense of men-only organizations is not popular, and even the ACLU, famed for its defense of the rights of the American Nazi Party, has seen fit to join the women in the attack against the Jaycees. The climate of the times may be on the side of “equal rights.” But if the precious freedoms protected by the First Amendment may be swept away whenever one of those is involved in an unpopular cause, then this great land is further down the road to a fictional 1984 than most of its citizens would wish to travel.⁹⁵

Rotary's argument resembles the premise that the First Amendment protects expressing “the thought that we hate.”⁹⁶

The Jaycees denied that they practiced “invidious” discrimination, and they objected to appellants' invocation of discrimination precedents like *Runyon v. McCrary*: “The use of this term [invidious discrimination] is apparently intended to suggest that the Jaycees all-male membership policy is somehow immoral and unsavory and therefore not entitled to protection against the State's police powers.”⁹⁷ In striking language that prefigures Chief Justice Roberts's dissent in *United States v. Windsor*,⁹⁸ the Jaycees spoke of the attempted analogies between sex and race as “attempts to tar the Jaycees with the brush of ‘invidious discrimination’” and asserted that that race-discrimination context does not apply to the Jaycees's “benign policy.”⁹⁹

93. *Id.*

94. Brief of Appellee, the United States Jaycees, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 237, at *22–23 (“The fact that the Jaycees' central purpose may not, in this period of history, appear as important as that of the NAACP provides no invitation to state power. Justice Harlan stated in *NAACP v. Alabama* that the nature of the beliefs sought to be advanced by association was ‘immaterial.’”).

95. Amicus Curiae Brief of Rotary International, *supra* note 37, at *36. In support, Rotary enlists *NAACP v. Button*, in which Justice William J. Brennan, Jr. criticized “selective enforcement” of “vague and broad” statutes “against unpopular causes.” *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 435 (1963)).

96. See *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting); *supra* note 10 and accompanying text.

97. Brief of Appellee, the United States Jaycees, *supra* note 94, at *23.

98. 570 U.S. 744 (2013).

99. Brief of Appellee, the United States Jaycees, *supra* note 94, at *25. Compare *id.*, with *Windsor*, 570 U.S. at 776 (Roberts, C.J., dissenting) (“I would not tar the political branches with the brush of bigotry.”).

2. Appellants: The NAACP and the Jaycees Are Different—Freedom of Association Is a Shield, Not a Sword

The appellants and their amici vehemently resisted the Jaycees comparing itself to the NAACP and enlisting *NAACP v. Alabama* to defend its membership practices, would turn freedom of association into a sword, not a shield. Appellants countered that *Runyon* was the more apt precedent: “The Jaycees’ claim that freedom of association protects its denial of equal access to women should be rejected on the same basis that this Court rejected the claim of parents in [*Runyon*] that associational freedom insulated their racially motivated practice of denying educational opportunities to black children.”¹⁰⁰ In effect, the Jaycees were more like the segregationist groups the NAACP and other civil rights groups challenged.

Appellants and their amici strenuously disagreed with the Eighth Circuit’s ruling that requiring the Jaycees to admit women to full membership would impair the First Amendment rights of its members. The National Organization for Women (NOW) and other feminist groups argued that *NAACP v. Alabama* held that “[f]or group activity to be protected, it must embody appropriate First Amendment content.”¹⁰¹ Thus, “[t]he Jaycees does not enjoy a constitutional shield for its discriminatory practices simply because its members have joined together to hone their career skills, provide themselves with civic exposure, and enhance their opportunities in the business world.”¹⁰²

Appellants insisted that *NAACP v. Alabama* showed that the Court had not recognized freedom of association as an independent First Amendment right but instead as a derivative right necessary to protect enumerated First Amendment rights, such as freedom of speech and freedom of assembly.¹⁰³ The Court protected that derivative right because compelling the NAACP to disclose its membership lists would “chill or impede the NAACP’s exercise of free speech and assembly” in “an atmosphere of racial animosity,” where members “faced economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”¹⁰⁴ The Jaycees faced no such threat to an enumerated right.¹⁰⁵

The National League of Cities elaborated on this lack of threat, stressing the Jaycees’s comparative popularity:

[M]embers of unpopular groups [like the NAACP] were threatened with devastating retaliation if their names or affiliations were revealed pursuant to state law. Such retaliation would have made it impossible for the members to continue to associate with the groups or advocate the groups’ beliefs. . . .

100. Appellants’ Brief, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 227, at *34.

101. Brief Amicus Curiae of NOW, *supra* note 36, at *33–34.

102. *Id.* at *34.

103. Appellants’ Brief, *supra* note 100, at *29–31.

104. *Id.* at *27–28.

105. *Id.* at *30–31.

[The present case] concerns an enormously *popular* group, which has a huge membership predominantly comprised of employees and leaders of the powerful American business community. The prospect that the regulation at issue will lead to retaliation against the Jaycees or its members is nil. The threat to a right to associate with the group or advocate its positions is correspondingly nil.¹⁰⁶

In distinguishing *NAACP v. Alabama*, the ACLU argued that the purpose of freedom of association was to preserve diversity by protecting minority and dissident expression and advocacy from “suppression by the powerful.”¹⁰⁷ It warned that an “unbounded freedom to dis-associate would cripple the guarantees of equality contained in the Constitution and our Civil Rights statutes, since every ban on discrimination would be checkmated by an assertion of individual autonomy phrased as a claim of associational freedom.”¹⁰⁸

Foreshadowing the Court’s rationale, the ACLU argued that the Jaycees’ freedom of association was only minimally impacted by having to admit women to full membership.¹⁰⁹ It argued that, in reaching a contrary conclusion, the Eighth Circuit impermissibly engaged in “sex stereotyping” and advanced an “unsupported hypothesis” that the “systemic relegation” of female Jaycees members to “inferior roles” within the Jaycees was necessary to the organization’s expression and advocacy.¹¹⁰ By doing so, the Eighth Circuit wielded “the traditional shield of freedom of association” as a sword against “excluded or subordinated groups,” which the U.S. Supreme Court had expressly held was impermissible even if protected ideas about “exclusionary practices” were involved.¹¹¹

In deploying this shield-to-sword image, appellants and their amici repeatedly invoked *Norwood* and *Runyon*, in which the Court rejected the argument that “[t]he practice of racial segregation . . . was sheltered as a form of constitutionally protected association.”¹¹² They reminded the Court that “[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.”¹¹³

106. Brief for the National League of Cities et al. as Amici Curiae in Support of Appellants, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 232, at *30–31.

