# EQUAL ACCESS OR FREE SPEECH: THE CONSTITUTIONALITY OF PUBLIC ACCOMMODATIONS LAWS

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## INTRODUCTION

The public accommodations statutes of most states and many municipalities prohibit discrimination by private citizens who control access to public facilities.[1] These statutes were enacted to ensure that all members of society have equal access to goods and services.[2] In creating a right of access, however, the statutes inevitably conflict with the First Amendment right of a proprietor to select those with whom he

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[1] See, e.g., Ariz. Rev. Stat. § 41-1442(A)-(B) (1992):

> Discrimination in places of public accommodation against any person because of race, color, creed, national origin or ancestry is contrary to the policy of this state and shall be deemed unlawful. No person shall, directly or indirectly, refuse to, withhold from, or deny to any person, nor aid in or incite such refusal to deny or withhold, accommodations, advantages, facilities or privileges thereof because of race, color, creed, national origin, or ancestry, nor shall distinction be made with respect to any person based on race, color, creed, national origin, or ancestry in connection with the price or quality of any item, goods or services offered by or at any place of public accommodation.

See also Cal. Civ. Code § 51 (West Supp. 1997) (Unruh Civil Rights Act) ("All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."); Okla. Stat. tit. 25, § 1402 (1987) ("It is a discriminatory practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a 'place of public accommodation' because of race, color, religion, sex, national origin, age, or handicap."). The Oklahoma statute defines "place of public accommodation" as "any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds." Id. § 1401(1). It exempts private clubs, small rental housing units, privately-owned resorts, and barber shops and beauty parlors. Id. §§ 1401(1)(i), 1401(2). See generally Lisa Gabrielle Lerman & Annette K. Sanderson, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215 (1978).

[2] See Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984) (noting that "fundamental object [of Civil Rights Act of 1964] was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'" (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964))).

will speak and associate.[3] This Note addresses that conflict through an examination of *City of Cleveland v. Nation of Islam*,[4] an illustrative controversy involving the Nation of Islam and its leader, Minister Louis Farrakhan. The Nation of Islam is a Muslim sect with affiliated mosques in many large American cities. Members of this sect believe that men and women play separate roles in religious life. Consequently, for sixty years its ministers have adhered to a tradition of delivering addresses to all-male audiences on Monday nights and to all-female audiences on Saturday mornings.[5]

Minister Farrakhan, a controversial political and religious figure, has conducted several nationwide speaking tours. In 1994, his "Let Us Make Man" tour consisted of a series of speaking engagements in which only men were invited to be audience members. Interspersed with the lectures for men were a few speeches for women.[6] Many of Minister Farrakhan's speaking engagements were held at municipal convention centers and arenas.[7] Representatives of the local mosque generally leased the facility and admitted all comers free of charge—so long as they were members of the specified gender.[8]

In September 1994, the head of the Nation of Islam mosque in Cleveland, Ohio, Minister Roland Muhammad, sought to organize a Monday night address at the Cleveland Convention Center (Convention Center), where Minister Farrakhan would lecture to a male audience comprising both members of the Nation of Islam and nonmembers.[9] The Convention Center's director told Minister Muhammad, however, that the City of Cleveland (City) would not permit the Convention Center to be used for an all-male event,[10] as such use would violate the public accommodations laws of both the

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3 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I. For a discussion of the inherent conflict between public accommodations laws and the First Amendment, see generally Pamela Griffin, Comment, Exclusion and Access in Public Accommodations: First Amendment Limitations upon State Law, 16 Pac. L.J. 1047 (1985).

4 922 F. Supp. 56 (N.D. Ohio 1995).

5 See Plaintiff's Declaratory Judgment Brief at 3, *City of Cleveland* (Nos. 1:95-CV-0250 & 1:95-CV-0286).

6 See S.A. Reid, Reaching Out to Women: Controversial Nation of Islam Leader Farrakhan Brings Message of Self-Esteem to Atlanta in Women-Only Tour, Atlanta J.-Const., June 25, 1994, at B10 (describing Farrakhan's speech to women in Atlanta).

7 See, e.g., id. (describing segregated speeches at Atlanta's Georgia World Congress Center and Omni Center); S.A. Reid, Farrakhan Coming to Atlanta to Address Men Only at Omni; Nation of Islam Leader Expected to Draw Big Crowd, Atlanta J.-Const., May 22, 1994, at G10 (describing men-only address at New York's Jacob Javits Convention Center).

8 Plaintiff's Declaratory Judgment Brief at 3, *City of Cleveland* (Nos. 1:95-CV-0250 & 1:95-CV-0286).

9 See *City of Cleveland*, 922 F. Supp. at 57.

10 See id.

State of Ohio[11] and the City.[12] The City was only willing to lease the Convention Center to the sect on the condition that the sect comply with those laws.[13]

Minister Muhammad and the local Nation of Islam mosque filed an action in the Northern District of Ohio seeking preliminary and permanent injunctive relief against the City in order to obtain access to the Convention Center for the gender-segregated address.[14] The sect's arguments rested upon, inter alia, its right of free speech under the First Amendment. Relying on the Supreme Court's 1995 opinion in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,[15] it contended that by regulating Minister Farrakhan's audience, the City regulated the content of his speech: "Minister Farrakhan has one message for male constituents, *another* message for female constitu-

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11 Ohio law provides:

> It shall be an unlawful discriminatory practice . . . for any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

Ohio Rev. Code. Ann. § 4112.02(G) (Banks-Baldwin 1995). The code defines a place of public accommodation as "any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public." Id. § 4112.01(A)(9).

12 Cleveland, Ohio Cod. Ordinances § 667.01 states in part that

> [n]o person, being the proprietor or his employee, keeper, or manager of an inn, restaurant, eating house, barber shop, public conveyance by land or water, theater, public or private hospital or other place of public accommodation and amusement, shall deny to a citizen, except for reasons applicable to all citizens, and regardless of color or race, the full enjoyment of the accommodations, advantages, facilities or privileges thereof, and no person shall aid or incite the denial thereof.

13 *City of Cleveland*, 922 F. Supp. at 58.

14 See Muhammad's Mosque No. 18 and Minister Roland Muhammad v. City of Cleveland, No. 1:95-CV-0286 (N.D. Ohio 1995) (White, J.). The City had already filed a preemptive suit in state court, seeking a declaratory judgment that conducting a gender-segregated event at the Convention Center would violate state and local law and that denying use of the facility to the Nation of Islam for such an event would not violate the sect's First Amendment rights. See *City of Cleveland*, 922 F. Supp. at 57. The defendant, the Nation of Islam, immediately removed the action to federal court on the ground that it involved a federal question. Id. at 57. That case was captioned City of Cleveland v. Nation of Islam, No. 1:95-CV-0250 (N.D. Ohio 1995) (White, J.). The two cases were then consolidated before Judge White in the Northern District of Ohio. See *City of Cleveland*, 922 F. Supp. 56.

15 515 U.S. 557 (1995). In *Hurley*, the Court held that the Massachusetts public accommodations statute could not constitutionally require the private organizers of the Boston St. Patrick's Day Parade to include a contingent of individuals who wished to march under a banner celebrating their identity as Irish-American gay men and lesbians. See infra text accompanying notes 131-149.

ents, and yet *another* message for mixed audiences. By commanding that he speak to a mixed, and not to an all-male audience, the government is dictating a change in the *content* of Minister Farrakhan's message."[16] Such control, the Nation of Islam maintained, was an unconstitutional restriction on Minister Farrakhan's freedom of speech.

The district court was sufficiently persuaded to grant the injunctive relief requested by the Nation of Islam. It ordered the City to lease the Convention Center to the sect for a men-only address by Minister Farrakhan.[17]

*City of Cleveland* illustrates the tension between two compelling and competing values: the right of the State to prevent discrimination and the right of the speaker to select his audience and shape his event. The United States Supreme Court has developed an implicit framework for evaluating rights that conflict with each other in this manner.[18] According to this framework, courts should first assess whether application of the statute actually infringes upon the individual's ability to engage in constitutionally protected activity.

Second, courts should evaluate the nature and strength of the governmental interests underlying the regulation and the extent to which those interests are actually served by the particular application at issue. Is the government's intent to stifle expression or control as-

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16 Plaintiff's Declaratory Judgment Brief at 21, *City of Cleveland* (Nos. 1:95-CV-0250 & 1:95-CV-0286).

17 See *City of Cleveland*, 922 F. Supp. at 60. This Note's conclusion assumes that the governing state has determined correctly that its public accommodations statute has been triggered by a group's admission policy. In *City of Cleveland*, the sect argued that the public accommodations laws did not apply to a facility leased by a private party because the act of paying for the space converts a city owned facility to a private establishment. See Plaintiff's Declaratory Judgment Brief at 11, *City of Cleveland* (Nos. 1:95-CV-0250 & 1:95-CV-0286). The district court accepted this argument. See *City of Cleveland*, 922 F. Supp. at 59 (noting that Ohio Rev. Code Ann. § 4112.02(G) "makes it [an] unlawful discriminatory practice for a proprietor, employee, keeper or manager of a place of public accommodation to discriminate. It does not bar discrimination by a lessee."). This is an invalid interpretation of the statute, however, because the events at issue in *City of Cleveland* and similar cases involve general admission. Typically, entrance is free, there is no assigned seating, and the events are advertised through flyers, posters, and radio announcements. See Motion for Leave to File Surreply Brief at 4-5, *City of Cleveland* (Nos. 1:95-CV-0250 & 1:95-CV-0286). The only criterion for admission is gender. By renting a large stadium and opening its lecture up to the general public, the sect becomes the proprietor of a place of public accommodation. Therefore, it would be appropriate for a court or legislature to conclude that the event is not rendered sufficiently "private" to justify an exemption from the statute. See Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969) (holding that a community park was not a "private social club" meriting exemption from federal Civil Rights Act, because "[i]t is open to every white person within the geographic area, there being no selective element other than race"); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 438-39 (1973) (same) (citing *Sullivan*, 396 U.S. at 236).

18 See infra Part II.

sociation, or is the infringement on such liberties merely incidental to the achievement of a permissible governmental interest?

Third, courts must question whether the government's interests could be equally well served by some other means that would not infringe upon constitutional rights. If the statute as applied does infringe upon protected rights but also serves important governmental interests that could not be achieved in a manner less restrictive of those rights, courts should then engage in a balancing analysis: assess the scope and depth of the infringement and measure it against the strength of the governmental interests served.

