AN ALTERNATIVE TO PRIVACY: THE FIRST AMENDMENT RIGHT OF INTIMATE ASSOCIATION

KATIE WATSON*

INTRODUCTION

* Inez lived with her two grandsons, Dale Jr. and John Jr., who came to live with Dale and his grandmother after his mother's death. A zoning ordinance, which limited the occupancy of homes to members of a single family, defined John as an "illegal occupant" because the boys were first cousins rather than brothers. When Ms. Moore refused to remove him from their home, she was

* B.A., 1989, Indiana University; J.D., 1992, New York University School of Law. During the development of this Note, the author was the Senior Note and Comment Editor of the Review of Law & Social Change. She is currently a law clerk in the Western District of Michigan.

convicted of violating the ordinance and sentenced to five days in jail and a $25 fine.[1]

* David and Catherine divorced when their daughter was one year old. Seven years after David and his daughter began living together, his custody was revoked. His daughter was prohibited from visiting his home because he was gay. Though the trial court found that the living arrangement had no adverse impact on the "happy [and] well-adjusted" child, the appellate court found that a gay parent living with his partner is always an "unfit and improper" caretaker of a child.[2]

* Michael T., Michael M., Bruce, Anne, Franklin, and Leonard rented a six-bedroom home, sharing meals, expenses, and chores. The owners of the house evicted them to comply with the town's single-family zoning ordinance, which defined "family" as one or more persons related by blood, adoption or marriage, or two unrelated persons.[3]

* Marjorie was a high school guidance counselor. She was fired because she told several colleagues and two gay students who came to her for counseling, that she was bisexual. The school's basis for its decision that Marjorie was unfit to counsel students was that "she was a 'free spirit' who had embarked on an 'uncharted course' and was operating in an unconventional manner."[4]

* Janet was a patrolwoman and Stanley was a sergeant in the Amarillo, Texas, police department. They worked different shifts, and Stanley was not Janet's supervisor. The pair began dating and spent several nights together. Although this conduct was not prohibited by any particular regulation, Janet and Stanley were suspended, and Stanley was demoted to patrolman.[5]

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1. Moore v. City of East Cleveland, 431 U.S. 495, 497 (1977) (invalidating zoning ordinance as it applied to the Moores).

2. Roe v. Roe, 324 S.E.2d 691 (Va. 1985); *see also* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991). Alison D. and Virginia M. lived together for several years before they decided to have a child. Virginia conceived a child through artificial insemination, and they raised the child together for two years. After the couple separated, the child remained with Virginia, and spent weekly overnight visits with Alison for two years. Alison continued to pay child support and mortgage payments to Virginia during this time. When Virginia started to place limits on such visits, Alison asked a court to preserve her visitation rights. The court reasoned that because Alison was not a biological or adoptive parent, the law which empowered the court to hear visitation petitions by parents did not apply. Therefore, it refused to hear evidence about their relationship and the best interests of the child.

3. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding single-family zoning ordinance).

4. Rowland v. Mad River Local School Dist., No. C-3-75-125, slip op. at text surrounding n.6 (S.D. Ohio Mar. 23, 1984); *see also* Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984) (upholding dismissal in the face of a jury finding that plaintiff's mention of her bisexuality did not in any way interfere with school operations), *cert. denied*, 470 U.S. 1009 (1985).

5. Shawgo v. Spradlin, 701 F.2d 470 (5th Cir. 1983) (finding the police department's actions constitutional), *cert. denied sub nom.* Whisenhunt v. Spradlin, 464 U.S. 965 (1983); *see also* Hollenbaugh v. Carnegie Free Library, 578 F.2d 1374 (upholding state-maintained library's dismissal of a librarian and custodian who moved in together and refused the library's demand to "normalize" their relationship through marriage or to live apart), *cert. denied*, 439 U.S. 1052 (1979).

* Early one August morning, Michael and an adult male companion were engaged in oral sex. When Michael heard a sound and looked up, he saw a police officer standing in his bedroom, watching him. The officer announced that Michael and his lover were under arrest, and he refused to leave the room or turn his back while the pair dressed. Michael spent the day in jail, where the officers made it clear to other inmates that he was gay and had been charged with sodomy, by saying, "Wait until we put [him] into the bullpen. Well, fags shouldn't mind — after all, that's why they are here."[6]

As these case summaries illustrate, the State has great power to prohibit, burden, and penalize intimate relationships which exist outside the nuclear family.[7] If you share your life with the "wrong" person(s), you may be ineligible for government aid programs, unable to live in certain neighborhoods, denied employment, or imprisoned. Entitlements and privileges, such as child-visitation and child-custody agreements, support obligations, insurance benefits, tax advantages, subpoena power, intestate succession, spousal right of election, and proxy decision making in health care, are often awarded on the basis of your legal status with loved ones, not your commitment.

State control, potential or exercised, is present in all intimate associations. Yet if you are a lesbian or a gay man, the penalties which may be visited upon you based on your choice of a partner are much heavier than those likely to be incurred by participants in other kinds of non-marital relationships. In all but a few localities, it is legal to deny you employment or housing on the basis of your sexual orientation.[8] The federal government excludes you from the

6. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1422, 1424-25 (2d ed. 1988). This incident culminated in Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia prohibition of oral and anal intercourse as applied to gay men and lesbians). Interestingly, the facts of the incident and the ultimate arrest are not discussed by any of the three courts that considered Michael's case. For a detailed account of the *Hardwick* litigation and an essay by Michael Hardwick on his experience, see PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 381-403 (1988).

7. For an excellent discussion of the protection extended to the "traditional" family and the disadvantages suffered by family formations outside the traditional mold, see Kris Franklin, *"A Family Like Any Other Family": Alternative Methods of Defining Family in Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027 (1990-91). *See also Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991) [hereinafter *Family Resemblance*].

8. NAN HUNTER, SHERRYL MICHAELSON & THOMAS STODDARD, THE RIGHTS OF LESBIANS AND GAY MEN 15-27, 64-73 (1992). To date, California, Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, and Wisconsin are the only states which prohibit discrimination on the basis of sexual orientation. *See* CAL. LAB. CODE § 1102.1 (West 1993); 1991 Conn. Acts 58 (Reg. Sess.); HAW. REV. STAT. § 368 (1991); MASS. GEN. LAWS ANN. ch. 151 B, § 4 (West Supp. 1991); N.J. REV. STAT. § 10.5 (1992); 1992 Vt. Laws 135; WIS. STAT. ANN. § 101.22, § 111.31 (1988); Several metropolitan areas, such as New York and San Francisco, do so as well. S.F. ADM. CODE 33-3301 *et seq.*; N.Y.C. ADM. CODE § 8-107 (1991 Supp.).

Controversy over bills and referenda which seek to block laws prohibiting discrimination on the basis of sexual orientation was prominent in the 1992 elections. For example, Colorado's Amendment 2 amended the state constitution to ban anti-discrimination laws which specifically protect gay men and lesbians. This amendment passed with 54% of the vote in a state-wide referendum and would override gay rights ordinances passed in Denver, Aspen, and Boulder. Jeffrey Schmaltz, *The 1992 Elections: The States — The Gay Issues*, N.Y. TIMES, Nov. 5, 1992,

Armed Forces and the FBI by statute.[9] If you are a citizen of another country, you are prohibited from immigrating to the United States or becoming a naturalized citizen.[10] You are not permitted to enjoy the symbolic bond and material benefit conferred by the status of marriage.[11] Your sexual orientation may be the basis for a finding that you are not fit to have custody of your own children.[12] And in twenty-five states and the District of Columbia, your love-making is an illegal act.[13]

The degree to which the State is permitted to burden a citizen's desire to share her life, mind, and heart with particular persons is of enormous consequence to the individuals involved and society as a whole. The formation of intimate relationships is central to human fulfillment and identity. Such relationships also play a critical structural role in the maintenance of democracy, by providing a barrier to the standardizing power of the State.

When the call of the heart and the command of the State conflict, does the Constitution protect intimate association and privacy rights from majoritarian morality? Since *Griswold v. Connecticut*,[14] litigants have invoked

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at B8, col. 6. The amendment's constitutionality was challenged before its effective date, and it was enjoined by a state judge until the case is resolved. Dirk Johnson, *A Ban on Gay-Rights Law is Put on Hold in Colorado*, N.Y. TIMES, Jan. 16, 1993, at A6, col. 1. In Oregon, a ballot measure which would have amended the state constitution to classify homosexuality as "abnormal, wrong, unnatural or perverse" was defeated with 56% of the vote. Schmaltz, *supra* this note. In addition, voters in Tampa, Florida chose to repeal that city's gay rights ordinance in the 1992 ballot. *Id.*

9. *See, e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (upholding FBI's exclusion of gay men and lesbians); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (upholding army regulation 1900.9C (Jan. 20, 1978 Joint Appendix at 216), which provides that "[a]ny member [of the Navy] who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service" under a rational basis test); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) (upholding Navy regulations excluding gay men and lesbians).

See generally Seth Harris, *Permitting Prejudice to Govern: Equal Protection, Military Deference, and the Exclusion of Lesbians and Gay Men From the Military*, 17 N.Y.U. REV. L. & SOC. CHANGE 171 (1989-90).

10. *See, e.g.*, *In re* Longstaff, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984) (upholding 8 U.S.C. § 1182(a)(4) (1976), which provides that "[a]liens afflicted with psychopathic personality, sexual deviation, or a mental defect" are ineligible to receive visas and shall be excluded from admission to the United States).

11. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974); *see also* Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 135 (1987-88).

12. *See generally* Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 463 (1990); Rhonda Rivera, *Legal Issues in Gay and Lesbian Parenting*, *in* GAY AND LESBIAN PARENTS (Fredrick Bozett ed., 1987).

13. HUNTER, MICHAELSON & STODDARD, *supra* note 8, at 119-20, App. A (Criminal Statutes Relating to Consensual Homosexual Acts Between Adults).

14. 381 U.S. 479 (1965) (invalidating a law prohibiting use of contraceptives as applied to married couples). *Griswold* was the first case to rest its holding on a right to privacy, but it also relied heavily on older substantive due process decisions.

Ironically, Justice Douglas' first draft of the majority opinion in *Griswold* rested on First Amendment associational grounds, analogizing the husband and wife relationship to other con-

the privacy doctrine to protect the autonomy of intimate relationships.[15] Yet the mode of analysis employed in *Bowers v. Hardwick*,[16] and the result it produced, are a powerful indication that the privacy doctrine, as understood and applied by the Justices of today's Supreme Court, is contracting. Although many believe that the privacy doctrine was misapplied in *Hardwick*,[17] a growing chorus of commentators contend that the doctrine is inherently flawed and susceptible to such misapplications.[18] Regardless of which of these two camps one joins, there is no escaping the fact that *Hardwick* limited the doctrine for those persons seeking protection and recognition for non-traditional intimate

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stitutionally protected associations. Justice Brennan, however, suggested to Justice Douglas that the holding be grounded in privacy as an aspect of substantive liberty contained within the Fourteenth Amendment, and a new doctrine was born. Laurence Tribe, *Justice William J. Brennan, Jr.: Architect of the Bill of Rights*, A.B.A. J. 47, 49 (Feb. 1991).

15. For a concise summary of the evolution of the right of privacy, see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

16. 478 U.S. 186 (1986).

17. *See, e.g.*, TRIBE, *supra* note 6, at 1430 (arguing that the Court's error in *Hardwick* was in using the wrong level of generality to conceptualize Hardwick's claim, and that it substituted "arbitrary judicial fiat" for principle in limiting its prior privacy decisions to marriage, family, and procreation); David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 862 (1986) (arguing that Justice White's argument in *Hardwick* "is itself unprincipled, and therefore illegitimate"); Daniel Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 242 (1986) ("[If *Hardwick*] were our only example, it would be difficult to defend the ability of the judiciary to engage in a process of reasoned decisionmaking."); Tom Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987) (arguing that the Court limited prior privacy cases to their facts and refused to extend their protection to Hardwick).

Justice Powell, the swing vote of the 5-4 decision, has indicated that he too may share the view that the *Hardwick* majority misapplied privacy doctrine. Justice Powell was the only member of the Court who voted with the majority against the state in Roe v. Wade, 410 U.S. 113 (1975), but voted with the state in *Hardwick*. When asked by this author, at a colloquy with NYU law students, how he reconciled the two votes and why he viewed the cases differently, he candidly replied that he had come to believe that he had been wrong to vote with the majority in *Hardwick*, and that after reading the published opinion, he felt that "the dissent seemed to have the better of the arguments." Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong: Powell on Sodomy*, NAT'L L.J., Nov. 5, 1990, at 3; Linda Greenhouse, *Washington Talk; When Second Thoughts Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at A14.