107. Brief Amicus Curiae of American Civil Liberties Union and Minnesota Civil Liberties Union in Support of Appellants, *Jaycees*, 468 U.S. 609 (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 229, at *13 [hereinafter Brief Amicus Curiae of ACLU].

108. *Id.* at *9.

109. *Id.* at *13–14; *see supra* note 48 and accompanying text.

110. Brief Amicus Curiae of ACLU, *supra* note 107, at *15.

111. *Id.* at *6–7.

112. Appellants’ Brief, *supra* note 100, at *24–25 (citing *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

113. *Id.* at *25 (quoting *Norwood*, 413 U.S. at 470).

*B. The Harms to Women from Unequal Access to the Marketplace—
and to Jaycees Membership*

The Eighth Circuit concluded that Minnesota's interest was not sufficiently compelling to override the infringement on the Jaycees's associational rights given that, among other things, the record did not show that "membership in the Jaycees was the only practicable way for a woman to advance herself in business or professional life."¹¹⁴ On appeal, the appellants and their amici argued that the Eighth Circuit failed to apply the proper test and to appreciate the nature and extent of the harm that women experienced from that unequal membership structure. This section highlights both the analogies drawn between race and sex discrimination and the more gender-specific argument about the significance of the Jaycees (as part of the old boys network) as an avenue to professional success.

1. The Jaycees: This Is a Case of "Relatively Minor Impediments"

The Jaycees argued that the record on appeal did not support its "alleged exalted status in the power structure of American society" and that "[t]here is no evidence from which to conclude that Jaycee membership is the *sine qua non* of employment, promotion or ability to make potentially useful business contacts by men or women."¹¹⁵ It painted a picture of the "virtually unlimited" ability of "women to make valuable contacts with other men and women" and have leadership experience in a myriad of organizations, including all-female ones.¹¹⁶ Amicus Boy Scouts of America (BSA) concurred that Minnesota's interest aimed at "relatively minor impediments to a person's desire for economic advancement or social recognition"; it could show "no more than that *one* of many possible means to a particular objective may be obstructed."¹¹⁷

2. Appellants: The Importance of Access

While the Jaycees and their amici challenged the significance of regular membership in the Jaycees for women's economic advancement, appellants and their amici situated the Jaycees in the context of a broader network of associations to which women had unequal (or no) access. In stressing the harm to women from this inequality, they turned to the language of second-class citizenship and to analogies between race- and sex-based exclusion.

114. U.S. Jaycees v. McClure, 709 F.2d 1560, 1573 (8th Cir. 1983), *rev'd sub nom.* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

115. Brief of Appellee, the United States Jaycees, *supra* note 94, at *47.

116. *Id.* at *48.

117. Brief of the Boy Scouts of America as Amicus Curiae in Support of Affirmance, Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 234, at *42.

a. Exclusion from the "Old Boys Network"

Disagreeing with BSA, NOW put it bluntly: one of the "most important services provided to [the Jaycees's] members" is "an entree to the 'Old Boys Network.'"¹¹⁸ As NOW explained:

The Old Boys Network is that series of linkages with influential elders, ambitious peers and younger men on their way up which men develop as they move through school, work, professional and community service organizations, and private clubs. It provides men with knowledgeable allies who help them to advance in their careers, teach them who the cast of characters is and how to behave in a new position, and assist them in getting the earliest news of job openings, business opportunities and financial grants.¹¹⁹

NOW asserted that "[t]he importance of access to such a network cannot be overestimated," citing a variety of sources confirming the critical role of networking to corporate advancement and of the "Old Boys Network" as a vital "power source" for men's job advancement.¹²⁰

In arguing that women would benefit as much from these networks as men, NOW made a series of "sameness" arguments about the "growing convergence in men's and women's career and family goals" and the importance of mentorship for success for both men and women.¹²¹ Prefiguring arguments decades later about why so few women in the pipeline make it to top management, NOW reported that a study of male and female college graduates from the classes of 1969 to 1972 "revealed that [they] chose the same types of jobs upon graduation" and that "there was no evidence that women work fewer hours or drop out of the labor force due to marriage or childbirth, explanations often given for the small representation of women in the ranks of management."¹²² Instead, there was a "strong correlation between mentoring and success for women" and, likewise, a strong correlation between lack of mentoring and low success.¹²³

New York and California, as amici, also emphasized the significance of full membership in groups like the Jaycees: "There is hardly a more important area of state concern than furtherance of the opportunities of all citizens to participate in educational, business and civic associations."¹²⁴ They explained that, because "the systematic exclusion of women" from such organizations has impeded their "full participation . . . in our society," New York and California, by aggressively enforcing their antidiscrimination laws

118. Brief Amicus Curiae of NOW, *supra* note 36, at *19.

119. *Id.*

120. *Id.* at *19–21.

121. *Id.* at *21–22 (citing results of "numerous studies of college students" on converging interests and a Wellesley College Center for Research on Women report on the critical role of mentoring to success).

122. *Id.* at *22.

123. *Id.* at *22–23.

124. Amicus Curiae Brief of the State of New York, Joined by the State of California in Support of Reversal, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 230, at *21.

and policies, “are firmly committed to altering this historical reality by requiring organizations which provide traditional avenues of professional advancement and community involvement to provide equal access to men and women.”¹²⁵ In contrast, the Eighth Circuit “greatly undervalued” Minnesota’s interest, and the dissent correctly identified states’ “compelling interest in eradicating second-class citizenship in places of public accommodation.”¹²⁶ In arguing that “allowing female citizens full and equal access to places of accommodation” was of utmost societal importance, the states observed that, when the New York State Legislature added “sex” to its public accommodations law in 1976, it found that “the failure to provide equal opportunity” posed a menace to a “free democratic state.”¹²⁷

Amici offered concrete examples of how the Jaycees offered unique opportunities for professional development. In those local chapters where women enjoyed full membership, female Jaycees members testified to receiving promotions at work because of their involvement.¹²⁸ Ms. Kathleen Hawn testified that her experience on the Jaycees board of directors developed her speaking and organization skills.¹²⁹ Appellants, the Minnesota officials, also stressed the benefit of women and men working together as equals in a business setting.¹³⁰ By comparison, they asserted, the inequality in Jaycees chapters that did not admit women to full membership reinforced stereotypes of men as leaders and women as followers:

The Jaycees portrays itself as a breeding ground for tomorrow’s leaders. If the state has a compelling interest in eliminating discrimination, it has an equal interest in ensuring that the formative experiences of future leaders include men and women working as equals on projects of leadership, development, community service, and civic betterment such as are engaged in by the Jaycees. Jaycees’ by-laws which relegate women to followers and elevate men to leaders solely on the basis of an immutable characteristic are antithetical to that interest.¹³¹

NOW argued that this hierarchical membership structure created a “‘together but unequal’ environment with many serious disadvantages to the second-class participants.”¹³² On one hand, it “create[d] feelings of inferiority in women,” while, on the other, it “reinforce[d] the handmaiden mentality in men—the notion that women are always the Women’s Auxiliary, there to serve without praise or pay.”¹³³ The NAACP Legal Defense and Educational Fund similarly elaborated that excluding women from “informal centers of power” represented by all-male organizations like

125. *Id.* at *4.

126. *Id.* at *19.

127. *Id.*

128. Motion for Leave to File Brief Amicus Curiae and Brief for Community Business Leaders as Amicus Curiae at 15, *Jaycees*, 468 U.S. 609 (No. 83-724).

129. *Id.* at 16.

130. Appellants’ Brief, *supra* note 100, at *40 n.15.

131. *Id.* (citation omitted).

132. Brief Amicus Curiae of NOW, *supra* note 36, at *27.

133. *Id.* at *27–28.

the Jaycees reinforces perceptions of business as a masculine activity, substantiates harmful prejudices, inhibits women's ability to succeed in business, and limits the aspirations of future generations.¹³⁴

b. Race-Sex Analogies

While appellants and their amici asserted gender-specific harms resulting from exclusion from full membership in the Jaycees as part of the old boys network, they also drew upon race-based analogies to emphasize the wrongness of unequal membership within the organization. Appellants and their amici argued that the analogy between the harms of racial and sex discrimination in the market was strong, as was the government's interest in each instance:

Equality of access to the market place for women is a significant state interest. No one can seriously dispute that "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" is not felt as deeply by women so treated as by persons accorded it on the basis of color.¹³⁵

As discussed in Part I, the Supreme Court's majority opinion in *Jaycees* would contain the same analogy and historical reference.¹³⁶ The appellants drew on potent images of repudiated racial segregation in urging the Supreme Court to reject the Eighth Circuit's finding that Minnesota had failed to demonstrate a compelling state interest because it did not show "that membership in the Jaycees was the only practicable way for a woman to advance herself in business or professional life."¹³⁷ Not only was this an overly narrow view of the state's interest in ensuring equal access to commercial activities regardless of race, sex, or ethnicity, but it was based upon the rejected theory of "separate but equal." Appellants urged the Court not to allow women to be deprived of equal opportunity by a failed justification for racial inequality properly assigned to "the constitutional graveyard."¹³⁸

In its statement of interest, the NAACP Legal Defense and Educational Fund asserted the similarity between the kind of discrimination experienced by racial minorities and women in private organizations and clubs: "Discrimination against women among private organizations and clubs rests on the same ill-founded claims that are offered to defend racial discrimination in the same kinds of institutions."¹³⁹

134. Brief for the NAACP Legal Defense and Educational Fund, Inc., Amicus Curiae in Support of Petitioner, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 228, at *12 [hereinafter Brief Amicus Curiae of the NAACP LDF].

135. Appellants' Brief, *supra* note 100, at *36 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964)).

136. *See supra* Part I.

137. Appellants' Brief, *supra* note 100, at *39-40.

138. *Id.* at *41.

139. Brief Amicus Curiae of the NAACP LDF, *supra* note 134, at *2.

Other amici enlisted the Court's race-discrimination precedents and its Equal Protection sex-discrimination precedents to label the Jaycees's discriminatory membership as "invidious" and counter the Jaycees's argument that it was a "single gender" organization whose freedom of association would be violated by admitting women.¹⁴⁰ The Alliance for Women's Membership argued that it was the women excluded from full membership who were being denied freedom of association because of the toll taken by such "invidious discrimination."¹⁴¹ After critiquing the unequal access to opportunities for female Jaycees members, the Alliance added: "Women may be confined to the back of the Jaycees bus, but they are fully associated in every way with the Jaycees organization."¹⁴²

C. Debating Whether Admitting Women as Full Members Will Harm the Jaycees

A third debated issue was whether the Jaycees would be harmed by admitting women to full, rather than associate, membership. Answering that question partly turned on whether the Jaycees was truly a "men's organization" with purposes unique to the advancement of young men's interests and rooted in ideas about gender difference and the desire for all-male or all-female associations. The issue also arose at oral argument, in which the justices debated whether a group need be committed to the cause of "male chauvinism" to be harmed by admitting women as full members.¹⁴³

1. The Jaycees and Their Amici Defend Advancing
the "Interests of Young Men Only"

The Jaycees contended that compliance with Minnesota's public accommodations law—requiring it to serve the interests of young women, along with those of young men—would destroy the organization's ability to achieve its "core purpose": "to provide young men with an opportunity for personal development and achievement through participation in the affairs of their community, state and nation."¹⁴⁴ They argued that the organization serves as a spokesman—a "representative voice"—for young men and speaks out on controversial issues.¹⁴⁵ The Jaycees warned that a ruling

140. Amicus Brief of Alliance for Women Membership in Support of Appellants, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 231, at *6–10 (first citing *Frontiero v. Richardson*, 411 U.S. 677, 687 (1972); then citing *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974)).

141. *Id.* at *6–9. The Alliance quotes one female "associate" member: "It would be like being allowed to go into a restaurant and being able to sit at a table with somebody else, but not being able to order or eat." *Id.* at *10.

142. *Id.* at *3.

143. See Official Transcript Proceedings Before the Supreme Court of the United States at 42–43, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), https://www.supremecourt.gov/pdfs/transcripts/1983/83-724_04-18-1984.pdf [<https://perma.cc/RK3D-KT9C>] [hereinafter Official Transcript]; *infra* Part III.C.3.