To date, the Supreme Court has not faced a public accommodations case in which the right of the State to ensure equal access and the right of an individual to exercise constitutional liberties have come into direct conflict. In each case the Court has found that the infringement on individual rights was incidental,[19] or that the particular application of the statute did not in fact serve the governmental interest in ensuring equal access to a publicly available benefit.[20] With one side of the scale thus carrying a heavier weight than the other, the Court has carried out its balancing analysis with ease. The facts of *City of Cleveland*, by contrast, place the clashing values in stark relief. If the statute is not enforced, women are denied the benefit of hearing Minister Farrakhan's ideas solely on the basis of their gender. If the statute is enforced, the character of the event is altered and the First Amendment rights of Minister Farrakhan and the Nation of Islam are seriously curtailed. The traditional ad hoc balancing approach is an inadequate solution to this problem, for it provides both insufficient guidance for state and local governments and insufficient protection for individual rights.

This Note therefore proposes that a claim that freedom of speech or expressive association is infringed by operation of a public accommodations law should be subjected to the tests developed by the Supreme Court for the analysis of content-neutral restrictions on those rights. A public accommodations statute is a content-neutral regulation: the government's purpose in enacting and enforcing the statute is not related to the suppression of free expression.[21] Because

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19 See infra Part II.A.

20 See infra Part II.B.

21 See Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 572 (1995) (finding statute does not target content); Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (same); infra notes 68-69 and accompanying text. The analysis will assume that the government does not seek to regulate Minister Farrakhan or the Nation of Islam out of a distaste for their views.

In *City of Cleveland*, the Nation of Islam argued that the public accommodations statutes were applied in a content-based manner, for the City had permitted the Billy Graham

the Court has decided that content-neutral regulations present less of a threat to the values underlying the First Amendment than do content-based restrictions, a content-neutral regulation is not presumptively invalid. Such a regulation is constitutional if justified on the basis of a sufficiently strong governmental interest which is not related to its effect on individual freedoms.[22]

In Part I, this Note discusses the values that come into tension through the application of a public accommodations statute: the interest of the state in ensuring equal access and the right of the individual to exercise his freedom of speech and association under the First Amendment. Part II traces the development of the Supreme Court's approach to the problem of clashing values presented by the application of public accommodations statutes and demonstrates that the Court has not yet been faced with a case in which the two values truly conflict. Finally, Part III sets forth a proposed framework for evaluating a case in which the two values directly clash and applies this approach to the problem presented in *City of Cleveland*. This Note concludes that, as applied in the context of the Nation of Islam's general admission lectures, a public accommodations statute serves the purposes for which it was enacted, and the ensuing infringement on speech and associational freedoms is not unconstitutional.[23]

## I
## THE TWO VALUES IN TENSION

This Part first discusses public accommodations laws and their underlying theory and purpose. It then details some basic principles

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Crusade to advertise gender-segregated events held in the Cleveland Convention Center. See Plaintiff's Declaratory Judgment Brief at 13, *City of Cleveland* (Nos. 1:95-CV-0250 & 1:95-CV-0286). Despite its advertising, however, the Billy Graham Crusade had admitted all comers regardless of gender, and the City said it was willing to lease the Convention Center to the Nation of Islam on identical terms. See *City of Cleveland*, 922 F. Supp. at 58. This Note's analysis assumes that the public accommodations statute is applied in an even-handed manner and that the government's only interest is in ensuring equal access to facilities.

22 See generally Laurence H. Tribe, American Constitutional Law § 12-2, at 791 (2d ed. 1988) (stating that courts examine cost of free expression when evaluating regulations intended to alleviate other harms); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 54-57 (1987) (discussing reasons why content-neutral regulations receive less scrutiny than content-based ones).

23 This Note does not address the issue of a potential claim under the Free Exercise Clause of the First Amendment. The *City of Cleveland* court did not discuss the sect's free exercise claim. The scope of this Note is limited to an analysis of the impact of public accommodations laws on the right to free speech and expressive association. It does not deal with freedom of religion claims, and the proposed test would not apply in a situation in which religious freedom were at issue.

of First Amendment jurisprudence, explaining the constitutional right to freedom of speech and freedom of association.

### A. *Public Accommodations Laws and the Principle of Equal Opportunity*

Public accommodations statutes advance the goal of equal opportunity, a value that is central to American constitutionalism. The enactment of a public accommodations statute is one highly effective way in which a state can attempt to level society's playing fields, thus enabling each of its citizens to fulfill his potential.[24] These laws, generally enacted by state and municipal governments, seek to prevent discrimination by private individuals who control access to goods and services.[25]

Public accommodations laws are invoked when an individual seeks access to an establishment and the proprietor tries to prevent his entrance.[26] In placing the customer's right of entry over the proprietor's right of exclusion, the statutes bring the equal access ideal into direct conflict with the principle that an individual has the right to choose the people with whom he will speak, associate, and do business.[27] In another context, the Supreme Court has held that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[28] Public accommodations laws thus have been viewed as an unprecedented intrusion on a proprietor's right to exclude.[29] This right to exclude im-

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[24] See generally Roberts v. United States Jaycees, 468 U.S. 609, 624-25 (1984) (discussing public accommodations laws and protections that such laws afford).

[25] See id. at 624 (noting that "state laws impose[ ] a variety of equal access obligations on public accommodations"); Griffin, supra note 3, at 1047.

[26] See Griffin, supra note 3, at 1047.

[27] See id.

[28] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); see also Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) (discussing Court's established position that right of exclusion is fundamental component of set of rights comprising property rights).

[29] At common law, only innkeepers and common carriers had an obligation to serve all comers regardless of race; other businesses generally had the right, as property owners, to exclude anyone for any reason. See Earl M. Maltz, "Separate But Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment, 17 Rutgers L.J. 553, 553-54 (1986) (discussing obligations of common carriers); see also Alfred Avins, What Is a Place of "Public" Accommodation?, 52 Marq. L. Rev. 1, 2-7 (1968) (discussing common law rule that innkeepers and common carriers could not exclude, while others were legally permitted to do so). But see Joseph William Singer, No Right to Exclude: Public Accommodations and Private Property, 90 Nw. U. L. Rev. 1283, 1303 (1996) (arguing that "the assumption that the common law always limited the duty to serve to innkeepers and common carriers is almost certainly wrong").

plicates constitutional rights of freedom of speech and association as well as the common law right to control the use of one's property.[30]

In *Heart of Atlanta Motel, Inc. v. United States*,[31] the Supreme Court unanimously upheld the constitutionality of Title II of the Civil Rights Act of 1964,[32] a federal public accommodations statute.[33] In their separate concurring opinions, Justices Douglas and Goldberg quoted from the Senate Report,[34] noting the report's emphasis on the pressing need to eradicate discrimination in public accommodations:[35]

> The primary purpose of . . . [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.[36]

A democratic society will not flourish if groups of its citizens are routinely told that they are inferior and unwelcome, that they cannot

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30 See, e.g., Avins, supra note 29, at 24, 72 (arguing that public accommodations laws limit traditional property rights and interfere with freedom of association); Griffin, supra note 3, at 1048-49 (discussing ways in which public accommodations statutes may place limitations on freedom of speech, freedom of religion, freedom of association, and freedom of the press).

31 379 U.S. 241 (1964).

32 42 U.S.C. § 2000a-2000h (1994). Title II provides, in relevant part, that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." Id. § 2000a(a).

33 *Heart of Atlanta*, 379 U.S. at 261. The plaintiff in *Heart of Atlanta*, a motel proprietor who wished to restrict his clientele to white persons, argued that the law was not a valid exercise of Congress's power under the Commerce Clause, that it violated the Fifth Amendment because it deprived him of property and liberty without due process of law, and that it violated the Thirteenth Amendment because forcing him to rent available rooms to blacks constituted involuntary servitude. Id. at 243-44. The Court rejected each of these challenges. See id. at 258, 261.

34 See id. at 284 (Douglas, J., concurring) (citing S. Rep. No. 88-872, at 12-13 (1964)); id. at 291-92 (Goldberg, J., concurring) (citing S. Rep. No. 88-872, at 16).

35 See id. at 284 (Douglas, J., concurring) (suggesting that although Congress enacted statue pursuant to its powers under Commerce Clause, statute's drafters strongly considered "the objectives of the Fourteenth Amendment"); id. at 292 (Goldberg, J., concurring) (emphasizing that "it is clear that Congress based this section . . . on § 5 of the Fourteenth Amendment").

36 Id. at 291-92 (Goldberg, J., concurring) (alteration in original) (quoting S. Rep. No. 88-872, at 16).

drink from the same water fountains, eat at the same tables, rest in the same inns, ride in the same buses, reside in the same neighborhoods, or listen to the same public addresses as their fellow men and women.[37] Access to privately provided goods and services is as necessary to individual growth and dignity as is access to public schools and health care. Discrimination handicaps its victims by depriving them of the cultural, social, and educational opportunities that would enable them to succeed in the commercial world. The insult and injury resulting from this type of rejection take a heavy toll on one's self-esteem and one's desire to succeed in and contribute to society.[38] The larger community is harmed as well, for it is deprived of the contributions that these individuals would otherwise make.[39] Consequently, the State is obligated to prevent such discrimination on behalf of each of its citizens and on behalf of society as a whole.

In addition to preventing the psychological harms wrought by discrimination, these statutes are intended to help traditionally disadvantaged groups succeed in fields that were once closed to them. For this reason, the concept of "public accommodations" now sweeps well beyond the traditional category of inns, restaurants, and other common carriers,[40] reaching "various forms of public, quasi-commercial conduct."[41] Most public accommodations statutes are written broadly,[42] and courts construe them to embrace not only goods and services but

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[37] See Charles L. Black, Jr., The Unfinished Business of the Warren Court, 46 Wash. L. Rev. 3, 21 (1970). Black argues that the common factor present in all racial segregation is "life-pervading symbolism":

> To walk to the back of that bus and to sit down there was to take part, with one's own body, in a compulsory pantomime which asserted, with entire clarity to all concerned, "The political society in which blacks live officially judges and declares their closeness to be contaminative; it judges them unfit to associate with all other citizens."

Id. at 20. Black continued:

> I think none of us whites can do more than guess what it must have meant to live all one's life in repeated daily enactments of a ritual of legally declared unfitness to play golf on the same course as the master race, or to eat at the same counter in a restaurant. My guess is that its effects were deep and corroding.

Id. at 21.

[38] See *Heart of Atlanta*, 379 U.S. at 250 (citing statute's legislative history to find that its purpose was to eliminate deprivation of personal dignity that results from denying all individuals equal access to public establishments).

[39] See Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984) (noting that discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life").

[40] See Lerman & Sanderson, supra note 1, at 218 (noting that modern public accommodations laws reach broadly to include all providers of goods and services); see also Griffin, supra note 3, at 1047-48 (observing dramatic enlargement of scope of public accommodations laws).