18. In Roe v. Wade: *A Study in Male Ideology*, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES 45 (Jay L. Garfield & Patricia Hennessey eds., 1984), Catherine MacKinnon argues that the existing division between public and private is not gender neutral. The privacy doctrine protects the existing distribution of power and resources within the private sphere; it thus shields the place of battery, marital rape, and exploited labor; has preserved the central institutions whereby women are deprived of identity, autonomy, control, and self-definition; and has protected the primary activity through which male supremacy is expressed and enforced). *See also* Rhonda Copelon, *Losing the Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15, 44 (1990-91) (arguing that the liberal conception of privacy as a negative right to be left alone denies the relationship of social conditions to the ability of the individual to exercise autonomy; therefore it renders privacy a weak vehicle for challenging traditional, sexist reproductive and sexual norms); Rubenfeld, *supra* note 15 (arguing that *Hardwick* exposed a conceptual vacuum which has always been at the heart of the privacy analysis); Norman Vieira, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181 (1988) (arguing that *Hardwick* demonstrates that privacy is an unreliable safeguard for non-textual rights).

associations.[19] The decision thus adds an enormous urgency to the exploration of the intimate association analysis.

Litigants, jurists, and theorists must find a new constitutional basis for claims that seek to protect human relationships. This Note establishes such a basis. It first defines the dimensions of a doctrine which begins with an understanding of human passion and works outward; a doctrine rooted in life as experienced, not hypothesized. The framework developed from this inquiry is then used to analyze and refine the underdeveloped jurisprudence of the First Amendment right of intimate association.

My analytical framework begins with two main premises. First, in recognition of the primacy of human relationships to individual happiness and fulfillment, it should reach and protect the most important relationships in our lives — our "essential networks." These networks are composed of relationships which are critical to personal fulfillment and self expression. The most significant relationships in our essential networks are set apart by their life-determining quality: we cannot imagine being the same person, or living the same life, without these relationships. Secondly, if a framework is to be consistently applied, and yet remain relevant to future generations, it must be flexible enough to accommodate "family" arrangements inconceivable to us now. Analogizing to the nuclear family, no matter how well intentioned an exercise, is doomed to failure.[20] American patterns of intimacy have changed radically over the last forty years[21] and are likely to continue changing.[22] The challenge is to develop an application of constitutional principles that keeps pace with change while maintaining its identity and internal consistency.[23]

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19. TRIBE, *supra* note 6, at 1429-30; Conkle, *supra* note 17; Copelon, *supra* note 18, at 46; Michael R. Engleman, Bowers v. Hardwick: *The Right to Privacy — Only Within the Traditional Family?*, 26 J. FAM. L. 313 (1987-88); Harvard Law Review Association, *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 210 (1986); Mark John Kappelhoff, Bowers v. Hardwick: *Is There a Right to Privacy?*, 37 AM. U. L. REV. 487 (1988); Rubenfeld, *supra* note 15; George Thomas, *Privacy: Right or Privilege: An Examination of Privacy After Bowers v. Hardwick*, 39 SYRACUSE L. REV. 815 (1988).

20. *See generally* Katharine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (arguing for "non-exclusive" parenthood which would not limit the legal status of parent to one person of each gender); Franklin, *supra* note 7, at 1068-70 (discussing the desirability of a family-initiated registration system which would permit differing levels of commitment among "family" members and friends to be registered as such).

21. *See generally Only One U.S. Family in Four is "Traditional,"* N.Y. TIMES, Jan. 30, 1991, at A19.

22. "Looking at our associational patterns in [recent decades], we have seen the future, and it diversifies." Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 660 (1980).

23. I am aware of the magnitude of change such a shift in legal analysis might bring about, in such areas as taxation, child custody, government benefits, and insurance law. However, my project is not to rewrite these codes, and I will not discuss in detail how the right of intimate association might affect each area. It is not a foregone conclusion that the intimate association analysis requires dramatic change in every one of these systems, but it does require that, when they are challenged, courts carefully examine the impact of the regulations on particular relationships and the state interest in maintaining the system.

The First Amendment right of intimate association provides a promising new way in which to conceive of interests at the core of human existence in a democratic society. This Note focuses on the nascent right of intimate association, its utility as an organizing principle, and its potential to protect the most significant relationships in our lives. It first advances a theory of intimate association which offers a more coherent, sustainable, and expansive mechanism by which to protect such interests than that supplied by current constitutional doctrine. It next explores an intriguing new application of this concept in Supreme Court jurisprudence, one which locates the right of intimate association in the First Amendment. Finally, it discusses the similarities between the freedoms of speech, religion, and intimate association, and how the three liberties work in tandem.

Intimate associations shape our sexual identity, family life, social life, and public personae.[24] The development of these relationships is as essential to personal fulfillment and happiness as is religious freedom, uncensored discourse, and free political exchange. However, unlike the freedoms of religion and speech,[25] the First Amendment right of association has not yet developed into a strong, consistent shelter which protects intimate associations from state intrusion. This Note proposes that a shelter for intimate association be built into the First Amendment's guarantee of free association.

Part I assesses the ideal contours of a fully developed associational right by examining the significance and role of intimate relationships in individual human lives. Part II traces an interesting and underdeveloped new strain of jurisprudence which addresses many of the "ideals" described in Part I. Initiated by *Roberts v. Jaycees*,[26] this line of cases recognizes the right of intimate association, locates the right in the First Amendment right of association, prescribes an objective functional test for identifying protected relationships, and recommends a sliding scale for the measurement of government interests. Part III takes the class of life-determining relationships, which Part I discussed in terms of their impact on the individual, and examines the impact these relationships have on the State. It concludes that the right of intimate association is as critical to the maintenance of democracy and protection against totalitarianism as are the doctrines of free speech and religious exercise. Finally, Part IV explores potential gaps in the intimate association analysis, and grapples with the questions raised by social congregations, casual relationships, and potential relationships.

24. Copelon, *supra* note 18, at 46.

25. "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

26. 468 U.S. 609 (1984).

I

THE CONTOURS OF THE RIGHT OF INTIMATE ASSOCIATION

The following analysis is shaped by four basic, but often overlooked, recognitions. First, both love and hatred are decidedly extrarational experiences, which defy logic and reason. Second, we can be certain that each of us have, or are working to build, an essential network of relationships which offer support, enrichment, and happiness. Third, no one can predict who each person in our essential network is, or the roles these people will play. Fourth, it is likely that each member of our essential network is not equally important to us. The cumulative effect of these observations is to suggest the contours of a doctrine which is grounded in and responds to life as it is lived by human beings, liberals and conservatives alike. Each will be discussed in turn, their relationship to the privacy doctrine will be considered, and the limiting principles of the doctrine they suggest will be explained.

A. The Extrarational Quality of Love

Whether it is a lover's torrid passion or a friend's steady affection and loyalty, love[27] resists reason. The source of intimacy is a mystery which eludes the analyses of both logic and science.[28] You cannot be convinced to fall in love, and you cannot reason your way out of it.[29] The emotion which forms the basis of affectionate and fulfilling bonds is rooted in the spirit, not the mind.[30]

The passion with which some revile certain incarnations of intimacy also

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27. I use the word "love" to refer both to romantic love, *eros*, and *philia*, the love of family and friends.

28. As Eve, through Twain, explained to her diary after the fall:

> The garden is lost but I have found him, and am content. . . . If I ask myself why I love him, I find I do not know, and do not really much care to know; so I suppose that this kind of love is not a product of reasoning and statistics, like one's love for other reptiles and animals. I think that this must be so. I love certain birds because of their song; but I do not love Adam on account of his singing—no, it is not that; the more he sings, the more I do not get reconciled to it. Yet I ask him to sing, because I wish to learn to like everything he is interested in. I am sure I can learn, because at first I could not stand it, but now I can. It sours the milk, but it doesn't matter; I can get used to that kind of milk. . . . So I think it is as I first said, that this kind of love is not a product of reasoning and statistics, it just comes, none knows whence, and cannot explain itself, and doesn't need to.

2 THE UNABRIDGED MARK TWAIN 535, 547-48 (L. Teacher ed., 1979).

29. These observations are not meant to paint a picture of a tumultuous sea of emotion, tossing humans by waves we can never control. I intend to describe feelings, not necessarily subsequent actions. While action may be taken as a direct consequence of feelings of love, when there are other reasons that dictate a different course (for example, pain to a partner in the case of infidelity), human beings are capable of using the power of intellect to control and order their lives. I simply mean to point out that, despite the capacity to "overcome" emotion in some situations, love is a unique and powerful emotion which cannot be generated or stifled at will.

30. David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 999-1009 (1979) [hereinafter Richards, *Sexual Autonomy*] (arguing for recognition of the "principle of love as a civil liberty" in the context of prohibitions of gay and lesbian sexual activity).

resists reason. Sex is "historically the preeminent source of taboo and target of irrational vendettas."[31] Therefore, we should recognize that where there is a loving relationship (which may or may not have a component of sexual expression), it will be rooted in an extrarational force, and that when that relationship is accompanied by hostility from some segment of the population, that hostility is similarly extrarational.

This basic recognition suggests an instructive analogue: the freedom of religion. The constitutional protection of religion comprehends the nature of and plans for the force of faith, spirituality, revelation, and a belief in the other-worldly. Religion is an enormously important and potent force, but not one that responds to reason.[32] Therefore, the free exercise clause leaves matters of faith to the individual conscience. The free exercise clause is designed to prevent conflict between state mandates and extrarational religious drives which might otherwise place a person in an impossible dilemma, forced to choose between her conscience and governmental authority.[33] The free exercise clause tolerates difference,[34] and it has traditionally prohibited even facially neutral regulations from placing unnecessary burdens on religious choice.[35]

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31. Copelon, *supra* note 18, at 27; *see also* Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1176 (1988) ("Statutes and regulations that discriminate on the basis of sexual orientation often reflect fear and hostility that are not susceptible to rational justification.").

32. Democracy requires the nourishment of dialogue and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. When the government appropriates religious truth, it "transforms rational debate into theological decree." Those who disagree are no longer questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach.

Lee v. Weisman, 112 S. Ct. 2649, 2666 (1992) (Blackmun, J., concurring) (citing Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1131 (1990)); *see also* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120-23 (1992) (arguing that the Warren and Burger Courts viewed "religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere," and attributing that view to the philosophical position represented by John Dewey).

33. "[A]t the core of constitutional values is religious toleration, understood as neutrality between those visions of the good life that are fundamental to autonomous capacities." Richards, *Sexual Autonomy*, *supra* note 30, at 976.

34. Wisconsin v. Yoder, 405 U.S. 205, 223-24 (1972) ("There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong'. A way of life that is odd or even erratic but interferes with no rights or interest of others is not to be condemned because it is different."); *see also* Martha Minow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925 (1991). Minow argues that "the religious freedom protections are the most explicit acknowledgment and endorsement of pluralism in our Constitution," and explores the applicability of free exercise analysis as a potential framework for family freedom. *Id.* at 935.

35. Sherbert v. Verner, 374 U.S. 398 (1963) (holding that unemployment benefits cannot be conditioned upon willingness to work during a day which was recipient's sabbath); Hobie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (same); Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting the Amish from compulsory school attendance law).

Unfortunately, the word "traditionally" in this sentence may become a reference to the past. Two recent cases, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), and Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872

The constitutional recognition that there is no one "right" way to worship also dictates the form of free exercise adjudications. Free exercise jurisprudence does not allow courts to decide the truth or falsity of a claimant's belief,[36] but only whether it is sincerely held.[37] All sincerely held religious beliefs are presumed legitimate. The Court has refrained from defining "religion," because any definition would be restrictive, and the act of defining would risk violating the establishment clause.[38] Furthermore, the free exercise guarantee has no requirement of rationality.[39]

Similarly, the Establishment Clause orders the relationship between government power and the religious passions of its citizens. First, it recognizes the divisive power of religious faith. The Constitution therefore places religious choices in the private sphere,[40] and it forbids the State from using its power and prestige to advance or inhibit any particular sect or religion over non-religion.[41] Recent jurisprudence uses the perceptions of the outsider to measure whether the government has endorsed religion.

> [T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a par-

(1990), throw the continuing vitality of this analysis of the free exercise clause into question. In *Lyng*, the Court rejected the assertion of burden, because the federal government's decision to build a road through sacred Indian sites now held by the United States did not tend to coerce individuals into acting contrary to their religious beliefs. In *Smith*, the Court upheld the denial of employment benefits to Native Americans who were fired because they ingested peyote during a religious ceremony. The *Smith* Court ruled that when a generally stated rule with universal applicability burdens the free exercise of some people's religions as a side effect, the State need only show a rational basis to justify its actions.

I recognize that *Lyng* and *Smith* are inconsistent with my analysis of the power of the religion clauses. However, I view them as misguided departures from an impressive tradition of guarding religious pluralism. The fact that Justice Scalia's opinion in *Smith* openly directs those of minority religions who are dissatisfied to address the elected branches demonstrates the opinion's misunderstanding of the anti-majoritarian force that the Bill of Rights was designed to provide. *Smith*, 494 U.S. at 890.

36. *See generally* TRIBE, *supra* note 6, at 1249 (discussing Sherbert v. Verner, 374 U.S. 398 (1963)), at 1246 ("Clearly a belief should not be dismissed because it has little historical pedigree or fails to resemble the factfinder's own idea of what a religion should resemble. . . . [but where] extrinsic evidence exists to establish that 'religion' is being used as a completely fraudulent cloak, such evidence must be considered.").