144. Brief of Appellee, the United States Jaycees, *supra* note 94, at *14.

145. *Id.*

against them would destroy the associational purposes and freedoms of a wide range of groups. For example, “all-female groups may be forced to serve the interests of men” and “all-Black groups may be compelled to take on the burden of serving the special interest of white people,” not to mention the toll taken on various “racially, religiously and ethnically restricted associations.”¹⁴⁶ Invoking Alexis de Tocqueville’s classic comment about the propensity of Americans to form a myriad of associations, the Jaycees contended that Minnesota “[sought] a rule of constitutional law which would stifle this pluralism in the name of a misbegotten concept of egalitarianism.”¹⁴⁷ Rotary similarly appealed to pluralism: “The State of Minnesota seeks to compel homogeneity which is the antithesis of freedom of association and runs counter to the pluralism which is one of America’s strengths.”¹⁴⁸

With another nod to de Tocqueville, the BSA denied that Minnesota had a sufficiently compelling interest to intrude on freedom of association—a “pillar of our pluralistic society” and a bulwark differentiating “our society from totalitarian regimes.”¹⁴⁹ Having seen its own membership policies excluding “homosexuals or women from certain leadership positions” successfully challenged in court under some other states’ public accommodations laws, the BSA urged the Court not to adopt such a “stunted concept of the nature and scope of associational freedom.”¹⁵⁰

The brief of the Conference of Private Organizations turned to gender difference and “like seeking like” to deny that the Jaycees accorded women second-class membership status. It argued that many “[f]raternal, social clubs, and civic and service organizations . . . sponsor specific programs open to the general public,” and those allowed to participate did not become “second class” members by doing so.¹⁵¹ Further, “sponsorship of such programs should not destroy [the groups’] right to maintain their restricted-class membership policies for strictly member functions.”¹⁵² Beliefs in gender differences and gender complementarity, it asserted, explain the parallel existence of fraternal societies by “working men” and women’s (and sometimes children’s) auxiliaries:

[S]uch [fraternal] associations have generally been limited to men. However, similar sororal societies, based on a like spirit of kinship,

146. *Id.* at *19, *21.

147. *Id.* at *21.

148. Amicus Curiae Brief of Rotary International, *supra* note 37, at *25. Rotary also argued that, although Minnesota “believes sex discrimination in private associations to be harmful to women, if not to the entire citizenry of the State,” this interest is not a compelling interest that would justify “abolish[ing] all private discriminatory organizations.” *Id.* at *30–33.

149. Brief of the Boy Scouts of America as Amicus Curiae in Support of Affirmance, *supra* note 117, at *7–8, *16–17.

150. *Id.* at *7.

151. Brief of Conference of Private Organizations as Amicus Curiae in Support of Affirmance, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 225, at *23–24.

152. *Id.* at *24.

sociability and mutuality, and carrying out comparable, but distinct, benevolent, social and philanthropic programs, exist for women. Social clubs also depend heavily on common bonds among members to achieve their purposes. . . . Because men and women members often perceive that they have different interests and objectives, club membership is frequently all-male or all-female. Class restrictions of this type are often thought to be essential for achieving the goals of a social club¹⁵³

The Conference insisted that those who adhere to this view of gender deserve protection even if “times have changed” and this view is “undoubtedly less universal that it once was”:

However foolish it may seem to some, it is widely believed by members of some fraternals and clubs that the roles of men and women in society are different, and that the organizations through which men and women strive for personal development should reflect that difference. . . . [T]hat philosophy still plays an important role in the lives of millions of “traditional” families. [It] inspires such . . . clubs to provide civic, public, eleemosynary and social benefits which contribute significantly to the common weal. The expression and practice of this philosophy . . . are as deserving of protection under the freedom of association guarantee as the communications activities of such organizations.¹⁵⁴

To establish the legitimacy of single-gender organizations, the Conference cited Congress’ chartering of the BSA and the Girl Scouts of America.¹⁵⁵

Although Minnesota’s public accommodations law clearly excluded private clubs, the Conference segued to the Jaycees: the Jaycees’s “positions are inherently a product of the common bond among the members, which includes the restrictions on voting, policymaking and leadership by certain age groups and by women.”¹⁵⁶

2. Disputing that the Jaycees Was Truly a “Men’s Organization”

Appellants and their amici argued that admitting women to full membership would not impair the Jaycees’s organizational goals, a theme later sounded in the Court’s majority opinion. NOW argued that the Jaycees’s admission of women as associate members was evidence that it was “not in fact the men’s organization that it purports to be.”¹⁵⁷ Further, the “‘Jaycee Creed’ . . . contains nothing that espouses discrimination on the basis of sex” and “nothing that the Jaycees does . . . is uniquely related to the interest of men.”¹⁵⁸ NOW urged the Court to reject the Jaycees’s argument that a ruling in favor of Minnesota raised “the specter of Minnesota’s invading all kinds of membership organizations, from B’nai Brith to the Polish Women’s Alliance.”¹⁵⁹ Instead, to insist that the Jaycees “eliminate

153. *Id.* at *27–28.

154. *Id.* at *28–29.

155. *Id.* at *29.

156. *Id.* at *29–30.

157. Brief Amicus Curiae of NOW, *supra* note 36, at *44–45.

158. *Id.* at *39, *45.

159. *Id.* at *44.

women's second class status" within its organization neither "drastically alters" the Jaycees's nature, nor "threatens the identity of other truly homogenous groups."¹⁶⁰

Once again, analogies to race-discrimination precedents in which the Court rejected freedom of association claims played a part. The appellants asserted that, as in *Runyon*, "the record does not show that the advocacy by the Jaycees of any of its beliefs, or indeed its exercise of any other first amendment freedom, would be impaired by giving women full membership rights."¹⁶¹ "Allowing women to vote, hold office, and receive awards," the brief insisted, "will . . . change nothing about the organization except its sexually restrictive nature."¹⁶²

3. The Oral Argument: Was the Jaycees "an Organization of Male Chauvinists"?

At the oral argument, the justices pressed counsel for the Jaycees about the claim that admitting women to full membership would injure the Jaycees's purpose. Counsel Carl D. Hall, Jr. argued that it is "only rational to assume that" an organization "dedicated to voting the interests of men" would "undergo a substantial change" if it admitted women.¹⁶³ Chief Justice William Rehnquist countered that it seemed that it would "depend on the nature of the organization."¹⁶⁴ He illustrated his point with a hypothetical "organization of all male stockbrokers that are concerned solely with the business of stockbrokering."¹⁶⁵ He noted that there are minimal differences between men and women in the focus on stockbroking, such that requiring female admission would not significantly impact the organization's purpose.¹⁶⁶ Conversely, Chief Justice Rehnquist posited:

[I]f you have an organization of male chauvinists that says we're tired of this affirmative action in favor of women, we want what we think is a square deal, it seems to me there you get a different thing.

