Notes

FUNCTIONAL INTIMATE ASSOCIATION ANALYSIS: A DOCTRINAL SHIFT TO SAVE THE *ROBERTS* FRAMEWORK

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ABSTRACT

In Roberts v. U.S. Jaycees*, the Supreme Court recognized intimate association as one of the two distinct senses of the freedom of association. In doing so, the Court identified two essential functions that justify constitutional protection for the relationships that provide them: intimate relationships cultivate and transmit shared ideals and beliefs, and they provide opportunities for emotional enrichment and self-identification by facilitating the creation of close bonds among members. Then, recognizing that familial relationships often exemplify these functions, the Court identified four aspects of family relationships that would help distinguish intimate from nonintimate associations: size, purpose, selectivity, and seclusion from others. Despite the secondary role of these aspects, subsequent decisions have focused solely on these four characteristics without even mentioning the justifications that originally supported constitutional protection. This factor-based analysis has resulted in unpredictable and inconsistent decisions that threaten to undermine the legitimacy of the entire* Roberts *framework. Drawing from the original functional justifications, this Note argues that courts must abandon their sole reliance on the* Roberts *factors and instead adopt a functional analysis that properly appreciates the right's underlying values and ensures that groups reflecting those values are consistently protected.*

† Duke University School of Law, J.D. expected 2012; Marquette University, B.A. 2009. I would like to thank Professor Joseph Blocher for his thoughtful insights and feedback during this process. I would also like to acknowledge Professor John Inazu for helping me develop this topic, the editors of the *Duke Law Journal* for their invaluable suggestions, and the Marquette Chapter of Triangle Fraternity for showing me that private relationships are worth defending. Most of all, I would like to thank my wife, Kathleen, my parents, Paul and Linda, and my brother, Sean, without whom none of this would have been possible.

INTRODUCTION

In early 2004, a group of students at the College of Staten Island (CSI)[1] applied to have the Chi Iota Colony of the Alpha Epsilon Pi Fraternity officially recognized by CSI.[2] Because the fraternity allowed only male students to join, the college determined that it violated CSI's antidiscrimination policy and withheld recognition.[3] As a result, the fraternity could not use CSI's facilities, calendars, and bulletin boards; receive funding from CSI; associate the college's name with the group's name; or distribute information on campus to recruit new members.[4] The fraternity sued for a preliminary injunction against enforcement of the nondiscrimination policy, alleging that CSI had violated its rights of intimate and expressive association.[5] In *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York*,[6] the U.S. District Court for the Eastern District of New York concluded that "[u]nder the totality of circumstances, considering the Fraternity's relatively small size, exclusivity in membership, and seclusion in activities central to the group's purposes, [the] plaintiffs ha[d] shown 'clear' or 'substantial' likelihood of success on the merits that the Fraternity qualifie[d] as an intimate association."[7] The court therefore granted the injunction.[8]

After hearing the case on appeal, the Second Circuit reversed, holding that "[b]ased on its size, level of selectivity, purpose, and inclusion of non-members, the Fraternity lack[ed] the characteristics that typify groups with strong claims to intimate association."[9] Even though both courts considered the same factors in reaching their opposite conclusions, neither court explained why those factors were determinative or how they were relevant to analyzing the group's level of intimacy. Nevertheless, as the courts struggled to define the

1. The College of Staten Island is a senior college within the City University of New York. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374, 376 (E.D.N.Y. 2006), *vacated*, 502 F.3d 136 (2d Cir. 2007).

2. *Id.* at 380.

3. *Id.*

4. *Id.*

5. *Id.* at 381.

6. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374 (E.D.N.Y. 2006), *vacated*, 502 F.3d 136 (2d Cir. 2007).

7. *Id.* at 387.

8. *Id.* at 397.

9. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 147 (2d Cir. 2007).

attributes of a constitutionally protected intimate association, the Chi Iota Colony—having been denied access to the resources enjoyed by other student groups—disbanded while its case was before the Second Circuit.[10]

More than fifty years before the Chi Iota Colony's case reached the Second Circuit, Justice Goldberg opined that the Fourteenth Amendment imposes limits on a state's ability to regulate truly private relationships. He explained, "[I]t is the constitutional right of every person to close his home or club to any person or to choose his social intimates . . . . These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties."[11] Twenty years after Justice Goldberg wrote these words, in *Roberts v. U.S. Jaycees*,[12] the Supreme Court recognized the right of intimate association as one of the "two distinct senses" of the freedom of association.[13] The *Roberts* Court identified two functions that are characteristic of the kinds of intimate associations that are entitled to constitutional protection: First, these associations "cultivat[e] and transmit[] shared ideals and beliefs." Second, they provide opportunities for emotional enrichment and self-identification by facilitating the creation of close bonds.[14] Because familial relationships exemplify these roles, the Court concluded that the distinguishing aspects of family relationships—their size, purpose, selectivity, and seclusion from others—would help identify similar groups that "are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty."[15]

Although these factors were intended to serve as proxies for the underlying values of intimate association, courts considering intimate association claims by nonfamily groups after *Roberts*—including the Second Circuit in *Chi Iota Colony*—have increasingly analyzed a group's intimacy solely based on some combination of the group's

10. John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 191 (2010).

11. Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

12. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

13. *Id.* at 617. The other half of the freedom of association—expressive association—is anchored in the First Amendment rather than the Fourteenth Amendment. Despite its status as one part of the freedom of association, expressive association is largely beyond the scope of this Note because these two types of associative freedom are usually analyzed separately.

14. *Id.* at 618–19.

15. *Id.* at 620.

size, purpose, selectivity, and exclusion of nonmembers—the *Roberts* factors.[16] Disconnected from the values that they were intended to help identify, these factors provide no basis for meaningful comparison. As a result, a group's level of constitutional protection often depends on a court's unpredictable and arbitrary analysis of the group's objective characteristics in light of the court's own conception of what constitutes intimacy.[17]

Regardless of whether the fraternity in *Chi Iota Colony* was truly an intimate association entitled to constitutional protection,[18] the factor-based analysis employed in these cases denies groups the ability to make a direct case for protection and creates uncertainty for similarly situated groups across the country. This Note argues that to develop a consistent and workable framework for intimate association analysis, courts should abandon their myopic reliance on the *Roberts* factors and adopt a functional analysis that determines a group's intimacy based on whether the group performs the two functions that *Roberts* identified as defining intimate associations: (1) "cultivating and transmitting shared ideals and beliefs" and (2) facilitating the creation of close ties between members.[19]

The functional analysis proposed by this Note differs from traditional responses to intimate association decisions. These responses typically fall into one of two categories: either they accept the factor-based analysis as a given and object to a court's particular

16. *See, e.g.*, Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987) ("In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship."); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 442 (3d Cir. 2000) ("In determining the nature of a given relationship, relevant factors to consider include a group's 'size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.'" (quoting *Roberts*, 468 U.S. at 620)); La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1494 (5th Cir. 1995) ("In determining whether a particular association is sufficiently private to warrant constitutional protection, as well as the scope of that protection, the Court has considered several factors, including: (1) the organization's size; (2) its purposes; (3) the selectivity in choosing its members; (4) the congeniality among its members; (5) whether others are excluded from critical aspects of the relationship; and, (6) other characteristics that in a particular case may be pertinent.").

17. *See infra* Part II.A.

18. Because both the district court and the court of appeals organized their analyses around the *Roberts* factors, the decisions provided little insight into the actual role that the group played in the life of its members and did very little to answer the key question of whether the group provided the benefits that should have entitled it to constitutional protection.

19. *Roberts*, 468 U.S. at 618–19.

application of the factors,[20] or they advocate an abandonment of the *Roberts* intimate and expressive association framework altogether in favor of a broader right of assembly.[21] Taking a middle ground, this Note proposes that the *Roberts* framework can be salvaged, but only if courts shift their analysis of intimate association claims from one that is based on the formulaic application of the *Roberts* factors to one that requires a substantive consideration of the group's functions.

Parts I.A and I.B review the early foundations of the right of intimate association and its initial recognition in *Roberts*, noting both the functional and factor-based characteristics of intimate associations identified by the Supreme Court. Part I.C examines the entrenchment of factor-based analysis after *Roberts* as courts have applied the right of intimate association to nonfamily social groups. Part II demonstrates two inherent shortcomings of any approach that attempts to work within the current factor-based doctrine. First, Part II.A examines intimate association precedent to demonstrate the unpredictability and inconsistency that is inherent in each of the *Roberts* factors. Second, Part II.B illustrates the potential for a group to manipulate the *Roberts* factors to improve its level of constitutional protection without making any substantive changes to the role that the group plays in the lives of its members. Finally, Part III proposes a functional intimate association analysis that will overcome the problems posed by factor-based analysis and will protect groups that more closely reflect the values underlying the right of intimate association.

