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Screeches from the Red Hen: Public Accommodations Laws and Political Affiliation Discrimination in the United States and Louisiana

Meredith N. Will

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* J.D./D.C.L., 2020. Paul M. Hebert Law Center, Louisiana State University. This Comment is dedicated to my parents, Chris and Kathleen Will, for consistently inspiring me and encouraging me in all of my endeavors. Special thanks to Professor John Devlin for his guidance throughout the writing process and law school, as well as Professor Jim Garand for his invaluable mentorship.

INTRODUCTION

In June 2018, Stephanie Wilkinson, owner of the Red Hen restaurant in Virginia, asked White House Press Secretary Sarah Huckabee Sanders to leave her restaurant.[1] Wilkinson asked Sanders to leave because she viewed the Trump administration as "inhumane and unethical," lacking "honesty . . . compassion, and cooperation."[2] Sanders left without a fuss, but public support and outcry rained down on the restaurant both online and at the restaurant's location.[3] Despite the public response, the Red Hen was within its rights to deny Sanders service based on her political affiliation.[4] As a restaurant, the Red Hen is subject to public accommodations laws.[5] Generally, a business is a public accommodation when it serves a public interest.[6] Although public accommodations laws vary among jurisdictions, they typically list classifications protected from

1. Whitney Filloon, *The Red Hen Didn't Break the Law When It Kicked Out Sarah Huckabee Sanders*, EATER (June 26, 2018), https://www.eater.com/2018/6/26/17505512/red-hen-discrimination-laws-sarah-huckabee-sanders [https://perma.cc/5WW5-JLT8].

2. *Id.*

3. Avi Selk & Sarah Murray, *The Owner of the Red Hen Explains Why She Asked Sarah Huckabee Sanders to Leave*, WASH. POST (June 25, 2018), https://www.washingtonpost.com/news/local/wp/2018/06/23/why-a-small-town-restaurant-owner-asked-sarah-huckabee-sanders-to-leave-and-would-do-it-again/?utm_term=.b1a5c5329952 [https://perma.cc/UK5D-KG5W].

4. Filloon, *supra* note 1.

5. Sonia Rao, *Did the Red Hen Violate Sarah Huckabee Sanders's Rights When It Kicked Her Out?*, WASH. POST (June 25, 2018), https://www.washingtonpost.com/news/food/wp/2018/06/25/was-sarah-huckabee-sanders-denied-public-accommodation-when-a-restaurant-kicked-her-out/?noredirect=on&utm_term=.7217ad133493 [https://perma.cc/P7Z4-ACL6].

6. German All. Ins. Co. v. Kansas, 233 U.S. 389, 408 (1914).

discrimination within businesses that qualify as public accommodations.[7] Political affiliation, or a person's attachment or support of a political party,[8] is overwhelmingly absent from the lists of protected classes in most public accommodations laws.[9]

In addition to political figures,[10] private individuals can also face political affiliation discrimination from public accommodations. For example, when a family wearing Donald Trump shirts and hats walked up to the service window at Cook Out in Virginia, an employee initially denied them service.[11] Although the fast food restaurant eventually took the family's order, the employees' behavior made the family so uncomfortable while waiting that they cancelled the order.[12] Across the country, after the confirmation of U.S. Supreme Court Justice Brett Kavanaugh, the University of Washington chapter of College Republicans posted a Facebook event to celebrate at Shultzy's Bar and Grill in Seattle.[13] The bar, however, asked the group to find another venue "due to the political nature" of their event.[14] Despite the bar's request, the Seattle public accommodations law[15]—which protected discrimination based on political affiliation—enabled the group to go forward with the event.[16] Additionally, in 2019, a Michigan consulting firm challenged an Ann Arbor ordinance that prohibited political affiliation discrimination in public accommodations like their consulting firm for fear of "having a

7. Rao, *supra* note 5.

8. *See* Blodgett v. Univ. Club, 930 A.2d 210, 211 (D.C. 2007) (citing D.C. CODE STAT. § 2:1401.02(25) (2001 & 2006 Supp.)); Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 10 (1974) (defining "political ideas or affiliations" as referring to "basic rights to freedom of beliefs and associations with respect to government").

9. Rao, *supra* note 5.

10. For a discussion of public accommodations that chose to ban President Donald Trump, see Matthew Sedacca, *The Politics (and PR) of Restaurants Banning Donald Trump*, EATER (July 11, 2016), https://www.eater.com/2016/7/11/12112598/donald-trump-banned-restaurant [https://perma.cc/4CQ4-24RC].

11. Wayne Covil, *Trump Supporters Denied Service at Cook Out*, WTVR (June 13, 2016), https://wtvr.com/2016/06/13/trump-supporters-cook-out/ [https://perma.cc/7SPM-Y9VJ].

12. *Id.*

13. Jason Rantz, *Rantz: Seattle Bar Tried to Deny Service to Republicans Celebrating Kavanaugh*, 770 KTTH (Oct. 8, 2018), http://mynorthwest.com/1139400/seattle-bar-deny-college-republicans/ [https://perma.cc/LPF5-ZL8K].

14. *Id.*

15. SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5) (2015).

16. Rantz, *supra* note 13.

socialist client come to them."[17] Essentially, the consulting firm sought the ability to refuse service to clients who held different political beliefs than the conservative views of those who worked at the firm.[18] These examples demonstrate that incidents of political affiliation discrimination in public accommodations can affect not only political figures but also private individuals. Few United States jurisdictions, however, specifically provide protection for these situations.[19]

Although Louisiana is not among the jurisdictions on this rather short list, Louisiana law presents a particular potential to join the ranks.[20] Article I, section 12 of the Louisiana Constitution provides the state's public accommodations law.[21] Section 12 lists race, religion, national ancestry, age, sex, and physical condition as protected classifications.[22] Contrarily, Louisiana's equal protection legislation, article I, section 3 also protects political affiliation with language parallel to section 12.[23] The similarities between the two constitutional provisions—left untouched by decades of cultural change—reveal that the Louisiana Constitution is poised for

17. Alex Swoyer, *Conservative Consultants Sue over City's Ban on Political Discrimination*, WASH. TIMES (Aug. 5, 2019), https://www.washingtontimes.com/news/2019/aug/5/grant-strobl-jacob-chludzinski-fear-political-disc/ [https://perma.cc/CT87-ZDM8]; Ingrid Jacques, *Jacques: Ann Arbor Shouldn't Force Promotion of Political Views*, DETROIT NEWS (July 30, 2019), https://www.detroitnews.com/story/opinion/columnists/ingrid-jacques/2019/07/31/jacques-ann-arbors-anti-bias-law-overreach/1866555001/ [https://perma.cc/8H6D -BQSW].

18. *See* Swoyer, *supra* note 17.

19. *See, e.g.*, D.C. CODE ANN. STAT. § 2:1402.31 (2012); SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5) (2015); V.I. CODE ANN. § 10:64(3) (2014); Rao, *supra* note 5.

20. *See generally* LA. CONST. art. I, §§ 3, 12.

21. LA. CONST. art. I, § 12.

22. The first portion of section 12 completely bars all discrimination from public accommodations based on "race, religion, or national ancestry." *Id.* This Comment focuses on the second half of section 12, which prohibits "arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition." *Id.* When the remainder of this Comment references "protected" or "enumerated" classifications, it is referring to the second half of section 12.

23. *See id.* §§ 3, 12. Sections 3 and 12 offer a more complete bar to discrimination based on race and religion. *See id.* Section 12 adds national ancestry to the stricter standard. *Id.* § 12. This Comment focuses on the classifications subject to an intermediate standard of review, the language for which is mirrored in both sections. Section 12 prohibits "arbitrary, capricious, or unreasonable" discrimination based on age, sex, or physical condition, whereas section 3 uses the same standard and also includes birth, culture, and political affiliation. *Id.* §§ 3, 12.

revision to prevent discrimination based on political affiliation in public accommodations.

Sections 3 and 12 protect similar classes under shared standards of judicial review.[24] Both sections strictly bar discrimination based on race and religion.[25] Additionally, each section applies an intermediate standard of review[26] that prohibits "arbitrary, capricious, or unreasonable discrimination" of other articulated classifications.[27] Due to the similarities between the two sections and in light of recent events that necessitate reconsideration,[28] the Louisiana Legislature should read the sections *in pari materia*.[29] Furthermore, the Louisiana Legislature should include political affiliation under section 12 protection, either through a constitutional amendment or a new revised statute.[30]

Part I of this Comment provides background on public accommodations legislation in the common law tradition and on the federal level today. Also, Part I introduces the freedom of association rights embodied in the First Amendment to the United States Constitution and presents the tension between public accommodations legislation and the freedom to associate. Part II considers article I, sections 3 and 12 of the Louisiana Constitution and identifies similarities in language, application, and legislative intent between the two sections. Part II proposes the addition of political affiliation as a section 12 protected classification under the intermediate standard of scrutiny. Part III

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24. *Id.* §§ 3, 12.