But you haven't really shown that the Jaycees are in the latter category at all, that they espouse anything close to men's rights or the kind of issues that men and women might feel differently about.¹⁶⁷

Hall answered by repeating that, similar to women's organizations whose core purposes were to advance women, the Jaycees's main purpose was to advance the interests of young men.¹⁶⁸ He continued by arguing that, just as

160. *Id.* at *45.

161. Appellants' Brief, *supra* note 100, at *31–32.

162. *Id.* at *34.

163. Official Transcript, *supra* note 143, at 42; Oral Argument at 46:34, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), <https://www.oyez.org/cases/1983/83-724> [<https://perma.cc/4VHK-K7CM>].

164. Official Transcript, *supra* note 143, at 42; Oral Argument, *supra* note 163, at 46:51.

165. Official Transcript, *supra* note 143, at 42; Oral Argument, *supra* note 163, at 46:51.

166. Official Transcript, *supra* note 143, at 42; Oral Argument, *supra* note 163, at 46:51.

167. Official Transcript, *supra* note 143, at 42–43; Oral Argument, *supra* note 163, at 47:16.

168. Official Transcript, *supra* note 143, at 43; Oral Argument, *supra* note 163, at 47:49.

such women's organizations would change by admitting men, so too would the Jaycees.¹⁶⁹ When Rehnquist later asked if there was a relevant distinction between the Jaycees and a hypothetical "National Organization of Men, that [is] anti-affirmative action, anti-ERA, and so forth," Hall answered: "It seems irrational to assume that this organization, to continue as an all-male organization, has to deliberately take positions on ERA or abortion in order to show how anti-woman it is."¹⁷⁰ Hall once again pointed out that "all-women organizations" are "accepted"; so too, he argued should be "all-male organization[s]."¹⁷¹ Justice John Paul Stevens pointed out that organizations to which Hall pointed, such as NOW, had women *and* men among their members.¹⁷²

In an exchange that made the newspapers, Justice Thurgood Marshall asked, "Aren't you just afraid that the women will 'take over'?" Hall conceded that this "may be a possible fear" but that "it's the kind of fear that would be legitimately protected by any group."¹⁷³ Justice Byron White pressed the issue, observing that, while Hall asserted that the Jaycees's purpose was to promote the interests of young men, none of the Jaycees's public positions could be identified as promoting such interests "as distinguished from young women."¹⁷⁴ Hall shifted gears by arguing that taking positions on issues is only "one part of the way in which young men are developed"; others include "running projects" that benefit the community.¹⁷⁵ To that, Justice Stevens observed that if such projects are "designed to teach [men] to be good, effective executives," then would not women "learn exactly the same way"?¹⁷⁶ Hall admitted that women, as associate members, did participate in such programs, but they could not vote, control policy, or hold office.¹⁷⁷ This led Justice Marshall to quip: "Well, tell me, what other right do they have, other than to pay their dues?"¹⁷⁸

Also reported was the questioning pursued by Justice Sandra Day O'Connor—then the only female justice on the Court—about the analogy to race-based refusals of service in public accommodations. When Hall invoked Supreme Court privacy precedents,¹⁷⁹ Justice O'Connor observed that there were "businesses that said we don't want to serve blacks," but "this

169. Official Transcript, *supra* note 143, at 43; Oral Argument, *supra* note 163, at 47:49.

170. Official Transcript, *supra* note 143, at 49–50; Oral Argument, *supra* note 163, at 54:47.

171. Official Transcript, *supra* note 143, at 42–43; Oral Argument, *supra* note 163, at 55:35.

172. Official Transcript, *supra* note 143, at 53; Oral Argument, *supra* note 163, at 59:30.

173. Official Transcript, *supra* note 143, at 43–44; Oral Argument, *supra* note 163, at 48:34; *see also* Fred Barbash, *Minnesota Argues in Supreme Court to End U.S. Jaycees' Men-Only Rule*, WASH. POST, Apr. 19, 1984, at A2.

174. Official Transcript, *supra* note 143, at 54–55; Oral Argument, *supra* note 163, at 50:44.

175. Official Transcript, *supra* note 143, at 55; Oral Argument, *supra* note 163, at 51:09.

176. Official Transcript, *supra* note 143, at 56; Oral Argument, *supra* note 163, at 51:40.

177. Official Transcript, *supra* note 143, at 56–57; Oral Argument, *supra* note 163, at 52:11.

178. Official Transcript, *supra* note 143, at 57; Oral Argument, *supra* note 163, at 52:37.

179. *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Court has said that the state's interest in eliminating discrimination is enough to put a stop to that."¹⁸⁰ When Hall tried to distinguish the "private associational characteristics" of the Jaycees from "sharing a plate of food in a restaurant," Justice O'Connor retorted: "Don't you think those were the arguments that were made in those cases?"¹⁸¹

D. *The Supreme Court Rules*

It is worth reiterating that both the Court's majority opinion and Justice O'Connor's concurrence in *Jaycees* have proven to be treasure troves of nuggets enlisted to support freedom of association¹⁸² and the basic legitimacy and compelling nature of the government's interest in "eradicating discrimination against its female citizens" as well as, by analogy, other marginalized populations.¹⁸³ The Court accepted Minnesota's "functional definition" of public accommodations¹⁸⁴ to reach groups like the Jaycees because "leadership skills are 'goods' [and] business contacts and employment promotions are 'privileges' and 'advantages,'"¹⁸⁵ such that the state has a compelling interest in ensuring that women have equal access to such goods, privileges, and advantages.¹⁸⁶

The Court included *NAACP v. Alabama* among its many precedents establishing that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs" and, in so doing, "foster diversity and act as critical buffers between the individual and the power of the State."¹⁸⁷ The Jaycees chapters, "large and basically unselective groups," "clearly" fell outside of this category of "relationships worthy of this kind of constitutional protection."¹⁸⁸

The Court elaborated on the freedom of association for purposes of political expression: "According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."¹⁸⁹ In its majority opinion, the Court concluded that some of the Jaycees's activities implicated this right but added that the right was not

180. Official Transcript, *supra* note 143, at 51; Oral Argument, *supra* note 163, at 57:18; *see also* Barbash, *supra* note 173, at A2.

