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Katherine E. Speyer

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# ***New York State Club Association v. City of New York: The Demise of the All-Male Club***

*When some types of association are forbidden and others allowed it is hard to tell in advance the difference between the former and the latter. Being in doubt, some people steer clear of them altogether and in some vague way public opinion tends to consider any association whatsoever as a rash and almost illicit enterprise.<sup>1</sup>*

## I. Introduction

The purpose of this article is to examine the Supreme Court ruling in *New York State Club Association v. City of New York*.<sup>2</sup> This case is the Supreme Court's most recent pronouncement regarding the constitutional right of association in private clubs.<sup>3</sup> Unfortunately, the effect of *New York State Club Association*, is to further confuse an area of law whose parameters are already ill-defined.<sup>4</sup> The right of association, as an unenumer-

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1. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 494 (G. Lawrence ed. 1966).

2. 108 S. Ct. 2225 (1988).

3. Other Supreme Court rulings regarding the right of association in a private club setting include: *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

4. In 1987, the Court in *Rotary* conceded that while it "recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental liberty protected by the Bill of Rights[,] . . . [the Court has] not attempted to mark the precise boundaries of this type of constitutional protection." *Rotary*, 481 U.S. at 545.

Traditionally, membership policies of private organizations were not subject to constitutional scrutiny. For example, when Congress passed Title VII of the Civil Rights Act of 1964, the law that serves as a model for virtually every state and local public accommodations statute, it questioned the constitutionality of legislation that would encroach on the membership policies of private clubs and as a result, exempted private clubs from the Act's application. 42 U.S.C. § 2000a (1982). During the Senate debates regarding the private club exemption, Senator Hubert Humphrey of Minnesota stated: "We intend only to protect the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis." 110 CONG. REC. 13,697 (1964).

It was only until relatively recently, in the late 1970s and early 1980s that lobbying and litigation efforts began to expand conventional understanding of which clubs qualified as distinctly private under state and local public accommodations laws. These efforts

ated and dependent right,<sup>5</sup> is complex. It is a concept that owes its existence to the judiciary, which often employs conflicting and various means by which to determine the extent of that right.<sup>6</sup> This Article will examine the current status of the right of association after *New York State Club Association*, focusing on the inherent tension between the personal liberty to choose one's associates and the interest of the state to prevent discrimination of its citizens.<sup>7</sup>

*New York State Club Association* is but one in a recent trilogy of decisions in which the Court has dealt with the conflict between the first amendment rights of association and privacy within organizations and the rights of individuals to be free from the discriminatory membership policies employed by these organizations.<sup>8</sup> The principal issue addressed in *New York State Club Association* was whether an amendment to New York City's Public Accommodations Law was constitutional.<sup>9</sup>

New York City's Public Accommodations Law bans discrimination in places of public accommodation while specifically exempting, in the interest of preserving the right of association,

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received cautious approval by the Supreme Court: first in *Roberts*, 468 U.S. 609 (1984) (Court held that the Jaycees were not a distinctly private organization) and later, in *Rotary*, 481 U.S. 537 (Court held that the Rotary Clubs do not fall within the private club exemption under the California public accommodations law).

5. The right of association is not specifically stated in the U.S. Constitution, but the Court has recognized the right of association as an essential freedom, necessary to preserve the rights embodied in the first amendment and inextricably linked to the right of privacy. See *infra* notes 55-73 and accompanying text for a discussion on the right of association.

6. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), a unanimous Court clearly articulated a right of association.

Effective advocacy of both public and private points of view . . . is undeniably enhanced by group association . . . It is beyond debate that freedom to engage in association for the advancement of . . . the 'liberty' assured by the . . . Fourteenth Amendment . . . [and] state action which may have the effect of curtailing that freedom to associate is subject to the closest scrutiny.

*Id.* at 460. However, by 1984, the Supreme Court, in *Roberts*, found that the right of association was not "undeniable" as articulated in *Patterson*, but subject to several limitations that may be justified by "state interests, unrelated to the suppression of ideas." *Roberts*, 468 U.S. at 623.

7. See *Roberts*, 468 U.S. at 612.

8. See also *Rotary*, discussed *infra* notes 117-47 and accompanying text; *Roberts*, discussed *infra* notes 74-116 and accompanying text.

9. *New York State Club Ass'n*, 108 S. Ct. at 2231.

those institutions which are "distinctly private."<sup>10</sup> In 1986, the Public Accommodations Law was amended for the purpose of expanding the scope of the Law to private downtown men's clubs.<sup>11</sup> The amendment created a three-part test which effectively placed a majority of these clubs within the ambit of the statute, thus rendering them ineligible to defend their discriminatory membership policy by claiming a right of association.<sup>12</sup>

The Supreme Court unanimously upheld the statute as constitutional, finding that the criteria applied in New York City's three-part test was significant in defining the non-private nature of an association.<sup>13</sup> The Court found further that the Law did not infringe upon a club member's right of expressive association,<sup>14</sup> was not overbroad,<sup>15</sup> and did not violate the equal protection clause under the fourteenth amendment.<sup>16</sup>

*New York State Club Association v. City of New York* raises many questions. After the Court's ruling, what is the sta-

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10. NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986).