25. *See id.*

26. A standard of review can indicate two analytical approaches: (1) the appellate court's measure of deference toward the court below it; or (2) a method to evaluate the constitutionality of a law. *Standard of Review,* BLACK'S LAW DICTIONARY (10th ed. 2014). This Comment utilizes the latter definition.

27. LA. CONST. art. I, § 12 ("In access to public areas, accommodations, and facilities, every person shall be free from . . . arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition."); *see id.* § 3 ("No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations."); Hargrave, *supra* note 8, at 40.

28. *See supra* notes 1–5, 10–18 and accompanying text.

29. In Latin, *in pari materia* means "in the same manner." The approach enables commentators to read similarly constructed statutes together to draw conclusions through comparison. *In Pari Materia,* BLACK'S LAW DICTIONARY (10th ed. 2014).

30. Although this claim begs another consideration—that is, whether to include the other enumerated classifications in section 3 that do not appear in section 12—this issue is beyond the scope of this Comment. This Comment focuses solely on whether political affiliation should be added to section 12.

compares Louisiana's public accommodations legislation to developments in other U.S. jurisdictions and considers Louisiana's employment regulations, which offer some protection for political affiliation. Part IV contemplates the ramifications of adding political affiliation to section 12, particularly in relation to freedom of association.[31] Part V concludes by addressing how the Louisiana Legislature can protect political affiliation in public accommodations without running afoul of other rights.

I. BACKGROUND TO PUBLIC ACCOMMODATIONS LAWS AND FIRST AMENDMENT FREEDOM OF ASSOCIATION

Before states imposed their own public accommodations legislation, the federal government held the legislative power to construct public accommodations laws.[32] Initially, under United States common law, only innkeepers and common carriers had a duty to serve their patrons—no other public accommodations law existed.[33] In the late 1800s, federal courts began to recognize that the legislative power over public accommodations had shifted to the states.[34] Exercising their newly recognized legislative ability, each state formed its own public accommodations law, expanding the duty to serve from only inns and common carriers to all businesses that serve the public, such as restaurants.[35] Now, state laws primarily govern public accommodations.

A. Defining Public Accommodations

Before the Civil War, federal law restricted public businesses from discriminating against patrons by imposing a duty to serve.[36] This duty superseded public businesses' right to refuse service.[37] The common law doctrine specifically distinguished between public and private businesses, restricting public businesses' right to refuse service simply because the

31. *See* James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961 (2011).

32. *See* Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014).

33. Nance v. Mayflower Tavern, 150 P.2d 773, 776 (Utah 1944).

34. Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 571–72 (1995).

35. *Nance*, 150 P.2d at 776.

36. Bagenstos, *supra* note 32, at 1225.

37. *Id.*

business acted within the public sphere.[38] Federal law did not impose the same duty to serve upon private businesses.[39]

Public accommodations are businesses that perform a "service which has become of public interest."[40] In 1876, the United States Supreme Court in *Munn v. Illinois* defined "public interest" as arising when one uses her property in a way that affects the community at large.[41] Once a person's property affects the community, she must "submit [that property] to be controlled by the public for the common good."[42] Inns and common carriers are the quintessential early examples of places of public accommodation because they catered to travelers by providing places to stay and transportation.[43] By serving public interests, inns, common carriers, and other similar businesses could only refuse service if they had "good reason."[44] For example, innkeepers could refuse service to "drunks, criminals, and diseased persons" for the safety, property, and health of the innkeeper and her patrons.[45] The "good reason" exception, however, only applied when the court determined that the given reason outweighed the general public interest in receiving the accommodation.[46] This approach to public accommodations implicitly preferred the public's interest in receiving service.[47] This preference for the public interest was intertwined with the idea of an innkeeper acting like a public servant.[48] As years passed, the concept of public accommodations grew to include more than only innkeepers and common carriers, yet the public interest consideration remained.

Legislation gradually expanded to include more types of businesses as public accommodations, such as restaurants and hotels.[49] As the states'

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38. Private businesses held the right to refuse service, but legislation could change this default rule. Madden v. Queens Cty. Jockey Club, 296 N.Y. 249, 253–54 (N.Y. Ct. App. 1947).

39. *See id.* at 253.

40. German All. Ins. Co. v. Kansas, 233 U.S. 389, 408 (1914).

41. Munn v. Illinois, 94 U.S. 113, 126 (1876). The term "public interest" developed from property law. *Id.*

42. *Id.* at 126.

43. Lombard v. Louisiana, 373 U.S. 267, 275–76 (1963).

44. Romer v. Evans, 517 U.S. 620, 627 (1996); *Lombard*, 373 U.S. at 280.

45. *Lombard*, 373 U.S. at 280.

46. *Id.*

47. *Id.*

48. Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 571 (1995).

49. Gottry, *supra* note 31, at 966 (citing President John F. Kennedy, *Radio and Television Report to the American People on Civil Rights* (June 11, 1963), *available at* http://www.jfklibrary.org/asset-viewer/archives/JFKPOF/045/JFK

legislative power over public accommodations increased, states drafted their own statutes that extended regulations over the right to refuse service to include private businesses in addition to public businesses.[50] State regulations, such as health inspections, price control, wage standards, zoning restrictions, and safety requirements, pulled private businesses into the public forum.[51] For example, licensing requirements make private businesses "instrumentalit[ies] of the State."[52] Through issuing licenses, the state supervises a private business's performance and allows the business to serve the public.[53] By also regulating private businesses, states expanded the definition of places of public accommodation to include not only public businesses, but also private enterprises like restaurants and places of amusement.[54] State authority, however, was not the initial mode of control over public accommodations, even though states primarily assert this legislative power today.

B. Public Accommodations Laws Historically: From General Duty to Serve to Legislation Today

Power over public accommodations shifted from federal to primarily state dominion over time, and today federal and state public accommodations laws work together. Early United States Supreme Court cases found that the Fourteenth Amendment provided federal legislative authority regarding the duty to serve.[55] The Supreme Court overturned this precedent, however, in the *Civil Rights Cases* by holding that the Fourteenth Amendment did not grant broad congressional power to legislatively prohibit public accommodations from discriminating against potential patrons.[56] Although states had already begun to create their own anti-discrimination public accommodations regulations prior to 1883, the

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POF-045-005 [https://perma.cc/WC5V-K7B9]); *see also Lombard*, 373 U.S. at 279–83. Louisiana defines public accommodations in its Revised Statutes as any establishment that: (1) "supplies goods or services to the general public"; (2) "solicits or accepts the patronage or trade of the general public"; or (3) receives direct or indirect support from government funds. LA. REV. STAT. § 51:2232(9) (2014).

50. Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 571–72 (1995); *Lombard*, 373 U.S. at 279–82.

51. *Lombard*, 373 U.S. at 280–81.

52. *Id.* at 282–83.

53. *Id.*

54. *See id.* at 279–82.

55. Romer v. Evans, 517 U.S. 620, 627–28 (1996).

56. *Id.* (citing The Civil Rights Cases, 109 U.S. 3, 25 (1883)).

Civil Rights Cases fully cemented the shift from federal power to state authority.[57] The Court acknowledged that states had formulated their own statutes preventing discrimination in public accommodations, indicating an assignment of this power to the states.[58] The control over public accommodations legislation fully remained with the states until the passage of the Civil Rights Act of 1964, but states continue to retain broad authority.[59]

Although states retain some public accommodations control, the Civil Rights Act also regulates public accommodations discrimination by seeking to eradicate race-based discrimination from public facilities.[60] The Civil Rights Act stemmed from President Kennedy's request for Congress to pass legislation requiring "equal service in places of public accommodation," such as restaurants, hotels, theaters, and retail stores.[61] According to the Civil Rights Act, a place of public accommodation is any business that affects interstate commerce or any business whose activities the state supports.[62] The Civil Rights Act lists several examples of public accommodations, including inns, hotels, restaurants, and theaters.[63] The legislation also contains a catch-all provision for public accommodations, including any business that is physically located on the same property as any of the establishments listed within the Civil Rights Act, any business

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57. In Louisiana cases from 1875 to 1876, the Louisiana Supreme Court ruled that public accommodations could not unfairly infringe on individuals' rights to be free from unjust discrimination. John Devlin, Louisiana Associated General Contractors*: A Case Study in the Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights*, 63 LA. L. REV. 887, 895 (2003). These places of public accommodation included a coffeehouse, theater, and steamboat. *Id.* at 895–96. In 1879, Louisiana instated the "Long Constitution" of 1879, replacing the 1868 Constitution and deleting the explicit bar to public accommodations discrimination. *Id.* at 896–97. Public accommodations legislation returned in 1974 with the new Louisiana Constitution. *Id.* at 900–01. The 1974 Constitution included freedom from discrimination in public accommodations. *Id.*; *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984).