37. United States v. Seeger, 380 U.S. 163, 185 (1965). *See generally* TRIBE, *supra* note 6, at 1244 (noting that even this scrutiny cannot be too exacting, because an intrusive inquiry into religious beliefs would itself undermine religious liberty).

38. Zorach v. Clauson, 343 U.S. 306, 318 n.4 (1952).

39. Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit first amendment protection."); Bowen v. Roy, 476 U.S. 693, 699 (1986) (accepting the claimants' assertion that their belief was religious, although their belief — that the government's use of a social security number in their daughter's name would injure her spirit — was apparently not held by any organized religious group).

40. "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." Lee v. Weisman, 112 S. Ct. 2469, 2656 (1992).

41. *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971).

> ticular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.[42]

The religion clauses consider the valuation of religious choices beyond the competence of courts and legislatures. Because the "right" way to worship and the "right" way to love are equally indiscernible, courts should be as reluctant to define "family" as they are to define "religion." Our sexual choices and our religious choices are both driven by extrarational passions and beliefs which resist compromise and accommodation.[43] A doctrine which draws from the wisdom of the Free Exercise Clause would allow individuals to choose their own paths to fulfillment through intimate relationships. Application of the logic propelling the anti-establishment principle suggests that the State should not be permitted to promote, endorse, or condemn particular intimate associations which are central to the people in them. Further, as has been the case with certain religious minorities, any constitutional doctrine which sets out to protect intimate associations must stand ready to interpose itself between those who express love in a way which offends others and those zealous to "reform" or punish them.

Current privacy jurisprudence only recognizes rights as fundamental if they are based in the history and tradition of the United States or are implicit in the concept of ordered liberty.[44] Yet the significance of essentially removing a practice from the legislative arena is greatly diminished when the criteria for doing so — history and tradition — are remarkably similar to what motivates a majority of legislators to protect such practices. A test which is shack-

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42. Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (internal quotations omitted); *see also Lee*, 112 S. Ct. at 2658 (considering the perception of the dissenter); *Id.* at 2665 (Blackmun, J. concurring) (stating that the establishment clause seeks to counter the message of exclusion that government sends to non-believers when it endorses a particular religion).

43. *See generally The Brennan Legacy, A Roundtable Discussion*, A.B.A. J., 52, 56 (Feb. 1991) (Professor Burt Neuborne of the NYU School of Law posits that Justice Brennan saw religion as the 1791 version of sex, comparing the extrarationality and the power of the two).

44. *See, e.g.*, Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2859-60 (1990) ("It is at least true that no 'substantive due process' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference."); Michael H. v. Gerald D., 491 U.S. 110, 129 n.7 (1989) ("[W]e rest our decision not upon our independent 'balancing' of such interests, but upon the absence of any constitutionally protected right to legal parentage on the part of an adulterous natural father in Michael's situation, as evidenced by long tradition."); Bowers v. Hardwick, 478 U.S. 186 (1986); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) ("Appropriate limits on substantive due process come . . . from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie society.' " (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring))); *see also* Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83 (1980) (arguing that *Griswold* and its progeny follow the Court's original focus on protection of tradition and have no implication for laws regulating sexual expression outside of traditional marriage).

led to the consensus of the past offers no opportunity to transcend majority morality.

Choices driven by love, like religious choices, should be presumed legitimate and left to the individual conscience. State imposition of an orthodoxy is as illegitimate and destructive to the human spirit in matters of love as it is in matters of religion.

B. Everyone Has (or is Working to Build) an Essential Network

Intimate relationships are central to human fulfillment and identity. The most important relationships of our lives, our "essential networks," have a unique potential to enrich, sustain, and stimulate.[45] Our quest to build these networks is driven by the desire to enjoy the company of certain other people, to fulfill the human need to love and be loved, and to develop the sense of trust and deep affiliation which lovers and close friends share.[46] We all share these needs and desires; their existence is part of what it is to be human.[47] In addition, the construction of an essential network is part of the construction of self. Identities are inexorably shaped by these relationships.

The quality which distinguishes many of the relationships in our essential networks from other human connections is their life-determining force.[48] They are the relationships that weave the fabric of our lives, that define who we are by whom we love, whom we give life to, whom we raise, with whom we share our homes, and with whom we grow. Therefore, the intimate association analysis correctly focuses inquiry on the relational values at stake, because these "private" decisions create our social connections. Indeed, there is an intuitive sense in which the concept of privacy misses the mark. Privacy seems to connote a secret arrangement, and it focuses on the rights of the individual; yet few of the activities termed "fundamental rights" in the privacy

45. I do not mean to paint a rosy picture of life among intimates which obscures the fact that for many, "essential networks" are a source of terror, degradation, or quiet desperation. For others, such intimate connections are simply nonexistent; however, the following discussion does not contradict this fact. It is instead meant to emphasize the potential for such rewards, and the inevitability of the quest.

46. Karst, *supra* note 22, at 630-37. Although my analysis parts company with Professor Karst's in several respects, I am indebted to his work. His article provides an excellent discussion of the significance of the value of intimate association.

47. As Rosalind remarked: "Love is merely a madness; and, I tell you, deserves as well a dark house and a whip as madmen do: and the reason why they are not so punish'd and cured is, that the lunacy is so ordinary that the whippers are in love too." WILLIAM SHAKESPEARE, AS YOU LIKE IT 267, act 3, scene 2 (Walter J. Black, Inc. 1965).

48. For example, for better or worse, my relationships with both my mother and my father have had a significant impact on the course of my life and the way in which my personality and self-concept has developed. Part of the power to shape that these relationships contain is in the experience of the role of a daughter, but it is more than this role. I, my mother, my father, and our relationships are unique; if I was the daughter of a different woman or man, I would not be who I am. Though we have not shared a home for many years, I still live my life, in ways known and unknown, in response to these relationships. Because my life would be significantly (though unimaginably) different but for these relationships, they are appropriately termed life-determining.

rubric are undertaken alone. Family relationships, marriage, and the use of contraception in sexual relationships each require the presence of at least one other person.[49]

The right of intimate association is not a right to be let alone, but a right to connect. Because it is defined by the sense of collectivity that intimate association engenders, the feeling that "we" exist as something different than you and me,[50] the right should inhere in a relationship. The right of intimate association does not inhere in a particular activity (such as sex), status (such as marriage or genetic ties), or place (such as the home). Although considerations of elements such as shared activities, status, and place are instructive as to whether the relationship in question should be labeled as part of an essential network, none of them are determinative. The definitive element of the intimate association analysis is the relationship's life-determining force.

The concept of intimate association cannot be correctly applied to unilateral actions. The conclusion that an individual cannot possess the right of intimate association without a partner excludes interests which may be conceived of as elements of sexual privacy, such as the desire of an individual to view obscene materials in her home. Therefore, the intimate association rubric is of no relevance to a case like *Stanley v. Georgia*.[51] In addition, this parameter is the basis for the limiting principle that a judicially cognizable "intimate association" cannot be coerced. The formation of an intimate association requires a semblance of free will or a balance of power. There is no such thing as a forced intimate association, only unilateral action. Because the right extends to relationships, not to particular acts or statuses, it may aid the exploited in a way that privacy does not — when one party has not freely chosen an intimate relationship, no "privacy" right can shield one who seeks to force intimacy on another from State intervention.

Finally, the emotional investment and time required to form such commitments suggests one of the intimate association doctrine's most important limiting principles. Life determining relationships commonly require a great deal of time and energy to form and maintain. Natural limitations on human emotional energy and time on earth dictate that our essential networks of rela-

49. The glaring exception to this statement is the fundamental individual right to decide whether or not to beget or bear a child. *See, e.g.*, Carey v. Population Services Int'l, 431 U.S. 678, 688-89 (1977); Roe v. Wade, 410 U.S. 113 (1973). The applicability of the intimate association doctrine to unilateral decisions is discussed *infra* text accompanying note 51.

50. Karst, *supra* note 22, at 629.

51. 394 U.S. 557 (1969). Further, the mere presence of more than one person and a "sexual aura" at a pornographic movie venue does not bring cases like Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973), into the realm of the right of intimate association. The simple fact that an unacquainted group of people choose to enjoy a movie in one another's presence will not move the group under the umbrella of the intimate association analysis. Of course, the fact that activities such as those in *Stanley* and *Paris Adult Theater I* are not included in the intimate association rubric in no way affects the constitutional protection they are extended through the First Amendment freedom of speech.

tionships are not infinitely expansive.[52]

C. No One Can Predict Who is in Our Essential Networks

Privacy and substantive due process are hinged on the concept of fundamental rights.[53] Perhaps the fundamental rights framework can be imagined as a clumsy proxy for "essential networks," because the rights which have been termed fundamental do in fact reach relationships which are part of many people's essential networks. However, rights are imprecise and static, and they fail to respond to the fact that no one can predict how many people are in our essential networks, who they are, or what role they play. Though a large number of individuals might be caught by casting the net of "spouse," or "biological child," it would miss some people completely. Of those people such a net does touch, it is likely to provide incomplete coverage of all the relationships within their essential network. Similarly, there are some people who may have spouses or biological children, but would not list them as part of their essential network.

How can we protect essential networks if we cannot predict who is in them? The most reliable source of information is the parties involved, who could testify as to the life-determining force of their relationship; however, the need for generally applicable and predictable principles and laws mitigates against individualized inquiry. Therefore, in order to identify protected relationships in a manner which is as content-neutral as possible, flexible enough to adapt to social changes, and resistant to majority morality, I propose a functional test, but one with a safety valve.[54] Functional tests identify "similarly situated" relationships without any reference to formal status. They look to such criteria as the longevity of a relationship, emotional commitment, selectivity, and exclusivity.[55] The goal of a functional test is to measure whether

52. Karst, *supra* note 22, at 634-35 (discussing love and friendship's foundation on intimacy's economy of scarcity).

53. The privacy analysis protects individual rights which are "fundamental." *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

54. Ideally, an enlightened legislature would develop a way for you to inform the relevant decision maker about who is included in your essential network, perhaps through a system of national family registration. *See, e.g.*, Franklin, *supra* note 7. The most powerful criticism registration advocates level at the functional approach is that its reliance on case-by-case adjudication treats nontraditional adult relationships differently than traditional ones, which is contrary to the desire to achieve parity between the two categories of relationships. *Id.* at 1065. While this is a valuable insight as a policy matter, it is unlikely that one could argue that a registration system is constitutionally required. In contrast, I am arguing that the Constitution requires that courts look beyond the "status" conferred by state law when particular love relationships are burdened or prohibited, regardless of the system of state law which confers that status. Of course, from the legislator's point of view, if the right of intimate association became firmly entrenched in constitutional doctrine, a registration system which allowed individuals to declare their levels of commitment would be appealing because its classifications would be presumptively valid, and thus an easy way to identify similarly situated classes of relationships.

55. The New York Court of Appeals provides one example of a judicial use of a functional definition for interpreting the word "family" in a statute. In Braschi v. Stahl Assocs., 543

the parties serve the same *function* in one another's lives that traditionally protected parties, such as married persons or parents and children, serve for one another.

When applied, functional tests risk reducing the inquiry to an investigation of whether this group "looks like" a more familiar family form. This is why the test's "safety valve" is necessary. It guards against the accidental exclusion of relationships which deserve protection. With this in mind, the last criteria of the intimate association functional test must always be the life-determining force of a relationship. This allows parties to demonstrate that, although they fall outside of the criteria which we choose as indicative of an essential network relationship, the life-determining force of their relationship is such that it warrants protection. This safety valve acknowledges that our criteria are simply proxies for life-determining force, and that they inevitably will fail to describe some relationships which belong in essential networks.

The result of this functional test is a movement toward a framework within which the definition of essential networks is located in the parties who experience them, and not the court or the legislature. This flexibility is absolutely essential if we are to make intimate association a stable constitutional principle which will remain relevant to future generations who may conjure up satisfying family arrangements we cannot now imagine. Only a functional test can preserve consistent core values over time, while adapting to the manner in which citizens choose to order their most significant relationships in a content-neutral manner. This attribute of the intimate association analysis gives it a flexibility which will translate into staying power.

D. Each Member of Our Essential Networks is Not Equally Important to Us

The fourth basic recognition of intimate association analysis is that all the relationships in our essential network are not equally important to us. Instead of engaging in a bipolar analysis which defines some bonds as "always protected" and others as "never protected," a sliding scale should be used. Once the functional test determines that the relationship in question falls within the intimate association rubric, the next question is the degree of protection it will receive or conversely, the level of state interest necessary to justify intervention or prohibition. The sliding scale is a more sensitive measure than the all-

N.E.2d 49 (N.Y. 1989), the court interpreted the word "family" in a rent control statute to extend to those who satisfy a functional test that examines the exclusivity and longevity of relationships, the level of emotional and financial commitment, the manner in which the parties conduct their everyday lives and present themselves to others, and the reliance placed upon one another for daily family services. It concluded that the relationship of the male partners fulfilled this criteria. *But see* Allison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (holding that a live-in lover who shared parenting responsibilities for a period of years with the child's mother was not a parent within the meaning of the statute which allows "either parent" to apply for a writ of habeas corpus to determine the issue of visitation rights, following the termination of the parties' relationship).

or-nothing analysis of the fundamental rights approach. It acknowledges that essential networks are comprised of several different kinds of relationships, each important, but not equally so. The sliding scale takes into account varying degrees of commitment, intimacy, and life-determining force.