I. RECOGNITION AND DEVELOPMENT OF THE RIGHT OF INTIMATE ASSOCIATION

A. Doctrinal Foundations of the Right of Intimate Association

The freedom of association was first recognized by the Supreme Court in *NAACP v. Alabama ex rel. Patterson*.[22] In *Patterson*, the NAACP challenged the constitutionality of an order by an Alabama

20. *See, e.g.*, Clinton N. Daggan, Case Comment, Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York, 53 N.Y.L. SCH. L. REV. 627, 628 (2008/09) ("This case comment contends that the Second Circuit's analysis was too stringent and is inconsistent with the United States Supreme Court's and other federal circuit courts' 'spectrum' analysis.").

21. *See* Inazu, *supra* note 10, at 153–55 (proposing that the categories of intimate and expressive association should be eliminated and that courts should begin to apply the right of assembly as a means of strengthening group autonomy).

22. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

state court requiring it to disclose the names of its members.[23] Finding that the order constituted an unconstitutional interference with the group's associational rights,[24] the Supreme Court held that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[25] Because it relied on both the Fourteenth Amendment's protection of liberty and the First Amendment's protection of free speech, however, the decision did not precisely define the constitutional source of the freedom of association.[26]

In *Griswold v. Connecticut*,[27] the Court established the foundation of the right of intimate association by identifying the right of privacy as falling within the "penumbras" formed by the various specific guarantees in the Bill of Rights.[28] In doing so, the Court extended the "zone of privacy" to include not only the privacy of membership lists that had allowed the NAACP's members in *Patterson* to associate without interference, but also the privacy to enter into and maintain private personal relationships.[29] The *Griswold* Court concluded by identifying the two ends of the spectrum of relationships that would qualify for protection—with marriage on one end and groups like the NAACP on the other.[30] The Court held that marriage, unlike the association protected in *Patterson*, "is an association that promotes a way of life, not causes; a harmony in

23. *Id.* at 454.

24. *Id.* at 462–63.

25. *Id.* at 460 (quoting U.S. CONST. amend. XIV, § 1).

26. *See* John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 517 (2010) ("It was clear that the Court had broken new constitutional ground in *NAACP v. Alabama*, but specifying exactly what had taken place proved elusive."); *id.* at 558 (noting Justice Douglas's preference for basing the right of association in the First Amendment—the "incorporation argument"—and Justice Brennan's preference for basing the right in the Fourteenth Amendment—the "liberty argument").

27. Griswold v. Connecticut, 381 U.S. 479 (1965).

28. *Id.* at 484.

29. *See id.* at 485–86 (noting that the right of privacy within marriage is protected by the right of association).

30. *Id.* at 483 ("In like context, we have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." (citing NAACP v. Button, 371 U.S. 415, 430–31 (1963))). This Note argues that, rather than simply staking out two types of protected associations, those similar to the NAACP and those related to marriage, the Court actually suggested a *spectrum* between the privacy necessary to protect expressive associations such as the NAACP and the privacy inherent in marital relationships. This spectrum includes a wide variety of associations, including fraternal relationships.

living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."[31]

Professor Kenneth Karst argues that *Griswold* and its progeny can all "be seen as variations on a single theme: the freedom of intimate association."[32] Karst defines an intimate association as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship."[33] In his view, these relationships are primarily distinguished by some mixture of "living in the same quarters, or sexual intimacy, or blood ties, or a formal relationship."[34] Explaining why such associations should be protected, Karst identifies four benefits provided by intimate associations: (1) "the opportunity to enjoy the society of" others,[35] (2) the opportunity "to love and be loved" in committed relationships,[36] (3) the emotional enrichment from "close and enduring association,"[37] and (4) the formative effect that close relationships have on an individual's self-identification.[38] Although the Supreme Court did not cite Karst's article when it recognized the right of intimate association in *Roberts*, many of Professor Karst's values were reflected in the Court's rationales for protecting intimate associations.[39]

B. Supreme Court Recognition of Intimate Association Rights

In *Roberts*, the Court separated the two recognized sources of constitutional support for the right of association—the First and Fourteenth Amendments—and concluded for the first time that the

31. *Id.* at 486.

32. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625 (1980).

33. *Id.* at 629.

34. *Id.*

35. *Id.* at 630–31.

36. *Id.* at 632–33.

37. *Id.* at 633–35.

38. *Id.* at 635–37.

39. For example, the Court explained the rationale for recognizing the right of intimate association by reasoning: "[T]he 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 unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984); *see also* Inazu, *supra* note 10, at 165 & n.83 ("Brennan's *Roberts* opinion never cites Karst's article, but the intellectual debt is apparent.").

freedom of association encompasses two distinct rights.[40] The first, intimate association—anchored in the Fourteenth Amendment—protects the ability to "enter into and maintain certain intimate human relationships."[41] The second, expressive association—anchored in the First Amendment—protects the "right to associate for the purpose of engaging in those activities protected by the First Amendment."[42]

The right of intimate association, as envisioned by the *Roberts* Court, promotes individual liberty[43] by protecting human relationships that facilitate cultural and personal development from undue interference by the state.[44] To distinguish intimate from nonintimate associations, the Court in *Roberts* described both the functions and the characteristics of intimate associations.[45] Despite the tendency of courts in later cases to focus on only a few of these characteristics,[46] this Note argues that the controlling consideration should be whether the group performs the defining functions of intimate associations and, as a result, provides the benefits to its members that justify constitutional protection for those associations.

1. *Defining Functions of Intimate Associations.* Although it left the door open for other considerations, the Court specifically noted two characteristic functions of intimate associations: (1) "cultivating and transmitting shared ideals and beliefs" and (2) providing the opportunity to experience the "emotional enrichment" that individuals gain from "close ties with others."[47] These functions provide the basis for the analysis proposed in Part III.

The decisions cited by the *Roberts* Court in support of the first function demonstrate the importance of intimate associations, wholly apart from their potential expressive value, in limiting the state's ability to define or control social and cultural norms through

40. *See Roberts*, 468 U.S. at 617 ("Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses.").

41. *Id.*

42. *Id.* at 618.

43. *See id.* at 617–18 ("[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.").

44. *Id.* at 617–19.

45. *Id.* at 618–20.

46. *See infra* Part I.C.

47. *Roberts*, 468 U.S. at 618–19.

otherwise-legitimate actions. In this sense, intimate associations "foster diversity and act as critical buffers between the individual and the power of the State."[48] The Court has, therefore, overruled state actions that prohibit marriage,[49] preempt decisions about procreation,[50] limit a family's ability to cohabitate,[51] interfere with parental control over the education of children,[52] or significantly disrupt or threaten political organizations.[53] These examples demonstrate the importance of an individual's ability to develop, share, and act upon his beliefs in an attempt to preserve a unique, and even unpopular, way of life. In *Gilmore v. City of Montgomery*,[54] the Court explained, "The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic

48. *Id.* at 619.

49. *See* Zablocki v. Redhail, 434 U.S. 374, 386 (1978) ("It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.").

50. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.").

51. *See* Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) (plurality opinion) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

52. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . . ."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

53. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958) ("Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

54. Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

government . . . ."[55] Thus, the protection of a group's ability to share its beliefs internally, regardless of any external message, benefits both its members and the nation as a whole. Accordingly, when analyzing an intimate association claim, a court should consider the potential for a group to cultivate and transmit shared ideals and beliefs.

In contrast to the first function's societal benefits, the second function—the facilitation of close relationships among members of the group—emphasizes the individual benefits of intimate associations. As the *Roberts* Court explained, "Protecting these relationships . . . safeguards the ability independently to define one's identity."[56] Recognizing an additional benefit of close relationships, Professor Karst argues that "[f]or most of us, the chief value in intimate association is the opportunity" to "love and be loved" and to care and be cared for through committed relationships.[57] Although family relationships may often provide opportunities for personal development, entitling family relationships to special recognition,[58] these opportunities are not restricted to the family alone.[59] In fact, the Court has held that the Fourteenth Amendment allows individuals to satisfy their "intellectual and emotional needs in the privacy of [their] own home[s]" in a variety of ways.[60] It is hard to imagine that private social groups might not also provide opportunities similarly worthy of constitutional protection.

By recognizing the benefits of intimate associations rather than simply defining specific protected relationships, the *Roberts* Court laid the foundation for the decision in *Board of Directors of Rotary*

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55. *Id.* at 575.

56. Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984).

57. Karst, *supra* note 32, at 632.

58. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" (alteration in original) (quoting Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in the judgment))); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause . . . .").

59. Nor are biological families always entitled to protection. *See, e.g.*, *Quilloin*, 434 U.S. at 255 (rejecting a biological father's due process challenge to the adoption of his illegitimate child by another man because the biological father had never sought actual or legal custody of the child).

60. Stanley v. Georgia, 394 U.S. 557, 565 (1969) (holding unconstitutional a Georgia statute that prohibited the possession of obscene materials within the home).