11. The basis for this amendment, known as Local Law 63, was the finding by the New York City Council that the club members' interest or right to private association does not outweigh the public interest in equal access and opportunity. The legislative declaration that accompanied the amendment states in relevant part:

One barrier to the advancement of women . . . in the business and professional life of the city is the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment, and professional advancement are formed . . . [T]he commercial nature of some of the activities occurring therein and the prejudicial impact of these activities on business, professional and employment opportunities cannot be ignored.

Joint Appendix at 15, *New York State Club Ass'n*, 108 S. Ct. 2225 (1988) (No. 86-1836) [hereinafter Joint Appendix].

12. The amendment states in part:

An institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. For the purpose of this section, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporation law shall be deemed to be in its nature distinctly private.

NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986).

13. *New York State Club Ass'n*, 108 S. Ct. at 2229.

14. *Id.* at 2234.

15. *Id.* at 2235.

16. *Id.* at 2236-37.

tus of the right of association? Which, if any, social spheres is the Court prepared to recognize and protect in which a single sex may exercise its own expression? How much legislative structuring of private and individual choices is the Court prepared to tolerate? These questions cannot be addressed without establishing some historical and theoretical framework. As a result, Part II of this Article addresses the two fundamental concepts which are in conflict in *New York State Club Association* — the right of association versus the right of the state and local governments to preserve equal opportunity and equal access for all of their citizens. Part A addresses the nature of the private men's club and the motivation behind legislation which seeks to amend the rights of association. An examination of New York City's Public Accommodations Law will be set forth in Part B. The historical development of the constitutional right of association and the likelihood that an all-male club can succeed in claiming constitutional protection in the face of legislation abridging this right is discussed in Part C.

Part III begins by an examination of the precursors to *New York State Club Association*: *Roberts v. United States Jaycees*<sup>17</sup> and *Board of Rotary Club International v. Rotary Club of Duarte*.<sup>18</sup> This section concludes by setting out the facts, procedural history, and Supreme Court opinion of *New York State Club Association v. City of New York*. These three cases form a trilogy that represents an attempt by the Court to define the limits on the right of association and to address the ability of the state and local government to limit individual choice to further some collective need.

Part IV analyzes the effect of *New York State Club Association* on the right of association, as well as its departure from precedents laid out in *Roberts* and *Rotary*. *New York State Club Association* is consistent with *Roberts* and *Rotary* in that the Court has determined that the freedom of association extends only so far as the enumerated right of freedom of expression and the right to individual privacy.<sup>19</sup> But the Court does

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17. 468 U.S. 609 (1984).

18. 481 U.S. 537 (1987).

19. See *New York State Club Ass'n*, 108 S. Ct. at 2234; *Rotary*, 481 U.S. at 545; *Roberts*, 468 U.S. at 623.

more than merely give a "rubber stamp" affirmation to previous case law. In *New York State Club Association*, the Court embarked on a new line of analysis in which the right of association is dependent on whether an organization is deemed commercial in nature.<sup>20</sup> In *Rotary* and *Roberts*, the Court had employed more flexible standards, which focused on the expressive rather than the commercial nature of an organization and examined whether the organization is private or public.<sup>21</sup>

The outcome of *New York State Club Association* is laudable in that it affords women equal access to those clubs which can be essential to professional growth.<sup>22</sup> This author takes issue, however, with the analysis employed by the Court. The end result of *New York State Club Association* is a confusing mesh of different standards leaving organizations with no clear guidelines for determining the extent of their associational right to select members.

## II. Background

### A. *The Effect of Sex Discrimination in Private Clubs*

For the past two decades the American courts and legislatures have recognized that discrimination of individuals is contrary to the best interest of society.<sup>23</sup> To wit, exclusion of women, like the exclusion of minorities, has a devastating social effect — perpetuating outmoded and archaic sexual stereotypes and stigmatizing women in the eyes of society.<sup>24</sup> Recognizing

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20. Specifically, in order to define whether or not an organization is distinctly private, Local Law 63 examines such criteria as whether the organization has restaurant facilities, or whether the organization receives payment from nonmembers to further commercial trade or business. NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986), *See infra* notes 44-47 and accompanying text.

21. *See Rotary*, 481 U.S. at 546; *Roberts*, 468 U.S. at 617. In both *Rotary* and *Roberts*, the Court considered such factors as size, purpose, selectivity, interaction with outside community, interaction of nonmembers with club activity, and the use of a discriminatory membership policy to further the club's rights of expression.

22. *See infra* notes 30-32 and accompanying text.

23. For a brief history on the Court's recognition of gender as a basis for discrimination see generally, GINSBURG, *The Burger Court's Grappling with Sex Discrimination*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 132 (1983).