The United States Supreme Court has recently shown signs of responsiveness to these four basic recognitions. In *Roberts v. Jaycees*,[56] the Court established a functional test and a sliding scale, and it anchored the right of intimate association in the First Amendment right of association. This jurisprudence is young; the precedent is only nine years old, and the doctrine is largely untested in the intimate association arena. Yet intimate association is also an old, durable doctrine. Its roots lie in over sixty-five years of precedent and many more years of constitutional, political, and psychological theory. The *Jaycees* decision is a reordering of sorts, a judicial assembly of old ideas reformulated to benefit from constitutional insights collected since footnote four of *United States v. Carolene Products*[57] and the patterns that hindsight reveals. The next section of this Note will briefly trace the development of the right of association, and then it will analyze the *Jaycees* decision in detail.

II
THE EVOLUTION OF SUPREME COURT JURISPRUDENCE ROOTING THE RIGHT OF INTIMATE ASSOCIATION IN THE FIRST AMENDMENT

A. The First Generation Cases: Ending State Interference in the Association of Large Groups

To understand recent developments in the First Amendment right of intimate association, one must first understand the evolution of the right of association, grounded in the constitutional "right of the people peaceably to assemble."[58] The first time the Supreme Court referred to the First Amendment right of assembly as the right of association in a constitutional holding was in *NAACP v. Alabama ex rel. Patterson*.[59] *NAACP* began when Alabama's Attorney General sought to compel the state chapter of the NAACP to produce a list of its members' names and addresses. The NAACP successfully argued that compelled disclosure of its rank-and-file membership abridged the right of its members to engage in lawful association in support of their beliefs, and that no valid overriding state interest had been offered which would justify the intrusion. Though the holding was ultimately grounded in the Due Process Clause of the Fourteenth Amendment, Justice Harlan wrote

56. 468 U.S. 609 (1984).

57. 304 U.S. 144, 152 (1938). Justice Stone's famous footnote marked the beginning of the Court's shift in focus toward judicial attention to civil rights and liberties.

58. For general discussions on the development of the right of association, see Reena Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977); Lawrence Wilson & Ralph Shannon, *Homosexual Organizations and the Right of Association*, 30 HASTINGS L.J. 1029 (1979).

59. 357 U.S. 449 (1958).

for the majority that freedom of association for the advancement of beliefs and ideas was an "inseparable aspect of the liberty provided in that clause."[60] The Court reasoned that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[61] In so stating its rationale, the Court connected the right of free association to a right of privacy, through its acknowledgment that denying this group's claim to privacy would effectively end its association. Though the NAACP's association was clearly political, the Court emphasized that the ideas propelling the group need not be political in order to subject state action that curtails the freedom to associate to "the closest scrutiny."[62]

In *Shelton v. Tucker*,[63] the Court fulfilled the promise of *NAACP*, and held that the ideas furthered by an association need not be political to be protected. The *Shelton* Court struck down an Arkansas statute requiring public school teachers to annually disclose all the associations in which they were members or to which they had contributed money over the past five years. In further recognition of the nexus between privacy and free association, the Court stated that "[e]ven if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy."[64] Although the Court conceded that some associations might be relevant to determining teacher fitness, it found the statute too broad to be justified by this concern.

Twenty-one years later, in *Citizens Against Rent Control v. Berkeley*,[65] the Supreme Court reaffirmed its stance that encroachments on association and political expression require strict or "exacting" scrutiny. This time the Supreme Court grounded the right solely in the First Amendment. In *Citizens*, the Court found that limitations on the amount organizations could donate to political causes, in the absence of limits for individuals, were an unacceptable restraint on the right of association.[66] *Citizens* recognized that political expression is an activity that may be valuable only in groups when

60. *Id.* at 460.

61. *Id.* at 462.

62. *Id.* at 461.

63. 364 U.S. 479 (1960).

64. *Id.* at 486.

65. 454 U.S. 290 (1981).

66. *Id.* at 436, 438, 440 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978)).

The Court distinguished Buckley v. Valeo, 410 U.S. 1 (1976), which limited contributions to candidates, because the limits on expression created by the restrictions in that case were overridden by a governmental concern with the prevention of corruption or the appearance thereof. The Court noted that there was no similar risk when a group advanced an issue, instead of a person, and that the state could protect systemic integrity by requiring public disclosures of donor identities and amounts. However, the Court did not explain why its suggestion that "legislation can outlaw anonymous contributions" is not at odds with *NAACP*. *Citizens*, 454 U.S. at 299.

individual voices would fade or disappear.[67]

B. The Second Generation Cases: Association Versus the Anti-Discrimination Principle and the Development of the Intimate Association/Expressive Association Dichotomy

NAACP, Shelton, and *Berkeley* all involved groups which successfully invoked the right of association to end state interference with their gatherings. In contrast, the next generation of claims involved organizations which resisted state orders to open their doors, not to the state itself, but to minorities and women. These organizations argued that the right of association, as established by the *NAACP* line of cases, precluded state efforts to integrate. In each case, the Court held either that the group did not enjoy protected associational rights, or that the state interest in eliminating discrimination was greater than any associational rights held by the group. In the course of these decisions, the Court was required to define when the State may regulate its citizens' gatherings and which types of associations are protected by the First Amendment. It is through this inquiry that the right of intimate association was born.

The first suggestion that two distinct components may be found in associational rights analysis came in 1976 with *Runyon v. McCrary*.[68] *Runyon* held that the racially discriminatory admission policies of a private day camp and a nursery school violated Title 42 of the United States Code. The school claimed that section 1981 was unconstitutionally applied, because it violated the students' *NAACP* right of association. The Court rejected this argument on two grounds: expression and privacy. It first determined that the students' right to engage in association for advancement of beliefs and ideas (in this case the idea that racial segregation is desirable) did not protect the *practice* of excluding racial minorities from the school. The Court noted that there was no evidence to support the claim that admitting minorities would at all inhibit the teaching of certain ideas or dogma. Second, the Court found that the schools' privacy claim was contradicted by their mass-mailings and yellow pages advertisements. The relationship involved was found to be more contractual than personal, and the Court denied that the acceptance of minority students violated the current students' privacy interests.[69]

Eight years later, the Court was confronted with a similar associational claim in the case which is the basis for the modern intimate association analysis. In *Roberts v. Jaycees*,[70] the Court rejected the Jaycees' right of association

67. *Citizens*, 454 U.S. at 294.

68. 427 U.S. 160 (1976).

69. The Court also found that, in light of the Thirteenth Amendment, private discrimination is not afforded any affirmative constitutional protection, despite the fact that it may be characterized as a form of freedom of association protected by the First Amendment. *Id.* at 176 (quoting Norwood v. Harrison, 413 U.S. 455 (1973)).

70. 468 U.S. 609 (1984). Five of the seven participating justices joined the opinion — Justices Brennan, Stevens, Marshall, Powell, and White. Justice Rehnquist concurred in the

defense and found constitutional a Minnesota law[71] requiring the club to accept women members. In an analytical shift that is key to the development of a First Amendment doctrine which protects intimate human relationships, the Court approached the competing interests in *Jaycees* differently than it had in *Runyon*. The *Runyon* Court considered two separate claims: expression and privacy. In contrast, the *Jaycees* Court declared that its decisions "have referred to constitutionally protected 'freedom of association' in two distinct senses . . . . We therefore find it useful to consider separately the effect of applying the Minnesota statute to the Jaycees on what could be called its members' freedom of intimate association and their freedom of expressive association."[72]

Jaycees thus marks the second turn in the development of the First Amendment "right of the people peacably to assemble." First transformed to the right of association in *NAACP*, *Jaycees* initiated a second turn, propelling the right of association to its current status as a right with two distinct components: "instrumental," or expressive association and "intrinsic," or intimate association.[73] Intimate association protects associations essential to personal liberty. Expressive association protects associations that are otherwise protected by the First Amendment.

There are two striking aspects of the *Jaycees* opinion. First, it uses a functional test to describe which types of associations may be termed "intimate." Second, rather than a bright line between protected and unprotected associations, the Court proposes a sliding scale to assess which relationships should be protected by the intimate association analysis, and the state interest necessary to override the individual's interest in her relationship.

The Jaycees contended that they deserved protection under both branches of the right of association. The Court first determined that the Jaycees could not sustain an intimate association claim. In order to reach this conclusion, Justice Brennan explored the doctrine of "intimate association" in depth. The opinion first explains why intimate associations are protected by the Constitution.

> [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from

judgment and Justice O'Connor concurred in part (including the intimate association framework) and concurred in the judgment. Chief Justice Burger and Justice Blackmun took no part in the decision.

71. MINN. STAT. § 363.03 (1982).

72. 468 U.S. at 617-18.

73. *Id.* at 618.

> unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.[74]

Justice Brennan refers the reader to eighteen cases as "examples" to support these propositions, none of which mentions the First Amendment right of association.[75] The right of intimate association is thus a new right, for *Jaycees* is the first instance when the Supreme Court used the term to describe a constitutional doctrine. At the same time, it is also a very old right, which is grounded in more than sixty-five years of precedent concerning intimate human relationships. By locating the driving principles of the precedents it lists in the First Amendment, *Jaycees* ingeniously joins the old and new.[76] The Court then charts the future course of a reformulated right of association.

The *Jaycees* opinion next specifies the manner in which the judiciary should determine which personal relationships are protected by the intimate association framework. The significance of the newly announced First

74. *Id.* 618-19 (citations omitted).

75. *See* Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978) (holding that the Fourteenth Amendment protects marriage as a fundamental right); Quillion v. Walcott, 434 U.S. 246, 255 (1978) (holding that adoption may be allowed over the objection of the natural father without violating his Fourteenth Amendment due process and equal protection rights if he has not established sufficient relationship with the child); Carey v. Population Services Int'l., 431 U.S. 678 (1978) (holding that the Fourteenth Amendment privacy right extends to minor's right to contraceptives); Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion) (holding that the Fourteenth Amendment protection of the family recognizes the sanctity of extended as well as nuclear family); Smith v. Organization of Foster Families for Equality and Reform (O.F.F.E.R.), 431 U.S. 816, 844 (1977) (holding that, despite lack of biological ties and the role of the State in creating the relationship, foster families might have a protected "liberty interest" sufficient to trigger procedural due process when the State removes the child from a foster home); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974) (holding that freedom of choice in matters of family life is protected by the Fourteenth Amendment; school board's conclusive presumption that all pregnant women are unfit to teach after a certain date in their pregnancy thus unconstitutionally restricts the right to procreate); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (holding that state interest in compulsory school attendance laws does not outweigh the First Amendment right of Amish parents to guide the religious future of their children); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (holding that Fourteenth Amendment protection extends to "illegitimate" biological ties); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (holding that the First and Fourteenth Amendments confer a right to read "obscene" materials at home); Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965) (recognizing a Fourteenth Amendment right to marital privacy); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing that the Constitution confers a right to be let alone); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing a Fourteenth Amendment liberty of parents and guardians to direct a child's upbringing and education); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the Fourteenth Amendment protects the right to contract, engage in common occupations of life, acquire useful knowledge, marry, establish a home and bring up children, worship freely, and enjoy privileges necessary to the pursuit of happiness).

76. At the outset of the test in *Jaycees*, Justice Brennan wrote that freedom of association is a "fundamental element of personal liberty," 468 U.S. at 618, but it seems to be meant in a broader sense, not as a reference to the Fourteenth Amendment. Though the phrase rings of substantive due process, Brennan names no constitutional provision but the freedom of association as its source.

Amendment right of intimate association is magnified when coupled with the functional test advanced by the Court.

> The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family. . . . *Among other things, . . . [family relationships] are distinguished by such attributes as 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.*[77]

This functional test does not depend on a finding that the relationship in question is rooted in any "tradition." Nor does it require that a union "look like" a familiar family formation.

If the Court had ended its analysis with this functional test and used it to determine whether any particular intimate association was "fundamental" or not, it would have been a significant advance; however, the Court did not stop there. It rejected the strict line drawing approach of the fundamental rights rubric and adopted a sliding scale to determine the amount of protection each intimate association should receive:

> Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. We need not mark the potentially significant points on this terrain with any precision. We note only that *factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.*[78]

The Jaycees, with over 800 members in the Minneapolis and St. Paul chapters, were found to be a "large and basically unselective group," outside of the range of protection offered by the intimate association framework.[79] The State's interest in overriding any intimate association concern was therefore not addressed.