International v. Rotary Club of Duarte.[61] In that case, the Court held that although marriage, as "the foundation of the family and of society,"[62] is a prototypical example of intimate association,[63] the protection afforded by the right is not "restricted to relationships among family members."[64] Indeed, the Court had previously explained the wide variety of protected nonexpressive associations in *Gilmore*, holding:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.[65]

2. *External Characteristics of Intimate Associations.* After explaining the functions and benefits that underlie the protection of intimate associations, the *Roberts* Court went on to describe the characteristics of relationships that "are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty."[66] This statement suggests that these characteristics were only intended to serve a secondary role, helping courts identify groups that are likely to produce the two benefits on which the Court based its decision in *Roberts*.

Building on well-established precedent recognizing the importance of family relationships, the *Roberts* Court explained that intimate associations, like families, "involve 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."[67]

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61. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

62. Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)) (internal quotation mark omitted).

63. Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) ("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 . . . .").

64. *Duarte*, 481 U.S. at 545.

65. Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974) (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Douglas, J., dissenting)) (internal quotation marks omitted).

66. *Roberts*, 468 U.S. at 620.

67. *Id.* at 619–20.

Recognizing the need for flexibility in identifying associations that deserve protection, the Court explained that a "broad range of human relationships . . . may make greater or lesser claims to constitutional protection."[68] The Court marked the ends of this spectrum by noting that family relationships exemplify intimate association and are entitled to the strongest constitutional protection, whereas "large business enterprise[s]" are "remote" from the underlying values of intimate association and are not entitled to protection.[69] To further aid lower courts in the difficult task of assessing a relationship's constitutional value,[70] the Court identified five factors—the *Roberts* factors—that have become the framework for current intimate association analysis. These factors "include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."[71]

The *Roberts* Court then applied these factors to determine whether the Jaycees, a nonprofit organization open only to young men, qualified as an intimate association. The Court began its analysis by noting that the local chapters at issue in the case had 400 and 430 members respectively.[72] In a discussion of the group's purpose, the Court cited the Jaycees' bylaws, finding that the Jaycees' mission was to develop a "spirit of genuine Americanism and civic interest," to provide members with an opportunity for personal development, and to "develop true friendship and understanding among young men of all nations."[73] Then, analyzing the selectivity of the group, the Court found that the Jaycees were "basically unselective," noting in particular that age and sex were the only criteria for membership and that new members were regularly "admitted with no inquiry into their backgrounds."[74] Finally, the Court found that the Jaycees did not maintain policies that excluded nonmembers from critical aspects of the relationship because nonmembers of both genders were regularly

68. *Id.* at 620.

69. *Id.*

70. *See id.* ("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.").

71. *Id.*

72. *Id.* at 621.

73. *Id.* at 612–13 (quoting Brief of Appellee at 2, *Roberts* 468 U.S. 609 (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 237, at *5) (internal quotation mark omitted).

74. *Id.* at 621.

invited to participate in a substantial portion of "activities central to the decision of many members to associate with one another."[75] Based on these considerations, the Court held that the Jaycees "lack[ed] the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women."[76]

C. Entrenchment of Factor-Based Intimate Association Analysis

Three years later, the Court considered whether California's Unruh Civil Rights Act,[77] which prohibits discrimination "in all business establishments,"[78] violated the Rotary Club's right of intimate association.[79] In holding that the Rotary Club was not an intimate association, the Court relied exclusively on the factors it had identified in *Roberts*. Beginning with an analysis of the group's size, the Court found that local chapters ranged from twenty to more than nine hundred members and that those members were instructed to keep a flow of new members coming in, both to enlarge membership and to make up for a turnover rate of about 10 percent each year.[80] Next, the Court noted that the purpose of the Rotary Club was to "produce an inclusive, not exclusive, membership" that created a "cross section of the business and professional life of the community,"[81] and that Rotary Clubs were encouraged to include all "qualified prospective members located within [their] territory," avoiding "arbitrary limits" on membership.[82] Finally, the Court found that "[m]any of the Rotary Clubs' central activities [were] carried on in the presence of strangers," and that Rotary Clubs "[sought] to keep their 'windows and doors open to the whole world.'"[83]

Although these early intimate association cases were consistent with each other and likely reached the same conclusions as would have resulted from functional analyses, they have nevertheless had a limiting effect on the development of the right of intimate association. The Court's denial of constitutional protection to two nonfamily groups within three years of recognizing the right of intimate

75. *Id.*
76. *Id.*
77. Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1982).
78. *Id.*
79. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546–47 (1987).
80. *Id.* at 546.
81. *Id.* (quoting 1 ROTARY BASIC LIBRARY, FOCUS ON ROTARY 60–61 (1981)).
82. *Id.* at 547.
83. *Id.* (quoting 1 ROTARY BASIC LIBRARY, *supra* note 81, at 60–61).

association likely signaled a stricter standard for intimate association claims than otherwise would have been required by the right's underlying rationale. *Roberts* and *Duartes* also provided a framework for dismissing intimate association claims without a substantive investigation into the nature of the relationships at issue. In *City of Dallas v. Stanglin*,[84] for example, the Supreme Court rejected the claim that a city ordinance establishing age and hour restrictions on "teenage" dance halls violated the patrons' associational rights.[85] Dismissing the ordinance's impact on intimate association in one sentence, the Court concluded, "It is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in *Roberts*."[86]

A reliance on an increasingly strict application of the factors alone can be seen in subsequent circuit court opinions concerning intimate association claims by social clubs. In *Louisiana Debating & Literary Ass'n v. City of New Orleans*,[87] the Fifth Circuit considered whether the application of a city ordinance that prohibited discrimination in places of public accommodation violated the intimate or private associational rights of four exclusive clubs.[88] Applying the *Roberts* factors, the court found that the clubs, which had between 325 and 1000 members and lacked any affiliation with a national organization, were "[r]elatively small in size."[89] The purpose of the clubs was exclusively social, the court held, and all of the clubs had very restrictive admissions processes, including rigorous screening and votes by the general membership.[90] The court also favorably noted that the clubs had policies that strictly excluded nonmembers from using club facilities.[91] Based solely on these

84. City of Dallas v. Stanglin, 490 U.S. 19 (1989).

85. *Id.* at 20–22.

86. *Id.* at 24 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984)). The case was ultimately decided under the rubric of expressive association, and only Justices Stevens and Blackmun would have considered the existence of a general right of "social association" under the Fourteenth rather than the First Amendment. *Id.* at 28 (Stevens, J., concurring in the judgment).

87. La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483 (5th Cir. 1995).

88. *See id.* at 1493 n.15 (explaining that the Supreme Court uses the broad term "private association" to connote constitutional protections for organizations and relationships outside the family).

89. *Id.* at 1497.

90. *Id.* at 1496.

91. *Id.*

considerations, the court concluded that "the Clubs constitute organizations whose location on the spectrum of personal attachments places them near those that are 'most intimate.'"[92] They were, therefore, entitled to "the fullest protection of their right of private association."[93]

In *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*,[94] the Third Circuit denied a fraternity's claim that its associational rights were violated when its university recognition was revoked because four members had been arrested during a drug raid at the fraternity's house.[95] In a brief application of the *Roberts* factors that considered only the fraternity's size, selectivity, and level of seclusion, the court concluded that the fraternity was not entitled to constitutional protection as an intimate association.[96] Interestingly, the court made no mention of the fraternity's purpose, which had been one of the primary considerations in *Duarte* and which is the factor that is arguably the most relevant in determining the functions the group will provide.

Most recently, in *Chi Iota Colony*, the Second Circuit rejected the Chi Iota Colony's intimate association claim by relying entirely on the *Roberts* framework.[97] The court began by considering the size of the fraternity. Despite finding that the fraternity had only nineteen members, the court focused on the fact that the fraternity hoped one day to have as many as fifty pledges each semester and had no upper limit on membership, and concluded that the group's size was a "product of circumstances, not a desire to maintain intimacy."[98] Next, the court considered the fraternity's purpose. The court characterized the purposes of the fraternity as "broad, public-minded goals that [did] not depend for their promotion on close-knit bonds," such as encouraging participation in university and community activities, engaging in community service, and expressing Jewish culture.[99]

92. *Id.* at 1497 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984)).

93. *La. Debating*, 42 F.3d at 1497–98.

94. Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435 (3d Cir. 2000).

95. *Id.* at 438–39.

96. *Id.* at 442 ("All of these elements—the Chapter's size, lack of selectivity, and lack of seclusion in its activities—support our conclusion that the Chapter lacks the essential characteristics of constitutionally protected intimate association.").

97. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 145–48 (2d Cir. 2007).

98. *Id.* at 145.

99. *Id.* at 146.