58. *Romer*, 517 U.S. at 628; *see also Roberts*, 468 U.S. at 624.

59. *Roberts*, 468 U.S. at 625 (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81–88 (1980)).

60. 42 U.S.C. § 2000a(b) (1964); *see also* Gottry, *supra* note 31, at 965–66 (citing Miller v. Amusement Enters., Inc., 394 F.2d 342, 352 (5th Cir. 1968)).

61. Gottry, *supra* note 31, at 966 (citing President John F. Kennedy, *Radio and Television Report to the American People on Civil Rights* (June 11, 1963), *available at* http://www.jfklibrary.org/asset-viewer/archives/JFKPOF/045/JFKPOF-045-005 [https://perma.cc/WC5V-K7B9]).

62. 42 U.S.C. § 2000a(b).

63. *Id.* § 2000a(b)(1)–(3); Gottry, *supra* note 31, at 966.

that is an establishment housing any of the listed businesses, or any business that presents itself as serving patrons of a listed establishment.[64] To violate the Civil Rights Act, the public business must discriminate or segregate based on "race, color, religion, or national origin."[65] The Civil Rights Act continues to work in tandem with state legislation today.[66] Other federal laws also apply to state regulation of public accommodations, especially the First Amendment to the United States Constitution.

C. Public Accommodations Laws and First Amendment Freedom of Association

Although states possess broad authority to enact public accommodations laws, remaining federal law limits this legislative power.[67] State public accommodations laws must not violate federal law, such as the Civil Rights Act, the First Amendment, and the Fourteenth Amendment.[68] In particular, the First Amendment's freedom of association provision creates a demanding limitation upon restrictions on discrimination within the public accommodations context.[69]

The First Amendment to the United States Constitution grants the freedom of association "without regard" to the race, creed, religious ties, or political affiliation of the group members in consideration.[70] Freedom to associate is the right to engage in activities that the First Amendment protects, such as assembly or speech.[71] States infringe upon the freedom to associate when they impair individuals' rights to choose with whom they will participate as a group, regardless of whether the group goal is political, religious, cultural, or otherwise.[72] In addition, the freedom of

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64. 42 U.S.C. § 2000a(b)(4).

65. *Id.* § 2000a(a).

66. *See generally id.*

67. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 658 (2000) (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995)).

68. *Id.*

69. *See id.*

70. National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 444–45 (1963); *Dale*, 530 U.S. at 647.

71. Case law also articulates a second flavor of freedom to associate: the ability to enter into relationships with other individuals. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984). This second articulation of the freedom of association is beyond the scope of this Comment.

72. *Roberts*, 468 U.S. at 618, 622.

association includes a freedom not to associate.[73] The freedom not to associate allows a group to exclude other potential members.[74]

Infringement on the freedom to associate occurs when a government regulation requires groups to include members that they would not otherwise include.[75] A freedom of association claim may arise when a plaintiff alleges that a defendant organization—which must satisfy the state's definition of "public accommodation"—discriminated against her.[76] In such a case, the defendant organization members may then allege that requiring the organization to include the plaintiff would violate the members' right to freedom of association under the First Amendment.[77] Compelling state interests may override a violation of freedom of association, rendering an infringement still constitutional and enabling a plaintiff to join the group regardless.[78] State interests are compelling when the interests are unrelated to the constraint upon freedom of association and when less suppressive means cannot achieve the legislative goals.[79] For example, a statute barring discrimination will be upheld under expressive freedom of association if the statute does not materially interfere with ideas of a group.[80] The group, however, is free to not associate with a potential member if barring her presence prevents significant interference with the existing members' purposes within the group.[81] Therefore, freedom of association enables a person to join a group

73. *Id.* at 623.
74. *Id.*
75. *Id.*
76. *See, e.g.*, *id.* at 614.
77. *See, e.g.*, *id.* at 615.
78. *Id.* at 622.
79. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).
80. Contained within the freedom to associate is the category of expressive association. *Dale*, 530 U.S. at 647–48. Expressive association allows a group to include and exclude members based on the views and ideas that people within the group seek to express. *Id.* A law requiring a group to include unwanted members infringes upon the existing group members' freedom of expressive association when the additional, unwanted members impose a significant burden upon the group's expression of viewpoints or ideas. *Id.* at 648 (citing New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988)).
81. *See* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987).

so long as she does not substantially impose upon group goals or ideas, but a group retains the right to exclude members to a limited degree.[82]

Boy Scouts of America v. Dale presents a freedom of association challenge to New Jersey's public accommodations law, which restricted discrimination in groups based on sexuality.[83] The Boy Scouts of America is a private organization with the goal of promoting moral values to its members.[84] James Dale, a homosexual scoutmaster of the Boy Scouts, was actively involved in promoting gay rights.[85] The Boy Scouts revoked Dale's membership upon discovering his involvement in the LGBTQ community.[86] Dale filed a complaint that alleged the Boy Scouts violated New Jersey's public accommodations law by revoking his membership because of his sexual orientation.[87]

The United States Supreme Court held that the New Jersey public accommodations statute did not require the Boy Scouts to readmit Dale because readmittance would materially infringe upon the group's freedom of expressive association.[88] The Court stated that prohibiting discrimination could be a compelling state interest that enables infringement upon the freedom of association, but it indicated that this infringement will only be allowed when its impairment upon expression of ideas is not material.[89] The Court determined that the Boy Scouts' mission to promote values in young members, particularly through its adult leadership, qualified as expressive activity, and forcing the Boy Scouts to include Dale would materially impair the Boy Scouts' group goals.[90] In particular, the Court stated that Dale's readmission would significantly interfere with the Boy Scouts' official position of not encouraging homosexual conduct.[91] The Court held that New Jersey's public accommodations law, which restricted groups' discrimination

82. *See Roberts*, 468 U.S. at 623; *Dale*, 530 U.S. at 658 (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995)).

83. *Dale*, 530 U.S. 640; Bagenstos, *supra* note 32, at 1208.

84. *Dale*, 530 U.S. at 644.

85. *Id.*

86. *Id.* Dale had earned the rank of Eagle Scout, one of the highest honors in the Boy Scouts. *Id.* When he wrote to Monmouth Council Executive James Kay—who revoked the membership—to question the revocation, Kay replied that the Boy Scouts barred membership to homosexual people. *Id.* at 645.

87. *Id.*

88. *Id.* at 644.

89. *Id.* at 658.

90. *Id.* at 655–56.

91. *Id.*

toward potential members' sexuality, should not be applied because its enforcement would materially impair the members' expression of ideas as protected by the freedom of association.[92] In *Dale*, therefore, the Court prioritized freedom of association over the state public accommodations statute and properly excluded Dale from the group.[93]

The *Dale* decision demonstrates that freedom of association can outweigh—or at least threaten—enforcement of a public accommodations statute.[94] If a public accommodations statute requires a group to accept an unwelcome member, the statute may infringe upon the freedom to associate.[95] In these cases, a compelling state interest can override a freedom of association violation when the infringement is not material.[96] For example, in *Roberts v. U.S. Jaycees*, the United States Supreme Court recognized that "eradicating discrimination against [a state's] female citizens" served as a compelling state interest for infringing upon an all-male group's freedom to associate.[97] In particular, the Court emphasized that application of the state public accommodations law would not impose "any serious burdens" upon the group's freedom of expressive association.[98] Thus, for a public accommodations statute to outweigh the freedom to associate, the state must both demonstrate that the interest is unrelated to suppression of the group's ideas and that the state cannot achieve the compelling interest in a less suppressive way.[99] Freedom of association thus acts as a hurdle over which both legislation and application of public accommodations laws must leap.