While *Jaycees* rooted the right of intimate association in case law developed to protect the traditional family, it skillfully avoided limiting the protection of intimate association to familiar family configurations. It developed a functional test that directs a judge to focus on whether an intimate relationship serves for the parties involved the same purposes that "traditional families" purport to serve, instead of resting on the personal beliefs of a particular

77. *Id.* at 619-20 (citations omitted) (emphasis added).
78. *Id.* at 619-20 (citations omitted) (emphasis added).
79. *Id.* at 621.

judge. Fairly applied, the test has the potential to transcend majoritarian morality.

The *Jaycees* Court went on to address the claim of "expressive" association advanced by the Jaycees membership. It explained that the freedom of expressive association has "long [been] understood as implicit in the right to engage in activities protected by the First Amendment [and is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[80] Although the State's interference with the internal organization and affairs of the Jaycees "plainly implicated" this right, it was trumped by the compelling state interest in eradicating sex-based discrimination.[81] The Jaycees' expressive association claim failed in part because, as in *Runyon*, the Jaycees made no showing that the admission of female members would impede the organization's ability to disseminate its preferred views.[82] The Court found that the statute imposed no "serious burdens" on the male members' freedom of expressive association.[83]

This functional test to determine which relationships are protected by the right of intimate association was affirmed three years later in *Board of Directors of Rotary International v. Rotary Club of Duarte*.[84] In *Rotary*, the Supreme Court found that a California Act requiring gender equality in all state business establishments did not violate the Rotary Club's intrinsic or expressive rights of association. Justice Powell, writing for the Court,[85] stated that *Jaycees* provided the framework for analyzing the Rotary Club's constitutional claims. Powell quotes a great deal of language from *Jaycees* in the Court's opinion. He employs a functional test, calculating the significance of the threatened relationship by assessing its objective characteristics and comparing that to the degree of legitimate state interest. In an important passage

80. *Id.* at 622 (citations omitted).

81. *Id.* at 626.

82. The Court noted that the Minnesota Human Rights Act did not require the Jaycees to alter their creed of "promoting the interests of young men," and it imposed no restrictions on the groups' ability to exclude individuals with ideologies or philosophies different from its existing members. *Id.* at 627.

83. *Id.* A flaw in the *Jaycees* framework, the discussion of which is beyond the scope of this Note, is the Court's potentially distasteful and perhaps dishonest test regarding expressive associational rights. With regard to schools segregated by race and business clubs segregated by sex, the Court dismissed rather lightly the contention that minorities and women, if admitted, would change the ideologies advanced by their segregationist policies. The Justices offered no suggestion as to what type and weight of evidence a group must present in order to demonstrate the possibility a group's core values will be undermined. Moreover, the Justices did not state what the defendant's evidence must prove in order to prevail, i.e., whether it must show a mere possibility, a significant likelihood, or an overwhelming chance that the group's message will be altered.

84. 481 U.S. 537 (1987).

85. Justices Powell, Brennan, Stevens, Marshall, and White and Chief Justice Rehnquist joined the opinion. Justice Scalia concurred without opinion and Justices O'Connor and Blackmun did not participate.

reinforcing the premise of Justice Brennan's functional test, Justice Powell wrote:

> Of course, we have not held that constitutional protection is restricted to relationships among family members. *We have emphasized that the First Amendment protects those relationships*, including family relationships, that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[86]

C. *The Impact of the* Jaycees *Functional Test and Sliding Scale*

Jaycees established three categories of association. The first is expressive association, which can be curtailed only if there is a compelling state interest. The second type of association is not referred to collectively in the cases, but I will call them "open associations." Open associations include social gatherings and Jaycees-like groups, and they receive little constitutional protection. The third realm of the First Amendment right of association is intimate association, which includes the relationships which I refer to collectively as our essential networks.

The *Jaycees* Court drew a line between associational disputes which should be resolved by the courts, and associational disputes which are better left to the legislature. The Court defined the non-expressive associations which the Constitution protects by focusing on the enclaves in which Americans find sustenance today. As our society becomes increasingly atomized, the significance of intimate associations as our primary (if not sole) sources of identity, community, and fulfillment increases.[87] Therefore, *Jaycees* identifies one type of community, the "intimate," and protects it from intrusion. The associations on the other side of that line, "open" associations, are left in the realm of majoritarian politics.[88] The decision whether to compel the Minneapolis Jaycees to admit women thereby was left to the larger community in Minnesota, which voted to do so through its adoption of the Minnesota Human Rights Act.

The first task of a court considering an association claim is to determine how the threatened association is best classified. A functional test determines whether a relationship should be classified as an intimate association. *Jaycees*

86. *Id.* at 545 (emphasis added).

87. *See, e.g.*, Linda Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 989 (1990) ("The sociological and political criticism asserts that, insofar as American society has evolved toward the liberal vision of human behavior, it produces lives for its members that are alienated, stripped of meaning, and devoid of significant human communities on every level, including the level of politics.").

88. Of course, majoritarian political decisions concerning open associations remain subject to other constitutional requirements, such as adherence to the Fourteenth Amendment and the Equal Protection Clause. However, unless they interfere with associations that are intimate or expressive, the strictures of the right of association do not apply to such legislative decisions.

suggests that guides like relative smallness, height of selectivity in decisions to begin and maintain the affiliation, purpose, policies, and seclusion from others in critical aspects of the relationship are useful criteria.[89] However, the opinion indicates that this list of factors is not exhaustive, because it includes "other characteristics that in a particular case may be pertinent."[90] This phrase could be interpreted to encompass the "safety valve" that I advocated earlier: the life-determining force of the relationship.[91] This final criterion would allow those who seem to fall outside the framework to submit evidence of the relationship's life-determining quality as a "relevant characteristic" which would bring the relationship within the intimate association framework.

The label "intimate association" alone does not determine the level of state interest necessary to justify burdening or regulating a relationship. The threatened relationship must be placed on a sliding scale, which stretches from the "most intimate to the most attenuated of personal attachments."[92] The mid-points on this scale are nebulous. Neither *Jaycees* nor *Rotary* found that the aggrieved party was a member of an intimate association. Therefore, these cases did not address the level of state interest necessary to override intimate association rights at any point on the sliding scale.[93] Presumably those at the high end of the scale would receive the strict scrutiny analysis that the privacy doctrine extends to fundamental rights.

89. Much remains to be written about the appropriate criteria for identifying "functional families." The task of setting out criteria to measure something as elusive and intangible as emotional commitment is a daunting one. I am not endorsing the list the *Jaycees* Court identified; however, for the remainder of this Note, references to the criteria for identifying functional families are intended to refer to the *Jaycees* test. For a discussion of functional approaches to family law and their problems, see Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991) [hereinafter Minow, *Redefining Families*]. For another court's choice of criteria to identify functional families, see Braschi v. Stahl Assocs., 543 N.E.2d 49 (N.Y. 1989).

90. Roberts v. Jaycees, 468 U.S. 609, 619-20 (1984) (citations omitted).

91. *See supra* section I.A.

92. *Jaycees*, 468 U.S. at 620.

93. Though it did not help to identify the state interest at different points on the sliding scale, in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), the Court identified an association which falls outside the *Jaycees* scale altogether. *FW/PBS* adjudicated the constitutionality of a comprehensive Dallas ordinance regulating "sexually oriented businesses," which included a licensing requirement for motels that rent rooms for fewer than ten hours at a time. The Dallas Motel Association challenged this part of the ordinance, claiming that it violated their patron's *Jaycees* right of intimate association. The Court was unanimous on the section of Justice O'Connor's opinion which quickly rejected the motel owner's challenge: "[W]e do not believe that limiting motel room rentals to ten hours will have any discernible effect on the sorts of traditional personal bonds to which we referred in [*Jaycees*]. Any 'personal bonds' that are formed from the use of a motel room for less than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.' " *Id.* at 237 (quoting *Jaycees*, 468 U.S. at 618-19).

The briefs of the Motel Association and the City of Dallas both accepted the applicability of the *Jaycees* standard, and argued about whether the motel liaisons are a protected intimate association. However, the Motel Association's assertion that the "well-recognized 'quickie', the 'nooner', [and] the 'one night stand' are traditional in America" provides some indication of why the Court disposed of its claims so quickly. Brief for Dallas Motel Association at 15, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) (No. 88-49).

The intimate association analysis recognizes that a vision of the Constitution which does not protect sexual expression outside traditional bonds fails to acknowledge the significance of sexuality to human development. Furthermore, a vision which protects sexual relationships but does not protect friendship extends too much significance to sex. Although shared sexual expression may be an essential ingredient of some relationships, sex does not guarantee intimacy. Long-standing and intimate friendships should not be considered more "casual" than long-standing and intimate romantic relationships. Therefore, the intimate association analysis acknowledges that there is a roughly equal potential for fulfillment and intimacy in friendship and romantic relationships, and it preserves both.[94]

The functional test presented by *Jaycees* is a limited doctrine, because it only grants the maximum protection from state intrusion to those few relationships which are most central to us; however, the doctrine is expansive in that it protects these relationships for everyone. In addition, through the use of a sliding scale, it continues to protect relationships which are not primary in our lives, but are still classified as "intimate."

The scope of intimate association analysis does not hinge on the formal or "official" status of a relationship. There are two consequences which flow from this fact. The first is an advantage the intimate association analysis holds over privacy. The privacy doctrine divides and categorizes us because its definition as to whom is protected emphasizes differences in status. In contrast, the intimate association doctrine cuts across group lines defining who is protected by emphasizing what we have in common — the need to love and be loved. With the intimate association analysis, we will never have to worry about "adding groups."

The second consequence of the fact that intimate association analysis is not based on formal status is that it has the potential to throw the protection of previously recognized relationships into question. For example, a married couple could fail to satisfy the functional test, and thus be left outside the protection of the intimate association rubric. However, the effect of the intimate association analysis is to require a "floor" of protection to relationships which meet its criteria. The legislature always can accord shelter to a relation-

94. In addition, female friendship contains some of the anti-standardizing potential I will discuss in Section III in the context of interracial relationships, single fathers, and gay and lesbian relationships. As Jan Raymond argues, our society confers social and political status only on "hetero-relations [the wide range of affective social, political, and economic relations that are ordained between men and women by men]. In doing so, it has fostered a social context in which friendship, especially female friendship, is regarded as a personal association." Raymond urges women to "come to recognize in our friendships with each other the implications beyond the personal nature of this bond so that we ourselves do not underrate its social and political power, a power that, at its deepest level, is an immense force for disintegrating the structures of hetero-reality. The empowering of female friendships can create the conditions for a new feminist politics in which the personal is most passionately political." JANICE RAYMOND, A PASSION FOR FRIENDS: TOWARD A PHILOSOPHY OF FEMALE AFFECTION 7, 9-10 (1986).

ship which falls outside the criteria — or grant more protection to one which falls within it — than the intimate association analysis requires. Therefore, legislative recognition of relationships such as marriage is in no way inconsistent with the intimate association framework.

There are two concerns readers may have about the functional test and sliding scale of the *Jaycees* intimate association analysis. The first is that it gives judges too much discretion. The privacy analysis identified a category of relationships, such as marriage, and drew a circle of protection around them. Such relationships could be proven by a marriage certificate, at which point judges no longer had any discretion about what standard to apply — they had to find a compelling state interest or strike the regulation. It may appear at first glance that judges' predispositions will have more room to manifest themselves when they are asked to consider the criteria of a functional test. How much weight should be given each factor, such as time spent together, seclusion from others in critical aspects of the relationship, interdependence, and how the relationship was presented to the outside world? Where does a particular combination of traits belong on the sliding scale?

Although privacy analysis may limit discretion for categories already named, it gives greater discretion than the intimate association analysis when new categories of protected relationships are to be named. The Supreme Court uses vague and manipulable concepts to assess a claim for the extension of the privacy doctrine, such as "history and tradition" and "implicit in the concept of ordered liberty." The reach of this test in any application will depend on the breadth of one's characterizations of our nation's history and traditions. For example, while all nine Justices seemed to agree that history and tradition provided the appropriate test, the sharp split between the plurality and dissent's identification of the relevant tradition in *Michael H. v. Gerald D.*[95] was determinative. *Michael H.* denied the claim of a biological extramarital father and upheld California's conclusive presumption that the child of a married woman is the offspring of her husband. To reach this result, Justice Scalia, writing for the plurality, pointed to the "historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."[96] Justice Brennan, writing for the dissent, responded that "the plurality opinion's exclusively historical analysis portends a significant and unfortunate departure from our prior cases and from sound constitutional decision-making," and pointed to the history and tradition surrounding the relationship between parent and child.[97] Because it is easy for Justices to hide their predilections behind these concepts, they allow for extensive discretion.

Moreover, the privacy doctrine is failing to accomplish its counter-

95. 491 U.S. 110 (1989).
96. *Id.* at 123.
97. *Id.* at 137, 141-42.

majoritarian function. Cases like *Bowers v. Hardwick*[98] illustrate this point. Judges often share the biases of the society from which they come. The intimate association analysis directs their attention toward objective criteria which apply equally to many types of relationships and away from their own preconceptions about the relationship before them. While this cannot stop a biased judge from injecting her own preconceptions and unfairly weighing the evidence presented, at least she must weigh the factors openly and justify her results. For example, under the privacy doctrine, she can argue that proscriptions against sodomy "have ancient roots"[99] and be done with it.