Having determined that the fraternity's goal was broad and public-minded, the court declined to assign any significance to the fraternity's stated goal "to foster personal, intimate relationships between its members" because that goal was similar to that held by "nearly any student group in which members become close friends."[100]

The court also considered the fraternity's selectivity. Although the court found that the fraternity "employ[ed] some care in selecting recruits in order to ensure that all its members [were] compatible," the court ultimately emphasized the fact that the fraternity aggressively recruited new members from the student body, both to replace members who had graduated and to enlarge membership.[101] Further, the court held that because "a relatively high percentage of Jewish men at CSI who express[ed] an interest in the Fraternity [were] invited to join," the selectivity of the group "compare[d] unfavorably with that employed in creating the strongest of associational interests, as in the cases of marriage or adoption."[102]

Finally, the court considered whether the fraternity sufficiently excluded nonmembers from its activities. Rejecting the district court's conclusion that members-only weekly business meetings and secret rituals were "central to the Fraternity's purpose,"[103] the court instead determined that public recruitment events and parties for nonmembers were the "crucial aspects of its existence."[104] Because these events were open to the public, the court concluded that the fraternity, like the Jaycees or the Rotary Club, was not sufficiently exclusive.[105] Based on this analysis, the Second Circuit concluded that "the Fraternity lack[ed] the characteristics that typify groups with strong claims to intimate association."[106]

Despite its general acceptance in the courts, this reliance on the *Roberts* factors has not gone entirely unnoticed. Professor Kevin Worthen purports to propose a functionalist approach to intimate association claims that would protect inner-city public schools and

100. *Id.* This finding is particularly problematic given the fact that the primary aim of the fraternity was to "foster and promote brotherly love." *Id.*

101. *Id.* at 145.

102. *Id.* at 145–46.

103. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374, 386 (E.D.N.Y. 2006), *vacated*, 502 F.3d 136 (2d Cir. 2007).

104. *Chi Iota Colony*, 502 F.3d at 146.

105. *Id.*

106. *Id.* at 147.

Native American tribes.[107] Arguing that such an approach should protect entities that provide either the societal benefit of transmitting ideals and beliefs or the individual benefit of emotional enrichment,[108] Professor Worthen concludes that public schools could satisfy the first prong and Native American tribes could satisfy the second.[109] Professor Worthen recognizes the importance of justifying the use of the *Roberts* factors by identifying how they are relevant to the group's ability to serve the characteristic functions of intimate associations. Nevertheless, he declines to consider the potential for courts to entirely alter the group of factors that they would analyze—say, by ignoring irrelevant *Roberts* factors and considering other factors that might be useful in a particular case. This default consideration of only the *Roberts* factors suggests their continued pervasiveness even among critics of the factor-based analysis.

II. THE SHORTCOMINGS OF A FACTOR-BASED INTIMATE ASSOCIATION ANALYSIS

The applications of factor-based analysis described in the previous Part reveal two inherent shortcomings. First, for a group seeking protection, the courts' inconsistent and unpredictable analysis creates uncertainty about the strength and likely success of an intimate association claim. Second, factor-based analysis is a poor proxy for intimacy and is likely to be both underinclusive and overinclusive. Thus, in addition to denying protection to groups that may otherwise be considered intimate, factor-based analysis is susceptible to manipulation by groups that are able to adjust their physical attributes without any real increase in intimacy.

A. Unpredictable and Inconsistent Analysis of the Roberts *Factors*

1. *Size.* Despite size's being the first factor in the traditional *Roberts* analysis, courts have not identified a bright-line rule for the

107. Kevin J Worthen, *One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of "Intimate" Government Entities*, 71 N.C. L. REV. 595, 598–99 (1993).

108. *Id.* at 605.

109. *Id.* at 609. By contrast, under the functional analysis proposed by this Note, both prongs of the functional analysis would have to be met. Thus, neither of Professor Worthen's favored associations would likely qualify for protection.

size of an intimate association.[110] On the one hand, the Supreme Court has found that local Rotary Clubs, ranging from fewer than twenty to more than nine hundred members, were not intimate.[111] On the other hand, the Fifth Circuit has accepted the intimate association claims of several New Orleans clubs with between six hundred and one thousand members.[112] And in her concurrence in *New York State Club Ass'n v. City of New York*,[113] Justice O'Connor suggested that in a city as large as New York, a club with more than four hundred members could be intimate.[114] These seemingly inconsistent holdings suggest at least two ways to analyze the size of a group seeking protection: by comparing the group's size to that of the community in which it is located[115] or by simply considering the absolute number of members without comparison to the surrounding community.

With respect to a relative-size analysis, Justice O'Connor's concurrence in *New York State Club Ass'n* and the Fifth Circuit's decision in *Louisiana Debating* provide indications of the relative sizes that might be acceptable. First, if the population of New York City is estimated to be approximately seven million,[116] a four-hundred-member group would represent 0.006 percent of the total population. At the other end of the range, taking the population of New Orleans to be approximately five hundred thousand,[117] a group

110. *See, e.g.*, Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374, 385 (E.D.N.Y. 2006) ("[T]he Third Circuit's [*Pi Lambda Phi*] decision does not give the court clear direction, particularly since the Supreme Court has not established a bright line test when considering a group's size."), *vacated*, 502 F.3d 136 (2d Cir. 2007).

111. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546–47 (1987).

112. La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1497 (5th Cir. 1995).

113. N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988).

114. *Id.* at 19 (O'Connor, J., concurring).

115. *See Chi Iota Colony*, 443 F. Supp. 2d at 385 ("In determining whether a group is intimate, the court should look at how small it is numerically in comparison to the potential pool of applicants.").

116. *Population Finder: New York City, New York*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/SAFFPopulation?_event=ChangeGeoContext&geo_id=16000US3651000&_geoContext=01000US&_street=&_county=New+York&_cityTown=New+York&_state=04000US36&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=010&_submenuId=population_0&ds_name=null&_ci_nbr=null&qr_name=null&reg=null%3Anull&_keyword=&_industry= (last visited Dec. 19, 2011) (providing the population of New York City in the 1990 census).

117. *Population Finder: New Orleans City, Louisiana*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/SAFFPopulation?_event=Search&geo_id=16000US3651000&_geoContext=01000US%7C04000US36%7C16000US3651000&_street=&_county=new+orleans&_cityTown=new+orleans&_state=04000US22&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoS

with one thousand members would represent 0.2 percent of the population. Even if this analysis could provide a more consistent way to analyze a group's size, it would still raise the question of whether one of two identical groups should be denied protection simply because it is located in a smaller community.

Additionally, relative-size analysis does not make the factor-based analysis any more predictable because it has not been uniformly accepted. In fact, in its first application of the *Roberts* framework, the Supreme Court in *Duarte* based its size analysis on the fact that local Rotary Clubs ranged from fewer than twenty to more than nine hundred members[118] without considering the size of the cities in which the clubs were located. Similarly, the Second Circuit in *Chi Iota Colony* rejected the district court's relative-size analysis[119] and decided that the size of the group taken alone was the relevant factor.[120]

If, however, the relevant consideration is the absolute size of the group, the analysis remains subject to uncertainty because there is no clear determination of what size constitutes intimacy. This uncertainty largely stems from the *Duarte* Court's determination that Rotary Clubs were not intimate because they ranged in size from fewer than twenty to more than nine hundred members and from the fact that the Court failed to clarify which number in that range was too large. In *Chi Iota Colony*, the Second Circuit rejected the size of the hypothetical four-hundred-member intimate group suggested by Justice O'Connor and the nine-hundred-member upper range of the Rotary Club, concluding instead that because some of the local Rotary Clubs had had fewer than twenty members, the fraternity was similar in size to other unprotected groups.[121]

Finally, in addition to lacking clear standards, both forms of analysis suffer from uncertainty as to how to measure the size of the

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elect&_useEV=&pctxt=fph&pgsl=160&_submenuId=population_0&ds_name=null&_ci_nbr=null&qr_name=null&reg=null%3Anull&_keyword=&_industry= (last visited Dec. 19, 2011) (providing the population of New Orleans in the 1990 census).

118. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987).

119. *Chi Iota Colony*, 443 F. Supp. 2d at 385.

120. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 145 (2d Cir. 2007) ("The Fraternity currently has nineteen members, eighteen of whom are CSI students and one of whom is not. It aspires to one day have about fifty pledges per semester. But the Fraternity places no limit on membership size.").

121. *Id.* ("These characteristics render the Fraternity similar to other groups whose intimate-association interests were held to be weak." (citing *Duarte*, 481 U.S. at 546)).

group. First, although scholars have generally concluded that the size of local chapters, rather than the size of the national organization, is the relevant consideration,[122] courts nevertheless have considered affiliation with a national organization as a factor that weighs against an intimacy claim.[123] Second, and perhaps most surprisingly, the Second Circuit in *Chi Iota Colony* determined that the relevant size was not the nineteen members the fraternity had at the time of the litigation but the fifty members it hoped to have one day.[124]

2. *Purpose.* The purpose of a group is arguably the factor that is most closely related to the underlying values of intimate association. For that reason, a group that explicitly seeks both to cultivate shared ideals and beliefs and to facilitate the creation of close bonds among its members should have a strong argument under both factor-based and functional analyses.[125] Additionally, under the intimate association precedent summarized in the previous Part, to differentiate themselves from nonintimate groups such as the Jaycees and Rotary Clubs, groups seeking constitutional protection should neither encourage civic involvement or community service nor aim to provide business connections or networking benefits to their members.