In analyzing the expansive New Jersey public accommodations statute, the *Dale* Court noted that the definition of public accommodations has broadened over time through legislation, heightening the possibility of infringing upon the First Amendment right to freedom of association.[100] In Louisiana, the drafters within 1973 Louisiana Constitutional Convention, who formulated Louisiana's public accommodations statute, also noticed

92. *Id.* at 644; Bagenstos, *supra* note 32, at 1208.
93. *See Dale*, 530 U.S. at 658–59.
94. *Id.* at 657–59; *see* Bagenstos, *supra* note 32, at 1208.
95. *See* Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 680 (2010).
96. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984); *Dale*, 530 U.S. at 647–48.
97. *Roberts*, 468 U.S. at 623.
98. *Id.* at 626.
99. Kusper v. Pontikes, 414 U.S. 51, 58–59 (1973); *Roberts*, 468 U.S. at 623.
100. Boy Scouts of Am. v. Dale, 530 U.S. 640, 656–57 (2000).

the potential for Louisiana's public accommodations law to infringe upon freedom of association.[101]

II. LOUISIANA'S PUBLIC ACCOMMODATIONS LEGISLATION

Louisiana's public accommodations provision drew inspiration from the Civil Rights Act.[102] The Civil Rights Act states that "all persons" must be provided "full and equal enjoyment" of services that a public accommodation offers.[103] Although the Civil Rights Act mentions that public accommodations shall not discriminate based on "race, color, religion, or national origin,"[104] each jurisdiction's respective statute or ordinance lists its own protected classifications.[105] The District of Columbia, Seattle, and the U.S. Virgin Islands include political affiliation as a protected class,[106] but no state's collection of protected classes lists political affiliation,[107] including Louisiana.[108] The Louisiana Constitution contains Louisiana's public accommodations provision in article I, section 12.[109]

The Louisiana definition of public accommodations is set forth in the Louisiana Revised Statutes. Section 51:2232(9) defines public accommodations as any establishment that: (1) "supplies goods or services to the general public"; (2) "solicits or accepts the patronage or trade of the general public"; or (3) receives direct or indirect support from government funds.[110] The Louisiana Revised Statutes also provide examples of public accommodations, including restaurants, hotels, and places of entertainment.[111] Housed in the Louisiana Constitution of 1974, section 12 provides the primary law governing discrimination in public

101. *See* Hargrave, *supra* note 8, at 40; VII RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS, Sept. 13–14, 1973 at 1245–46.

102. RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, *supra* note 101, at 1245.

103. 42 U.S.C. § 2000a(a) (1964).

104. *Id.*

105. *See, e.g.*, LA. CONST. art. I, § 12; D.C. CODE ANN. STAT. § 2:1402.31 (2012); SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5) (2015); V.I. CODE ANN. § 10:64(3) (2014).

106. *See, e.g.*, D.C. CODE ANN. STAT. § 2:1402.31; SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5); V.I. CODE ANN. § 10:64(3); Rao, *supra* note 5.

107. Rao, *supra* note 5.

108. *See* LA. CONST. art. I, § 12.

109. *Id.*

110. LA. REV. STAT. § 51:2232(9) (2014).

111. *Id.* § 49:146(2) (1987).

accommodations. The location of section 12 creates a unique opportunity for Louisiana legislators to include political affiliation in future drafts of Louisiana's public accommodations law.

Section 12 is a short distance away from section 3, Louisiana's equal protection statute. The two sections share statutory language and certain classifications; however, although Louisiana's public accommodations statute does not include political affiliation, its equal protection statute explicitly protects political affiliation, creating a gap in the law.[112] This gap provides an opportunity to add political affiliation as a protected classification from discrimination in Louisiana public accommodations law. Political affiliates need explicit protection under public accommodations law because the United States currently faces a political climate in which a restaurant serving the public can ask even a prominent national official to leave based on her political affiliation.[113] Louisiana legislators can address the current societal context by amending Louisiana's public accommodations statute to include political affiliation as a protected classification. The comparisons between sections 3 and 12 bolster this approach.

A. The Framework: Sections 3 and 12 of the Louisiana Constitution

Article I, section 12 reads: "In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition."[114] Section 12 does not offer protection to political affiliates.[115]

The equal protection statute in Louisiana's Constitution, however, does include political affiliation.[116] Section 3 states:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or *political ideas or affiliations*. Slavery and involuntary servitude are prohibited,

112. *See generally* LA. CONST. art. I, §§ 3, 12.

113. *See, e.g.*, Filloon, *supra* note 1; Selk and Murray, *supra* note 3; Rao, *supra* note 5.

114. LA. CONST. art. I, § 12.

115. *See id*.

116. *See id.* art. I, § 3.

except in the latter case as punishment for crime.[117]

Louisiana thus offers some protection to political affiliation through its equal protection statute.[118] The mirrored language between sections 3 and 12 indicates a relationship between the sections upon which Louisiana legislators may capitalize.[119] Both sections' intermediate standards of review specifically prohibit arbitrary, capricious, or unreasonable discrimination.[120] Additionally, under the intermediate standard of review, both sections protect age, sex, and physical condition, but only section 3 lists political affiliation.[121] Due to the paralleled language and classifications, Louisiana legislators should amend section 12 to add political affiliation under the intermediate standard of review. Although the drafters did not initially include political affiliation in section 12, the current social and political climate[122] indicates a recent problem highlighted by the Red Hen incident.[123] The occurrence at the Red Hen indicates a broader issue: Existing public accommodations laws[124] allow public establishments like restaurants to discriminate against potential patrons based on political affiliation.[125] Inclusion of political affiliation under section 12's intermediate standard of review enables Louisiana to address this current social climate by curbing political affiliation discrimination in public accommodations.

B. Standards of Review Under Sections 3 and 12

Comparing sections 3 and 12 reveals a gap that Louisiana legislators should use to place political affiliation as a protected classification in the public accommodations context of section 12.[126] In particular, sections 3

117. *Id.* (emphasis added).
118. *See id.* §§ 3, 12.
119. *See id.* §§ 3, 12.
120. *See id.* §§ 3, 12.
121. *See id.* § 3. Although section 3 also includes other classifications that are not listed in section 12, the scope of this Comment is limited to only the consideration of including political affiliation from section 3's list in section 12.
122. *See supra* notes 1–5, 10–18 and accompanying text.
123. *See, e.g.*, Filloon, *supra* note 1; Selk & Murray, *supra* note 3; Rao, *supra* note 5.
124. The exceptions include the District of Columbia, Seattle, and the U.S. Virgin Islands public accommodations laws, which already cater to this problem. *See* D.C. CODE ANN. STAT. § 2:1402.31 (2012); SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5) (2015); V.I. CODE ANN. § 10:64(3) (2014).
125. *See supra* notes 1–5, 10–18 and accompanying text.
126. *See generally* LA. CONST. art. I, §§ 3, 12.

and 12 share similar standards of review that address the sections' respective protections.[127] Under the shared language, discrimination based on race or religion—and also national ancestry in section 12—faces an absolute bar, the highest level of scrutiny.[128] If a state law or public accommodation discriminates against someone based on religion, for example, a court would instantly find the law or accommodation in violation of the related provision.[129] Discrimination based on the other articulated classes must not be "arbitrary, capricious, or unreasonable," which is an intermediate level of scrutiny described in more detail below.[130] Age, sex, and physical condition appear in both sections as protected classifications, and they are the only protected classifications in section 12.[131] Section 3, Louisiana's equal protection statute, includes additional classes under the intermediate standard of review, namely birth, culture, and political ideas or affiliations.[132] The background on section 3's formation shows that sections 3 and 12 should be read *in pari materia*.

C. Section 3: Legislative Intent and Court Interpretations

The delegates to the Louisiana Constitutional Convention intended to implement more safeguards in its equal protection statute than the Fourteenth Amendment guarantees by specifically enumerating the classifications to which it granted equal protection, such as religious belief, age, birth, and political affiliation.[133] The Convention drafters divided the section 3 classifications into two levels of scrutiny: strict and intermediate.[134] Article I, section 3 strictly prohibits discrimination based on race or religion, and the other articulated classifications receive intermediate scrutiny.[135] The drafters intended to make the substance of article I, section 3 more expansive than federal law.[136]

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127. Hargrave, *supra* note 8, at 40; *see* LA. CONST. art. I, § 3.

128. *See* LA. CONST. art. I, §§ 3, 12.

129. *See* Sibley v. Bd. of Supervisors of La. State Univ., 477 So. 2d 1094, 1107 (La. 1985).

130. LA. CONST. art. I, § 12; Hargrave, *supra* note 8, at 40; *see also* LA. CONST. art. I, § 3.

131. LA. CONST. art. I, §§ 3, 12.

132. *Id.* § 3.

133. Sibley v. Bd. of Supervisors of La. State Univ., 477 So. 2d 1094, 1108 (La. 1985); Louisiana Associated Gen. Contractors, Inc. v. State *ex rel*. Div. of Admin., Office of State Purchasing, 669 So. 2d 1185, 1198 (La. 1996).

134. *See* LA. CONST. art. I, § 3.