181. Official Transcript, *supra* note 143, at 52; Oral Argument, *supra* note 163, at 58:00.

182. *See, e.g.,* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.").

183. *Id.*

184. *Id.* at 625.

185. *Id.* at 626 (quoting *U.S. Jaycees v. McClure*, 305 N.W.2d 764, 772 (Minn. 1981)).

186. *Id.*

187. *Id.* at 618–19.

188. *Id.* at 620–21.

189. *Id.* at 622 (citing *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)). Recall that the appellants and their amici emphasized this shielding function as a reason why the Jaycees's reliance on *NAACP v. Alabama* was unpersuasive. *See supra* Part III.A.2.

absolute and could be infringed to “serve compelling state interests.”¹⁹⁰ Minnesota, the Court concluded, had such an interest: its public accommodations law “reflects the State’s strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.”¹⁹¹

The Court, unlike the Eighth Circuit, did not require Minnesota to establish that full membership in the Jaycees was the only route to professional advancement. Notably, in reiterating that Minnesota’s law “protects the State’s citizenry from a number of serious social and personal harms,” the majority raised the concern over stereotyping and its impact on dignity in its own Equal Protection jurisprudence:

[T]his Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.¹⁹²

Concern over stereotyping also played a role in one of the most controversial parts of the majority opinion. The Court concluded there was “no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in protected [First Amendment] activities or to disseminate its preferred views.”¹⁹³ The Court argued that Minnesota’s law “requires no change in the Jaycees’s creed of promoting the interest of young men” or any restriction on excluding members who do not share the Jaycees’s “ideologies or philosophies.”¹⁹⁴

Indeed, the Court stated that, in arguing that women might differ on some of the issues on which the Jaycees had expressed a position (such as “the federal budget, school prayer, voting rights, and foreign relations”), the Jaycees “relie[d] solely on unsupported generalizations about the relative interests and perspectives of men and women.”¹⁹⁵ Without a more substantial showing, the Court “decline[d] to indulge in the sexual stereotyping” underlying the Jaycees’s contention that if women were permitted to vote, it would “change the content or impact of the organization’s speech.”¹⁹⁶ Citing *Hishon v. King & Spalding*,¹⁹⁷ the *Jaycees* majority stated that the Jaycees “failed to demonstrate that [Minnesota’s law]

190. *Jaycees*, 468 U.S. at 623.

191. *Id.* at 624 (citation omitted).

192. *Id.* at 625.

193. *Id.* at 627. For such criticisms, see *supra* note 17 and accompanying text.

194. *Jaycees*, 468 U.S. at 627.

195. *Id.* at 627–28.

196. *Id.* at 628.

197. 467 U.S. 69 (1984). In *Hishon*, the Court rejected a freedom of association claim brought by a law firm in response to a sex-discrimination suit brought by a female associate who was not promoted to partner. *Id.* at 78.

imposed any serious burdens on the male members' freedom of expressive association."¹⁹⁸

Justice O'Connor's concurrence is an equally rich source for statements in support of state antidiscrimination law.¹⁹⁹ But O'Connor eschews the majority's inquiry into whether an organization's expression will be altered.²⁰⁰ Instead, she urged a line-drawing test between "expressive associations" and "commercial associations."²⁰¹ Based on the record, she concluded the Jaycees chapters presented a "relatively easy case" for applying this dichotomy: they fall on the commercial side.²⁰² Their basic activities—recruiting members and selling membership as a "product"—are commercial.²⁰³

IV. WHITHER THE "OLD BOYS NETWORK" TODAY? OLD AND NEW CHALLENGES

In this final Part, I discuss the immediate impact of the Court's decision on the U.S. Jaycees and its local chapters, drawing on newspaper accounts. I observe that concerns over the problem of the old boys network are not just a thing of the past, as efforts to counter effects of such networks with woman-centered networks indicate. I identify some remaining challenges at the intersection of freedom of association and freedom from discrimination.

A. *The Immediate Aftermath of Jaycees*

In its *Jaycees* opinion, the Court noted that, in 1981, the Jaycees "had approximately 295,000 members in 7,400 local chapters affiliated with 51 state organizations" and "about 11,915 associate members."²⁰⁴ Women associate members accounted for 2 percent of total membership.²⁰⁵ On August 16, 1984, about one month after the Court's ruling, U.S. Jaycees "overwhelmingly approved a resolution allowing women full membership."²⁰⁶ The Jaycees's president, Tommy Todd, stated that the organization was "in no way compelled to do this" but instead it was "an 'opportune time' to set 'a direction for others to follow.'"²⁰⁷ However, another Jaycees official observed that thirty-seven states, like Minnesota,

198. *Jaycees*, 468 U.S. at 626 (citing *Hishon*, 467 U.S. at 78).

199. *Id.* at 634, 636 (O'Connor, J., concurring) (stating that "[a] shopkeeper has no constitutional right to deal only with persons of one sex" and "[a]n association must choose its market").

200. *Id.* at 632.

201. *Id.* at 632–37.

202. *Id.* at 638–39.

203. *Id.* at 639–40.

204. *Id.* at 613 (majority opinion).

205. *Id.*

206. *Jaycees Vote to Admit Women to Membership*, N.Y. TIMES, Aug. 17, 1984, at A8.