24. *See, e.g., Roberts*, 468 U.S. at 625 (Discrimination "deprives persons of their individual dignity and denies society the benefits of their wide participation in political, economic, and cultural life."); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-

that gender discrimination is a denial of equal protection,<sup>25</sup> legislatures have passed laws to ensure equal opportunity in education and the workplace.<sup>26</sup>

However, despite their education and training, and despite the fact that there are more women in the workplace than ever before, when it comes to achieving the uppermost level positions,<sup>27</sup> women may still operate at a disadvantage to their male counterparts.<sup>28</sup> This disadvantage stems from the summary exclusion of women from membership in men's clubs, wholly on the basis of their sex.<sup>29</sup> Evidence strongly suggests that these

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26 (1982)(Discrimination perpetuates stereotypic notions and stigmatizes disfavored groups as innately inferior.); *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977)(Gender based standards in Social Security Act reflected "archaic and overbroad" stereotypes about roles and relative abilities of women.); *Frontiero v. Richardson*, 411 U.S. 677, 684-87 (1973)(plurality opinion) ("Statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."); *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954)(holding that segregation of blacks and whites in education is "inherently unequal").

25. See *Craig v. Boren*, 429 U.S. 197 (1976) (invalidating, as a violation of equal protection, an Oklahoma law which permitted the sale of 3.2% beer to women at age 18 but to men at age 21); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating, as a violation of due process and equal protection, a military service regulation which gave automatic dependent status on a serviceman's wife but not a servicewoman's husband); *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating, as a violation of equal protection, an Idaho statute which preferred males to females as administrators of intestate estates).

26. See, e.g., CAL. GOV'T CODE § 12,920 (West 1980) which states: "It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment . . . deprives the state of the fullest utilization of its capacities for development . . . and substantially and adversely affects the interest of employees, employers and the public in general." See also the legislative declaration to Local Law 63 (enacted to amend New York City's Public Accommodations Law) which states in relevant part: "[T]he city of New York has a compelling interest in providing its citizens an environment where all persons . . . have a fair and equal opportunity to participate in the business and professional life of the city, and may be unfettered in availing themselves of employment opportunities." NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986).

27. While women may be occupying more of the low to mid-level positions, a survey of executives in the highest level positions revealed that only two-percent were women. Hymowitz & Schellhardt, *The Glass Ceiling*, Wall St. J., Mar. 24, 1986, at 10 col. 1.

28. See Burns, *The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L.REV. 321 (1983). In examining the effect of sex discrimination in private men's clubs, Professor Burns contends that despite the equal access women have had to education and training, "[t]heir success has been limited, . . . within the most lucrative and prestigious professions, by the recognition of the truth of the adage that 'who you know is at least as important as what you know.'" *Id.* at 322.

29. See, Brief *Amicus Curiae* of the American Bar Ass'n in support of appellees at

clubs can be essential to professional achievement.<sup>30</sup> In fact, approximately one-third of all businessmen obtain their jobs through personal contacts,<sup>31</sup> and these clubs strive to create an atmosphere that cultivates business deals and contacts.<sup>32</sup>

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5, *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988) (No. 86-1836), which states in relevant part:

The harm to the professional advancement of women . . . caused by the exclusion from this critical aspect of market place activity is . . . widely recognized. Women excluded by discriminatory policies are denied opportunities for contacts and professional betterment available in "private" business clubs. These invidious effects are exacerbated by the clear message to the larger community that the groups excluded . . . are inherently inferior or are not entitled to equal professional opportunities.

See also Brief *Amicus Curiae* of the Minnesota Chapter, Nat'l Org. for Women at 21-22, *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981)(No. 51171), which describes the important role private clubs play in boosting a man's career: "It provides men with knowledgeable allies who help them to advance in their careers, to quickly learn who the cast of characters is and how to behave in a new position, and to get the earliest news of job openings, business opportunities and grants to be awarded." *Id.*

30. Examples of opportunities lost by women as a result of being banned from these clubs include the following: The New York Director of the Anti-Defamation League of B'nai B'rith was barred from a White House briefing taking place in an all-male club. See Brief for Appellee at 5, *New York State Club Ass'n, v. City of New York* 108 S. Ct. 2225 (No. 86-1836) [hereinafter Brief for Appellee]. An Executive Director of the New York chapter of the Democratic National Committee could not attend a meeting of the New York Public Affairs Professionals held at the all-male Union League Club. *Id.* Women have been barred from industrial meetings and training seminars held at all-male clubs by Wall Street professionals. *Id.* at 6 (citing Schafran, *Private Clubs, Women Need Not Apply*, Foundation News, Jan.-Feb. 1982).

In addition, the president of a New York securities firm testified to the New York City Council that he used the club "solely for business meetings." *Id.* at 7. The Chairman of the Conference of Private Organizations admitted during his testimony that his business is carried out at these clubs. *Id.* at 5. In addition, Andrew Stein, City Council President, testified that "business is transacted over lunch in the clubhouse dining room. Contacts and deals are made in the relative quiet of the clubhouse bar." *Id.*

31. See Brief for Appellee, *supra* note 30, at 4, which states in relevant part: "The Bureau of Labor Statistics revealed that almost one-third of males get their jobs through personal contacts and that this figure is almost certainly higher for high-level jobs." For a general discussion on the continued importance of job contacts in employment, see *JOB SEEKING METHODS USED BY AMERICAN WORKERS*, BULL. NO. 1886, TABLE III, U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR (1972).