135. Devlin, *supra* note 57, at 902–03; *see* LA. CONST. art. I, § 3.

136. Devlin, *supra* note 57, at 902.

Initially, Louisiana courts utilized a three-tier system for its equal protection analysis, modeled after federal case law, with a different level of scrutiny at each tier.[137] In 1985, the Louisiana Supreme Court departed from the federal system in *Sibley v. Board of Supervisors* and formulated a different equal protection test for the articulated classifications other than race or religion: whether the governmental action at issue promotes a suitable and legitimate state purpose, which the state must identify.[138] The court found that the distinguishing factor among the three standards of review was the application of the burden of proof.[139] With its approach, the court determined that when a plaintiff shows that a statute discriminated against her based on race or religion, that law shall be instantly declared unconstitutional.[140] If the plaintiff cites a section 3 classification other than race or religion, the burden shifts to the government to prove a legitimate state purpose for the law or show that the discrimination was not arbitrary, capricious, or unreasonable.[141] Finally, if the plaintiff argues that a government actor discriminated against her under a category not included in section 3, she bears the burden of proving that the government action discriminating against a "disadvantaged class" did not further a legitimate state purpose.[142] Thus, in *Sibley*, the Louisiana Supreme Court articulated a burden-shifting test for the section 3 equal protection analysis.[143]

Sibley endures as the primary authority regarding the approach to section 3 cases.[144] As section 3 and section 12 share the same standards for review, the question of whether to apply the *Sibley* standard to section 12 remained. In 2004, the Louisiana Supreme Court considered whether to

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137. *Id.* at 902–03.

138. *Sibley*, 477 So. 2d at 1104, 1107–09; Devlin, *supra* note 57, at 903–04.

139. *Sibley*, 477 So. 2d at 1107–09; Devlin, *supra* note 57, at 904.

140. *Sibley*, 477 So. 2d at 1107; Devlin, *supra* note 57, at 904–05. Devlin noted that this statement was dictum in *Sibley*. *But see* Louisiana Associated Gen. Contractors, Inc. v. State *ex rel*. Div. of Admin., Office of State Purchasing, 669 So. 2d 1185, 1198 (La. 1996) (specifically holding that when a law discriminates based on race, it "shall be repudiated completely, regardless of the justification behind the racial discrimination").

141. *Sibley*, 477 So. 2d at 1107; Devlin, *supra* note 57, at 904.

142. *Sibley*, 477 So. 2d at 1107; Devlin, *supra* note 57, at 904.

143. Devlin, *supra* note 57, at 904.

144. *See, e.g.*, *Louisiana Associated Gen. Contractors, Inc.*, 669 So. 2d at 1196–98 (affirming *Sibley*'s delineation of the burden-shifting approach within the three standards of review, as well as specifically holding that when a law discriminates based on race, it "shall be repudiated completely, regardless of the justification behind the racial discrimination").

apply the section 3 approach to section 12 in *Albright v. Southern Trace Country Club of Shreveport*.[145]

D. Combining Section 3's Standard of Review Interpretation with Section 12's Application

In *Albright*, the Louisiana Supreme Court addressed the question of whether the parallel language of "arbitrary, capricious, and unreasonable" in sections 3 and 12 should apply similarly.[146] The defendant was a country club that included a restaurant facility named the "Men's Grille."[147] The plaintiffs, who were female members of the country club, attempted to dine at the Men's Grille, which was the only restaurant facility open at the time of their visit.[148] Male employees, however, denied the plaintiffs access, specifically stating that the plaintiffs were not allowed entry or service at the Men's Grille because they were women.[149] The plaintiffs sought equal access to the Men's Grille regardless of gender.[150]

The court found that section 12 governed this case because it is "directed toward those who would discriminate" and prohibits arbitrary, capricious, or unreasonable discrimination on the basis of sex.[151] The court held that, first, the plaintiffs had the burden of proving a prima facie case, by a preponderance of the evidence, of arbitrary, capricious, or unreasonable discrimination under section 12.[152] To establish a prima facie case, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the establishment is a public accommodation; and (3) the public accommodation discriminated against the plaintiff on the basis of her membership in the protected class.[153] Once proven, the burden of proof shifts to the defendant to provide a sufficient, non-discriminatory purpose for its actions.[154] Thus, the *Albright* test employs *Sibley*'s enumeration of the intermediate standard of review as applied to section 3.[155] The court

145. Albright v. Southern Trace Country Club of Shreveport, Inc., 879 So. 2d 121 (La. 2004).
146. *Id.* at 131–34.
147. *Id.* at 125.
148. *Id.* at 126.
149. *Id.*
150. *Id.*
151. *Id.* at 127.
152. *Id.* at 132–33.
153. *Id.* at 133.
154. *Id.* at 132–33.
155. *Id.* at 133–34.

held that the plaintiffs satisfied their burden of proof.[156] The defendant's justification for its discriminatory action—preference of the male club members and the alleged ability to make more revenue based on the discrimination itself—did not satisfy its burden of proof.[157]

The *Albright* court specifically noted that the analogy between *Sibley*'s section 3 intermediate standard of review and similar language in section 12 was the most appropriate course.[158] In particular, the court chose to adopt the *Sibley* approach because the section 12 language that prohibits "arbitrary, capricious, or unreasonable discrimination"[159] was "obviously patterned after"[160] the section 3 language prohibiting laws from "arbitrarily, capriciously, or unreasonably" discriminating against a protected class.[161] Therefore, the *Albright* court utilized section 3 analysis for a section 12 case, so the mirrored language of "arbitrary, capricious, or unreasonable" discrimination for protected classifications should be subject to the same analysis in both section 3 and section 12.[162]

Shared analyses between sections 3 and 12 align with the drafters' intent for protection against arbitrary, capricious, and unreasonable discrimination.[163] The drafters specifically voiced their intention for increased protection in the equal protection context because their aim was to expand the Fourteenth Amendment.[164] The similar language between the sections indicates the intent to also extend the same standard of protection to section 12. Due to the legislative intent embodied in the drafters' linguistic choices, today's Louisiana legislators should amend section 12 to also include political affiliation, which would make the two sections even more parallel. An amendment to section 12 that includes political affiliation would protect political affiliates from discrimination not only in the equal protection context, but also within public accommodations. Without such an amendment, arbitrary, capricious, and unreasonable discrimination against political affiliates may continue in Louisiana public accommodations.

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156. *Id.* at 135.
157. *Id.*
158. *Id.* at 132–34.
159. LA. CONST. art. I, § 12.
160. *Albright*, 879 So. 2d at 133.
161. LA. CONST. art. I, § 3.
162. *Albright*, 879 So. 2d at 133.
163. *See* Sibley v. Bd. of Supervisors of La. State Univ., 477 So. 2d 1094, 1108 (La. 1985); LA. CONST. art. I, §§ 3, 12.
164. *See Sibley*, 477 So. 2d at 1108; Louisiana Associated Gen. Contractors, Inc. v. State *ex rel*. Div. of Admin., Office of State Purchasing, 669 So. 2d 1185, 1198 (La. 1996).

III. THE ADDITION OF POLITICAL AFFILIATION IN LIGHT OF DRAFTING HISTORY AND OTHER LEGISLATION

The drafting history of section 12, along with a comparison to language in other legislation,[165] indicates the Louisiana Legislature's ability to add political affiliation under the intermediate standard of review.

A. Characteristics of Political Affiliation and Louisiana Constitutional Convention's Intent Reveal Potential to Add Political Affiliation

Section 12 explicitly bars discrimination based on race, religion, and national ancestry, and three additional classifications are subject to an intermediate standard of review: age, sex, and physical condition.[166] In the legislative history of section 12, the drafters acknowledged that the Louisiana Legislature can make certain "distinctions," or classifications, in public accommodations law.[167] The ability of the Louisiana Legislature to recognize classifications subject to discrimination[168] implies that it may acknowledge additional classifications in the future. Unprotected classifications currently subject to unfettered discrimination in Louisiana public accommodations, such as political affiliates, are poised for legislative recognition through a constitutional amendment or revised statute.

Political affiliation is admittedly different from the other classifications subject to section 12 intermediate scrutiny—age, sex, and physical condition—because political affiliation is a choice, not an immutable characteristic. The choice to belong to a certain political affiliation, however, is more limited, more calculated, and more significant than typical, daily decisions.[169] For example, political affiliation is not akin to choosing which article of clothing one may purchase. At a store, numerous options for clothing exist, and the decision is most often made within the day, if not within minutes. Some people may skim a few reviews online if the purchase is substantial, but most people

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165. *See, e.g.*, D.C. CODE ANN. STAT. § 2:1402.31 (2012); SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5) (2015); V.I. CODE ANN. § 10:64(3) (2014).