[41] *Roberts*, 468 U.S. at 625.

also such disparate benefits as membership in large social clubs,[43] access to recreational facilities,[44] the right to join labor unions,[45] and the right to receive job training.[46]

While the Civil Rights Act of 1964 and many state and municipal public accommodations statutes were initially aimed at racial discrimination, other invidious criteria provide equally strong justification for the application of public accommodations statutes.[47] In *Roberts v. United States Jaycees*,[48] for example, the Supreme Court noted that gender discrimination carries many of the same ill effects as does racial discrimination:

> [I]n upholding Title II of the Civil Rights Act of 1964 . . . we emphasized that its "fundamental object . . . was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" 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.[49]

In the Senate Committee Report on the Civil Rights Act of 1964, its drafters explained that the need to eradicate discrimination may take precedence over the right of the proprietor to exercise absolute control over his property. While protection of property rights has served as a means of ensuring individual liberty and the opportunity for all to prosper, the report asked, "Is this time honored means to freedom

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42 See generally Lerman & Sanderson, supra note 1, at 218 (discussing sweeping breadth of public accommodations statutes).

43 See, e.g., Warfield v. Peninsula Golf & Country Club, Inc., 896 P.2d 776, 798 (Cal. 1995) (holding that private golf club was "a business establishment" within meaning of California's public accommodations statute because "it engaged in a variety of 'business transactions' with nonmembers on a regular basis").

44 See Isbister v. Boys' Club of Santa Cruz, Inc., 707 P.2d 212, 214 (Cal. 1985) (holding that boys' club was "business establishment" within meaning of California's public accommodations statute and that its male-only membership policy violated that statute).

45 See Gaynor v. Rockefeller, 204 N.E.2d 627, 633 (N.Y. 1965) ("Included within the legislative proscriptions [of New York's public accommodations statute] is . . . discrimination on [the basis of race, creed, color or national origin] by a labor organization or an employer or any joint labor-management committee in the admission of persons to training, guidance or retraining programs.").

46 See id.

47 While race and gender are treated differently when analyzed by a court in a case involving the Fourteenth Amendment's Equal Protection Clause, see United States v. Virginia, 116 S. Ct. 2264, 2274-76 (1996), most public accommodations laws treat them identically, see Roberts v. United States Jaycees, 468 U.S. 609, 624-25 (1984).

48 468 U.S. 609 (1984).

49 Id. at 625 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (quoting S. Rep. No. 88-872, at 16-17 (1964))). For the Court's approach towards gender discrimination, see *Virginia*, 116 S. Ct. at 2274-76.

and liberty now to be twisted so as to defeat individual freedom and liberty?"[50]

Similarly, individual rights under the First Amendment are instruments of freedom and liberty.[51] The government, in appropriate circumstances, may limit those rights for the purpose of abolishing invidious discrimination, achieving equal access, and thus preserving those very same values of freedom and liberty.

### *B. The First Amendment*

In the context of *City of Cleveland v. Nation of Islam*,[52] the right most significantly implicated by the operation of the public accommodations statute is the First Amendment right to freedom of speech. Prohibiting the sect from holding a gender-segregated lecture infringed upon this right in two ways. First, since a speaker generally tailors his remarks to the composition of his audience, the regulation indirectly required Minister Farrakhan to deliver a different version of his address than he otherwise would. Second, because the selection of audience members is itself expressive activity, the regulation changed the message conveyed by the event to the outside world by altering the makeup of the group. At the same time, the regulation also infringed upon the sect's First Amendment right to associate with its chosen audience for expressive purposes.

#### *1. Freedom of Speech*

The right to freedom of speech is among the most sacred of constitutional principles. Free speech enjoys a level of protection greater than that afforded nearly any other governmental or individual interest: it is both a necessary means to, and a desirable result of, a democratic system. The free flow of ideas is critical to society's ability to make reasoned decisions and form a meaningful, democratic consensus about policy.[53] More generally, it is instrumental to the ongoing

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[50] S. Rep. No. 88-872, at 22 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2376.

[51] See infra notes 177-179 and accompanying text.

[52] 922 F. Supp. 56 (N.D. Ohio 1995).

[53] See First Nat'l Bank v. Bellotti, 453 U.S. 765, 791 (1978) (stating that in a democracy, people—not government—"are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments"); Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 25 (1948):

> The voters . . . must be made as wise as possible. [And] this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting [so] that all the alternative lines of action can be wisely measured in relation to one another.

search for truth in the political and social life of a community.[54] Free speech is also an end in itself: the opportunity to voice one's ideas without fear of censure is a salient benefit of citizenship in a democracy.[55] This freedom is so central to American constitutionalism that the Court has protected it even at the expense of other important individual and governmental interests.[56]

The First Amendment dictates that "a speaker has the autonomy to choose the content of his own message."[57] In *West Virginia State Board of Education v. Barnette*,[58] the Supreme Court held that a state cannot compel schoolchildren to salute the flag and pledge allegiance, because upholding the statute meant that "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[59] This type of coercion, the Court said, is an unconstitutional means of fostering the government's legitimate interest in national unity.[60] This principle of speaker autonomy has been further developed in a series of more recent cases[61] and is an established precept of modern First Amendment jurisprudence.

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54 See John Stuart Mill, On Liberty 20 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859) ("[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.").

55 See Cohen v. California, 403 U.S. 15, 24 (1971) (stating that constitutional right of free expression is protected "in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests"); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness . . . .").

56 See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 380-81 (1992) (striking down city's Bias-Motivated Crime Ordinance, which prohibited display of symbols that aroused "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"); Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (striking down Ohio Criminal Syndicalism Act, which criminalized advocacy of unlawful behavior, as violation of the First Amendment).

57 Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 573 (1995).

58 319 U.S. 624 (1943).

59 Id. at 634.

60 See id. at 640-42.

61 See, e.g., Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 9 (1986) (invalidating state regulation that required public utilities to print on monthly bills statements from group advocating lower utility rates, because regulation "force[d] speakers to alter their speech to conform with an agenda they d[id] not set"); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (striking down New Hampshire statute that required state slogan to be displayed on license plates); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (striking down Florida statute that required newspapers to permit political candidates to publish responses to newspaper criticisms).

The right to speaker autonomy, like the right to free speech more generally, is not absolute. One's ability to control the form and content of one's speech can be governed by a constitutionally permissible state regulation. In determining what sorts of infringements are acceptable, the Court has distinguished between "content-based" and "content-neutral" regulations.[62] When the government seeks to restrict expression on the basis of the ideas conveyed, the regulation is "content-based" and presumptively violates the First Amendment,[63] unless the speech fits into one of the categories of "low-value" speech, such as obscenity,[64] fighting words,[65] or child pornography.[66] In evaluating such a law, the Supreme Court applies strict scrutiny: the restriction on speech must be necessary to fulfill a compelling state interest.[67] When, however, a regulation restricts expression only incidentally, in the course of achieving a governmental objective unrelated to expression, the regulation is deemed content-neutral.[68]

Because a content-neutral restriction does not pose as much of a threat to the values underlying the First Amendment as does a content-based restriction, it is not presumptively invalid. Its validity is determined by reference to the strength of the government's purpose in enacting it and the extent to which that interest is served in the challenged context.[69] The Supreme Court has established a specific test for the constitutionality of content-neutral restrictions on expres-

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[62] See, e.g., Tribe, supra note 22, § 12-2, at 789.

[63] See id. § 12-2, at 790 ("Any adverse government action aimed at communicative impact is presumptively at odds with the first amendment.").

[64] See, e.g., Miller v. California, 413 U.S. 15 (1973).

[65] See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[66] See, e.g., New York v. Ferber, 458 U.S. 747 (1942); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (holding that false statements of fact constitute "low-value" speech). See generally Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 194 (1983).

[67] See, e.g., NAACP v. Button, 371 U.S. 415, 438-39 (1963) (holding that Virginia's interest in regulating legal profession does not justify restriction on plaintiff's activities); see also Stone, supra note 22, at 48 (explaining that Court typically finds content-based restrictions of "high-value" speech unconstitutional).

[68] See, e.g., Stone, supra note 22, at 48 (listing as examples of content-neutral regulations statutes that prohibit noise near hospital, placement of billboards in residential communities, and destruction of draft cards).

[69] See Tribe, supra note 22, § 12-2, at 791 (discussing need to balance competing interests and consequent validity of regulatory schemes aimed at noncommunicative harms, so long as they do not "*unduly* constrict the flow of information and ideas"; John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1497 (1975) (finding "critical question" to be whether harm state legislates against is related to "communicative significance" of speech, or whether harm would arise even without such communicative impact); Stone, supra note 22, at 54-57 (arguing that, although content-neutral regulations can severely constrict free expression, some are justifiable by reference to countervailing governmental interests and may be approved by Court).

sive conduct and on the time, place, and manner of speech. In *United States v. O'Brien*,[70] the Court held that such regulation is permissible when (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to suppression of free expression; and (4) the restriction is narrowly tailored to achieve the governmental interest.[71] This set of criteria is known as the *O'Brien* test.[72]

In summary, while the First Amendment right to freedom of speech is broad and stringently protected, it is not absolute. A content-neutral regulation that infringes upon a speaker's right to define the form and content of his message may be constitutionally permissible if it can be justified on the basis of a strong governmental interest.

### 2. *Freedom of Association*

While the word "associate" does not appear in the text of the First Amendment, the Supreme Court has held that a certain degree of freedom to choose one's confederates is necessary to the full exercise of one's constitutional rights.[73] Just as freedom of speech neces-

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[70] 391 U.S. 367 (1968).

[71] See id. at 377. The Court found that a regulation banning the destruction of draft cards was a content-neutral regulation of expressive conduct. While the statute had the incidental effect of prohibiting the burning of such cards in protest of the Vietnam War, its purpose was to serve various governmental interests which were unrelated to the suppression of speech. See id. at 381-82 ("[B]oth the governmental interest and the operation of the [statute] are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the [statute] are limited to preventing harm to the smooth and efficient functioning of the Selective Service System.").

In Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), defendant group of individuals sought to sleep overnight in two national parks in Washington, D.C., as part of a demonstration designed to call attention to the plight of the homeless. See id. at 289. While camping might not ordinarily be viewed as expressive activity, in this context the Court assumed that it was "expressive conduct protected to some extent by the First Amendment," because it was clearly undertaken for the purpose of communicating the demonstrators' viewpoint. See id. at 292. Nonetheless, relying on *O'Brien*, the Court held that application of the National Park Service's prohibition on overnight camping in the relevant areas was permissible.