207. *Id.*

included “sex” in their public accommodations laws, and so: “If we vote against this, we’re sued into oblivion.”²⁰⁸

News coverage after this vote included pictures of smiling and laughing women and men together as the former were sworn in to full membership in various Jaycees chapters or toasted by their male colleagues.²⁰⁹ Some chapters admitted women grudgingly, while some chose to disband rather than admit women. As the president of the disbanded Zilwaukee, Michigan, chapter explained: “I like a night out with the guys after the work’s done.”²¹⁰ In contrast, some local chapters that had “been quietly admitting women” as full members for some time could now do so openly.²¹¹ Some news stories pondered the fate of the local chapters of the all-female U.S. Jaycee Women, which had been formed by the Jaycees in the 1970s to make women’s presence official: would they disband all-women organizations and form newly integrated chapters or would they continue, but with full membership privileges?²¹² Reprising some of the themes in the briefs, Phyllis Marron, president of the Prince George’s Jaycee Women, reported that “[s]ome women prefer to participate in an-all women’s group.”²¹³ Notably, one reason she gave was that the chapters did programming around “women’s health issues as well as on rape, battered wives, self-protection and job-related stress”—and “[a] lot of women feel more comfortable discussing these topics with women only.”²¹⁴ Other media stories debated the merits of all-female networking groups, or whether membership in groups like the Jaycees was needed to break into the “‘old boy network,’ which can lead to career advancement.”²¹⁵

Less than one year later, this debate became moot. The U.S. Jaycee Women decided to disband “because most of the group’s members have joined the formerly all-male Jaycees.”²¹⁶ Echoing the words of the Jaycees’s president on the resolution to admit women, the president of U.S. Jaycee Women, Doris Gosnell, said that “[o]ur time is changing” and that the group’s leadership was recommending to its membership that “they begin the process of moving into the Jaycees framework.”²¹⁷

208. *Id.* (quoting Mr. Barclay Clark of the Pueblo, Colorado, Jaycees chapter, who voted against the resolution).

209. *See, e.g.*, Diana Griego, *Orange County Chapters Receptive to National Order: Women Welcomed as Jaycees Members*, L.A. TIMES, Aug. 18, 1984, at A5; Charles Hillinger & Tom Gorman, *Meeting Marks End of Jaycees’ Ban on Women*, L.A. TIMES, Aug. 21, 1984, at B3.

210. James Barron, *Some Units of Jaycees Rebel Against Admitting Women*, N.Y. TIMES, Sept. 10, 1984, at A14.

211. Tom Gorman & Charles Hillinger, *San Diego’s Way Ahead of the Game: State Jaycees Add Women in Wake of Ruling*, L.A. TIMES, Aug. 21, 1984, at A1.

212. Harriet L. Blake, *Area Women Begin Joining Jaycees as Full Members*, WASH. POST, Aug. 30, 1984.

213. *Id.*

214. *Id.*

215. Doug Brown, *New Approach to Networking: Professional Men, Women Exchange Ideas at Meetings*, L.A. TIMES, Oct. 18, 1984, at D1.

216. *Jaycee Women to Disband*, N.Y. TIMES, June 21, 1985, at A18.

217. *Id.*

B. Remaining Challenges at the Intersection of Freedom of Association and Freedom from Discrimination

Today, the Jaycees are not as prominent in the United States as they were in the 1980s.²¹⁸ Existing chapters describe their purpose in gender-neutral terms: providing “civic service” and “growing the skills of our members and providing an opportunity to make lifelong friendships.”²¹⁹ Nonetheless, although the Jaycees is no longer a central symbol of the old boys network, the term has by no means been retired. Like most public accommodations laws, Minnesota’s law excluded truly private clubs.²²⁰ At the time of the *Jaycees* decision, news coverage reported that feminists were taking aim at all-male clubs’ discriminatory policies because of the role of such clubs in advancing careers.²²¹

Over three decades later, some argue that all-male social clubs remain an important social network from which professional women are excluded.²²² The term “old boys network” has appeared in recent news reports about male clients’ strong preference for male attorneys to lead their cases as well as the obstacles women running for public office encounter.²²³ In response, one trend is to form women-centered networks to help women give and get peer mentorship, empower women in the workplace, and, as it were, “replicate the old boys club.”²²⁴

218. There are currently 12,000 Jaycees with 584 chapters (with no gender breakdown of membership provided). *About Us*, JCI USA, <https://jciusa.org/about-us/> [<http://perma.cc/WN8E-YKU3>] (last visited Apr. 10, 2019).

219. See, e.g., *Who Are the Foxboro Jaycees?*, FOXBORO JAYCEES, http://www.foxborojaycees.org/?page_id=752 [<https://perma.cc/HP7E-C8HX>] (last visited Apr. 10, 2019).

220. See *U.S. Jaycees v. McClure*, 305 N.W.2d 764, 771 (Minn. 1981) (stating that private organizations are beyond the scope of the state’s public accommodations law).

221. Dan Morain, *Next Target: Sex Bias in Men’s Clubs*, L.A. TIMES, Nov. 15, 1985, at A1 (reporting that law professor Herma Hill Kay described lawsuits against men’s clubs as “a second generation of sex discrimination cases”).

222. See, e.g., Liz Elting, *How to Navigate a Boys’ Club Culture*, FORBES (July 27, 2018, 4:59 PM), <https://www.forbes.com/sites/lizelting/2018/07/27/how-to-navigate-a-boys-club-culture> [<https://perma.cc/PT5H-LXQL>].

223. Eliza Collins, *Trump Prompts Dem Women to Run for Congress in Pa., but They Face ‘Old Boys Network,’* USA TODAY (Apr. 18, 2018, 12:34 PM), <https://www.usatoday.com/story/news/politics/2018/04/18/pennsylvania-democratic-women-running-after-trump-still-boys-network/524157002> [<https://perma.cc/2E25-554U>]; Kathryn Rubino, *The Old Boys Network Is as Strong as Ever—Study Finds Male Clients Prefer Male Attorneys*, ABOVE L. (Jan. 19, 2018, 3:25 PM), <https://abovethelaw.com/2018/01/the-old-boys-network-is-as-strong-as-ever-study-finds-male-clients-prefer-male-attorneys> [<http://perma.cc/Z7XH-PE2S>] (“[I]n only 17 percent of cases do male clients choose a female attorney to lead their matter—that’s a third less than the incidence of female clients selecting female attorneys to lead their projects.”).

224. Rina Raphael, *Millennial Women’s Business Conferences: Safe Spaces or Pink Silo?*, FAST COMPANY (Apr. 23, 2018), <https://www.fastcompany.com/40536521/millennial-womens-business-conferences-safe-space-or-pink-silo> [<https://perma.cc/MS2N-7ZHT>]; Rina Raphael, *This New Private Network for Women Execs Looks to Replicate the Old Boys’ Club*, FAST COMPANY (Jan. 15, 2019), <https://www.fastcompany.com/90290926/chief-the-boys-club-for-c-suite-women-launches-today> [<https://perma.cc/PFV4-H3NV>].