166. LA. CONST. art. I, § 12.

167. RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, *supra* note 101, at 1244.

168. *Id.*

169. *See Switching Parties in Trump's America*, ECONOMIST (Oct. 20, 2018), https://www.economist.com/united-states/2018/10/20/switching-parties-in-trumps-america [https://perma.cc/JH8V-MBUQ].

will not educate themselves before purchasing. A piece of clothing is rarely worn daily; one dons a different outfit every day, in some rotation. To the contrary, although both can be characterized as choices that one makes, political affiliation is not so easily shed or changeable as clothing.[170] Instead of arbitrarily or compulsively choosing one's political affiliation, people can educate themselves by discussing politics with peers, watching debates and the news, and comparing candidates. Political groups are limited in number[171] compared to the multitudes of clothes housed within a shopping mall. Additionally, once deciding their political viewpoints, people are typically loath to switch their ideologies,[172] and people often identify themselves based on their political ties.[173] Therefore, although political affiliation is not as inflexible as age, sex, or physical condition, it should still be included in section 12 because it is a calculated, significant choice that many integrate into their identities.

Additionally, in modern society, physical condition and sex are not as permanent as they were generally considered in 1974, the date of the Louisiana Constitution. Technology and surgical abilities have advanced—brain-controlled exoskeletons can enable quadriplegic people to walk,[174] and surgeons can perform sex reassignment surgery. Thus, two of the three categories subject to section 12 intermediate scrutiny are not as immutable as they once were. Admittedly, acquiring such advanced technology or engaging in any surgical procedure requires a more significant undertaking than changing one's political affiliation. Although political affiliation remains more changeable than sex and physical condition, when legislators today superimpose modern ideologies upon

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170. *See id.*

171. *See* Kristin Eberhard, *The United States Needs More than Two Political Parties: Sanders and Trump Show American Voters Want More Options*, SIGHTLINE INST. (April 28, 2016 at 6:30 AM), https://www.sightline.org/2016/04/28/the-united-states-needs-more-than-two-political-parties/ [https://perma.cc/2S9K-Y43L] (arguing that more parties should be involved in the American voting system because, although "[t]wo parties can adequately represent people's views along a single axis," "views [actually] bifurcate along two different axes," meaning that "two parties cannot reflect the diversity of political views.") For now, however, Americans tend to either consider themselves as Democrat or Republican, or, alternatively, as independent. *Id.*

172. *See Switching Parties in Trump's America*, *supra* note 169.

173. *See generally Switching Parties in Trump's America*, *supra* note 169.

174. James Gallagher, *Paralysed Man Moves in Mind-Reading Exoskeleton*, BBC NEWS (Oct. 4, 2019), https://www.bbc.com/news/health-49907356 [https://perma.cc/PBA3-CP6C] (nothing that this device enables walking movement but must still be attached to a harness that hangs from the ceiling of a laboratory).

section 12, political affiliation seems more at home under the intermediate standard than it may have in 1974 because it is also incorporated into one's identity such that it presents a significant undertaking to change.

Not only does political affiliation correspond with the other intermediate section 12 classifications, but also the comparison between sections 3 and 12 enables the addition of political affiliation to section 12.[175] Age, sex, and physical condition appear as protected classifications in both sections and are the sole protected classifications under intermediate scrutiny in section 12.[176] Section 3 includes additional classifications within its intermediate level: birth, culture, and political affiliation.[177] The drafters of section 3 noted that they specifically articulated categories for increased protection because they "fe[lt] very strongly about" the classes and found that the classes "need[ed] to be given some addressing to."[178] Additionally, the drafters of section 12 recognized the Louisiana Legislature may, in the future, add to the intermediate section 12 category.[179] Today, the Louisiana Legislature may add political affiliation to section 12 for the same reason it was included in section 3: It has become a classification that now needs additional protection. The parallel standard of review, in addition to the three mirrored classes, encourages a redraft of section 12. Adding political affiliation as a protected classification aligns with the Louisiana Constitutional Convention's acknowledgment that certain classes that face discrimination should receive additional protection.[180] The inclusion of political affiliation would also correspond with the Convention's related intent for increased protection toward the section 3 classifications, which already include political affiliation.[181]

The drafters specifically chose the classifications in section 3 to concretely establish protection against discrimination based on the articulated classifications.[182] Similar to section 3, section 12 specifically protects certain classifications that typically face discrimination.[183]

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175. *See* LA. CONST. art. I, §§ 3, 12.

176. *Id.*

177. *Id.* § 3.

178. VI RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, *supra* note 101, Aug. 29, 1973, at 1017.

179. VII *id.* at 1244; *see* LA. CONST. art. I, § 12.

180. *Id.*

181. *See* Sibley v. Bd. of Supervisors of La. State Univ., 477 So. 2d 1094, 1108 (La. 1985).

182. Hargrave, *supra* note 8, at 7 (citing VI RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, Aug. 29, 1973).

183. *Id.*

Recognition of particular classes implies that the list of protected classifications can be subject to additions that may arise later due to social or cultural change.[184] The Louisiana Legislature should add political affiliation as a protected classification under section 12 because unfettered discrimination against political affiliates can currently occur.[185] Today, public accommodations can arbitrarily refuse service based on a patron's political ties, and if the altercation even reaches the courts, intermediate scrutiny cannot be applied.[186] Protecting political affiliation in public accommodations laws is not foreign to the United States: The District of Columbia, Seattle, and the U.S. Virgin Islands already do so.[187]

B. Public Accommodations Legislation in the District of Columbia, Seattle, and the U.S. Virgin Islands

The public accommodations legislation in the District of Columbia, Seattle, and the U.S. Virgin Islands demonstrates that political affiliation is a protected classification in other jurisdictions.[188] Inclusion of political affiliation in other statutes indicates that political affiliation can be treated as akin to sex and other classifications already housed in section 12's intermediate category.[189] In a subsection of its Human Rights Law that deals specifically with public accommodations, the District of Columbia prohibits discrimination for 18 classifications, already a drastic difference from Louisiana.[190] In its limited legislative history, the articulated intent for including so many categories was to halt "discrimination for any reason other than that of individual merit," which included the articulated classifications but was not limited to them.[191] The District of Columbia law defines political affiliation as "the state of belonging to or endorsing any political party,"[192] and the statute has included political affiliation

184. *See* RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, *supra* note 101, at 1245.

185. *See, e.g.*, *supra* notes 1–5, 10–18 and accompanying text.

186. *See generally* LA. CONST. art. I, § 12.

187. *See* D.C. CODE ANN. STAT. § 2:1402.31 (2012); SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5) (2015); V.I. CODE ANN. § 10:64(3) (2014).

188. *See* D.C. CODE ANN. STAT. § 2:1402.31; SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5); V.I. CODE ANN. § 10:64(3). The District of Columbia legislation has more legislative history than Seattle or the Virgin Islands. *See* D.C. CODE ANN. STAT. § 2:1402.31.

189. *See generally* LA. CONST. art. I, § 12; D.C. CODE ANN. STAT. § 2:1402.31; SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5); V.I. CODE ANN. § 10:64(3).

190. D.C. CODE ANN. STAT. § 2:1402.31.

191. 24 D.C. REG. NO. 1, 5 (July 1, 1977).

192. D.C. CODE ANN. STAT. § 2:1401.02(25) (2010).

since its adoption in 1977.[193] The broad nature of the District of Columbia public accommodations statute is not exclusive to the nation's capital, however.

Across the country, Seattle has also adopted broad protection against discrimination based on political affiliation.[194] Like the District of Columbia, Seattle's public accommodations legislation also protects 18 classifications.[195] The ordinance refers to "political ideology," which it defines as any belief or idea connected to a political group, including membership in a political party.[196] The definition also includes acts related to political beliefs, so long as the actions do not cause significant disruption of the public accommodation provider's property rights.[197] In addition, the Seattle ordinance prohibits "harass[ment], intimidat[ion], or otherwise abusing any person," the person's friends, or the person's associations in public accommodations based on their political ideologies.[198] Thus, Seattle and the District of Columbia contain similar public accommodations restrictions toward discrimination based on political affiliation.[199] Beyond the continental United States, the public accommodations law in the Virgin Islands is written similarly to the Seattle and District of Columbia laws.[200]

The U.S. Virgin Islands prohibits discrimination within its public accommodations law based on eight categories, including political affiliation.[201] The U.S. Virgin Islands Code does not define most of its terms within its civil rights title,[202] but its public accommodations law is written similarly to the District of Columbia and Seattle provisions, indicating that the Virgin Islands' public accommodations law likely functions similarly.[203]

Each of these three jurisdictions' public accommodations legislation contains different definitions; however, the common themes among the

193. *Id.* § 2:1402.31 (2012); 24 D.C. REG. NO. 16, 2830, 2838, 2848–49 (Oct. 14, 1977).