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122. *See* Gregory F. Hauser, *Intimate Associations Under the Law: The Rights of Social Fraternities To Exist and To Be Free from Undue Interference by Host Institutions*, 24 J.C. & U.L. 59, 77 (1997) ("Thus, the clear weight of the case law indicates that it is an individual chapter's size that must be assessed and that college social fraternity chapters are well within the 'relatively small' requirement." (quoting La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1497 (5th Cir. 1995)); Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive in the 1990s?*, 18 J.C. & U.L. 419, 436 (1992) ("Courts may reach an opposite conclusion, however, when the scope of the analysis is limited to the specific local chapter at the particular collegiate campus and undergraduate chapters are distinguished from alumni chapters."); Scott Patrick McBride, Comment, *Freedom of Association in the Public University Setting: How Broad Is the Right To Freely Participate in Greek Life?*, 23 U. DAYTON L. REV. 133, 149 (1997) ("The Supreme Court recognizes that it is the size of the local chapter, not the entire national organization that weighs into the determination of intimacy." (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 621 (1984))).

123. *See, e.g.*, *La. Debating*, 42 F.3d at 1497 ("The Clubs are managed and controlled locally by their members; either directly, by an elected Board of Governors, or by both; none of the Clubs is associated with or controlled by a national organization.").

124. *See supra* note 120.

125. For example, the Fifth Circuit in *Louisiana Debating* concluded that the clubs at issue were sufficiently private to warrant constitutional protection based on the fact that the clubs sought "to maintain an atmosphere in which their members [could] enjoy the comradery and congeniality of one another." *La. Debating*, 42 F.3d at 1497.

Although these limitations are logical outgrowths of the privacy-based foundations of the right, it is important to ask, as a normative matter, whether it makes sense to require groups to refrain from public participation to be constitutionally protected.[126] This restriction is particularly troublesome given the fact that the quintessential intimate association—the family—is often the first setting in which children learn the importance of social responsibility and civic participation. As Part III explains, functional intimate association analysis removes this strange disincentive to perform public service by allowing groups to participate in public activities as long as those activities do not negatively affect their abilities to perform the two required functions of intimate association.

Setting aside this policy objection, the very requirement that a court determine the purpose of a group introduces further uncertainty into the factor-based analysis. Just as an expressive group's message is often subject to multiple interpretations,[127] a purportedly intimate group may have more than one purpose. For this reason, the Court's expressive association analysis in *Boy Scouts of America v. Dale*[128] is instructive. In that case, to determine whether the acceptance of a homosexual scoutmaster would impermissibly conflict with the Boy Scouts' message on homosexuality, the Court deferred to the Boy Scouts' assertion that homosexual conduct was inconsistent with the values they sought to instill in their members.[129]

Despite the Supreme Court's deference to an expressive group's characterization of its message, courts considering the purpose of potential intimate associations often consider only their own characterizations of the groups' respective purposes. For example, in *Chi Iota Colony*, the Second Circuit dismissed the fraternity's assertion that group members shared "a community of thoughts, experiences, beliefs and distinctly personal aspects of their lives" as being too similar to the associations that could be advanced by any

126. *Cf.* Daggan, *supra* note 20, at 635–36 ("The sad irony is that the repercussions of this decision will likely encourage even more discrimination by groups seeking to exercise intimate association rights. . . . As a result of the Second Circuit's ruling, in order for a group to be accorded intimate association rights, it must be as discriminatory and secluded as possible.").

127. *See, e.g.*, Inazu, *supra* note 10, at 179–80 (listing three different characterizations of the Boy Scouts' purpose articulated by various members, ranging from camping to providing single-sex activities to creating opportunities for personal development).

128. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

129. *Id.* at 650 ("We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality.").

group in which members become friends.[130] The court determined instead that the group's primary purpose was the promotion of traditional fraternity values, community service, and the expression of Jewish culture.[131] In addition to conflicting with the group's own characterization of its purpose, this conclusion flew in the face of the majority of intimate association scholarship, which, prior to *Chi Iota Colony*, had generally concluded that fraternities had intimate purposes.[132]

Finally, even if a court defers to a group's characterization of its purpose, the analysis lacks a definite standard for determining which purposes are intimate. For example, in rejecting the fraternity's statement that group members shared "a community of thoughts, experiences, beliefs, and distinctly personal aspects of their lives,"[133] the Second Circuit in *Chi Iota Colony* flatly contradicted the Supreme Court's *Roberts* opinion, which had used that phrase to describe the defining purpose of intimate relationships.[134] Although simply invoking the *Roberts* Court's description of a family relationship is not sufficient to earn constitutional protection, the Second Circuit's suggestion that such a description is meaningless indicates the wide discretion that courts have in defining a group's purpose.

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130. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 146 (2d Cir. 2007).

131. *Id.*

132. *See* Hauser, *supra* note 122, at 77–78 (noting that the primary purpose of fraternities is "to promote and encourage an interpersonal relationship and a life-long personal bond," that "[s]econdary purposes include personal social and emotional development and, like Boy Sco[u]t troops, the instillation of values," and that community-service participation is only a peripheral purpose (footnote omitted) (quoting Timothy A. Fischer, *Single Sex Status Protected*, FRATERNAL L. (Manley, Burke, Fischer & Lipton, Cincinnati, Ohio), Mar. 1994, at 3, 3)); Horton, *supra* note 122, at 439 ("The primary difference [between fraternities and service organizations] is the fraternities' emphasis on brother/sister-hood. Greek organizations exist because students desire to seek friendships and form groups with others mirroring their values. Unlike the Jaycees and Rotary Clubs, fraternities focus on the individual and how that person can become a better individual in society.").

133. *Chi Iota Colony*, 502 F.3d at 146 ("According to its president, Fraternity brothers form 'deep attachments and commitments' and share 'a community of thoughts, experiences, beliefs and distinctly personal aspects of their lives.' But the same can be said of nearly any student group in which members become close friends.").

134. Roberts v. U.S. Jaycees, 468 U.S. 609, 619–20 (1984) ("Family relationships, by their nature, involve 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.").

3. *Selectivity.* The extension of the right of intimate association to social groups, what the Fifth Circuit has referred to as "private association," logically entails some requirement that membership not be completely open to the general public.[135] Because few decisions have turned solely on a group's selectivity, little guidance exists for a group attempting ex ante to determine its level of intimacy. Thus, to distinguish themselves from the Jaycees, who selected members based solely on age and gender without any background inquiry,[136] or the Rotary Clubs, which were instructed to include all qualified prospective members in their territories,[137] groups seeking protection must at a minimum carefully screen potential new members and develop specific membership requirements. Careful screening might be demonstrated by requiring all active members to vote on decisions about whether to admit new members and by giving a limited number of members the power to reject potential new members.[138] In addition, some courts have considered the extent to which a group recruits aggressively from the general population.[139]

In *Chi Iota Colony*, the Second Circuit based its decision largely on two factors: the fraternity's relatively high turnover rate and the fact that the fraternity invited a large percentage of the Jewish men who had expressed interest to join.[140] This analysis demonstrates two potential problems. First, although high turnover rates may indicate a lack of intimate relationships, taken alone, they are not conclusive. For example, whereas high turnover rates among new members might indicate that their lengths of membership were short and that they were therefore unlikely to have had time to develop close personal bonds, departing members might be those who had been in the group

135. La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1493 n.15 (5th Cir. 1995). In *Louisiana Debating*, the court used the term "private association" to refer to the constitutional protections of private clubs, noting that the Supreme Court did not limit the right of intimate association to familial situations. *Id*.

136. *Roberts*, 468 U.S. at 621.

137. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 547 (1987).

138. *See, e.g.*, *La. Debating*, 42 F.3d at 1496 ("Finally, whether to admit the prospective member is voted on by the general membership. A very limited number of objections deny membership . . . .").

139. *See, e.g.*, Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 442 (3d Cir. 2000) ("[T]he Chapter actively recruits new members from the University population at large and it is not particularly selective in whom it admits. The international organization of Pi Lambda Phi strongly encourages its chapters to recruit new members aggressively so as to continue the growth of the organization.").

140. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 145–46 (2d Cir. 2007).

the longest, increasing the probability that they had had ample time to create close relationships. Thus, courts that replace selectivity in the traditional sense—"the quality of carefully choosing someone . . . as the best or most suitable"[141]—with selectivity based on turnover rates essentially consider an entirely different factor from the one identified in *Roberts*, making it hard for groups seeking protection to predict how they will be judged. The second problem with the Second Circuit's selectivity analysis is that the courts had wide leeway in framing this analysis. The Second Circuit's consideration of the percentage of Jewish men expressing interest who were invited to join rather than the percentage of the entire student body or even the city of New York illustrates how even a relatively small group might nevertheless be considered unselective.

4. *Exclusion of Nonmembers.* In addition to placing limits on who can be a member, a private or intimate group must also make sure that only members participate in the group's central activities.[142] Exclusivity seems to be a logical companion to—and extension of—selectivity, but the determination of which events are central to a group is inherently ambiguous. This problem is compounded by the fact that courts, not members, make the final decision about which activities are central to the members' decisions to associate with one another.[143]

Most of the activities undertaken by typical groups can be classified as one of four general types of activities[144]: initiations or rituals, regular business meetings, recruitment events, and general public activities, such as community-service or social events. Of these, initiation ceremonies and other rituals are often the group's most exclusive activities.[145] Regular meetings are likely to be the next most

141. OXFORD DICTIONARY OF ENGLISH 1613 (Angus Stevenson ed., 3d ed. 2010).

142. *Cf.* Roberts v. U.S. Jaycees, 468 U.S. 609, 621 (1984) ("Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship.").

143. *See id.* ("Indeed, numerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs, awards ceremonies, and recruitment meetings.").

144. Because no group is likely to be typical, these categories are intended only to be illustrative and not comprehensive.

145. *See Chi Iota Colony*, 502 F.3d at 146 ("Decisions about whether to offer or revoke membership occur in private, as do the ceremonies in which prospective members become pledges and pledges become full members."); Horton, *supra* note 122, at 438 ("Only initiated

exclusive,[146] although groups vary widely on the extent to which nonmembers are allowed to attend meetings.[147] Recruitment events, by necessity, involve nonmembers. Thus, to distinguish among groups based on this category of activity, courts have considered factors such as whether nonmembers must be invited to these events[148] and whether the events take place in public locations.[149] Finally, public activities, such as community-service events and parties, are intended to include, and are often for the benefit of, nonmembers.[150]

Because many groups participate in all four categories of activities, a court's decision regarding where to draw the line for defining central activities is crucial. Although this determination will

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fraternity members may attend meetings and other ritual ceremonies; nonmembers, outsiders, and even pledges of the fraternity may not participate in or even observe fraternity ritual ceremonies."); McBride, *supra* note 122, at 148 ("In addition, rituals are a critical aspect of Greek organizations' relations. Most fraternities and sororities require that their rituals be kept secret, and require their members to swear under oath to keep them secret.").

146. *See, e.g.*, *Chi Iota Colony*, 502 F.3d at 146 ("Weekly business meetings and frequent informal gatherings also take place only in the presence of members."); Horton, *supra* note 122, at 438 ("Fraternities conduct all their meetings in an atmosphere of privacy, secrecy, and confidentiality . . . ."); McBride, *supra* note 122, at 148 ("Most fraternities and sororities have meetings open to members only. Not only are the general public and guests prevented from joining in the meetings, but pledges are precluded from entering the meeting as well." (footnote omitted)).

147. *See, e.g.*, Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 547 (1987) ("Members are encouraged to invite business associates and competitors to meetings. At some Rotary Clubs, the visitors number in the tens and twenties each week. . . . The clubs are encouraged to seek coverage of their meetings and activities in local newspapers." (quoting Appendix to Jurisdictional Statement at G-24, *Duarte*, 481 U.S. 537 (No. 86-421)) (internal quotation marks omitted)); *Roberts*, 468 U.S. at 621 ("[D]espite their inability to vote, hold office, or receive certain awards, women affiliated with the Jaycees attend various meetings . . . .").

148. *See, e.g.*, La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1493 n.15 (5th Cir. 1995) ("Only existing members may propose a new member.").

149. *See, e.g.*, *Chi Iota Colony*, 502 F.3d at 146 ("Many rush events are held in public places such as local cafés or pool halls. During its February 2003 rush, the Fraternity planned several events requiring the interaction of current and prospective members with non-members—a party, as well as outings to a strip club, a karaoke bar, and a laser tag establishment.").

150. *See Roberts*, 468 U.S. at 621 ("[N]umerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs . . . ."); *Chi Iota Colony*, 502 F.3d at 146 ("The Fraternity gives parties, sometimes at a profit, at which non-members—including women—are encouraged to attend."); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 442 (3d Cir. 2000) ("The Chapter also invites members of the public into its house for social activities and participates in many public University events."); McBride, *supra* note 122, at 148 ("Not all aspects of Greek life are limited only to members, however. Fraternities and sororities hold formal and semi-formal dances and social parties to which members are permitted to bring a non-member guest.").

necessarily be made on a case-by-case basis, this Note proposes that courts should consider the relative weight that members give each type of activity rather than substituting their own perceptions of which activities may be important to members. Moreover, as with purpose analysis, courts should be careful not to ignore the fact that even families, the quintessential intimate associations, often interact with the public without compromising their intimate status.

5. *Judicial Resort to Other Considerations.* Notwithstanding its general reliance on factor-based analysis in the context of clubs and social groups, the Supreme Court has, perhaps unsurprisingly, been willing to depart from the *Roberts* factors to deny intimate association protection to less sympathetic plaintiffs in other contexts. In *FW/PBS, Inc. v. City of Dallas*,[151] the Court rejected the claim that patrons' intimate association rights were violated by an ordinance classifying hotels that rented rooms for fewer than ten hours as sexually oriented businesses.[152] Rather than applying the traditional *Roberts* factors, the Court considered directly whether the patrons' associations were of the type that the right of intimate association was intended to protect.[153] The Court ruled that "[a]ny 'personal bonds' that are formed from the use of a motel room for fewer than ten 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.'"[154]

This departure from the *Roberts* factors has two implications for this Note. First, by suggesting that the *Roberts* factors can be ignored when considering intimate association claims, the Court created even greater uncertainty about how any given claim will be analyzed. Second, by explicitly considering what this Note refers to as the first function of intimate association, the Supreme Court's decision in *FW/PBS* demonstrated the potential for courts to apply the functional analysis proposed in Part III.

B. Failure To Accurately Identify Intimate Groups

In addition to the problems of inconsistency and unpredictability described in the previous Section, factor-based analysis is simply a

151. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990).

152. *Id.* at 237.

153. *Id.*

154. *Id.* (quoting *Roberts*, 468 U.S. at 618–19).

poor proxy for determining which groups actually promote the values that form the basis of the right of intimate association. Because courts traditionally consider only the *Roberts* factors—size, purpose, selectivity, exclusion of nonmembers, and other factors—in determining a group's level of intimacy,[155] a group may be able to manipulate its constitutional status by altering those specific attributes without altering the role it plays in the life of its members.

Imagine, for example, a social club with fifty members. The club charges members a yearly fee for the use of its facilities. It has no limit on size, solicits new members from the general public, and imposes no requirements for membership other than that all members must be male. Male guests are allowed under very limited circumstances, and no female guests are ever admitted. Members do not generally know one another and share only casual interactions when they happen to be at the club at the same time. There are no weekly meetings. Finally, assume that the state in which the club is located has passed a law, similar to the Minnesota Human Rights Act at issue in *Roberts*, that prohibits gender discrimination in places of public accommodation.[156] In response to a suit challenging its discriminatory membership policy, the club claims that it is an intimate association. Even under a generous application of the factor-based analysis, this group is unlikely to qualify for protection. Its size, lack of selectivity, and general commercial purpose are almost certain to outweigh its credible argument about exclusivity.

Now, assume that prior to the challenge, the group attempts to strengthen its intimacy claim by altering its relevant attributes to comply with intimate association precedent. It begins by officially limiting its size to fifty members. The club also requires that new members be invited by current members and earn the votes of 75 percent of the current members. Information about the interests and backgrounds of potential new members is distributed to inform the

155. *See supra* Part I.C.

156. The pertinent part of the Act in *Roberts* provided: "It is an unfair discriminatory practice . . . [t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." MINN. STAT. § 363.03(3) (1982); *see also Roberts*, 468 U.S. at 615 (examining claims under the Act). The Act defined "[p]lace of public accommodation" as a "business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." MINN. STAT. § 363.01(18) (internal quotation marks omitted); *see also Roberts*, 468 U.S. at 615 (examining the Act's definition).

current members before they vote on new members. Finally, the group specifies that its purpose is to maintain an atmosphere in which its members can enjoy the camaraderie and congeniality of one another.