[72] In *O'Brien*, the Court was specifically concerned with restrictions on expressive conduct. See 391 U.S. at 377. In *Clark*, the Court focused on restrictions on the time, place, or manner of speech in a public forum. See 468 U.S. at 292; see also Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (finding that principal inquiry determining whether time, place, or manner restrictions are content-neutral is whether government's regulation is motivated by disagreement with speech's message). The Court has stated that in implementation, the *O'Brien* and *Clark* tests are nearly identical. See *Clark*, 468 U.S. at 298 n.8.

[73] See generally Roberts v. United States Jaycees, 468 U.S. 609, 617-24 (1984) (describing provenance and contours of constitutionally protected freedom of association); see also Tribe, supra note 22, § 12-26, at 1010-22 (describing evolution of Court's interpretation of freedom of association as "preferred right" derived from First Amendment); Douglas O. Linder, Freedom of Association After *Roberts v. United States Jaycees*, 82 Mich. L. Rev. 1878, 1887 (1984) (noting that "a right to associate has long been recognized as necessary

sarily includes the freedom not to speak, freedom of association includes the freedom not to associate—the right of a person or group to exclude unwanted individuals.[74]

In *Roberts v. United States Jaycees*,[75] the Supreme Court upheld the application of Minnesota's public accommodations law to the Jaycees, a national membership organization formed for the purpose of developing young men's civic groups, which wished to limit its membership to men.[76] In *Roberts*, the Court summarized its previous jurisprudence and identified two separate elements of the right to free association: the freedom of intimate association and the freedom of expressive association.[77] The former right generally is not implicated by operation of a public accommodations statute.[78] The right of an organization to select its membership is a fundamental one, so nearly every piece of state and federal antidiscrimination legislation contains an explicit or judicially created exception for private associations.[79] However, statutory and constitutional exemption depends upon a showing that the association is truly "private."[80] In determining whether an association is sufficiently private to merit constitutional protection, the relevant factors are its "size, purpose, selectivity, and

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to safeguard those activities specifically protected by the first amendment—religion, speech, assembly, petition for grievances."); Griffin, supra note 3, at 1067 (explaining history and limits of right to freedom of association).

74 See *Roberts*, 468 U.S. at 623; see also Democratic Party of United States v. Wisconsin, 450 U.S. 107, 122 (1980) (holding that freedom of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only").

75 468 U.S. 609 (1984).

76 See id. at 628 (stating that Minnesota's law abridged no more associational freedom than was necessary to accomplish its purpose). The Minnesota statute applied to every "'business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.'" Id. at 615 (quoting Minn. Stat. § 363.03 (1982)). For a detailed discussion of *Roberts*, see infra text accompanying notes 95-116.

77 See id. at 617-18.

78 The right to intimate association arises from the recognition that decisions in the context of one's intimate relationships implicate the "individual freedom that is central to our constitutional scheme." Id. at 618. These associations are characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." Id. at 620.

79 See Linder, supra note 73, at 1881.

80 See, e.g., Isbister v. Boys' Club of Santa Cruz, Inc., 707 P.2d 212, 220-21 (Cal. 1985) (holding that large recreational club open to all boys was not sufficiently private to justify statutory or constitutional exemption from California's public accommodations statute); United States Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1204-05 (N.Y. 1983) (holding that corporation that offered courses in boat handling and safety and extended invitations of membership to all males who passed piloting course was not "distinctly private" and therefore was not exempt from New York's public accommodations statute).

whether others are excluded from critical aspects of the relationship."[81]

The right of expressive association is the right to congregate for the purpose of engaging in an activity protected by the First Amendment.[82] This freedom is protected because it is "an indispensable means of preserving other individual liberties."[83] Full constitutional protection of the freedom to speak, practice one's religion, and petition the government for the redress of grievances requires protection of the freedom to engage in these activities as a group.[84] Moreover, recognition of the right to engage in collective effort helps to preserve political and cultural diversity and enables dissident groups to achieve the critical mass they need in order to be heard.[85] As a result, the Court has long recognized that the right to associate plays an important role in protecting activities guaranteed by the First Amendment.[86]

The *Roberts* Court demonstrated three particular ways in which the government might abridge this freedom. It might punish membership in a group by imposing penalties upon or withholding benefits from the group's members. It might require disclosure of one's mem-

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[81] Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 546 (1987) (citing *Roberts*, 468 U.S. at 620); see also Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 438 (1973) (stating that to be considered private, club must have "plan or purpose of exclusiveness"); Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969) (holding that community park was not "private social club" meriting exemption from federal Civil Rights Acts because "[i]t is open to every white person within the geographic area, there being no selective element other than race").

[82] See Griffin, supra note 3, at 1067 (discussing freedom of association and right to exclude); Linder, supra note 73, at 1887 (explaining history of and limits to right to freedom of association).

[83] *Roberts*, 468 U.S. at 618.

[84] See id. at 622; see also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911-12, 920 (1982) (holding that NAACP had constitutional right to gather for purpose of seeking political, social, and economic change, and that state could not impose liability on individuals solely because of their association with such group); Buckley v. Valeo, 424 U.S. 1, 58-59 (1976) (holding that congressional limitations on campaign expenditures violated political parties' First Amendment associational rights); Cousins v. Wigoda, 419 U.S. 477, 489-91 (1975) (holding that state could not constitutionally interfere with political party's selection of participants in its national convention because such interference violated party's right to associate for political purposes).

[85] See *Roberts*, 468 U.S. at 622 (recognizing role of associational rights in preserving minority views); see also Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974) (declaring that associational rights "tend[ ] to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change"); NAACP v. Button, 371 U.S. 415, 431 (1963) ("[T]he litigation [the NAACP] assists . . . makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.").

[86] See *Roberts*, 468 U.S. at 622.

bership in a group whose members would prefer anonymity. Or it might interfere with the "internal organization or affairs of the group."[87] Elaborating upon this last category, Laurence Tribe suggests that the interference may take the form of "intruding upon . . . its decisions of whom to include as members and its decisions as to which non-members to invite to take part in its processes."[88]

These abridgments, like those affecting free speech, are not per se unconstitutional. Infringements on the right to associate for expressive purposes are permissible if the regulations are "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[89] These criteria provide an appropriate starting point for assessing the constitutionality of public accommodations laws, which, as *City of Cleveland* demonstrates, can conflict with a group's right to associate for expressive purposes.

## II
## SUPREME COURT JURISPRUDENCE ON THE TENSION BETWEEN THE GOAL OF EQUAL ACCESS AND FIRST AMENDMENT RIGHTS

The Supreme Court has considered the impact of public accommodations laws on the exercise of constitutional liberties in a series of cases. In *Roberts v. United States Jaycees*[90] and *Board of Directors of Rotary International v. Rotary Club*,[91] the Court upheld the application of public accommodations statutes to large, national associations, finding that the statutes effectively ensured equal access to generally available benefits and did not unduly infringe upon the club members' First Amendment rights to freedom of intimate or expressive association.[92] By contrast, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,[93] the Court held that the Massachusetts public accommodations statute could not operate to force the private organizers of a parade to include an unwanted contingent in their event.

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87 Id. at 623.

88 Tribe, supra note 22, § 12-26, at 1015.

89 *Roberts*, 468 U.S. at 623.

90 468 U.S. 609 (1984).

91 481 U.S. 537 (1987).

92 Additionally, in New York State Club Ass'n v. City of New York, 487 U.S. 1, 7-8 (1988), the Court rejected a facial challenge, grounded in the club members' associational rights, to New York's public accommodations statute. Because this case involved a facial challenge, the analysis differed from that in *Roberts* and *Rotary International* and has little bearing on the analysis presented in this Note. See infra note 130 (discussing *New York State Club Ass'n*).

93 515 U.S. 557 (1995).

The intrusion constituted an impermissible infringement on the organizers' right to freedom of speech and did not act to protect the contingent's right of access to a public benefit.[94]

In each of these cases, the Court weighed the magnitude of the challenged infringement against the extent to which the statute acted to protect equal access to public facilities. Where the infringement on First Amendment rights was incidental and the rights protected by the statute as applied were significant, the scales tipped in favor of equal opportunity, and the Court upheld the application of the statute. But where the infringement was severe and the statute was not truly acting to protect equal access to goods, services, and other resources, the balance shifted the other way and the Court enjoined enforcement.

In each case, the Court assessed the operation of the statute in the context of the particular controversy. First, it determined whether the statute's application actually restricted conduct protected by the Constitution. If the statute as applied did infringe upon a protected right, the Court next evaluated the governmental interest that the regulation served and whether it could be served equally well by a means that would not restrict constitutional rights. Finally, the Court assessed the scope and depth of the infringement, balancing it against the strength of the governmental interests served. In each of these cases, the balancing analysis was easy to carry out, since none involved both a real threat to the value of equal access and a serious infringement on First Amendment rights.

### *A. The* Roberts *Line of Cases*

#### *1.* Roberts v. United States Jaycees

In *Roberts*, the Court characterized the issue before it as "a conflict between a State's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization."[95] The United States Jaycees is a nonprofit national membership organization whose stated purpose is to "'promote and foster the growth and development of young men's civic organizations in the United States.'"[96] Its national bylaws prohibited the admission of women as regular members.[97] The Minnesota Human Rights Department found that this policy violated the Minnesota Human Rights Act, a public accommodations law that

94 See id. at 573, 574-75.

95 *Roberts*, 468 U.S. at 612.

96 Id. (quoting bylaws of United States Jaycees, reprinted in Appellee's Brief at 2, *Roberts*, 468 U.S. 609 (1984) (No. 83-724)).

97 See id. at 613 (noting that only young men between ages of 18 and 35 could be regular members, while others, including women, could be associate members).

prohibits denial of access on the basis of sex.[98] In a suit in district court, the Jaycees claimed that "by requiring the organization to accept women as regular members, application of the Act would violate the male members' constitutional rights of free speech and association."[99]

While finding that the statute did not infringe upon the Jaycees's right of intimate association,[100] the Court did conclude that the organization had a valid expressive association claim. A significant portion of the Jaycees's activities involved protected expression: the organization engaged in fundraising, lobbying, and civic and charitable activities, and its national and local representatives regularly took public positions on various political issues.[101] The Court found that by forcing the group to accept members it did not want and consequently interfering with the group's internal organization, the application of the public accommodations statute clearly infringed upon the Jaycees's right of expressive association.[102]

The Court noted, however, that the right of expressive association is not absolute. This right can be restricted by statutes that "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[103] Consequently, even though the Court determined that the statute did infringe on the group's associational rights, the Court continued with an analysis of the purpose and breadth of the act.