194. *See* D.C. CODE ANN. STAT. § 2:1402.31 (2012); SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5) (2015).

195. *See* SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5).

196. *Id.* § 14:06.020(V) (2018).

197. *Id.*

198. *Id.* § 14:06.030(B)(5) (2015).

199. *See id.*

200. *See* V.I. CODE ANN. § 10:64(3) (2014).

201. *Id.*

202. *See id.* § 10:2 (1961).

203. *See id.* § 10:64(3) (2014); D.C. CODE ANN. STAT. § 2:1402.31 (2012); SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5).

three jurisdictions are the larger numbers of protected grounds and the inclusion of political affiliation.[204] Seattle and the District of Columbia protect 18 classifications each,[205] and the U.S. Virgin Islands protects eight.[206] These numbers alone demonstrate more inclusion in granted protections in other jurisdictions compared to Louisiana's six classifications.[207] The above legislation illustrates that public accommodations laws can include political affiliation as a protected class.[208] The Louisiana Legislature should take a proactive step toward more protective public accommodations law by adding political affiliation to section 12 or by creating a new revised statute to bar arbitrary, capricious, or unreasonable discrimination toward political affiliates in public accommodations. Currently, the Louisiana Revised Statutes already provide some protection for political affiliation within the employment law context.[209]

C. Political Affiliation in Louisiana Employment Law

In addition to section 3 equal protection, Louisiana employment law includes protection for political affiliates.[210] Louisiana Revised Statutes § 23:961 prohibits employers from directing or influencing employees' political affiliations.[211] The Louisiana Fourth Circuit Court of Appeal held in 1981 that firing an employee based on the employee's status as a political candidate violated Revised Statutes § 23:961, despite the fact that the employee's candidacy could detrimentally affect the defendant employer's business.[212] Additionally, Louisiana Revised Statutes § 23:962

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204. *See* D.C. CODE ANN. STAT. § 2:1402.31; SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5); V.I. CODE ANN. § 10:64(3).

205. D.C. CODE ANN. STAT. § 2:1402.31; SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5).

206. V.I. CODE ANN. § 10:64(3).

207. LA. CONST. art. I, § 12.

208. *See* D.C. CODE ANN. STAT. § 2:1401.02(24) (2010); SEATTLE, WASH., MUN. CODE § 14:06.020(U) (2018); V.I. CODE ANN. § 10:2 (1961).

209. *See* LA. REV. STAT. § 23:961 (2018); *id.* § 23:962.

210. *See* LA. REV. STAT. § 23:961 (2018); *id.* § 23:962.

211. *Id.* § 23:961.

212. Davis v. Louisiana Computing Corp., 394 So. 2d 678, 679 (La. Ct. App. 4th Cir. 1981). A substantial portion of the employer's business relied on negotiations with Jefferson Parish, the Jefferson Parish School Board, and other governmental agencies within the parish. The plaintiff became a candidate for Kenner City Council, in opposition to another candidate supported by officials within Jefferson Parish. In other cases in which the plaintiffs cite Louisiana Revised Statutes § 23:961, plaintiffs have been less successful. *See* Peacock v.

prohibits employers of laborers from discharging their employees because of their political opinions.[213] Louisiana employment law demonstrates that some prohibition of discrimination based on political affiliation is already in place.[214] Few cases examine Revised Statutes §§ 23:961 or 23:962, but their inclusion of political affiliation nonetheless indicates that Louisiana can add protection of political affiliation in other areas of legislation, including public accommodations law.[215]

Two contexts in Louisiana law already protect political affiliation: employment law and section 3.[216] Thus, adding political affiliation as a protected classification in section 12 is not unprecedented because Louisiana legislators have already included political affiliation within other contexts.[217] The addition to section 12 would correspond with the drafters' intent for increased protections toward political affiliation as a class, which can be derived from the sheer inclusion of political affiliation in article I, section 3; Revised Statutes § 23:961; and Revised Statutes § 23:962.[218] Section 12 deserves an amendment to include political affiliation within its intermediate level of protection. Notably, however, the addition of political affiliation must overcome an obstacle borne by the First Amendment to the United States Constitution: freedom of association.

IV. POTENTIAL CONFLICT WITH FREEDOM OF ASSOCIATION

Public accommodations regulations harbor the potential to infringe upon the freedom to associate, particularly if the public accommodations statute forces a group to accept an unwelcome member.[219] The definition of public accommodations has broadened over time and through

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West Carroll Parish Police Jury, 454 So. 2d 1253 (La. Ct. App. 2d Cir. 1984). The decisions that reject plaintiffs' § 23:961 contentions, however, usually hinge on the employment relationship or lack thereof. *See* Finkelstein v. Barthelemy, 565 So. 2d 1098 (La. Ct. App. 4th Cir. 1990); Boyer v. St. Amant, 364 So. 2d 1338 (La. Ct. App. 4th Cir. 1978).

213. LA. REV. STAT. § 23:962.

214. *See id*. §§ 23:961, 23:962.

215. *See id.*

216. LA. CONST. art. I, § 3; LA. REV. STAT. § 23:961; *id.* § 23:962.

217. *See* LA. CONST. art. I, § 3; LA. REV. STAT. § 23:961; *id.* § 23:962.

218. *See generally* LA. CONST. art. I, § 3; LA. REV. STAT. § 23:961; *id.* § 23:962.

219. Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000); *see* Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 680 (2010); *see* Bagenstos, *supra* note 32, at 1208.

legislation, and the possibility of infringing upon the First Amendment freedom of association has grown simultaneously.[220]

A. Freedom of Association Within Section 12's Constitutional History

The 1973 Louisiana Constitutional Convention members considered the tensions between public accommodations laws and freedom of association.[221] The committee proposal containing section 12 as it now stands initially included an additional sentence that addressed freedom of association, but the drafters later removed this sentence.[222] Further, directly after the adoption of section 12, two Convention members proposed amendments to section 12 that would add language barring infringement upon freedom of association, but the Convention also rejected both attempts.[223]

Both amendments to section 12 garnered debate before rejection.[224] Delegate Gravel, who proposed section 12 as it is today, opposed the first freedom of association amendment, reasoning that the addition might contradict and limit section 12 by potentially allowing public accommodations to exclude patrons.[225] The Convention rejected the first amendment with a 53 to 50 vote.[226] The debate regarding the second

220. *Dale*, 530 U.S. at 657.

221. *See* RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, *supra* note 101, at 1245–46, 1255–56.

222. The additional sentence read: "Nothing herein shall be construed to impair freedom of association." Albright v. Southern Trace Country Club of Shreveport, Inc., 879 So. 2d 121, 127 (La. 2004) (quoting Hargrave, *supra* note 8, at 37). Much debate surrounded the proposals for section 12, and some delegates wanted to extend section 12 further to also regulate private individuals. Hargrave, *supra* note 8, at 37. The initial proposal contained language preventing private discrimination in property sales or rentals. *Id.* at 38. The Convention soon deleted the property provision with substantial dissent. *Id.* The committee then withdrew its initial proposal and submitted a compromise provision. *Id.* The freedom of association language, which the committee removed before section 12 passed, was part of the compromise provision. *Id.* at 40.

223. A. Jackson suggested the first amendment, proposing that section 12 should include an additional sentence, which would have stated: "[N]othing herein shall be construed to impair freedom of association." Jenkins offered the second proposal, which would have read: "No law shall impair the right of each person to associate freely with others." RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, *supra* note 101, at 1245–46, 1255–56.

224. *See id.*

225. *Id.* at 1244, 1246.