Is the club more intimate under this second scenario than it was under the first? Although this question cannot be answered with legal certainty until after litigation,[157] these changes bring the group closer to, if not within, the zone of constitutional protection created by intimate association precedent. The fifty-member limit, for example, is at least on the low end of the *Duarte* spectrum from twenty to nine hundred, and it is far smaller than the memberships of the clubs protected in *Louisiana Debating*. Additionally, the new membership requirements improve the group's selectivity, making it more similar to the clubs protected in *Louisiana Debating* than the Jaycees or the Rotary Club. The new purpose—taken directly from *Louisiana Debating*[158]—will also likely strengthen the group's purpose argument. Even with these changes, however, it is worthwhile to consider whether the group is any more like a family than the fraternity in *Chi Iota Colony*—or even than the Rotary Club—and whether it is any more deserving of constitutional protection. This central question is lost through an overreliance on factor-based analysis.

* * *

These illustrations highlight a central and inevitable problem in applying the *Roberts* factors without considering the underlying values of intimate association. Because the *Roberts* factors are merely tools to help identify the kinds of relationships deserving of constitutional protection, they are meaningless when disconnected from those underlying values. As a result, courts have almost unlimited discretion not only in framing each of the factors but also in determining how those factors will be compared with the characteristics of other protected or unprotected groups. Responding to this unpredictable and inconsistent application of traditional factor-based analysis, Part III argues that courts should abandon their sole reliance on the *Roberts* factors and adopt a functional intimate

157. *See supra* Part II.A.

158. La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1497 (5th Cir. 1995) ("[T]hey seek to maintain an atmosphere in which their members can enjoy the comradery and congeniality of one another.").

association analysis under which a group's intimacy is determined by its role in the life of its members.

III. FUNCTIONAL INTIMATE ASSOCIATION ANALYSIS

A. *Doctrinal Foundations and Benefits of Functional Analysis*

Rather than giving conclusive weight to a group's physical characteristics, courts applying functional analysis should consider explicitly whether a group is likely to provide the benefits—both to its members and to society as a whole—that justify the constitutional right of intimate association. In *Roberts*, the Court provided a framework for identifying groups that deserve protection by associating the central benefits of intimate associations with the specific functions that make them possible.[159] According to the *Roberts* Court, a group that cultivates and transmits shared ideals and beliefs—the first characteristic function of intimate associations—provides the societal benefits of increased diversity and separation between the individual and the power of the state.[160] Similarly, a group that facilitates the creation of close ties with others—the second characteristic function of intimate associations—provides an opportunity for emotional enrichment that allows the group's members to define their own identities.[161]

Building on these two considerations, this Note argues that a court seeking to make the difficult and somewhat nebulous determination of whether a group "reflect[s] the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty"[162] should consider whether the group

159. *See Roberts*, 468 U.S. at 618–19 ("Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; 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 unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." (citations omitted)); Worthen, *supra* note 107, at 605–06 (noting that the *Roberts* Court "identified two distinct constitutionally protected roles for intimate associations," one that focuses on benefits to society and one that focuses on individual liberty).

160. *Roberts*, 468 U.S. at 619.

161. *Id.*

162. *Id.* at 620.

actually serves the functions identified rather than simply examining the group's measurable characteristics. Under functional analysis in its simplest form, a group that sufficiently (1) cultivates and transmits shared ideals and beliefs and (2) facilitates the creation of close relationships among members would be entitled to constitutional protection.

Although a wide range of relationships might serve these functions in some way, the Court's recognition of familial relationships as the exemplary intimate associations heightens the standard for considering these functions and provides a necessary limitation on the groups that are entitled to protection.[163] Only groups that serve these characteristic functions in a way that is similar to a family relationship deserve protection as intimate associations. Functional analysis, therefore, provides a more relevant and more accurate way to achieve the ultimate goal of traditional factor-based analysis: a meaningful comparison between the group seeking protection and a family relationship.

Functional analysis also improves upon factor-based analysis by removing a level of abstraction from a court's decision. In other words, the Court did not recognize the right of intimate association so that small, selective, and exclusive groups could exist. Instead, these factors serve as proxies for the likelihood that a group provides the benefits typically associated with intimate associations. Without making the connection between the factors and the defining characteristics of intimate associations explicit, however, courts can too easily lose sight of the real considerations that underlie constitutional protection and can confuse the factors with the rationale itself. Because the functions are directly responsible for the underlying benefits, a group's intimacy can be properly determined based on whether the group cultivates and transmits shared beliefs and facilitates the creation of close bonds among members. Thus, functional analysis removes the danger of ignoring the underlying values of intimate association and clearly identifies the strong interests at stake when a group seeks protection from state interference.

163. *See id.* ("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 of sustenance of a family . . . .").

As Part III.B illustrates, it is in supporting functional analysis that the *Roberts* factors regain their meaning. Functional analysis therefore serves as a framework that allows courts to consider the traditional *Roberts* factors along with any other factors that are relevant to the group's ability to serve the characteristic functions. Thus, although the size or selectivity of a group alone would not justify constitutional protection, both of those factors *may* be relevant in determining whether the group facilitates the creation of close relationships. In this way, functional analysis salvages the *Roberts* framework while ensuring that truly intimate groups receive constitutional protection.

B. Application of Functional Intimate Association Analysis

Because the Supreme Court has identified two characteristic functions of intimate associations, functional analysis ultimately breaks down into two distinct questions: (1) Does the group cultivate and transmit shared ideals and beliefs, and (2) does the group facilitate the creation of close bonds between members? For each of these questions, a court must determine first whether the group serves the requisite function and second how closely the group resembles a family relationship. Only a group whose functions are significantly similar to a family relationship's functions will qualify for constitutional protection. This Section identifies some of the considerations that might be relevant in analyzing the two functions of intimate associations.

A number of considerations might be relevant to a court's determination that a group cultivates and transmits shared ideals and beliefs. Of the traditional *Roberts* factors, the purpose of the group, as stated in its governing documents or as viewed by its members, would serve as a useful starting point. A group whose primary purpose is to host social events or to participate in community service is unlikely to serve this first function, whereas a group whose stated purpose is to assist and direct its members' personal development is more likely to transmit certain beliefs. Outside of the traditional *Roberts* factors, additional considerations may include whether the group has a clearly established moral code or code of conduct and whether the group conducts rituals and ceremonies for members. A group that espouses a moral code is more likely to transmit its beliefs to members in a

significant way.[164] In the same fashion, a group that uses initiation rituals and other ceremonies will often have an opportunity to present its ideals and beliefs clearly and directly to its members. At the same time, groups with temporary or sporadic membership will often lack this opportunity. Thus, insofar as an established and consistent membership would better allow the group to transmit its beliefs, the traditional factors of selectivity and exclusion of nonmembers may be relevant.

After determining that a group cultivates and transmits shared ideals and beliefs, the court must decide whether it does so in a way that is sufficiently similar to a family relationship. Because families are often the primary source of many personal ideals and beliefs, groups seeking protection face a relatively high standard. In *FW/PBS*, the Court specifically considered the extent to which a relationship cultivated and transmitted shared ideals and beliefs, finding that the patrons of a hotel room rented for fewer than ten hours would not form the types of relationships that are entitled to constitutional protection as a result of the critical role those relationships have played "in the culture and traditions of the Nation."[165] This ruling suggests that the duration of the relationship could be considered as one indication of the strength of the associational interests.

Additionally, in a case involving a student group like the fraternity in *Chi Iota Colony*, a court may consider the extent to which the group serves as a surrogate family for its members. Under this analysis, student groups will often serve the function of cultivating and transmitting shared ideals and beliefs to a greater extent than groups that are composed mostly of older adults. Based on this consideration, many college Greek-letter organizations should satisfy the first requirement for protection as intimate associations. On the other hand, social groups, such as the clubs at issue in *Louisiana Debating* or the hypothetical club considered in Part II.B, whose purposes are simply to provide a congenial atmosphere for their members, are less likely to cultivate and transmit shared ideals and beliefs.

Notably, this first branch of a functional analysis demonstrates the potential for a group to be both an intimate and an expressive

164. *Cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640, 650 (2000) (explaining that "[t]he values the Boy Scouts seeks to instill" are grounded in the "Scout Oath and Law.").

165. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990) (quoting *Roberts*, 468 U.S. at 618–19).

association. In considering the nature of a group's expression to its members, functional analysis rejects the obsession with secrecy and privacy that has contributed to a strict prohibition on communications between intimate associations and the outside world under factor-based analysis. In contrast to the court's reasoning in *Louisiana Debating*, which considered the fact that the clubs did not even publicly disclose their locations as a factor weighing in the clubs' favor,[166] functional analysis respects the *Roberts* Court's statement that "[t]he intrinsic and instrumental features of constitutionally protected association may, of course, coincide."[167] If intimate and expressive association can coincide in a single group, a group's expressive activity should not disqualify it from intimate status. In particular, the fact that a group advertises its recruitment efforts or participates in philanthropic activities should be considered only if those actions prevent the group from serving the functions that are characteristic of intimate associations.