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98 "'It is an unfair discriminatory practice . . . [t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.'" Id. at 615 (quoting Minn. Stat. § 363.03(3) (1982)). The statute defined "place of public accommodation" as "'a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.'" Id. (quoting Minn. Stat. § 363.01(18) (1982)). The Minnesota Supreme Court held that the law applied to the Jaycees and was violated by the single-sex admissions policy. See id. at 616 (citing United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981)).

99 *Roberts*, 468 U.S. at 615.

100 Local chapters of the Jaycees were large and essentially unselective, see id. at 621, and nonmembers, including women, were invited to participate in most of the Jaycees's activities, see id. at 627. Because most of the interactions which formed the basis for association between members took place in the presence of outsiders, the Jaycees's choice of members was so indiscriminate that it did not merit protection on the basis of a right of intimate association. See id. at 626-27.

101 See id. at 626-27.

102 See id. at 623.

103 Id.; see supra text accompanying note 89.

The Court assessed the strength of the governmental interest served by the statute, both as enacted and as applied. As a threshold matter, the Court found that the Minnesota Human Rights Act was content-neutral, both on its face and in application.[104] The statute, said the Court, "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services."[105] The Court held that the state's goals of ensuring equal access and enforcing the principle of equal opportunity were "compelling state interests of the highest order. . . . By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and personal harms."[106] Furthermore, by forcing the Jaycees to admit women as active members, the statute served precisely the purpose for which it was enacted: it prevented a group that offered its members valuable business opportunities from denying those benefits to women solely on the basis of their gender.[107]

After establishing that the statute fulfilled compelling state interests both on its face and as applied to the Jaycees, the Court assessed the extent to which the statute realistically infringed on the organization's protected rights and concluded that its practical effects were relatively minor.[108] The Court stated that the organization had failed to show the admission of women would affect the Jaycees's ability to engage in its customary civic, lobbying, and other activities that receive First Amendment protection, or that admission would impede the organization's ability to "disseminate its preferred views"[109] on political and social issues. Because the Jaycees already allowed women to participate in many of its activities and to share its philosophy, the Court found claims that admitting women would impair the organization's

104 For a detailed discussion of content-neutrality, see supra text accompanying notes 68-69. Here, the statute was not intended to suppress speech, did not distinguish between activities on the basis of viewpoint, and was not applied to the Jaycees in an effort to interfere with the organization's ability to engage in expressive association. See *Roberts*, 628 U.S. at 623.

105 Id. at 624.

106 Id.

107 Although an organization such as the Jaycees is not technically a "place," it fell within the broad purview of the statute. The Court found that a state has a compelling interest in ensuring that all persons can benefit from access to such leadership organizations. See id. at 625-26 (citing United States Jaycees v. McClure, 305 N.W.2d 764, 772 (Minn. 1981)).

108 See id. at 625-29 (noting that statute infringed upon organization's rights no more than necessary to effect its goals).

109 Id. at 626-27.

symbolic message "that women are not permitted to vote" to be "attenuated at best."[110]

The Court rejected the argument that permitting women to vote would necessarily alter the content of the resolutions adopted by the organization.[111] The Court found this assertion unsupported by the record and reliant upon stereotypical notions about the relative views and concerns of men and women, which are irrelevant for purposes of legal analysis.[112]

The Court concluded that even if the Human Rights Act incidentally abridged the organization's protected speech, invidious discrimination in the provision of publicly available goods, services, and other benefits is not inherently protected by the First Amendment even if the discriminatory practices transmit a particular point of view.[113] In preventing such discrimination, the statute "'responds precisely to the substantive problem which legitimately concerns the State' and abridges no more speech or associational freedom than is necessary to accomplish that purpose."[114]

Seven members of the Court took part in the consideration of *Roberts*. Only Justice O'Connor explicitly disagreed with the majority's reasoning, arguing in her concurrence that it was both "overprotective of activities undeserving of constitutional shelter and underprotective of important First Amendment concerns."[115] She objected to the majority's focus on the connection between the forced inclusion of unwanted members and a change in the message communicated by the association's speech: "Whether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it."[116]

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110 Id. at 627.

111 See id.

112 See id.; see also United States v. Virginia, 116 S. Ct. 2264, 2280 (1996) (characterizing sexual stereotyping as "'self-fulfilling prophec[ies] once routinely used to deny rights or opportunities'" (citations omitted) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982))); *Hogan*, 458 U.S. at 725 (providing that consideration be given to whether statute perpetuates unfounded stereotypes as aid to determining whether statute's objectives are illegitimate).

113 See *Roberts*, 468 U.S. at 628.

114 Id. at 628-29 (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984)).

115 Id. at 632 (O'Connor, J., concurring).

116 Id. at 633 (O'Connor, J., concurring). The concurrence offered an alternative approach, distinguishing between organizations engaged primarily in expressive activities and those whose primary purpose is commercial. Where an association's activities are "predominantly of the type protected by the First Amendment," it should receive a heightened degree of shelter from state regulation that would "necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard." Id. at 635. Commercial

In summary, the public accommodations law at issue in *Roberts* served a compelling governmental interest unrelated to the suppression of speech, both as enacted and as applied. Based upon the factual record, the law did not implicate the Jaycees's right of intimate association, and it did not place a significant burden upon the group's ability to engage in protected expressive association. Therefore, the statute's application was a permissible exercise of state power: the state's strong interest in equal access and equal opportunity far outweighed any effects that the statute had on the Jaycees's ability to associate for the purpose of conveying its views, or on the nature of those views as broadcast by the organization or as perceived by its audience.

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organizations, by contrast, would be subject to public accommodations statutes, for States can regulate businesses in any manner rationally related to a permissible governmental objective. Thus, nonexpressive associations would receive less than the full constitutional protection given to expressive associations. See id. at 633-34, 638. With respect to the Jaycees, O'Connor wrote, this approach yielded the same outcome as did that of the majority: the Jaycees were a predominantly commercial group, "an organization that, at both the national and local levels, promotes and practices the art of solicitation and management." Id. at 639. Therefore, the Minnesota act did not unconstitutionally infringe upon the Jaycee's associational rights. In application, this approach likely would yield inconsistent and unpredictable results. As Justice O'Connor recognized, it would be very difficult to distinguish between primarily commercial and primarily expressive associations, and courts would have difficulty categorizing associations which have both expressive and commercial elements. See id. at 635.

The Supreme Court no longer draws a line between speech made for profit and that made for other reasons, for most distributors of news, literature, movies, and other forms of communication are motivated both by profit and the desire to communicate. See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) (finding regulation of newspapers' content, purportedly justified by newspapers' profit motive, incompatible with First Amendment); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (holding that "allegedly libelous statements . . . do not forfeit [constitutional] protection because they were published in the form of a paid advertisement"). See generally Griffin, supra note 3, at 1071 (noting that Supreme Court has abandoned distinction between profit and nonprofit motives in classifying speech because these motives generally coexist and are not easily separable).

Moreover, commercial establishments that engage in communication do have the right to select their employees and customers based upon criteria that are relevant to their expressive functions. In Hishon v. King & Spalding, 467 U.S. 69 (1984), a woman brought an action against the law firm where she worked, alleging that the firm's refusal to consider her for partnership was based solely on her sex and therefore violated Title VII. The Supreme Court held that the woman had stated a claim upon which relief could be granted, and noted that application of Title VII in this context would violate the First Amendment if the law firm could show that its expressive and communicative activities "would be inhibited by a requirement that it consider petitioner for partnership on her merits." Id. at 78; see also Tribe, supra note 22, § 12-23, at 706; Griffin, supra note 3, at 1072 (noting that demonstrating "a reasonable connection between exclusion and first amendment purpose" will protect against "abuses of the associational protection" afforded by the Constitution). The Court has never accepted Justice O'Connor's analysis in *Roberts* and has adhered to the balancing approach employed by the *Roberts* majority.

### 2. Board of Directors of Rotary International v. Rotary Club

The Court retraced its analytical steps three years later in *Board of Directors of Rotary International v. Rotary Club*.[117] Rotary International, like the Jaycees, is a national, nonprofit organization whose membership used to consist of men in business and the professions.[118] Like the Jaycees, Rotary International consists of an association of local groups, known as Rotary Clubs. When the Duarte, California Rotary Club admitted three women as active members, Rotary International revoked its charter. The Duarte club filed suit in California state court, alleging that Rotary International's policy violated California's public accommodations statute, the Unruh Civil Rights Act.[119] The California Court of Appeals held that both Rotary International and the Duarte club were business establishments subject to the Unruh Act and that application of the law did not violate the club's First Amendment rights.[120] The California Supreme Court denied review, and the United States Supreme Court granted certiorari.[121]

As it had in *Roberts*, the Court first assessed the nature of the infringement on the club's right of intimate association. While Rotary Clubs were somewhat more selective in their admission processes than were the Jaycees, the relationships between members were still insufficiently private to merit constitutional protection.[122] The Court therefore rejected Rotary's intimate association claim.

The Court's treatment of Rotary International's expressive association claim covered the same points that the *Roberts* opinion had. The Court first noted that forcing the club to admit women was unlikely to affect adversely the organization's ability to engage in protected expression, for Rotary Clubs refrained from taking official positions on "public questions" as a matter of policy.[123] The admission of women also would not affect the organization's ability to engage in charitable and philanthropic activities protected by the First

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117 481 U.S. 537 (1987).

118 See id. at 539.

119 See id. at 541 n.2 (citing and quoting Cal. Civ. Code § 51 (West 1982) ("All persons . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.")); supra note 1 (quoting current version of Unruh Civil Rights Act).

120 See id. at 543-44.

121 See id. at 544.

122 The chapters were large, with inclusive, rather than exclusive, membership policies. Most businessmen would meet the membership qualifications. Most importantly, most of the chapters' central activities were undertaken in the presence of nonmembers and were publicized in local newspapers. See id. at 546-47.

123 See id. at 548.

Amendment.[124] Rotary International intended that its membership include a "cross section" of local business communities, and the inclusion of women would enhance rather than hinder this goal.[125] Finally, the Court found that requiring rotary clubs to admit women would not be inconsistent with their "basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace."[126]

Since the extent of the infringement was minimal at most, the remainder of the Court's analysis was brief. It stated that even if application of the public accommodations statute did cause some incidental restriction of First Amendment freedoms, such infringement would be justified. The Unruh Act, like other public accommodations statutes, was content-neutral.[127] The statute's infringement on the group's expressive association was not severe and served the compelling state interest in equal access, which, as in *Roberts v. United States Jaycees*, "extends to the acquisition of leadership skills and business contacts as well as tangible goods and services."[128] As a result, the Court concluded that application of the Unruh Act did not violate the First Amendment.[129]

Justice Powell's opinion was joined by six of the seven Justices who considered the case, while Justice Scalia concurred. Once again, this consensus reflected the straightforward nature of the analysis: the application was upheld because the statute was serving its compelling function of protecting equal access and did not seriously infringe upon the groups' First Amendment rights.[130]

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124 See id.