In 2018, the annual Women in the Workplace report found that, despite four years of verbal commitments to gender diversity, companies had not made meaningful progress.²²⁵ The report asserts that “[w]omen are doing their part”: “They’ve been earning more bachelor’s degrees than men for decades. They’re asking for promotions and negotiating salaries at the same rates as men.”²²⁶ Additionally, in an echo of NOW’s brief in *Jaycees*, “contrary to conventional wisdom, they are staying in the workforce at the same rate as men.”²²⁷ Yet they do not progress to top leadership positions within corporations.²²⁸ The report noted the path was even steeper and more stalled for women of color and lesbian women.²²⁹ Without explicitly mentioning the “old boys network,” the report mentioned various ways that women, especially women of color, received less support from managers than men do and were “more likely to say they never have informal interactions with senior leaders, such as casual conversations or lunch meetings,” or socialize with them outside of work.²³⁰ The vocabulary of gender and race discrimination is more sophisticated than it was at the time of *Jaycees* (e.g., the “microaggressions” of “everyday sexism and racism”²³¹), but such discrimination continues to hinder gender equality in the workplace and other spheres.

Are single-sex or single-gender organizations an anachronism or do they have a significant role in furthering values protected by freedom of association? Are such organizations particularly important to women and racial minorities when gender and race discrimination persists? Might they advance, rather than hinder, freedom from discrimination? I leave full discussion for another day, but note two recent developments that raise these questions. First, in 2017, the Boy Scouts of America, an amicus for the *Jaycees*, announced that it would admit girls into its Cub Scout program and, by February 2019, into all ranks of scouting; its new name would be Scouts BSA.²³² The leaders of the Girl Scouts cautioned against “reckless” thinking that the BSA could easily translate for girls a program “specifically tailored to boys” and appealed to research that girls learn scouting best in an all-

225. MCKINSEY & CO. & LEAN IN, *WOMEN IN THE WORKPLACE* 4 (2018).

226. *Id.*

227. *Id.*; see also Brief Amicus Curiae of NOW, *supra* note 36, at *22.

228. MCKINSEY & CO. & LEAN IN, *supra* note 225, at 4.

229. *Id.*

230. *Id.* at 14–15.

231. *Id.* at 18.

232. Press Release, The Boy Scouts of Am., The BSA Launches Historic ‘Scout Me In’ Campaign Inviting Girls and Boys to Experience Adventures Through a Cub Scout’s Point of View (May 2, 2018), <https://www.scoutingnewsroom.org/press-releases/scout-me-in/> [<https://perma.cc/WZ9G-HYGM>]. In 2013, the BSA reversed its national policy of excluding openly gay scouts and, in 2015, on excluding openly gay scout leaders. The latter policy had been upheld against a state public accommodation law on the basis of the BSA’s rights of expressive association. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648–49, 659 (2000) (“Thus, ‘[f]reedom of association . . . plainly presupposes a freedom not to associate.’” (alterations in original) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984))).

female environment.²³³ Stressing problems of sexual abuse within the BSA, they questioned how it could “credibly claim” it could create a “safe space” for girls.²³⁴

Sharp conflict over the value and place for single-gender organizations on college campuses is another example. At Yale, female students have brought a class action alleging that Yale lags behind peers like Harvard in discouraging students from joining single-sex clubs and that Yale has turned a “blind eye” to the alcohol consumption, sexual harassment, and sexual assault connected with fraternities.²³⁵ Reminiscent of NOW’s argument in *Jaycees*, the plaintiffs also argue all-male fraternities exclude them from valuable social networks helpful for future employment and mentoring.²³⁶ Meanwhile, at Harvard, where concern over campus sexual assault in all-male clubs spurred policies directed at all students who join single-sex clubs, fraternities, and sororities, such groups have fought back, alleging sex discrimination and “associational discrimination.”²³⁷ The complaint also speaks of women’s loss, through Harvard’s policy, of the “tremendous value” of sorority membership as a source of resources, networks, knowledge, and connections and of women’s groups being “collateral damage” in the cause of purportedly protecting women from men.²³⁸ This complaint squarely raises the issue of whether such spaces continue to be necessary and empowering or are an anachronism in the twenty-first century.²³⁹

233. Tasneem Nashrulla, *The Girls Scouts Have Accused the Boy Scouts of Secretly Trying to Recruit Girls to Appeal to Millennial Parents*, BUZZFEED NEWS (Aug. 22, 2017), <https://www.buzzfeednews.com/article/tasneemnashrulla/girl-scouts-letter-to-boy-scouts> [<https://perma.cc/TGZ4-WZ4D>]; Derek M. Norman, *New Kind of Recruit for Rebranded Boy Scouts: Girls*, N.Y. TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/03/nyregion/girls-in-boy-scouts-bsa.html> [<http://perma.cc/NA4F-DS88>].

234. Charles Garcia, *Girl Scouts Board Member: Boy Scouts Must First Fix Their Problems*, TIME (Oct. 13, 2017), <http://time.com/4982249/boy-scouts-should-not-admit-girls/> [<http://perma.cc/4MZ3-CWKN>].

235. Anemona Hartocollis, *Three Women Sue Yale, Saying Fraternity Scene Is Enabling Harassment*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/us/yale-fraternities.html> [<http://perma.cc/M2PY-7WWS>].

236. Evan Gerstmann, *Understanding the Dueling Lawsuits Against Yale and Harvard over Fraternities and Sororities*, FORBES (Feb. 19, 2019, 4:23 PM), <https://www.forbes.com/sites/evangerstmann/2019/02/19/understanding-the-dueling-lawsuits-against-yale-and-harvard-over-fraternities-and-sororities/> [<http://perma.cc/HCX6-P4VN>].

237. Complaint for Declaratory and Injunctive Relief at 65, *Kappa Alpha Theta Fraternity, Inc. v. Harvard Univ.*, No. 1:18-cv-12485 (D. Mass. Dec. 3, 2018), ECF No. 1. The associational discrimination claims arise under Title IX and Massachusetts law, not the First Amendment, since Harvard is a private university. *See id.* at 65–66, 70–71.

238. *Id.* at 3–4, 61.

239. Patricia Hurtado & Janelle Lawrence, *Harvard Is Sued by Greek Houses over Single-Sex Penalties*, BLOOMBERG (Dec. 3, 2018, 2:53 PM), <https://www.bloomberg.com/news/articles/2018-12-03/harvard-sued-by-sororities-and-fraternities-claiming-bias> [<https://perma.cc/NJC3-FAVB>].