A second concern about the functional approach is that it seems intrusive in comparison to privacy analysis. Under the privacy rubric, all a married person had to do to claim protected status was to produce a marriage certificate. Under the intimate association framework, she might have to testify about the significance of the relationship in her life, demonstrate financial interdependence, and supply evidence about how she presents the relationship in question to the world.

It is true that a functional test has the potential to require more people to divulge more personal information than the privacy rubric does; however, it is important to remember, as Frances Olsen has explained, that "[t]he experience of intervention depends upon having some expectation disappointed or some sense of entitlement violated."[100] The person who is accustomed to protection on the basis of her formal status might experience a functional test as an intrusion into her private affairs. In contrast, a lesbian couple, an unmarried couple, or an adult and child who are not related by blood might welcome the opportunity to tell a judge about their relationship, if the result is to receive a benefit or relief from a burdensome regulation, that they did not have under the privacy rubric. Thus, while I acknowledge that the intimate association framework confers upon the State more invasive powers over people currently protected by privacy's categories, the gain to those now unprotected outweighs this cost.

Furthermore, it is doubtful that this price will have to be paid. As discussed above, the legislature can identify *per se* categories of protected relationships. Given the high number of married voters, it seems apparent that the democratic process would work to protect their expectations of privacy. It is the groups that the legislature does not respond to which need the protection of their judiciary, and their claims to constitutional protection would likely be judged by a functional test.

A second response to the intrusiveness concern is to point out that the inquiries occasioned by the intimate association framework would not go beyond the scope of those currently accepted by the privacy doctrine. For exam-

98. 478 U.S. 186 (1986).

99. *Id.* at 192, 196-97.

100. Frances E. Olsen, *The Myth of State Intervention In the Family*, 18 U. MICH. J.L. REF. 835, 859 (1985).

ple, the Supreme Court has approved of an inquiry into "personal" lives and relationships in a series of cases concerning unwed fathers.[101] These cases establish that paternal rights are dependent upon biological fatherhood plus a "substantial relationship."[102] In addition, child custody cases often require that courts inquire into the quality of parent-child relationships. These cases "suggest that courts can examine intimate relationships without any devastating effects."[103]

III
THE STRUCTURAL ROLE OF THE RIGHT OF INTIMATE ASSOCIATION

A. The Maintenance of Democracy and the Anti-Standardization Rationale

Those who share Chief Justice Rehnquist's view of the First Amendment may scoff at the suggestion that it can anchor a right of intimate association. Chief Justice Rehnquist believes that the First Amendment right of association only extends to groups which effectuate other explicit First Amendment guarantees.[104] Yet upon closer examination, it becomes apparent that the right of intimate association has more in common with the freedoms of religion and speech than their location in the Bill of Rights. The freedom of expression and conscience, the right to political and religious dissent, and the right to choose one's intimate associations each preserve endeavors integral to human fulfillment. Each is paramount to an individual's ability to define her consciousness and her relationship to the larger community through her choice of how or whether to worship, her expressions of creativity, her political activity, and with whom she shares her home, her bed, and her thoughts. In addition to enriching the life of the individual, the freedoms of speech, religion, and intimate association each contribute to the preservation of an open society. These three core First Amendment rights serve as bulwarks against totalitarianism.[105]

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101. Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

102. *Caban*, 441 U.S. at 393; *id.* at 389 (assessing father's care and support of children and the length of time together); *id.* at 394 (father manifested significant interest in the child; Court suggests that evidence shows that he is a "loving father"); *Quilloin*, 434 U.S. at 251 (assessing father's support of children).

103. Olsen, *supra* note 100, at 858 n.57.

104. Justice Rehnquist took this position in dissent in Moore v. City of East Cleveland, 431 U.S. 494 (1977), stating that the suggestion "that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associational freedoms that the Constitution has been understood to protect. Freedom of association has been constitutionally recognized because it is often indispensable to the effectuation of explicit first amendment guarantees." *Id.* at 535; *see also* Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91, 99 (1987).

105. A totalitarian society is one which "seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State. The State is then not one vital institution among others . . . [i]nstead it seeks to [reduce these interest groups] to

1. *The Anti-Standardization Theme in Freedom of Religion and Free Speech Jurisprudence*

The threat posed by unchecked state power is the creation of "a society standardized and normalized, in which lives are too substantially or too rigidly directed."[106] The recognition of this threat propels the pronounced anti-standardization theme in free speech and religion jurisprudence.[107] The cumulative effect of government repression of the intellect or the spirit of select citizens is movement away from a government which serves the needs of the people and toward a state in which the government defines the populace. Freedom from standardization is essential to the structure of democracy, for "[t]he very possibility of accountability to a people presupposes that the bodies and minds of the citizenry are not to be too totally conditioned by the state that the citizenry is meant to be governing."[108]

Four signal First Amendment cases involving the public education system explicitly reject state efforts to prescribe conformity. In *Meyer v. Nebraska*,[109] the Court struck down a law prohibiting the teaching of "modern" foreign languages to elementary school students. The *Meyer* Court viewed the law as an attempt to "foster a homogeneous people with American ideals,"[110] and it invoked the specter of Plato's Ideal Commonwealth in response to the state's effort. To develop ideal citizens, Plato proposed that "the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent."[111] The Court saw the Nebraska law as a step down the path which leads to the Ideal Commonwealth, and it used the First Amendment to block that road.

In *Pierce v. Society of Sisters*,[112] the state prohibited private elementary schooling altogether, requiring all children between the ages of eight and sixteen to attend public schools. The Court invalidated the regulation, holding that the "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children."[113]

Forty-six years after *Pierce*, the Court cited the passage quoted above in

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organs and agencies of the State." Robert L. Calhoun, *Democracy and Natural Law*, 5 NAT'L L.F., 31, 36 (1960), *quoted in* Poe v. Ullman, 367 U.S. 497, 521-22 (1960) (Douglas, J., dissenting).

106. Rubenfeld, *supra* note 15, at 784.

107. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985) (proposing that the First Amendment should be equipped "to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The first amendment, in other words, should be targeted for the worst of times.").

108. Rubenfeld, *supra* note 15, at 805.

109. 262 U.S. 390 (1923).

110. *Id.* at 402.

111. *Id.* at 401-02.

112. 268 U.S. 510 (1925).

113. *Id.* at 535.

Wisconsin v. Yoder.[114] In *Yoder,* Amish plaintiffs prevailed in their challenge to Wisconsin's compulsory education laws. The *Yoder* Court exempted the Amish children from public school attendance after age fourteen. The state had argued that the Amish practice of withdrawing children from public schools at the age of fourteen "foster[ed] 'ignorance' from which the child must be protected by the State."[115] The Court rejected the state's argument with a resounding defense of the right to live our lives in contradiction to what conventional wisdom would dictate:

> There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different. . . . Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.[116]

In the last of these cases, the Supreme Court invalidated a requirement that students salute the flag. A Jehovah's Witness who had refused to do so sued the school district in *West Virginia v. Barnette.*[117] The Court's holding did not rely on the religion claim, and it did not simply grant an exemption to the flag salute requirement for religious objectors. Instead, the *Barnette* Court held that such regulations affect all citizens equally, in that they "invade the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."[118] The Court therefore struck the entire regulation on free expression grounds. In the course of this holding, Justice Jackson penned a classic warning of the poison of standardization in an open society:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Compulsory unification of opinion achieves only the unanimity of the graveyard. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. . . . [F]reedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order.[119]

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114. 406 U.S. 205, 232-33 (1971).

115. *Id.* at 222.

116. *Id.* at 223-24, 226.

117. 319 U.S. 624 (1942).

118. *Id.* at 642.

119. *Id.* at 640-42. The Court affirmed this sentiment twenty-seven years later when it struck a high school prohibition on anti-Vietnam armbands: "In our system, state-operated schools may not be enclaves of totalitarianism. . . . [Students] may not be regarded as closed-

At the heart of these cases, and within the guarantees of free speech and religious exercise, is the "right to differ as to things that touch the heart of the existing order." This right is what distinguishes our constitutional democracy from oppressive and unmediated majoritarianism.

2. *The Anti-Standardizing Power of Intimate Associations*

Diversity in intimate associations, like diversity of opinion and religion, is an essential buffer against the standardizing power of the State; however, the anti-standardizing power of intimate associations has not been adequately recognized.[120] This may be due in part to the fact that the operation of intimate associations is often more concealed than that of religion and speech. When a person expresses a religious or political opinion, we are likely to ascribe it to the individual standing before us. Although each individual may arrive at perspectives that are uniquely hers, they do not arise in a vacuum. When we step back and look to the origin of our world-view, it is apparent that identity is defined in relation to our interactions with others.

Our identities are shaped by the most influential relationships in our lives — those I have characterized as comprising our essential networks. Important dimensions of our identities are shaped by our family experience.[121] It stands to reason that when the institution of the family is homogenized, the range of ideas and identities present in our society is also narrowed. This process undermines the pluralism and diversity necessary to a robust democracy.

Examining some familiar controversies with this perspective illustrates the point. For example, the advent of interracial romance and families was an explosive development in many parts of the United States, because it challenged accepted views of African Americans and whites in relation to one another.[122] Bans on interracial marriage can be understood as unsuccessful attempts to standardize citizens through genetic manipulation that sought to preserve "racial integrity" and to maintain "White Supremacy."[123] In addi-

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circuit recipients of only that which the State chooses to communicate." Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1969).

120. An obvious exception to this statement is the *Jaycees* decision. "[C]ertain kinds of personal bonds . . . foster diversity and act as critical buffers between the individual and the State." Roberts v. Jaycees, 468 U.S. 609, 618 (1984).

121. I use the term "family" here to connote a web of intimate relationships which involve interdependence, support, and care. Further, people commonly play different roles in different families over the course of a lifetime. All of these experiences help to comprise the individual.

122. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 6 (1967) (invalidating Virginia's ban on interracial marriage on Equal Protection and Fourteenth Amendment grounds; noting the existence of similar laws in 15 other states); Palmore v. Sidoti, 466 U.S. 429 (1984) (Equal Protection Clause requires reversal of order denying white mother custody of her biological Caucasian child because she later married an African American man).

123. *Loving*, 338 U.S. at 12 n.11. Because the miscegenation statutes attempted to regulate reproduction genetically, they can be classified with the statute challenged in Buck v. Bell, 274 U.S. 200, 206 (1927) which ordered that "mental defectives" be sterilized by the State. Justice Holmes, writing for an eight-member majority, affirmed the finding that Carrie Buck was the

tion to invalidating these homogenizing statutes, the Court has also upheld the rights of families who resist the standardizing force of private biases.[124]

Similarly, in *Stanley v. Illinois*[125] the Court struck an irrebuttable presumption Illinois imposed in child custody hearings which provided that a father is an unfit parent if he never married his child's deceased mother. The state's rule enforced a stereotypical notion of men's capacity to parent, and it served to punish fathers who choose to cohabitate instead of marrying their partners.[126] Fathers who resist the State's efforts to define parenting roles by gender and marital status challenge the pervasive social notion that men cannot perform a nurturing role in raising children.[127]

"probable potential parent of socially inadequate offspring" and approved Virginia's sterilization law with the chilling line: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." *Id.* at 207.

The investigative work of Stephen Jay Gould suggests that the *Buck* and *Loving* cases have more in common than is usually thought. Gould believes that in the final analysis the *Buck* case "was never about mental deficiency; it was always a matter of sexual morality and social deviance." Stephen Jay Gould, *Carrie Buck's Daughter*, NATURAL HISTORY, July 1984, at 14, *reprinted in* IN THE BEST INTERESTS OF THE CHILD 127, 137 (Joseph Goldstein ed., 1986). Gould reports that Carrie was one of several illegitimate children. She grew up with foster parents, and after being raped at eighteen by a member of the foster family, she was deemed an "imbecile" based on statements by her grandparents and two doctors, and was committed to the State "Colony for Epileptics and Feeble-Minded" in order to hide her pregnancy. After she had her baby, she was targeted to be the first person sterilized under the new law. Why Carrie? As one of the state's eugenics experts began his "family history" of the Bucks: "These people belong to the shiftless, ignorant and worthless class of anti-social whites of the South." Carrie's daughter, Vivian, the fateful "third generation" of imbeciles, was sentenced to that status when she was seven months old, by a social worker who testified simply that "There is a look about [the baby] that is not quite normal, but just what it is, I can't tell." When academics visited Carrie in 1980, at age seventy-four, they found that she was a woman of normal intelligence. Gould's examination of Vivian's grade school records (she died at age eight) suggest she was an average student.

124. *Palmore*, 466 U.S. at 433 (vacating a custody award which was predicated on a finding that the daughter of a white mother and an African American step-father would encounter prejudice due to the interracial marriage. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

125. 405 U.S. 645 (1972).

126. Though Joan and Peter had lived together "intermittently" for eighteen years before she died, and had three children together, under the Illinois scheme a marriage certificate alone was determinative of his fitness to parent. Illinois allowed married, divorced, widowed, or separated fathers and unwed mothers, the presumption that they were fit to raise their children, but it placed an irrebuttable presumption of unfitness in the path of unwed fathers who sought custody of their children. *Id.* at 648.