125 See id. at 548-49.

126 Id. at 548.

127 See id. at 549.

128 Id. (citing Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984)).

129 See id.

130 In New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988), the Court again considered the impact of a public accommodations statute on club members' associational rights. In amending the New York City Human Rights Law to narrow the exemption for "distinctly private" clubs, the city council expressly stated that the discriminatory membership policies of organizations where business was conducted constituted a barrier to the advancement of women and minorities in commerce. It found that "'the public interest in equal opportunity' outweighs 'the interest in private association asserted by club members.'" Id. at 6 (quoting Local Laws of the City of New York No. 63, § 1, App. 14-15 (1984)). The Court rejected the State Club Association's facial challenge to this law, finding that, given the holdings in *Roberts* and *Rotary Club*, the statute clearly could be applied constitutionally to at least some large New York clubs. See id. at 11-12. Moreover, it was not substantially overbroad, for the State Club Association had failed to identify "those clubs for whom the antidiscrimination provisions will impair their ability to associate together or to advocate public or private viewpoints." Id. at 14. Because the case involved a facial challenge, the Court was not presented with a particular factual scenario and could not conduct the balancing test it had used in *Roberts* and *Rotary Club*. However, its assessment of the likely impact of the statute indicates that it agreed with the city council that

### B. *The* Hurley *Case*

*Hurley v. Irish-American Gay, Lesbian and Bisexual Group*[131] presented a new set of clashing rights. For the first time, the Supreme Court considered the impact of a public accommodations statute on the principle of speaker autonomy. The Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) wished to march in Boston's St. Patrick's Day Parade, which was organized by a private group, the South Boston Allied War Veterans Council (Council). GLIB's founders established the group for the purpose of marching in the parade "as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade."[132] Traditionally, the Council had not been selective in admitting participants: it had no formal criteria for participation, it voted on applicants in batches; it did not screen the specific themes of applicants; and it had sometimes included groups who showed up on the day of the parade without submitting an application in advance.[133] It nonetheless rejected GLIB's application in both 1992 and 1993, asserting that it did not wish to sponsor the group's message.[134]

GLIB filed suit in Massachusetts state court, alleging that the Council's rejection of its application violated the Massachusetts public accommodations statute.[135] The trial court found for GLIB and ordered the Council to include the group; the Massachusetts Supreme Court affirmed the decision.[136] The United States Supreme Court granted certiorari to determine whether this application of a public accommodations law, requiring private parade organizers to include a

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any restriction wrought by the Human Rights Law on the club members' associational rights was likely to be de minimis. This case lends further support to the idea that the Court generally views public accommodations laws favorably and is inclined to uphold them against constitutional challenges where it appears that First Amendment rights are not seriously threatened.

131 515 U.S. 557 (1995).

132 Id. at 561.

133 See id. at 562.

134 See id. at 574.

135 See id. at 561-62 (citing Mass. Gen. Laws. ch. 272, § 98 (1992), which prohibits "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement," and Mass. Gen. Laws. ch. 272, § 92A (1992), which defines a public accommodation as including "any place . . . which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be . . . (6) a boardwalk or other public highway [or] . . . (8) a place of public amusement, recreation, sport, exercise or entertainment").

136 See *Hurley*, 515 U.S. at 563.

particular contingent against the organizers' wishes, violated the First Amendment.[137]

As in the earlier cases, the Court's first question was whether operation of the public accommodations statute infringed upon the Council's constitutionally protected rights. The Court found that application of the law did substantially curtail the organizers' freedom of speech because a parade is a form of expressive conduct—the marchers convey a message both to each other and to bystanders.[138] In selecting contingents for the parade, the Council thus shaped the message conveyed by the activity.[139] GLIB's participation was equally expressive, for the organization had been formed for the explicit purpose of conveying a message about gay men and lesbians of Irish descent.[140] Forcing the Council to include GLIB's banner effectively required that the Council advocate GLIB's message. Consequently, this application of the public accommodations law required that the Council permit any group to express its own message in the parade, even if the private organizers disagreed with that message.[141] This coercion violated the principle of speaker autonomy and constituted a direct infringement on the Council's First Amendment right to freedom of speech.[142]

The Court next considered the strength of the governmental interests served by the statute and found that it was unconstitutional as applied because it was not serving the purpose for which it was enacted.[143] By rejecting GLIB's application, the Council did not intend to exclude gay men and lesbians from the parade, an act which would clearly run afoul of the statute as applied constitutionally—the Council did not prevent any individual member of GLIB from parading as a member of any group that had received a permit, nor did it deny gay

137 See id. at 566.

138 See id. at 572; see also Gregory v. City of Chicago, 394 U.S. 111, 112 (1968) (holding that peaceful march for desegregation constituted expressive conduct protected by the First Amendment); Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963) (holding that conviction of peaceful protest marchers under breach of peace statute violated First and Fourteenth Amendments).

139 See *Hurley*, 515 U.S. at 574 ("Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day.").

140 See id. at 572.

141 See id. at 573 (finding that, upon application of the public accommodations law, "any contingent of protected individuals with a message would have the right to participate in [the Council's] speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own").

142 See id.

143 See id. at 578.

men and lesbians access to the street or to the public amusement. Instead, the Council declined to include GLIB as a unit expressively marching under its own banner.[144] The purpose of a public accommodations statute is to ensure equal access to public facilities for all,[145] not to give a particular contingent a distinct voice in a privately organized event whose organizers select its participants on the basis of the messages they add to the overall theme. As applied by the Massachusetts courts, "the statute had the effect of declaring the sponsors' speech itself to be the public accommodation."[146]

Central to the Court's holding was the fact that public accommodations laws do not prevent an organization from excluding from participation individuals whose expressed views conflict with those of the organization. At neither the federal nor state level do these statutes prohibit discrimination on the basis of ideology.[147] In *Hurley*, the Council rejected GLIB's participation on the basis of its expressed views, not on the basis of its members' sexual orientation.[148]

The state courts' application of the statute did not proscribe a discriminatory admission policy, but policed the content of the message the parade attempted to convey. The Court unanimously struck down this application as an unconstitutional infringement on the Council's freedom of speech "in the absence of some further, legitimate end."[149]

Reduced to its basics, then, *Hurley* was not a complicated decision. *Hurley* can be distinguished from *Roberts* and its progeny in two

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144 See id. at 572.

145 See Griffin, supra note 3, at 1047 (noting that purpose of public accommodations law is to "creat[e] equal access to public accommodations").

146 *Hurley*, 515 U.S. at 573.

147 See Lerman & Sanderson, supra note 1, at 224-25, 260-72. While many of the statutes do prohibit discrimination on the basis of religious affiliation, they do not prohibit religious groups from excluding nonbelievers. See id. at 263-64. The ability of groups to screen out persons who disagree with their views was explicitly protected by the Court in Democratic Party v. Wisconsin, 450 U.S. 107, 122 (1981) (holding that political parties are entitled to screen out individuals with "adverse political principles").

148 The Court expressly distinguished *Hurley* from New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988), in which it had found that the expressive associational character of a large dining club could be sufficiently attenuated such that a public accommodations law could be applied constitutionally to such a private organization. See *Hurley*, 515 U.S. at 572. The *Hurley* court noted:

> Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.

Id. at 580-81.

149 *Hurley*, 515 U.S. at 578.

ways. In *Hurley*, the Massachusetts statute as applied severely infringed upon constitutional rights and failed to serve the ends for which the statute was enacted. In *Roberts* and *Rotary Club*, application of a public accommodations statute preserved the rights of individuals deprived of a generally available benefit solely on the basis of an impermissible criterion, and in neither of those cases was the curtailment of protected rights severe.

It is not surprising that in each of these three cases the Court was unanimous in its judgment, since none of them involved a true clash of rights. In each case, either the values underlying the statute were not implicated, as in *Hurley*, or the First Amendment rights at issue were not seriously threatened, as in *Roberts* and *Rotary Club*. But in *City of Cleveland v. Nation of Islam*,[150] the Nation of Islam has raised a new problem. Which right should take precedence when a public accommodations statute is applied in a manner that does indeed protect equal access, but the application results in a significant infringement on constitutionally protected freedoms? Part III of this Note proposes a solution to this problem.

## III
## A Proposed Framework for Assessing Direct Conflict Between the Principle of Equal Access and First Amendment Rights

### *A. The Proposed Analysis*

This section suggests a framework for evaluating an individual's claim that application of a public accommodations statute has unconstitutionally curtailed his First Amendment rights. As a threshold matter, an individual must demonstrate that his constitutionally guaranteed rights have actually been infringed by the government regulation at issue. Once this threshold has been passed, an as-applied challenge to the constitutionality of a public accommodations statute is best evaluated by reference to the tests developed by the Supreme Court for content-neutral restrictions on freedom of speech and expressive association.

As discussed above,[151] the *O'Brien* test was developed by the Supreme Court to evaluate restrictions on either expressive conduct or the time, place, or manner of speech. This test is applicable where a statute enacted for purposes unrelated to the suppression of speech nonetheless has the effect of restricting speech or other expressive

150 922 F. Supp. 56 (N.D. Ohio 1995).

151 See supra notes 70-72 and accompanying text.

conduct. The test has four requirements: (1) the regulation must be within the constitutional power of the government; (2) it must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; (4) and the restriction must be narrowly tailored to achieve the governmental interest.[152] In *Roberts v. United States Jaycees*,[153] the Court articulated a similar test to evaluate a restriction of the First Amendment right to associate for expressive purposes: such a regulation "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[154]

These two tests overlap—they both require that the regulation be content-neutral and that it be narrowly tailored to serve its ends. A third requirement of each deals with the strength of the governmental interest served by the statute. The *Roberts* test requires that a stronger regulatory interest be at stake—it must be "compelling"[155]—whereas the *O'Brien* test mandates that the purpose underlying the regulation be "important or substantial."[156] Additionally, the *O'Brien* test requires that the regulation be within the legislative power of the enacting body. A merger of these two tests, incorporating the stronger requirement of a compelling state interest with the requirements that the statute be content-neutral, that it be within the legislative power of the body that enacts it, and that it be narrowly tailored, provides an appropriate standard for judging the constitutionality of a public accommodations law's impact on freedom of speech and association.