226. *Id.* at 1246.

proposal further defined freedom of association in the public accommodations context of section 12.[227] Jenkins, who proffered the amendment, defined associational freedom as "the right of people to join together in organizations, societies, and ventures" and to "make interpersonal relations."[228] Jenkins distinguished the right to freedom of association from the right of assembly, which Jenkins described as the individual's right to gather in particular places.[229] The Convention, however, rejected Jenkins's proposal with a 59 to 53 vote.[230] Thus, neither amendment that attempted to include freedom of association became law.[231]

The close votes indicate that the Convention was divided on whether to consider freedom of association as a valid limit on the rights guaranteed in section 12.[232] Although Convention members refused to adopt the associational freedom proposals, the close voting ratio and the recorded debates imply that the Louisiana Convention members found some importance in freedom of association.[233] The Convention, however, preferred to ensure curtailment of discrimination within public accommodations for articulated classes.[234]

Notably, the Louisiana Constitution includes some indirect connections to freedom of association.[235] Article I, sections 7 and 9 implicitly address freedom of association by guaranteeing First Amendment freedoms.[236] Section 7 codifies the freedom of expression through speech and the press.[237] Section 9 addresses the right to peaceably assemble and to petition the government for redress.[238] These sections thus indirectly include freedom of association, enabling a somewhat tenuous associational freedom protection toward section 12.[239] Additionally, prior cases, such as *Dale*, ensure that claims under public accommodations laws are subject to a freedom of association analysis.[240]

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227. *Id.* at 1255–56.
228. *Id.* at 1255.
229. *Id.*
230. *Id.* at 1256.
231. *See id.* at 1246, 1256.
232. *Id.* at 1246, 1256.
233. *See id.* at 1244–46, 1255–56.
234. *See id.*
235. *See* LA. CONST. art. I, §§ 7, 9.
236. *See id.*
237. *Id.* § 7.
238. *Id.* § 9.
239. *See id.* §§ 7, 9.
240. *See id.* §§ 7, 9, 12; Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

B. Potential Threats to Freedom of Association by Public Accommodations Laws

Expansion of public accommodations laws to include more classifications can potentially threaten the freedom to associate, but adding political affiliation in section 12 would not violate the First Amendment to the United States Constitution.[241] States violate individuals' freedom to associate when states infringe on individuals' rights to choose with whom they will participate in a joint political, religious, cultural, or other group goal.[242] States also infringe upon the freedom of association when states force groups to include members who they would have otherwise excluded.[243] Adding political affiliation to section 12 could potentially infringe on First Amendment associational freedom by forcing political groups to comingle in places of public accommodation. Existing Louisiana and federal legislation and case law, however, ensure that the addition will be subject to freedom of association analysis before section 12 would grant protection to a plaintiff who claims political affiliation discrimination in a public accommodation.[244]

If the application of a public accommodations statute infringes upon the freedom of association, the courts should only uphold the action if the compelling state interest of prohibiting discrimination of the articulated classification does not materially impair the freedom of association.[245] By adding political affiliation to section 12, the Louisiana Legislature would indicate a state interest to protect political affiliates from discrimination in public accommodations.[246] Material impairment of a group's exchange of ideas, however, will outweigh prohibition of discrimination based on political affiliation in public accommodations.[247] Incidents like the Red Hen's discrimination against the White House Press Secretary based on her political ties[248] demonstrate an overall problem that anyone in the United States may face and that can otherwise pass unaddressed.[249] Thus,

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241. *See* Gottry, *supra* note 31, at 968.

242. Roberts v. U.S. Jaycees, 468 U.S. 609, 616, 622 (1984).

243. *Id.* at 623; *see also Dale*, 530 U.S. at 648.

244. *See* Bagenstos, *supra* note 32, at 1208; *Dale*, 530 U.S. 640; LA. CONST. art. I, §§ 7, 9.

245. *Dale*, 530 U.S. at 647–48.

246. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995).

247. *Dale*, 530 U.S. at 647–48.

248. *See, e.g.*, Filloon, *supra* note 1; Selk and Murray, *supra* note 3; Rao, *supra* note 5.

249. *See supra* notes 10–18 and accompanying text.

Louisiana legislators should amend section 12 to include political affiliation as a protected class or create a new revised statute to protect political affiliates from discrimination in public accommodations.

V. LEGISLATIVE SOLUTIONS: AMEND SECTION 12 OR DRAFT A NEW LOUISIANA REVISED STATUTE

Due to the Louisiana Constitutional Convention history,[250] as well as similarities between sections 3 and 12, Louisiana legislators should add political affiliation to the public accommodations law.[251] The drafters of the 1974 Louisiana Constitution noted that the Louisiana Legislature holds the ability to recognize classifications that need additional protection under the public accommodations law.[252] The Red Hen incident presented a national example of current societal divisiveness that has drawn political lines, illustrating that political affiliates are subject to discrimination in places of public accommodation.[253] The parallels and gaps in article I, sections 3 and 12 enable the inclusion of political affiliation in Louisiana's public accommodations statute.[254] Additionally, although not typically applied in courts, some Louisiana employment laws already offer political affiliates protection.[255] As a significant, infrequently changed choice, political affiliation is sufficiently close to sex and physical condition, which section 12 already protects under intermediate scrutiny. Louisiana should therefore follow the lead of the District of Columbia, Seattle, and the U.S. Virgin Islands and grant political affiliation protection within public accommodations, becoming the first state to do so.[256] The amended public accommodations law would only restrict public businesses from discriminating based on a patron's political views if the business's discrimination against the patron were arbitrary, capricious, or unreasonable, as determined by the courts.[257]

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250. *See* RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, *supra* note 101, at 1244–46, 1255–56.

251. *See* LA. CONST. art. I, §§ 3, 12.

252. RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, *supra* note 101, at 1244.

253. *See supra* notes 1–5, 10–18 and accompanying text.

254. *See* LA. CONST. art. I, §§ 3, 12.

255. *See* LA. REV. STAT. § 23:961 (2018); *id.* § 23:962.

256. *See,* D.C. CODE ANN. STAT. § 2:1402.31 (2012); SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5) (2015); V.I. CODE ANN. § 10:64(3) (2014).

257. *See* Albright v. Southern Trace Country Club of Shreveport, Inc., 879 So. 2d 121, 133 (La. 2004); LA. CONST. art. I, §§ 3, 12.

The Louisiana Legislature has two options. First, it can propose a constitutional amendment that would add political affiliation as a protected classification in section 12, next to age, sex, and physical condition, under the intermediate standard. A constitutional amendment would be ideal because it would place political affiliation protection in the same location as the other classes under intermediate scrutiny.

The second solution would be to draft a new revised statute that extends protection to political affiliation in public accommodations. The new revised statute would mirror section 12's language,[258] reading: "In access to public areas, accommodations, and facilities, every person shall be free from arbitrary, capricious, or unreasonable discrimination based on political affiliation."

Each of these solutions contains its own advantages and disadvantages. Procedurally, an amendment to the Louisiana Constitution requires a more arduous procedure than creating a new Louisiana Revised Statute.[259] To pass a constitutional amendment, the Louisiana Legislature must first introduce the amendment through a joint resolution during a legislative session, and two-thirds of each house in the legislature must vote in favor of the joint resolution.[260] Then, the proposed amendment would be submitted to a statewide election, and it must receive a majority vote to pass.[261] Comparatively, a proposed revised statute only needs a majority vote from each house of the Louisiana Legislature and need not go through a statewide election.[262]

The constitutional amendment, however, presents the more straightforward approach, even though it would be procedurally more difficult to pass. If successful, the amendment would place protection for political affiliates within the current section 12 classifications subject to the intermediate standard of review.[263] The addition of political affiliation protection would be clear by placing it within the existing section 12 language; no plaintiff or court would need to address a new and separate revised statute.

The Louisiana Legislature should therefore amend section 12 to include political affiliation under the intermediate standard of review. The constitutional amendment would address a current social and political climate exemplified by incidents like that at the Red Hen.[264] Without a

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258. *See* LA. CONST. art. I, § 12.
259. *See id.* art. XIII, § 1.
260. *Id.* § 1(A)(1).
261. *Id.* § 1(A)(1), (C).
262. *Id.* art. III, § 15(A), (G).
263. *See generally id.* art. I, § 12.
264. *See supra* notes 1–5, 10–18 and accompanying text.

legislative response, discrimination against people based on their political affiliation can continue with only a low standard of review. Louisiana has the opportunity to become the first state to address this problem.

CONCLUSION

The Louisiana Constitution allows the expansion of Louisiana's current anti-discrimination public accommodations legislation to add political affiliation as a protected classification.[265] The addition of political affiliation must not infringe upon the right of freedom to associate, but case law and other constitutional provisions incorporate the freedom of association concern.[266] In light of the recent societal context,[267] the Louisiana Legislature should add political affiliation to the list of protected classes in public accommodations legislation. Louisiana legislators should follow the District of Columbia, Seattle, and the U.S. Virgin Islands[268] and extend the protection of political affiliation to its public accommodations legislation through a constitutional amendment.

265. *See generally* LA. CONST. art. I, §§ 3, 12.
266. *See id.* §§ 7, 9, 12; Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).
267. *See supra* notes 1–5, 10–18 and accompanying text.
268. *See, e.g.*, D.C. CODE ANN. STAT. § 2:1402.31 (2012); SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5) (2015); V.I. CODE ANN. § 10:64(3) (2014).