In considering the second requirement—that the group facilitate the creation of close bonds among its members—all of the traditional *Roberts* factors may become relevant, though not for their own sake. Although members of a relatively small group might be generally more likely to form close bonds, functional analysis gives courts discretion to consider groups on a case-by-case basis. A group whose members live together or meet frequently, for example, might be able to facilitate close bonds among a larger number of members than a group that meets less frequently. Careful selection of members based on compatibility and exclusion of nonmembers would also tend to weigh in favor of a group seeking protection because these characteristics are likely to improve members' abilities to form close relationships.

Considering the factors within the framework of functional analysis allows courts to review the relevance of any given characteristic in each case. Thus, commonly considered factors such as high turnover rates or national affiliation may not be conclusive or even helpful in many cases. For instance, although the high turnover rates and potentially large size of a public-minded group that meets infrequently, such as the Rotary Club, might serve as evidence that its members do not form close bonds, it is easy to imagine a situation in

166. La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1496 (5th Cir. 1995).

167. *Roberts*, 468 U.S. at 618.

which even relatively high annual turnover rates would not prevent close relationships from forming. For example, in the case of a group whose members participate in frequent meetings and group activities, the potential for the formation of significant and emotionally enriching relationships among members may be only marginally affected by the fact that a quarter of its members will graduate or leave the group each year.

After a court has concluded that a group facilitates the creation of close bonds between its members, it must then determine whether the group serves that function in a way that is sufficiently similar to the role performed by a family relationship. Although the Court has never specified specify the level of similarity required, the strength of the bonds must situate the group close to family relationships on the spectrum between the most intimate and the most attenuated of personal attachments. In contrast to the measures of seclusion and isolation that have dominated factor-based analysis,[168] the evaluation proposed by functional analysis of the strength of the bonds formed among group members is more consistent with the recognition of the family as the quintessential intimate association. After all, although families often interact with nonmembers and participate in activities outside of the household, they are largely defined by the strength of their relationships.

In *Roberts*, the Supreme Court provided some guidance for comparing the strength of the bonds between members of a social group and those of a family, explaining that "[f]amily relationships, by their nature, involve 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."[169] The bonds among members of truly intimate associations are therefore unique because individuals can only form a small number of these kinds of relationships over a lifetime. Other factors that might be relevant

168. *See, e.g.*, Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 147 (2d Cir. 2007) ("The associational interests of the Fraternity differ from the interests asserted by the social groups that were plaintiffs in [*Louisiana Debating*], on which the district court relied. In that case, ... [e]ach club had its own unmarked, private facility, which non-members were strictly prohibited from using."); *La. Debating*, 42 F.3d at 1496 ("Each club has only one facility, which is maintained for the exclusive use of its members and guests. No signs outside the Clubs' buildings identify the locations to the public. Nonmembers are strictly prohibited from using the facilities." (footnote omitted)).

169. *Roberts*, 468 U.S. at 619–20.

include the duration of the relationships and the extent to which members participate in each other's personal lives outside of official group events.

Based on these considerations, certain nonfamily social groups, such as fraternities and sororities, should qualify for constitutional protection. In many cases the bonds formed within these groups survive well beyond the period of active membership in the organization. Additionally, fraternity and sorority members often share in the distinctly personal aspects of fellow members' lives, including not only major life events such as weddings and funerals but also day-to-day activities that are not planned by or related to the group. This potential for intimacy can be easily contrasted with the hypothetical social club considered in Part II.B, whose members shared only casual connections as a result of their concurrent use of the group's facilities.

Functional intimate association analysis, then, rejects the reflexive resort to the *Roberts* factors that has given rise to the traditional factor-based analysis. Instead of giving conclusive weight to four characteristics that serve as imprecise proxies for a group's ability to provide the benefits associated with intimate associations, functional analysis requires courts to consider explicitly a group's role in the life of its members and in the community—an analysis that may take into account the *Roberts* factors and any other characteristics that bear on the group's ability to serve these two core functions.

C. Objections to Functional Intimate Association Analysis

Notwithstanding the greater reliability and accuracy provided by functional analysis, this proposal is likely to provoke criticism on the ground that it too greatly increases judicial discretion, too broadly extends constitutional protection, or represents too large a departure from Supreme Court precedent. As this Section illustrates, however, none of these objections is justified, and none should prevent courts from implementing functional analysis.

First, critics might argue that because a group's functions are potentially more difficult to measure than the group's physical characteristics, a court would have too much flexibility in determining both whether a group serves the functions that are characteristic of intimate associations and whether, in serving those functions, the group is sufficiently like a family relationship. Although unrestrained judicial discretion has long been a concern for courts applying

substantive due process to protect fundamental rights,[170] America's judicial system relies on the ability of judges to make reasoned judgments reflecting a balance between competing societal values.[171] Additionally, as *Chi Iota Colony* demonstrates, even seemingly objective factors such as size are often subject to surprising interpretations that reflect a court's perception of the group's intimacy.[172]

In fact, functional analysis would actually improve upon factor-based analysis by increasing judicial accountability. Although courts would still have considerable flexibility to determine which groups are intimate, the basis for those decisions under functional analysis would need to be made more explicit. For example, when faced with a claim for protection by a nonintimate group, a court applying factor-based analysis might simply point out the group's large desired size and high turnover rates.[173] Applying functional analysis, however, a court would have to use those and any other relevant factors to support its explicit conclusion that the group had failed to fulfill a characteristic function of intimate associations. Additionally, the group might be able to respond by making changes that would allow it to serve the required functions rather than attempting merely to manipulate its constitutional status by altering its physical characteristics.

A second potential objection is that the adoption of functional analysis would provide constitutional protection to a greater number of discriminatory groups, subverting the state interest in equality. Although functional analysis may limit the state's power to prevent private groups from discriminating, both individual liberty and equality are valued in the American constitutional scheme.[174] By

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170. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.").

171. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.").

172. *See supra* Part II.A.

173. *See supra* Part III.B.

174. *Cf.* John D. Inazu, Op-Ed., *Siding with Sameness*, NEWS & OBSERVER (Raleigh), July 1, 2010, at 9A ("The court should have decided [*Christian Legal Society v. Martinez*, 130 S. Ct.

allowing courts to ignore the benefits that underlie recognition of the right of intimate association, factor-based analysis has weakened the protections for individual liberty. As a result, functional analysis is necessary because it ensures that courts will clearly identify the benefits provided by intimate association before engaging in the difficult balancing of liberty and equality.

Finally, critics might question whether lower courts would have the authority to implement functional analysis before the question had reached the Supreme Court and whether approval of functional analysis would violate stare decisis. These concerns, however, are misplaced. First, the analysis proposed by this Note is not only consistent with but is also derived from the Supreme Court's holdings in *Roberts* and *Duarte*, and its implementation would not require either of those decisions to be overruled. Functional analysis is intended only to improve the courts' ability to protect the associational rights identified by the Supreme Court. Thus, lower courts should not be precluded from strengthening their reasoning by clearly explaining how the factors that they consider are related to the underlying values of intimate association. Second, to the extent that the implementation of functional analysis by the Supreme Court would require it to overrule factor-based decisions by lower courts, the Court would merely be clarifying the boundaries of the right of intimate association and adjusting the method of analysis rather than altering the right itself. Thus, neither lower federal courts nor the Supreme Court should be concerned about structural or prudential barriers to applying functional analysis.

CONCLUSION

More than twenty years before the right of intimate association was recognized in *Roberts*, Justice Harlan warned against a formulaic approach to due process, saying, "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that . . . it has represented the balance which our Nation . . . has struck between that liberty and the demands of organized society."[175] Respecting this admonition, courts have ordinarily rejected the allure of simple rules and have

2971 (2010)] by choosing between two constitutional visions: a radical sameness that destroys dissenting traditions (religious, sexual or otherwise), or the destabilizing difference of a meaningful pluralism.").

175. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

acknowledged their duty to protect fundamental rights through the exercise of reasoned judgment. In the context of the right of intimate association, however, a group's level of constitutional protection often depends entirely on a court's analysis of a handful of the group's objective characteristics divorced from the values that originally led to the recognition of the right itself. This line of factor-based decisions, which mistakenly treat the factors as the sole rationale for constitutional protection, obscures the true benefits of intimate associations both to group members and to the nation as a whole. In doing so, these decisions undermine the ability of the right of intimate association to protect individual liberties by providing a balance against other state interests.

To save the right of intimate association, courts should abandon their sole reliance on the *Roberts* factors and adopt a functional analysis that clearly identifies the right's underlying values and ensures that groups reflecting those considerations are consistently protected. By requiring courts to consider whether a group serves the functions that are characteristic of intimate associations—cultivating and transmitting shared ideals and beliefs and facilitating the creation of close bonds between members—functional analysis provides a framework for considering all of the factors that may be relevant to the court's determination. Functional analysis, then, restores reasoned judgment to a court's consideration of intimate association claims by nonfamily groups and eliminates the formulaic approach that has threatened to undermine the court's role as a protector of individual liberty.