32. Rhode, *Private Clubs and Public Values*, 22 *STAN. L. REV.* 15, 15-16 (1987). It is clear that a principal reason for these clubs' existence is the amount of commercial activity that occurs within the confines of the clubs. It is not uncommon for business deals and political opportunities to occur within the confines of all-male clubs. For example, Nixon's change in his presidential strategy came about after a discussion with fellow club member Ronald Reagan at the prestigious Bohemian Club in San Francisco. G. WILL, *NIXON AGONISTIES* 256 (1970). Sociologist G. William Domhoff has instituted several studies which catalogue the relationship between club memberships, private school attend-



## B. *Public Accommodations Statutes*

An examination of public accommodations statutes is significant because this legislative device reaches into the private sector, thus accomplishing for the people what the fourteenth amendment and the due process clause cannot.<sup>33</sup> Thirty-three

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ance and corporate directorships. G. DOMHOFF, *THE HIGHER CIRCLES* (1970). In one of his books, Domhoff published a study of the 20 largest industrial corporations in America. This study shows that "at least one director from 12 of the top 20 companies was a member of the Links Club," a prominent male club in New York. Similarly, at the Century Club in New York, eight of the top 20 companies were represented. G. DOMHOFF, *WHO RULES AMERICA?* 26 & n.41 (1970). For a more detailed discussion on business and political deals which have been conceived and negotiated in all-male clubs, see generally Burns, *supra* note 28, at 329-43.

33. An inherent limitation of the fourteenth amendment is that by its own terms, "[no] state shall . . . deny to any person . . . the equal protection of the laws[.]" it is limited to acts of states. U.S. CONST. amend. XIV, § 1 (emphasis added). Recognizing this limitation, the Supreme Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), invalidated Congressional legislation designed to ban discrimination in privately owned public accommodations.

The plaintiff has the burden of establishing that the seemingly private activity is colored by governmental involvement. See *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974) (city policy of granting temporary but exclusive use and control of city recreation facilities to private segregated schools perpetuated a dual school system and was constitutionally impermissible); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (leasing of space within a state-funded parking facility to a privately owned restaurant that refused to serve blacks held to be state action); *Nixon v. Condon*, 286 U.S. 73, 88 (1932) (Since the state delegated power to the private political party executive committees, they are "organs of the State itself, the repositories of official power."). *But see* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (granting of a state liquor license to a discriminatory private club not state action).

State involvement may not be a viable line of argument for a plaintiff because case law indicates that it is difficult to prove. For example, the Supreme Court tends to consider each component of governmental involvement separately. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), a case concerning the activity of a privately owned electric utility and the application of the due process clause to its practice of terminating services of its customers. The Supreme Court, in refusing to look at all the factors in the aggregate, found no state action. *Id.* In cases involving private sex discrimination, the Court's failure to look at the whole picture of governmental involvement invariably leads to the conclusion that the discriminatory practices do not involve, to any significant degree, state action. See Burns, *supra* note 28, at 357.

After establishing state involvement, plaintiffs alleging racial or ethnic discrimination have been largely successful because they have been regarded by the Court as a suspect class to which the Court has applied a "strict scrutiny" standard. See *e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944) (legal restrictions which curtail the civil rights of a single racial group are immediately suspect and subject to the most rigid strict scrutiny). Under strict scrutiny, a compelling state interest must be shown in order to justify the suspect classification. *Id.* at 216 ("Pressing public necessity may sometimes justify the existence of [race specific] restrictions; racial antagonism never can.").

states and the District of Columbia have enacted public accommodations statutes which prohibit sex discrimination.<sup>34</sup> Most of these statutes were amended to include gender as a basis of discrimination in the 1970s, arising from the impact of the women's rights movement.<sup>35</sup> Unfortunately, twenty-two of these public accommodations statutes provide an exemption for private clubs.<sup>36</sup>

Despite their limitations, properly amended private accommodations statutes have enormous potential for fighting gender discrimination.<sup>37</sup> For example, the use of public accommodations statutes to fight racial discrimination in private clubs has been

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The plaintiff wishing to prove sex discrimination will be disappointed to find that the Supreme Court has developed a lesser standard of review for cases involving sex discrimination. *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976) ("the perception of racial classifications as inherently odious stems from a lengthy tragic history that gender-based classifications do not share."). To date, the Court has not recognized women as a suspect class for the purpose of fourteenth amendment analysis and instead applies a standard which the Court has penned "a middle standard of review." *Id.* at 197 ("To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

Because the Court engages in a *seriatim* analysis in determining state involvement, and because a lesser standard of review is applied by the Court when state action is found, it is evident that combatting sex discrimination in a private club based upon a fourteenth amendment/state action argument may have limited success.