127. Many courts of the 1970s and 1980s imposed a presumption in favor of a young child's mother as her preferred custodial parent. *See, e.g.*, Orthner & Lewis, *Evidence of Single-Father Competence in Childrearing*, *in* CHILD CUSTODY DISPUTES 283 (Gary E. Stollak & Michael G. Lieberman eds., 1985) (indicating that in the 1970s, the mother gained custody 90% of the time); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 515-16 (1984) (noting the criticism of such a presumption because of its seeming reliance on outdated stereotypes regarding women's inherent superiority in parenting, yet reporting that some theorists still argue in favor of such a formulation).

The visceral rejection of homosexuality that many Americans express[128] also can be understood as being grounded in a fear of the challenge that gay and lesbian couples present to the existing order. Same-sex couples challenge the patriarchal order and reformulate gender roles:[129] "Homosexual couples by necessity throw into question the allocation of specific functions — whether professional, personal, or emotional — between the sexes. . . . the ban on homosexuality [plays a] central role in the maintenance of institutionalized sexual identities and normalized reproductive relations."[130] Compulsory heterosexuality[131] stifles an important avenue for evaluating the socially constructed and prescribed roles of the sexes. This is the type of standardization that intimate association analysis is designed to prevent. Hostility toward homosexuality, as expressed through state prohibitions of homosexual activity, robs the entire society of what such an exploration might reveal.[132]

Meyer, *Pierce*, *Yoder*, *Barnette*, *Loving*, *Stanley*, and *Hardwick* belong in the same category.[133] The lifestyles and practices involved in these cases were perceived as challenges to the social order. Yet it is important to remember

128. *See generally* Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923 (1986).

129. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 210; *see also* Susan Estrich & Virginia Kerr, *Sexual Justice*, *in* OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY 98, 123-24 (Norman Dorsen ed., 1984) (stating that homosexuality presents a formidable threat to the gender script's basic ground rules, which envision the male as aggressive, instrumental, and dominant in the public realm, and the female as destined by her reproductive role to passive, expressive, and emotionally supportive activities in the private realm); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 551 (1992) ("Gender is central to sexual orientation, and much of the positive social value of homosexuality lies in its creation of a zone of anti-orthodoxy for men and women, of whatever sexual orientation.").

130. Rubenfeld, *supra* note 15, at 800.

David A.J. Richards notes that the fear of gay male sexual activity historically has been more intense than that of lesbian sexual activity, and posits that this is due to the idea that sexual relations between men "degrade" one or both to the inferior status of woman. Richards, *Sexual Autonomy*, *supra* note 30, at 984-85.

Andrea Dworkin suggests that a source of female hostility toward gay male relationships is the fear of abandonment. "A woman has committed her life to bringing forth children in order to have a life of dignity and worth; she has found the one way in which she is absolutely necessary; and then, that is gone as an absolute. . . . Everything that women have to gain from homosexuality . . . is obliterated by the fear of losing what value women have, a fear conjured up by homosexuality in women whose own right to life is in having children. . . . homosexuality makes women afraid, irrationally, passionately afraid, of extinction . . . ." ANDREA DWORKIN, RIGHT WING WOMEN 145-46 (1978).

131. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 631 (1980).

132. "To be a lesbian means to extend what has been called a 'sexual preference' beyond the realm and reality of a sexual category to a state of social and political existence. In this way, Lesbian existence can provide certain patterns that can be used by other women to break the stranglehold of hetero-relations." RAYMOND, *supra* note 94, at 14.

133. While *Meyer*, *Pierce*, *Yoder*, and *Barnette* all involve children, a reading of these cases which does not extend their logic to adults belies a stunted vision of human growth and development. Although those of tender years are particularly impressionable, adults who have passed out of their "formative years" retain the capacity to grow, change, and learn through their entire lives. They too need protection from the standardizing power of the State. *See*

that the parties in these cases did not behave as they did in order to make this challenge. It is unlikely that Peter Stanley wanted to raise his children, the Lovings wanted to marry, or Michael Hardwick and his companion wanted to make love for the sole purpose of being iconoclasts. Love and the basic desire for companionship and fulfillment led them into conflict with the State; however, the *impact* of their choices has important ramifications for a democratic state; The threat their life choices were perceived to make to the established order is both why their choices were suppressed and a significant part of why they should be protected by the right of intimate association.[134]

B. Family, Sexual Orientation, and Gender as Ideology

Just as the anti-standardization power of intimate associations is often overlooked, so too is their ideological dimension. When the State seeks to suppress or discourage political or religious activity, the ideological aspects of the regulations are apparent, but when it comes to conflicts concerning the family, gender, or sexuality, many people are slow to recognize them as controversies which implicate ideology. For example, imagine that a group of communists withdrew from our capitalist economy, developed a collective farm, and urged people to duplicate their successful venture. If the State prohibited this activity, it would be readily understood as an imposition of ideology by force of law, motivated by the threat of communism to the fundamental role property plays in our culture. In contrast, prohibition of homosexuality is often viewed as a harm to gay and lesbian individuals or as an expression of legislative prejudice against this group.

It is a mistake to "privatize" the harm inflicted by state regulation of intimate associations. The prohibition of same-sex unions imposes an ideology of gender relations by force of law. Preordained roles of gender and family are deeply embedded in American culture, and those roles are accompanied by a philosophy. "Women's subordination is linked to The Family as a specific household arrangement *and* as an ideology."[135] These arrangements are essential to the maintenance of the existing allocation of power. As was the case with the "Red Scare"[136] of the 1950s, maintenance of "The American Way of

generally Richards, *Sexual Autonomy*, *supra* note 30, at 1000 (and citations therein), tracing stages of human development and identity formation from infancy to old age.

134. The regime of a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems emerge in new dimensions; needs, once never imagined, appear. To stop experimentation and the testing of new decrees and controls is to deprive society of a needed versatility.

Poe v. Ullman, 367 U.S. 497, 518 (1960) (Douglas, J., dissenting).

135. BARRIE THORN, *Feminist Rethinking of the Family: An Overview*, *in* RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 1-4 (1982).

136. For a concise summary of the hysteria and First Amendment jurisprudence of the era, see L.A. Powe, Jr., *Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights*, 6 CONST. COMMENTARY 267 (1989).

Life" also requires that challenges to the prevailing sexual order be suppressed.

Recognition of the ideological dimension of conflicts concerning the family, gender, or sexuality should lead courts to extend familiar First Amendment principles to halt state imposition of orthodoxy. For example, in the context of political hiring, the Supreme Court has recognized that conditioning employment on party affiliation "press[es] state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy."[137] Yet to view disputes over gender and sexuality as ideological is to understand that firing an employee on the basis of sexual orientation is equally "political." It is a patronage system for heterosexuals, who hold institutional power, and thus can impose "some state-selected orthodoxy."[138] The purpose of the right of intimate association, like the rights of freedom of speech and religion, is to function as a wall between the moral autonomy of the citizenry and the normalizing power of the State. The intimate association doctrine has the capacity to transcend the public/private distinction and to recognize standardizing ideology in all of its guises.

IV

GAPS IN THE INTIMATE ASSOCIATION ANALYSIS: SOCIAL GATHERINGS AND THE PROBLEM OF POTENTIALITY

The functional test of *Jaycees* brings hope for strengthening protection for intimate associations. Two gaps though deserve mention. *Jaycees* reaches both small, intimate groups which are not expressive in nature and large groups which gather for purposes of expression. It seems to leave the large category that lies between the two poles unprotected. I call these types of gatherings "open associations." These are groups which are not intimate, and which gather for reasons other than expression.

There are two reasons why, in some circumstances, this may be problematic. First, for those who are in a numerical minority or are socially excluded, opportunities to socialize and meet one another may take on unique significance. Yet the social congregations of unpopular groups are likely targets of repression. Second, casual and potential relationships clearly are not "intimate associations." But it seems odd that a doctrine would protect "serious" relationships, yet allow the State to prohibit their earlier manifestations or foreclose opportunities to form them at all. The Supreme Court has failed to acknowledge this dilemma in several cases announcing a right to engage in

137. Rutan v. Republican Party of Illinois, 110 S. Ct. 2729, 2737 (1990) (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1942); *see also* Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

138. "[U]nless we start to make family law connect with how people really live, the law is either largely irrelevant or merely ideology: merely statements of the kinds of human arrangements the lawmakers do and do not endorse [and] the production of a set of beliefs used to distribute status and value rather than effectively guide behavior." Minow, *Redefining Families*, *supra* note 89, at 271.

particular conduct. For example, *Griswold v. Connecticut*[139] held that the State may prohibit or regulate the manufacture and distribution of contraceptives, though it must not interfere with their use by married couples. Similarly, *Stanley v. Georgia*[140] held that the State may prohibit the manufacture and distribution of obscenity, though it must not interfere with home use of pornographic materials. A logically consistent doctrine must grapple with such questions.

The suggestion that the *Jaycees* analysis does not protect public associations which are not expressive by nature, such as large social gatherings, was confirmed in *City of Dallas v. Stanglin*.[141] In *Stanglin*, the plaintiff challenged a municipal ordinance that restricted admission to "Class E" dance halls to persons between the ages of fourteen and eighteen and limited their hours of operation. The Court rejected the challenge, reasoning that the patrons of the appellee's roller-skating rink and dance hall, as many as a thousand per night, cannot be considered intimate. Although such activities may contain a "kernel of expression," recreational dancing does not rise to the level of expressive association described in *Jaycees*.[142] Therefore, patrons of the Twilight Skating Rink hold no right of association as delineated in *Jaycees*. The Court further concluded that the Constitution does not "recognize[ ] a generalized right of 'social association' that includes chance encounters at dance halls."[143] The ordinance was thus found to satisfy the rational relationship test.[144]

The result in *Stanglin* is consistent with *Jaycees*. Open associations with no expressive element, such as business clubs or skating rinks, are not protected by the doctrine of intimate association. Because they are not classified as intimate associations, they are not considered on the sliding scale. This result is usually appropriate; however, *Stanglin* has a potentially negative impact when "out" groups gather.

The need for such protection arises in cases such as *Gay Students' Organization v. Bonner*[145] and *One Eleven Wines & Liquors v. Division of Alcohol & Beverage Control*,[146] cases in which the State attempted to inhibit the ability of

139. 318 U.S. 479 (1965).

140. 394 U.S. 557 (1969).

141. 490 U.S. 19 (1987).

142. *Id.* at 25.

143. *Id. Cf.* Coates v. Cincinnati, 402 U.S. 211, 218 (1971) (stating that freedom of assembly protects "the right of the people to gather in public places for social or political purposes") (dicta).

144. Justice Stevens, writing for himself and Justice Blackmun, concurred in the result because he felt the city had adequately justified the ordinance's "modest impairment of the liberty of teenagers." However, because he believed that "the opportunity to make friends and enjoy the company of other people . . . is an aspect of liberty protected by the Fourteenth Amendment," he would have analyzed the issue as one of substantive due process rather than the First Amendment right of association. *Id.* at 28.

145. 509 F.2d 652, 660 (1st Cir. 1974) (striking a University of New Hampshire ban on social activities by a Gay Students Organization on First Amendment freedom of expression grounds, because such activities may have a communicative element).

146. 235 A.2d 12 (N.J. 1967).

large groups of gay men and lesbians to congregate for social purposes. For example, in *One Eleven*, the New Jersey Department of Alcohol and Beverage Control revoked the liquor licenses of several gay bars, relying on nuisance and public morality regulations. The Supreme Court of New Jersey invalidated the departmental regulation, stating that there is a right to congregate and assemble if the group is not breaking any laws.[147] In contrast, according to the *Stanglin* reading of *Jaycees*, One Eleven's patrons would be termed a "social association," and they would not be protected from state restriction or prohibition of their social activity.

Before the advent of *Jaycees*, some courts tried to protect controversial social congregations by characterizing their repression as a free speech issue. This approach has protected the social activity of lesbian women and gay men on the basis of its expressive content, the "message" sent by being openly gay. For example, the University of New Hampshire's refusal to grant the Gay Students' Organization (GSO) permission to conduct social events, such as dances and parties, was struck on freedom of expression grounds in *Gay Students' Organization v. Bonner*.[148] Although the University claimed that social events were not protected associational activities, the court attached special significance to the student organization's political activities, and the state was held to the standard articulated in *United States v. O'Brien*.[149] The court found that not only did discussion and an exchange of ideas take place at the GSO's social events, but also that "beyond the specific communications at such events is the basic message" GSO seeks to convey — that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society.[150]

Although this approach correctly notes that certain intimate associations might convey alternative "statements," it is a doctrinal mistake to limit a so-

147. *Id.* at 18.

148. 509 F.2d 652 (1st Cir. 1974).

149. United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that restrictions on speech must be within the constitutional power of the government; they must further an important or substantial government interest which is unrelated to the suppression of free expression; and incidental restrictions on alleged First Amendment freedoms must be no greater than essential to the furtherance of that interest).