The Court designed the criteria in *O'Brien* and *Roberts* to evaluate precisely this sort of problem: the capacity of government to enact and enforce a content-neutral statute that has the effect of infringing the right of individuals and groups to engage in conduct intended to convey a particular message. The test utilizes each of the factors considered by the Court in the *Hurley* and *Roberts* analyses, but does so in a more explicit and systematic way. The first requirement, that the regulation be within the constitutional legislative power of the govern-

152 See United States v. O'Brien, 391 U.S. 367, 377 (1968).

153 468 U.S. 609 (1984).

154 Id. at 623.

155 Id.

156 *O'Brien*, 391 U.S. at 377. It is uncertain from the opinions how these requirements differ. The Court's use of the word "compelling" in *Roberts* recalls the strict scrutiny test, which requires that the government demonstrate that a regulation is necessary to the achievement of a compelling state interest. See, e.g., Tribe, supra note 22, § 12-2, at 791-92 (discussing strict scrutiny test as applied to content-based restrictions upon speech).

ment, will be met routinely.[157] But each of the other three requirements, when the regulation is considered as it is applied in a given situation, will help to ensure that the proper balance is struck between the principle of equal access and individual rights.

The requirement that the regulation further a compelling governmental interest will ensure that individual rights prevail in situations, such as that in *Hurley*, where the public accommodations statute is not truly serving the purpose for which it was enacted. The Court has characterized the state's interest in ensuring that all members of society have equal access to publicly available resources as "compelling."[158] If, however, the statute is applied in a manner that does not actually further this interest, this criterion will not be met. If the exclusionary policy is not based upon invidious discrimination, or the resource at issue is not generally available, then this factor favors the proprietor.

The test also requires that the regulation be content-neutral: the governmental interest must be unrelated to the suppression of expression. The Court has repeatedly held that public accommodations laws are facially content-neutral.[159] But the government must enforce the statute in an evenhanded manner. If the law is only applied to individuals or groups that the government seeks to suppress, out of a concern that their speech or association will have unwelcome effects or that it will provoke undesirable reactions, the application of the regulation will be unconstitutional.

Finally, the test requires narrow tailoring. If the government could achieve its purpose of preserving equal access in a manner that would not curtail the ability of individuals to associate for expressive purposes, the government will lose its case.[160]

The Court has already characterized public accommodations statutes as facially content-neutral[161] and has held that they serve compelling state interests.[162] Therefore, under the proposed analysis the statute generally will be upheld if it is being applied evenhandedly and

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157 The Supreme Court rejected a challenge to a state antidiscrimination law as early as 1945. See Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945) (holding that a state had the power to prohibit discrimination by private employees); see also Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 33 (1948) (noting that state public accommodations statutes were both commonplace and permissible); Griffin, supra note 3, at 1053 (stating that states' power to regulate public accommodations represents legitimate exercise of reserved police power).

158 See, e.g., *Roberts*, 468 U.S. at 623.

159 See id. at 623-24; see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 572 (1995).

160 See infra notes 182-187 and accompanying text.

161 See, e.g., *Hurley*, 515 U.S. at 572.

162 See, e.g., *Roberts*, 468 U.S. at 623.

in a manner that serves the purposes for which it was enacted. This is the correct outcome. These laws cannot serve their purposes unless they are applied consistently to all the goods, services, and other publicly available resources a society has to offer. They will be ineffective in eradicating discrimination and barriers to advancement if the government is deterred from enforcing them by the threat of mushrooming litigation.

Because the proposed test assesses the manner in which the statute is applied and validates it so long as the application is evenhanded and serves the value of equal access, the test eliminates the need for ad hoc balancing. This is an important and beneficial result, for it is dangerous for a court or a municipality to carve out exceptions to a facially constitutional law of general applicability. Granting an exception to one group but not to another creates the risk that the statute will be converted from a content-neutral regulation into a content-based one. The group that is permitted to discriminate receives an advantage over a group that is not, and public debate becomes distorted as a result of the exemption.[163]

At the same time, such balancing necessarily requires that courts evaluate the importance of preserving equal access to the benefit in question. Is it more crucial to preserve the right of women to hear a lecture than it is to preserve their right to join a country club or to eat in a particular restaurant or to attend a concert? Such case by case balancing sends a harmful message about the significance of the state interest at stake in a particular context. Either a court or a governmental agency seeking to conform its conduct to the law must determine whether the benefit in question, or the people seeking to gain access to that benefit, are sufficiently important to override the First Amendment rights of the individual seeking to pursue an exclusionary policy.[164] This is antithetical to the idea underlying public accommodations laws: that the government will not tolerate discriminatory admissions policies in any public places under any circumstances because it views each of its citizens as being equally deserving of all generally available benefits. Because public accommodations statutes are constitutionally acceptable content-neutral regulations, when they are ap-

[163] See Stone, supra note 22, at 68-69; see also R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) (holding that city's content-based prohibition on certain types of racial slurs was unconstitutional because "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules").

[164] See Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (holding that under both Equal Protection Clause and First Amendment, "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities.").

plied properly the state's strong interest in equal access must prevail even where it infringes upon an individual's First Amendment rights.

### *B. Application of this Approach to the Nation of Islam's General Admission Lectures*

As discussed above, the restrictions placed on speech and association by a public accommodations statute generally will be constitutionally permissible. It is only necessary to determine whether the statute's application in a particular case is evenhanded and actually serves the state's compelling interest in guaranteeing equal access to publicly available benefits. The extent of the claimed infringement enters into this analysis solely as a threshold matter: if the statute is not truly restricting constitutionally protected freedoms, it is unnecessary to apply the other criteria. This section, however, discusses the extent and nature of the infringement claimed in *City of Cleveland v. Nation of Islam*[165] in order to illuminate the difficult problems raised by the clash of values at stake. It then applies the proposed test to the facts of that case and concludes that the restriction, while substantial, was not unconstitutional.

#### *1. Demonstrating the Infringement*

*a. The Freedom of Speech Claim.* The City of Cleveland sought to apply its public accommodations statute in a manner which would have infringed upon the Nation of Islam's free speech in two ways. First, Minister Farrakhan would have been required either to compromise his religious tradition by delivering his all-male address to a mixed audience or to deliver his mixed-audience address. The government attempted to regulate the manner in which he could use a public forum, and this regulation effectively would have altered the content of his address. Second, the ability of the sect to select its audience members would have been limited by the proscription of gender discrimination. The audience members at such an event arguably can be viewed as part of a message that the speaker or the sponsoring group wishes to convey to the world beyond the walls of the Convention Center. This message may be one of gender or racial solidarity; it may be a statement about the needs of a particular group of individuals. The concept of the "speaker" thus widens to include all the participants in the event, and the concept of the "audience" broadens to encompass society at large. From this perspective, the government would have been regulating the sect's expressive conduct.

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165 922 F. Supp. 56 (N.D. Ohio 1995).

In *City of Cleveland*, the district court relied substantially upon *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*[166] to find that the Nation of Islam was likely to prevail on the merits. In its brief, the sect drew an analogy between the selection of contingents to make a parade and the selection of audience members for a lecture:

> Just as, in the context of a privately-sponsored parade, I cannot be compelled to include others in my message, just so, in the context of a private meeting, I cannot be compelled to include others in my *audience*. . . . As in *Hurley*, where application of the Massachusetts human rights statute would have led to government-imposed changes in the expressive content of a private parade, applying the human rights provisions invoked here by the City will lead to government-imposed changes in the content and character of Minister Farrakhan's address. By dictating that he speak to a mixed, and not to an all-male audience, the government is dictating a change in the *content* of Minister Farrakhan's message.[167]

Without explicitly accepting this comparison, the district court restated the Supreme Court's analysis in *Hurley* and concluded that "[i]f the City is allowed to make the public accommodations law requiring Minister Farrakhan to speak to a mixed audience, the content and character of the speech will necessarily be changed. The City would then be regulating private speech which would be a violation of the First Amendment."[168] While the analogy to *Hurley* is valid, the intrusion upon the First Amendment rights of the speaker was of a somewhat greater magnitude in *Hurley* than in *City of Cleveland*.

The exclusion of women from Minister Farrakhan's lectures is purely gender-based; it bears no relation to any expressed views that the women may hold.[169] If women are viewed as passive observers, their presence at the lecture has no expressive component. Even if women are viewed as unwanted components of a broader message that the sponsoring group wishes to convey to the outside world, their presence is still not entirely analogous to the participation of GLIB in the parade. GLIB was formed for the express purpose of conveying a message. An individual woman who wishes to gain access to a public lecture is presumptively motivated by a desire to hear the speech, not by a desire to make a statement. Her purpose in attending is to hear, not to speak. Her impact on the expressive quality of the event is

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166 515 U.S. 557 (1995).

167 Plaintiff's Declaratory Judgment Brief at 21, *City of Cleveland* (Nos. 1:95-CV-0250 & 1:95-CV-0286).

168 *City of Cleveland*, 922 F. Supp. at 59.

169 The Court has held that it is invalid to assume that individuals possess particular views on the basis of race or gender. See supra text accompanying note 112.

therefore somewhat less severe than that of a parade contingent, whose very existence is predicated on its expressive function.

Moreover, in this context, the statute indirectly causes the speaker to deliver a different version of his own views; it does not force him to voice the views of another. While forcing Minister Farrakhan to speak to a mixed audience would have changed the content of his message, the government did not attempt to put words in his mouth or to force him to propound a point of view in which he did not believe.[170]

Nonetheless, had it been implemented, the regulation inarguably would have altered the character of the event that the Nation of Islam sought to organize. It thereby would have altered indirectly the message that the sect attempted to convey to the outside world.[171] Although the infringement on the sect's right to free speech perhaps would not have been as severe as that inflicted on the Council in *Hurley*, and perhaps not as drastic as the sect would argue, it certainly would have been significant enough to warrant further scrutiny under the analysis appropriate for content-neutral restrictions.

*b. The Expressive Association Claim.* As in *Roberts,* the state attempted to infringe upon associational rights by "interfer[ing] with the internal organization or affairs of the group."[172] Renting a municipal facility in order to hold a lecture is undoubtedly expressive activ-

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[170] In PruneYard Shopping Center v. Robbins, 447 U.S. 74 (1980), the Supreme Court distinguished between a situation in which governmental regulation of a speaker's conduct results in an altered message and a situation in which the government compels a speaker to voice a particular idea. State constitutional provisions prevented a privately owned shopping center from prohibiting students from distributing political leaflets and circulating petitions. See id. at 85-88. The Court held that this state regulation did not infringe upon the First Amendment right of the shopping center owners to determine what messages they wanted to convey. "[West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)] is inapposite because it involved the compelled recitation of a message containing an affirmation of belief. . . . Appellants are not similarly being compelled to affirm their belief in any governmentally prescribed position or view . . . ." Id. at 88. For a discussion of *Barnette*, see supra text accompanying note 58.