34. *See* ALASKA STAT. § 18.80.230 (1986); CAL. CIV. CODE § 51 (West Supp. 1982); COLO. REV. STAT. § 24-34-501(2) (1988); DEL. CODE ANN. tit. 6, § 4503 (1975); IDAHO CODE § 18-7301 (Supp. 1977); IND. CODE ANN. § 22-9-1-2(A) (1986); IOWA CODE ANN. § 601A.7(1)(a) (West 1988); KAN. STAT. ANN. § 44-1001 (Supp. 1977); ME. REV. STAT. ANN. tit. 5, § 4592 (Supp. 1978); MASS. GEN. LAWS ANN. ch. 272, § 92A (West Supp. 1978-1979); MICH. COMP. LAWS ANN. § 37.2303 (Supp. 1978-1979); MINN. STAT. ANN. § 363.03 (Supp. 1978); MONT. CODE ANN. § 49-1-102 (1989); NEB. REV. STAT. § 20-134 (1987); N.H. REV. STAT. ANN. § 354A:8-IV (Supp. 1977); N.J. STAT. ANN. § 10: 5-4 (West 1976); N.M. STAT. ANN. § 4-33-7 (Supp. 1975); N.Y. EXEC. LAW § 296(2)(a) (McKinney Supp. 1988); N.D. CENT. CODE § 12.1-14-04 (Supp. 1988); OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1977); OR. REV. STAT. § 30.670 (1977); S.D. CODIFIED LAWS ANN. § 20-13-23 (Supp. 1977); UTAH CODE ANN. § 13-7-3 (Supp. 1977); W. VA. CODE § 5-11-9(f)(1) (Supp. 1977); WIS. STAT. § 942.04(a) (1975). *See generally* Special Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978) [hereinafter Project].

35. *See* Project, *supra* note 34, at 264.

36. *See id.* at 250 n.251.

37. *See* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1986) (use of California's public accommodations statute to assert the right to allow women into a California Rotary Club, despite the all-male membership policy of Rotary Club International); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (use of Minnesota's public accommodations statute to fight the all-male membership policy of the United States Jaycees).

most effective.<sup>38</sup> These statutes are a double-edged sword, however. They preserve for the public equal access and opportunity, while placing limits on an individual's right of association.

### 1. *New York City's Public Accommodations Law*

Prior to its amendment in 1984, New York City's Public Accommodations Law prohibited discrimination in places of public accommodation but, like the state and federal public accommodations statutes it was modeled after, broadly excluded from its coverage places deemed "distinctly private."<sup>39</sup> This exemption allowed private clubs to continue to exclude women from their membership even though a substantial amount of the clubs' activities were business, not socially, related.<sup>40</sup>

On October 24, 1984, the New York City Council passed Local Law 63, thereby amending the Public Accommodations Law by providing specific criteria for determining whether a place of accommodation is "distinctly private."<sup>41</sup> In enacting Local Law 63, the City Council was trying to find a balance between providing equal access to professional opportunities for all its citizens and the associational rights of the club members.<sup>42</sup> As a re-

38. Using a fourteenth amendment/equal protection argument, the plaintiff in *Moose Lodge No. 107*, 407 U.S. 163, 165 (1972), sought injunctive relief requiring the Pennsylvania liquor board to revoke a private club's liquor license after he was refused restaurant service on the basis of his race. *Id.* at 164-65. The Supreme Court held that the state's granting of a liquor license was not sufficient to implicate the state in the discriminatory policies of the club and was not "state action" within the meaning of the equal protection clause. *Id.* at 175-76.

Later, however, a different suit was brought against the same lodge, this time under Pennsylvania's public accommodations law. *Commonwealth Human Relations Comm'n v. Loyal Order of Moose, Lodge No. 107*, 448 Pa. 451, 229 A.2d 594 (1972), *appeal dismissed*, 409 U.S. 1052. Using the Pennsylvania's public accommodations statute as a basis for its decision, the state court was able to effect what it could not effect under the state action/fourteenth amendment theory. To wit, the lodge was found to be subject to Pennsylvania's public accommodations law and was banned from exercising its discriminatory policies. *Id.*

39. NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986).

40. Brief for Appellee, *supra* note 30, at 2.

41. NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986). *See supra* note 12 for amendment's relevant text.

42. *See Joint Appendix, supra* note 11, at 16. In its legislative declaration to Local Law 63, the Council states that it is not the "Council's purpose to interfere in club activities or subject club operation to scrutiny beyond what is necessary in good faith to enforce the [public accommodations law]." *Id.*

sult, the amendment was designed not to cover all private clubs, but only those clubs which satisfy the criteria set forth in the amendment.<sup>43</sup>

These criteria are outlined in a three-part test. Before a club can come within the scope of the Public Accommodations Law, it must satisfy all three criteria.<sup>44</sup> First, the organization must have over 400 members.<sup>45</sup> Next, the organization must provide regular meal service.<sup>46</sup> Finally, the organization must be in the habit of receiving, directly or indirectly, payment for dues, fees, space, meals, or other club business, from outside nonmembers for the furtherance of trade or business.<sup>47</sup>

Local Law 63 was passed after years of hearings and investigations which focused on the business activities prevalent in these clubs and the prejudicial effect on women of an all-male membership policy.<sup>48</sup> Testimony offered during these hearings documented several instances where important business events

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43. In its legislative declaration to Local Law 63, the New York City Council states: [It] is not the Council's purpose to dictate the manner in which certain private clubs conduct their activities or select their members, *except insofar as is necessary* to ensure that clubs do not automatically exclude persons from consideration for membership or enjoyment of club accommodations and facilities and the advantages and privileges of membership, on account of invidious discrimination. *Id.* at 16 (emphasis added).

44. NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986).

45. *Id.* See Brief for Appellee, *supra* note 30, at 9. The Council chose the number 400 after the Supreme Court's decision in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The *Roberts* decision characterized two local chapters of the Jaycees, one with 400 and the other with 430 members, as "large" and undeserving of a right of private association. *Id.* at 621.

46. NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986). The Council chose this criteria after making a finding, "that business activity often occurs at clubs . . . which provide regular meal service allowing persons to discuss business." Joint Appendix, *supra* note 11, at 15.

47. NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986). This criteria was based on the City Council's finding that because club membership can be important to develop an employer's business, employers are frequently in the habit of paying for their employee's club membership dues. In addition, the Council found that employers are frequently in the habit of renting out club facility space for business meetings which are attended by nonmembers. Because these organizations provide substantial benefits to nonmembers and businesses, they are not "distinctly private." Joint Appendix, *supra* note 11, at 15.

48. See Brief for Appellee, *supra* note 30, at 3. For a detailed report on the testimony heard, including who testified, and excerpts of the testimony, see Lynton, Behind Closed Doors: Discrimination by Private Clubs: A Report Based on City Commission on Human Rights Hearings 3 (May 1975); Hearings Before the Committee on General Welfare, New York City Council, December 22, 1983 [hereinafter Hearings].

have been held at private men's clubs;<sup>49</sup> where women have been excluded from these events solely because of their sex;<sup>50</sup> as well as the "awkward and humiliating" treatment women have experienced when they have been allowed entrance to the club as guests.<sup>51</sup>

Based on the extensive testimony and materials before it, the Council determined that because of the commercial activities occurring within, club membership can be an important "catalyst" in an individual's professional career, and that the denial of membership to women can have a prejudicial impact on these women's careers.<sup>52</sup> Despite the fact that many benevolent

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49. Joint Appendix, *supra* note 11, at 15. In the legislative declaration, the Council states that part of the "business activity" prevalent in the clubs addressed by Local Law 63 is the holding of business meetings in the club's conference rooms. *Id.* "The organizations also rent their facilities through members for use as conference rooms for business meetings attended by non-members." *Id.* In legislative hearings before the Committee on General Welfare, a division of the New York City Council, a president of a New York securities firm stated that he used the club "almost solely for business meetings." Brief for Appellee, *supra* note 30, at 7 (quoting Hearings, *supra* note 48, at 2 (written testimony of Martin Whitman)). In addition, the Vice Chancellor of the City University of New York and the City's chief lobbyist, was unable to attend an important business meeting at an Albany men's club. Brief for Appellee, *supra* note 30, at 6 (quoting Hearings, *supra* note 48, at 8 (oral testimony)). "Women have been barred from industry meetings and excluded from training programs held at these clubs by Wall Street professionals." Brief for Appellee, *supra* note 30, at 6 (citing Schafran, *Private Clubs, Women Need Not Apply*, Foundation News (Jan./Feb. 1982)). "When a woman member of the executive committee of the Republican Party Caucus objected to its meetings at the all-male Century Association, 'she was given the choice of shutting up or dropping out.'" *Id.* (quoting Hearings, *supra* note 48, at 4 (written testimony of Lynn Hecht Schafran)). "As Cyril Brickfield, then-President of the National Club Association concluded in 1973, '[i]t is sometimes vital to belong [to a club] to become an executive. To the extent you are excluded, you are disadvantaged.'" *Id.* (quoting Hearings, *supra* note 48, at 2 (written testimony of Isaiah Robinson, Jr., Chairman, New York City Commission on Human Rights)).

50. The legislative declaration which accompanied Local Law 63 notes that the exclusionary policies of all-male clubs creates a "barrier to the advancement of women . . . in the business and professional life of the city." Joint Appendix, *supra* note 11, at 15.

51. Humiliating treatment of women has included: being forced to use a service entrance, back stairwells, and service elevators; being directed not to sit in the lobby; and being required to use separate dining facilities (while the business discussion continues over lunch in the main dining room). See Brief for Appellee, *supra* note 30, at 6. See also Burns, *supra* note 28, at 333 n.36 (quoting L. Schafran, *supra* note 49, at 2-3).