150. *G.S.O.*, 509 F.2d at 661.

Similarly, in Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980), *vacated and remanded*, 627 F.2d 1088 (1st Cir. 1981), Aaron Fricke's choice to attend his high school prom with Paul Gilbert was analyzed on the basis that it would be "a political statement." As such, the school's decision to deny Aaron and Paul permission to attend was also held to the *O'Brien* standard. The denial of permission to attend the event failed a "least restrictive means" requirement. The court found that additional security could adequately shield Aaron and Paul from attack, and in the event of violence, prevent its escalation. To find otherwise, the court reasoned, would be to grant a "heckler's veto," prohibited by Terminello v. Chicago, 337 U.S. 1 (1949). *Terminello* stands for the proposition that the State may not restrain speech because it might provoke listeners to harm the speaker, and instead must protect a speaker against a hostile audience. (Because the *Fricke* court rested its holding on the freedom of expression claim, it did not reach Fricke's freedom of association or equal protection claims.)

cial right of association to the right of free speech. First, this formulation would have no boundaries, for there is an element of expression in every human activity.[151] Second, while those who choose to hold their intimate associations out to the community contribute to an ongoing debate over social roles, this fact does not supply the sole reason they are protected. It explains why our entire society can benefit from their preservation. Although Aaron, the plaintiff in *Fricke v. Lynch*,[152] testified that his attendance at the Cumberland High prom with another man would "have a certain political element,"[153] he also stated that he wanted to "attend and participate just like all the other students."[154] Although he could have done so if he paired with a female friend for the event, he invited Paul because "it would be dishonest to his sexual identity to take a girl to the dance."[155] They wanted to enjoy each other's company in public, just like the other couples at the prom.

Aaron and Paul's right to attend the school dance should not rest on their desire or willingness to "make a statement." Similarly, the fact that a Gay Student's Organization party is organized for purposes other than commentary on existence, repression, isolation, and understanding should not affect the University's obligation to treat GSO's request for facilities for a party in a content-neutral manner. Recourse to the expressive content of these relationships fails to capture why certain open associations deserve constitutional protection.

There are a few open associations which deserve to be analyzed on the low end of the *Jaycees* sliding scale. What puts them there is their unusual life-determining force. The value of the social interaction the Gay Student's Organization may have provided for its members is distinct from that provided by the Jaycees for its members, or the Twilight Skating Rink for its patrons. For those in a minority, or who experience social approbation, the opportunity to gather together has a heightened significance. Clubs such as the GSO may provide an enclave in which its members can feel comfortable, find a refuge from intolerance, and experience an affirmation of identity. Furthermore, certain open associations may take on more importance in the life of a member of an "out-group" because they provide a forum in which she can meet and develop relationships with people who share a similar identification.

The lack of protection for social congregations points to a second hole in the *Jaycees* framework: the failure to account for casual relationships and the problem of potentiality. Intimate relationships which fulfill the Court's criteria for size, purpose, and selectivity, but do not rival "family relationships" in

151. "It is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street, or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the first amendment." City of Dallas v. Stanglin, 490 U.S. 19, 25 (1987).

152. 491 F. Supp. 381.

153. *Fricke*, 491 F. Supp. at 384.

154. *Id.* at 385.

155. *Id.*

duration, commitment, or life-determining force may not be protected by the First Amendment. Such relationships include the type of relationship which might commence at an "open association" — casual romantic relationships and casual friendships. Some lower courts have interpreted *Stanglin* to foreclose all intimate association claims which are grounded in such interests.[156]

The intimate association framework should not ignore these relationships. Common sense dictates that long-term, committed, and trusting relationships do not appear out of the thin air. "Casual" relationships may well ripen into durable intimate associations.[157]

The specter of protecting casual romantic relationships and friendships raises a disturbing question concerning intimate association's limiting principle. It would seem contradictory to exalt the contribution that "life-determining" intimate associations make to individuals and to society, while allowing the State free reign to foreclose opportunities to form such relationships. But where does this protection end? Just as every enduring relationship must begin as a "casual" one, so must every relationship begin with an acquaintance. Yet the opportunity to meet people one might befriend or grow to love inheres in every journey out of one's home. Surely a city council's decision to zone an area to exclude grocery stores need not be hindered by the fact that more than one couple has met at the A & P. But what about a decision to rid an entire community of all bars frequented by gay men and lesbian women? A newspaper's refusal to print advertisements for services and products aimed at gay and lesbian customers?[158]

156. *See, e.g.*, Holley v. Schreibeck, 758 F. Supp. 283 (E.D. Pa. 1991) (finding that police officer's comment to male plaintiff's female friends that they should avoid plaintiff because he was a pimp did not implicate any associational right of plaintiff because *Stanglin* held that State inhibition of friendly association is outside the scope of First Amendment protection); Swank v. Smar, 898 F.2d 1247, 1251 (7th Cir. 1990) (holding that off-duty police officer's chance meeting and subsequent conversation and motorcycle ride with college student, which was a substantial basis for his dismissal, was not protected as intimate or expressive association, because "chit-chat," though "important to the participants," does not contribute to the marketplace of ideas); Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562, 570 (D. Minn. 1990) (finding that *Stanglin* dictates that the First Amendment extends no protection to a high school student's desire to associate with peers at social gatherings). *But see* Crain v. Board of Police Comm'rs, 920 F.2d 1402, 1409 (8th Cir. 1990) (upholding a regulation requiring St. Louis police officers on sick leave to stay at their homes even though it burdens intimate association because the burden was minimal, friends and family could visit officer, and the State interest in maintaining police discipline and avoiding abuse of sick leave policy was high).

See also Greater New York Health Care Facilities Ass'n, Inc. v. Axelrod, 770 F. Supp. 183, 186 (S.D.N.Y. 1991) (denying the intimate association claim of nursing home residents to "choose some of the individuals who will assist them in personal tasks such as bathing and dressing," because this interest does not override the state interest in requiring professional care; and upholding Department of Health regulations limiting volunteers in proprietary nursing homes to performing tasks not "routinely performed by the nursing home's professional staff").

157. Karst, *supra* note 22, at 633.

158. Hatheway v. Ganett Satellite Info. Network Inc., 459 N.W.2d 873 (Wis. Ct. App. 1990), *cert. denied*, 461 N.W.2d 445 (Wis. 1990).

The *Press Gazette*, the only major daily newspaper in the four-county area surrounding Green Bay, Wisconsin, refused to print classified ads which included the words "gay" and "lesbian." The classified ad that Jay Hatheway attempted to place stated, "Gay/lesbian referrals

These decisions should be scrutinized more carefully than in the case of grocery store zoning, and the different outcomes may depend on life-determining potential. Although strangers at a bar can hardly be termed "intimates," for those who are in a numerical minority or a group that faces majoritarian disapproval, the opportunities to meet one another may be more limited, and special settings designed to create such opportunities would thus take on an extra measure of significance.

In addition, resistance to standardization has an important public element. A regime which requires those who diverge from the mainstream to live a double life, which does not allow open self-identification and expression of non-conforming identities, is exercising an enormous power to shape the identity of the individual. Dissemination of information about events and gatherings of persons who are openly gay may help gay men and lesbians who feel isolated gain acceptance and affirmation within the community. The factors which heighten the significance of public social congregations for some groups may be what the court in *Gay Students' Organization* intuited, but it had to find an expressive element to protect GSO's right to have a social event.

For the intimate association analysis, *Stanglin*, *GSO*, and *Fricke* can be understood as cases that raise the problem of potentiality. The connections involved in the three cases (in the event that the prom was one of Aaron and Paul's first dates), are too attenuated or too numerous to rise to the level of inclusion in the parties' essential networks. Still, the social opportunities at the Gay Students' Organization parties may have more life-determining force than the social opportunities presented to the teenage patrons of the Twilight Skating Rink. The unusually strong life-determining element of some open associations should allow them to be considered on the low end of the intimate association sliding scale.

CONCLUSION

A constitutional doctrine grounded in life as it is experienced would recognize the centrality of intimate human relationships to American life. A constitutional doctrine that acknowledged that there is no "state" separate from the collection of individuals would insure that state power is not used to standardize the most critical elements of its citizens' lives. The intimate association doctrine is grounded in these basic tenets. The analysis provides a promising new way to conceive of the rights which are most dear to us. The *Jaycees* Court took an important step toward fuller recognition of these values when it established the First Amendment right of intimate association.

Still, advocates of the *Jaycees* intimate association framework must con-

for medical, legal and professional assistance for rural Wisconsin. Write Among Friends." Peggy and Tracy Vandeveer submitted an ad stating, "Unique, screen-painted sweatshirts with gay/lesbian slogans." The appellate court held that the newspaper's refusal to print these ads did not violate Wisconsin's prohibition of discrimination on the basis of sexual orientation in businesses and places of public accommodation.

front the fact that it was not applied two years later in the landmark case of *Bowers v. Hardwick*.[159] The *Hardwick* Court upheld a Georgia law prohibiting oral and anal sexual contact between all citizens, regardless of sexual orientation or marital status, as applied to two gay men.[160] The Court rejected Michael Hardwick's claim on the basis that a "right to consensual sodomy" is not "implicit in ordered liberty," nor "deeply rooted in this Nation's history and tradition." To reach this conclusion, the Court relied on the contentions that proscriptions against sodomy "have ancient roots;"[161] that "none of the rights announced in those cases[162] bears any resemblance" to the claimed right of gay men and lesbians to sexual autonomy and privacy, and thus cannot be located in the Fourteenth Amendment;[163] and that such a right has no "support in the text of the Constitution."[164] The statute was then held to the rational basis standard, which was found to be satisfied by the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.[165] Although the significance of the *Jaycees* test to the case was argued in some of the briefs,[166] the *Hardwick* majority makes no reference to it, neither dissent applies the intimate association framework, and Justice Blackmun's dissent makes only passing reference to its principles.[167]

159. 478 U.S. 186 (1986).

160. *Id.* at 188 n.1. The Court declined to express an opinion on the constitutionality of the statute as applied to "other acts of sodomy." *Id.*

161. *Id.* at 192, 196-97.

162. Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977) (procreation); Roe v. Wade, 410 U.S. 113 (1973) (contraception, abortion, and the fundamental right to decide whether to have a child); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Eisenstadt v. Baird, 405 U.S. 438 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944) (dealing with family relationships); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (child rearing and education).

163. *Hardwick*, 478 U.S. at 190-91.

164. *Id.* at 195.

165. *Id.*

166. Brief of Respondent Michael Hardwick in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140). The State of Georgia took the threat of *Jaycees* seriously, and tried to limit its holding to "family rights." Brief of Petitioner Michael Bowers, Attorney General of Georgia at 32. The State argued that if it were not so limited it would extend to overturn laws concerning polygamy, consensual incest, prostitution, adultery, and fornication. *Id.* at 32-33. Michael Hardwick's brief in the case makes one reference to *Jaycees*, under the heading "Ordered Liberty Requires That Intimate Relationships Between Consenting Adults Be Free From Unjustified State Intrusion." Brief of Respondent at 9. In response, Georgia addressed *Jaycees* at length, contending that it only extended to "families," and that the relationship at issue in *Hardwick* was not "like" the families *Jaycees* intended to protect. Petitioner's Reply Brief at 8-9. Amicus American Psychological Association cited *Jaycees* and after discussing several studies, concluded that "alternative" couples serve the same function for the parties involved as "traditional" couples. Brief of Amici Curiae American Psychological Association and American Public Health Association in Support of Respondents at 12-17.

167. Justice Blackmun's dissent cites *Jaycees* for the propositions that the privacy cases may be characterized by their connection to protection of the family, *Hardwick*, 478 U.S. at 204; and that the " 'ability to independently define one's identity that is central to any concept of liberty' cannot be exercised in a vacuum; we all depend on the 'emotional enrichment from

Established privacy analysis dictated that the Court look to history and tradition to learn about Michael Hardwick's sexual relationship with another man. Intimate association analysis would require that the Court look to Michael. Because it identifies the parties themselves as the ultimate source of information regarding the function a relationship plays in their lives, the intimate association analysis presents an opportunity to look beyond majority morality. Perhaps that is why it was not applied: it would have required the majority to confront and legitimize a lifestyle that made them uncomfortable.

The majority's analysis in *Hardwick*, or lack thereof, and its unwillingness to recognize the magnitude of the interest at stake, is bitter testimony to the fact that black robes cannot cloak the prejudice of the person beneath them. It is unlikely that a Court which rejects the privacy doctrine will adopt the intimate association doctrine. Yet, intimate association's roots in human experience give it persuasive power that previous arguments based in privacy may have lacked, and Supreme Court precedent concerning the intimate association analysis gives lower courts a textual and precedential anchor which they may use to develop the doctrine to its full potential. When fully applied, the intimate association analysis has the power to protect all citizens, respecting their different choices and responding to their needs.

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close ties with others'." *Id.* at 205. It cites Karst, *supra* note 22, for the propositions that the freedom to choose intimate bonds is a large source of their richness, and that the right to differ must extend to choices that touch the heart of the existing order. *Hardwick*, 478 U.S. at 211.