[171] It is worth noting that every time the government seeks to regulate the way in which a public facility is used, the interference alters the nature of the message conveyed by the speaker. The Court has validated prohibitions on the use of noisy amplifiers, the operation of adult theaters in residential zones, and indecent language on the radio during daytime hours. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986) (upholding zoning of adult theaters); FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978) (upholding time-of-day limitations on indecent language on radio); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) ("[No] infringement on free speech arises unless such regulation or prohibition undertakes to censor the contents of the broadcasting."). Without more, the fact that a regulation alters the conveyance of a message is not sufficient to render it unconstitutional. More was at stake in *Hurley*, because the regulation had the effect of forcing the Council to sponsor a message in which it did not believe.

[172] Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

ity protected by the First Amendment. The Nation of Islam's purpose was to convey Minister Farrakhan's message to a large group of men. By forcing it to include women, the government would have infringed upon the sect's freedom of association in much the same way that it would have infringed upon the sect's freedom of speech. The composition of the audience affects the character of the event.

If Minister Farrakhan wished to speak only with a select group of individuals, the public accommodations statute would not have been triggered, for the speech would not have been a generally available benefit. His right to choose his audience would be stronger, relative to the state's interest in preserving unfettered discourse and equal access. Because the sect's purpose is to reach a broad audience, and its method is to hold general admission lectures to which all men are invited, the calculus changes: the State's interest in giving all individuals access to his ideas grows stronger, and the speaker's interest in audience selection becomes weaker because the selection is based solely upon an invidious criterion. Nonetheless, the sect's and the speaker's right to associate with an exclusively male group is implicated by the application of the statute, and the constitutionality of this infringement must be assessed.

### 2. *Application of the Proposed Test*[173]

*a. Significance of the Governmental Interest.* As applied in this context, the public accommodations statute would have achieved a compelling governmental interest by preserving equal access to a generally available benefit. The statute would have served precisely the purpose for which it was enacted, and this purpose is sufficiently valuable to justify the attendant intrusion on free speech.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,[174] the Massachusetts courts applied the public accommodations statute to mandate modification of the message conveyed by the parade, rather than to allow members of the public access to a generally available benefit.[175] The Council did not prevent individual gay men and lesbians from marching in the parade. It did not deny any individual the opportunity to stand in the street or to view or even to participate

[173] The sect's speech and expressive association claims can be evaluated together. Once the constitutional infringement has been demonstrated as a threshold matter, the proposed test focuses on the way in which the statute is being applied, rather than on the nature of the infringement. Because the proposed test uses the stronger "compelling" governmental interest requirement from *Roberts* rather than the more lenient "important or substantial" requirement from *O'Brien*, it will be sufficiently protective of both speech and expressive association claims.

[174] 515 U.S. 557 (1995).

[175] See supra text accompanying notes 131-149.

in the parade on the basis of his or her sexual orientation.[176] The Nation of Islam, by contrast, wished to exclude all women from a lecture in a public facility. The purpose of a public accommodations statute is to ensure equal access to public facilities. This purpose is not thwarted by the refusal to give a particular contingent a voice in a privately organized parade whose organizers select its participants on the basis of the messages they add to the overall theme. It is thwarted by the refusal to allow women to hear a general admission lecture.

Perhaps ironically, preserving equal access by regulating the Nation of Islam in the posited manner would help to promote one of the most compelling justifications for free speech: protection of the free flow of ideas.[177] Free speech is not defended solely for the benefit of the speaker: John Stuart Mill argued that suppression of an idea hurts its potential audience more than it hurts the suppressed party. Even if the suppressed idea is not true, the conventional wisdom loses its force if it is not openly debated.[178] Furthermore, if a speaker in a public facility is permitted to address his remarks to members of only one race or gender, societal discourse is distorted because those who might oppose his views will not have access to them. The state has a large stake in preventing such distortion; it is constitutionally obligated not to engage in it. In this light, it is paradoxical to argue that freedom of expression demands that the state be forced to allow dis-

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176 In *Hurley*, the Court noted:

> [T]he Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. . . . Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. . . . [T]he state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation.

*Hurley*, 515 U.S. at 572-73.

177 See Abrams v. United States, 250 U.S. 616, 630 (1919) (holding that First Amendment protects marketplace in which ideas compete for acceptance). This argument finds support in both the "marketplace of ideas" metaphor espoused by John Stuart Mill, see Mill, supra note 54, at 19-55, and the view, supported by Alexander Meiklejohn, that free speech is protected by the First Amendment because it is crucial to the operation of government in a democratic system, see Meiklejohn, supra note 53.

178 Mill states:

> The fact, however, is, that not only the grounds of the opinion are forgotten in the absence of discussion, but too often the meaning of the opinion itself. The words which convey it, cease to suggest ideas, or suggest only a small portion of those they were originally employed to communicate. Instead of a vivid conception and a living belief, there remain only a few phrases retained by rote; or, if any part, the shell and husk only of the meaning is retained, the finer essence being lost.

Mill, supra note 54, at 41.

criminatory access to a general admission function in a public facility.[179]

*b. Content-Neutrality of the Law As Applied.* As applied, the public accommodations law would have had the *effect* of altering the content of Minister Farrakhan's speech: he would have been prevented from delivering his all-male address. But because this effect would have been incidental and did not reflect the purpose of the regulation, it would not have rendered the law content-based.[180]

In enacting and enforcing its public accommodations law, the City of Cleveland sought to ensure equal access to an event in a public facility, and such a law would be applied in the same manner no matter who the speaker was[181] and no matter whether the event in question were a play, a poetry reading, or a dance. Moreover, the law would be applied in the same way to an event with no expressive component at all—the government would be just as concerned about discriminatory admission to a basketball game or bake sale. The state's purpose of ensuring equal access does not change with the nature of the event in question, and the regulation is not triggered by the activity's expressive aspects. Therefore, the law in *City of Cleveland* was content-neutral both on its face and as applied.

*c. Narrow Tailoring.* The purpose of the narrow tailoring requirement for a content-neutral regulation is to ensure that the regulation does not burden substantially more speech than is necessary to preserve its interests. Even a compelling governmental interest cannot justify an overbroad statute. In the case at hand, the statute was narrowly tailored both as written and as applied.[182]

In order to fulfill its goal of equal access, a state cannot insist that the organizers of some, but not all, general admission events held in municipal facilities comply with its public accommodations laws.

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179 This argument does not suggest that the state's interest is stronger as a result of the ideas conveyed by the Nation of Islam. Such a suggestion would be at odds with the view that the statute is content-neutral as applied. The argument is simply that freedom of expression is fostered rather than limited by enforcing equal access to a public address.

180 See Stone, supra note 22, at 57 n.49 ("Some content-neutral laws may, of course, de facto limit the expression of some viewpoints more than others."); Stone, supra note 66, at 199-200:

> [C]ontent-neutral restrictions may also have content-differential effects, for such restrictions may impair the communication of some messages more than others.... By their very nature, however, content-neutral restrictions limit the availability of only *particular* means of communication. They thus leave speakers free to shift to other means of expression.

181 This analysis assumes that the City was not motivated by any antipathy toward Minister Farrakhan or the Nation of Islam. See supra note 21.

182 See supra note 11 and accompanying text.

Equal access is an all or nothing proposition. The substantive problem is discrimination; evenhanded and consistent prohibition of discrimination is the only appropriate response. Moreover, the government is not permitted to grant or deny access to its fora in a discretionary manner.[183] As discussed above,[184] consistent and universal application of the public accommodations law is preferable to a scheme in which municipal or state authorities, or courts, assess the constitutional rights of each applicant in an ad hoc manner.

On its face, the regulation at issue left open sufficient alternative channels for expression,[185] for it dictated nothing about the content of the speaker's message. Minister Farrakhan would have been permitted to give whatever lecture he chose, and he had several options if he wished to conform to his traditions. He could have spoken on a night not traditionally reserved for male-only lectures, or he could have invited only selected male individuals to a lecture.

As the City sought to apply it, however, the regulation was somewhat more problematic. By seeking to prevent Minister Farrakhan from speaking to a large group of men in a municipal forum, the government made it more difficult for him to reach as many men as he would have liked. It also made it more difficult for the sect to construct the event in a manner which would convey its desired message to the world at large. Nonetheless, the "alternative channels" requirement has typically been construed as prohibiting only blanket bans on a particular medium or method of communication, such as handbills[186] or signs.[187] In the case at hand, the regulation affected only one particular type of venue, and it is likely that a court applying the pro-

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183 See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) ("Invariably, the Court has felt obliged to condemn systems in which the exercise of . . . authority was not bounded by precise and clear standards [because] the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use.").

184 See supra text accompanying note 163.

185 The *Clark* formulation of the test for content-neutral regulations on expression discusses whether alternative channels for expression exist, rather than whether the regulation is narrowly tailored; though the general requirement is the same, it is instructive to consider both formulations. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 292 (1984).

186 See Schneider v. State, 308 U.S. 147, 161 (1939) (striking down blanket ban on handbills because governmental interest in preventing litter was insufficient to justify broadly sweeping regulation that entirely prevents some individuals from conveying their political messages).

187 See City of Ladue v. Gilleo, 512 U.S. 43, 54-57 (1994) (Municipal ordinance prohibiting all signs was invalid because city "almost completely foreclosed a venerable means of communication that is both unique and important. . . . Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.").

posed test would find that the regulation left sufficient alternative channels for communication of the desired message.

*d. Outcome of the Proposed Test.* The regulation at issue in *City of Cleveland* would have passed the proposed test, for it is a facially content-neutral statute applied evenhandedly and in a manner which serves the purposes for which it was enacted, and it did not completely foreclose any method of communication. It therefore would have been a permissible restriction on the right of Minister Farrakhan and the sect to engage in speech and expressive association.

## CONCLUSION

If consistently enforced, public accommodations statutes and other antidiscrimination laws serve a vital state interest: they provide citizens with equal access to publicly available goods and services. Equal access helps to level the societal playing field, to eradicate the entrenched consequences of previous inequities, and to enable individuals to succeed on their merits. If the Nation of Islam or any other private group wishes to use a municipal facility as a forum, it must abide by the generally-applicable rules regulating the use of that forum. Regulation of such a group's admission policy may indeed have some incidental impact on its exercise of its First Amendment rights of free speech and association. This impact, however, is no greater than is necessitated and warranted by the compelling state interest in preventing invidious discrimination in public places.