52. The Council, in their legislative declaration, found that although some of these clubs may be organized for social or educational purposes, "the commercial nature of some of the activities occurring therein and the prejudicial impact of these activities on business, professional and employment opportunities of . . . women cannot be ignored." Joint Appendix, *supra* note 11, at 15.

and religious organizations<sup>53</sup> meet the three-part requirement outlined in Local Law 63, the Council specifically exempted these organizations from the statute since they were not "places where business activity is prevalent."<sup>54</sup>

### C. *The Right of Association as a Means to Discriminate*

Proponents of all-male private clubs defend their admissions criteria by relying on the constitutional rights of association and privacy.<sup>55</sup> The right of association, however, is not a right that is specifically enumerated in the Constitution. Nevertheless it has been frequently invoked by the Supreme Court over the last thirty years<sup>56</sup> and has been traditionally linked to the first amendment rights of speech, petition, and assembly.<sup>57</sup> In the past few decades the Court has expanded the scope of the right of association into a right that may be exercised beyond

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53. Specifically, the amendment exempted corporations "incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law . . ." NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986).

54. Joint Appendix, *supra* note 11, at 15; Brief for Appellee, *supra* note 30, at 1.

55. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate . . . is protected by the First and Fourteenth Amendments."); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression."); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("Compelled disclosure of affiliation with groups . . . may constitute . . . a restraint on freedom of association.").

56. See generally *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989); *Eu v. San Francisco County Democratic Cent. Comm.*, 109 S. Ct. 1013 (1989); *Reed v. United Transp. Union*, 109 S. Ct. 621 (1989); *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988); *Board of Directors of Rotary Club Int'l v. Rotary Club of Duarte*, 481 U.S. 208 (1987); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkley*, 454 U.S. 107 (1981); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 347 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1975); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974); *U.S. v. Robel*, 389 U.S. 258 (1967); *NAACP v. Alabama ex rel. Patterson*, 347 U.S. 449 (1958).

57. *Buckley v. Valeo*, 424 U.S. 1, 15 (1975) (recognition by the Court that the right of political association is protected under the first amendment as a necessary component of political expression); *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973) (first and fourteenth amendments guarantee the "freedom to associate with others for the common advancement of political beliefs and ideas"). See also *Raggi, The Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977). Professor Raggi asserts that: "'freedom of association' has been little more than a shorthand phrase used by the Court to protect traditional first amendment rights of speech and petition as exercised by individuals in groups." *Id.* at 1.

individual interests in first and fourteenth amendment guarantees.<sup>58</sup> For example, in *NAACP v. Alabama ex rel. Patterson*,<sup>59</sup>

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58. In the 1960s and 1970s, some commentators speculated that the Court was beginning to recognize the notion that freedom of association was not strictly linked to enumerated first amendment rights and that the Court was ready to recognize the freedom of association as an independent right. See *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (expressly rejects any attempt to narrow the first amendment right of petition to political expression); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964) (First amendment rights of petition and assembly include the right to assemble to consult with others regarding the best means to exercise those rights.); *NAACP v. Button*, 371 U.S. 415, 430 (1963) (expressly rejects a "literal conception of freedom of speech, petition, or assembly" and instead invoked the freedom of association). See generally Raggi, *supra* note 57, at 2 (The purpose of this article was to consider the potential for an independent right of association, to determine what role an independent right could play in American society, and to formulate analysis and theory for the Court to utilize in creating this right.).

In *Button*, the Court alluded in dicta that freedom of association is an implied first amendment right, analytically separate from the enumerated first amendment rights. The Court rejected the notion that it should be bound by a narrow or literal reading of the constitutional rights and that both the first and fourteenth amendments protected "certain forms of orderly group activity." *Button*, 371 U.S. at 430.

*Griswold v. Connecticut*, 381 U.S. 479 (1965), was the first declaration by the Court that although the right of association owed its existence to the first amendment, its scope can be expanded and remain intact without any related first amendment rights of speech, petition, or assembly. Justice Douglas, writing for the Court suggested that freedom of association includes the opportunity to enjoy the society of other people, and that this right exists despite the absence of any express exercise of enumerated first amendment rights. *Id.* at 484. "Marriage is . . . an association that promotes a way of life, not causes. . . . Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.* at 486. In his closing dicta, Justice Douglas suggests that, although the right of association is not specifically enumerated in the Constitution, it is a "penumbra of the First Amendment" and stands independently of the rights enumerated in the first amendment. *Id.* at 484.

During his years on the bench, Justice Douglas alluded to the independent right of association in several opinions. For example, in his concurring opinion in *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), Justice Douglas clearly stated that the choice of one's associates is fundamental to the Court's interpretation of the Constitution; that the act of associating itself is entitled to Constitutional protection and that the right of association is "deep in our tradition." *Id.* at 536-38. *Moreno* involved a challenge to the 1965 Food Stamp Act which denied food stamps to households which contained unrelated individuals. The majority struck down the law as a violation of equal protection since the regulation was not rationally related to the purpose of the Act, to feed the poor. *Id.*

In *Lathrop v. Donahue*, 367 U.S. 820 (1961) (Douglas, J., dissenting), Justice Douglas argued that the act of "[j]oining is one method of expression." *Id.* at 882. Thus, Douglas might argue that all-male clubs make a statement that they do not wish to associate with women, and that this expression, no matter how unpopular, is worthy of protection, as is the form that the expression takes.

Finally, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (Douglas, J., dissenting

the Court affirmatively recognized that the freedom of association applies not only to the individual within the group, but to the group itself.

Since *NAACP*, the Court has recognized at least two categories of associational rights.<sup>60</sup> First, there exists a private or intimate right of association that is connected with the fundamental right of privacy.<sup>61</sup> The right of personal association is most often identified with "personal affiliations" that are necessary to "attend [to] the creation and maintenance of a family."<sup>62</sup>

It is difficult to envision a non-benevolent or non-religious organization that could successfully claim a right of intimate association. The values protected by the right of intimate association — marriage, child rearing, and physical intimacy — are rarely found and embraced beyond familial relationships. Although intimate relationships can be formed between individual members of an organization, the protection of that friendship is unlikely to extend to the protection of the organization in which

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on other grounds), Justice Douglas, in an opinion joined by Justice Marshall, reasoned that the right of association could be used to discriminate against others. *Id.* at 179-80. In essence, Justices Douglas and Marshall reasoned that under the right of association, the government could not regulate membership policies of associations which expressly excluded individuals on the basis of race, creed or color. *Id.*

59. 357 U.S. 449, 460 (1958) ("[e]ffective advocacy of . . . [speech] is undeniably enhanced by group association").

60. There may also exist a third category, the right of economic association. This right has been linked with the right to join together in labor unions and trade associations. However, in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945), the Court upheld a state law which prohibited a labor association from denying persons membership because of their race. Although the association argued that the ability to control one's economic associations was a fundamental liberty protected by due process, the Court refused to invalidate the statute, so long as the legislation was rationally promoting a legitimate goal by restricting the business association's activities. *Id.* at 93-94.

61. See *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) ("Freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights."); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (Bill of Rights was designed to preserve individual liberties and the "formation and preservation of certain kinds of highly personal relationships" should be secured from unjustified state interference); *Moore v. City of East Cleveland*, 431 U.S. 494, 504-05 (1977) (choice of relatives to live together cannot be lightly denied by the State).

62. See *Roberts*, 468 U.S. at 619. See also *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (Wisconsin statute barring divorced males paying child support from marrying without court approval was unconstitutional); *Carey v. Population Services Int'l*, 431 U.S. 678, 684-86 (1977) (regulations imposing a burden on a decision as to whether to bear children can be justified only by compelling state interests).



the friendship was formed.<sup>63</sup>

A second recognized right of association is expressive association, or, the right to associate in order to engage in activities specifically enumerated in the first amendment.<sup>64</sup> This right is implied in the first amendment's guarantees of free speech<sup>65</sup> and is protected under strict scrutiny.<sup>66</sup> The right of expressive association, therefore, cannot be curtailed unless the government regulation is narrowly tailored to promote an end not associated with first amendment rights and is no more restrictive than necessary.<sup>67</sup>

Courts have found that the need for expressive association is fundamental in a free society.<sup>68</sup> In a country as geographically and culturally diverse as the United States, the formation of associations in which to advance expression is worthy of constitu-

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63. It is unlikely that even the smallest organization can claim a right of intimate association when, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court was unwilling to apply associational rights to students living in the same household. *See also Bowers v. Hardwick*, 478 U.S. 156 (1986) (Court upheld state laws prohibiting sodomy, thus denying two unmarried adults the right to claim intimate association within their own home).

64. *See Roberts*, 468 U.S. at 622 (right to engage in first amendment activities implies the right "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends"); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977) ("The freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the first and fourteenth amendments."); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) (associational activity designed to obtain access to courts protected under first amendment); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967) (state, in exercising its interest to protect the public, cannot work a significant impairment on associational freedoms).

65. *See Roberts*, 468 U.S. at 622 (Implicit in the right to engage in first amendment activities is a right to associate with others in pursuit of those activities.).

66. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (Governmental action which has the effect of curtailing associational freedoms is subject to strict scrutiny.).

67. *See Rotary*, 481 U.S. at 549; *Roberts*, 468 U.S. at 623. *See also Buckley v. Valeo*, 424 U.S. 1, 25 (1975) (Even a state's significant interference with associational rights may be upheld as constitutional if the state can demonstrate a "sufficiently important interest and employ means closely drawn to avoid unnecessary abridgment of associational freedoms.").

68. *See Whitney v. California*, 274 U.S. 357, 372 (1929) (Brandeis, J., concurring) (Justice Brandeis warns that the founding fathers knew that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."). *See also, Roberts*, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.").

tional protection.<sup>69</sup> To limit the right of expression to the individual would not advance the purposes of the first amendment as envisioned by the Framers and would be contrary to a democratic society.<sup>70</sup>

The problem that all-male clubs have in advancing an expressive right of association, however, is that the modern Court has refused to recognize the freedoms of speech and expression as absolutes.<sup>71</sup> While some of the clubs' activities may in fact be expressive, this can be said for virtually all group activity. The first amendment was never meant to protect every expressive aspect of man's activity.<sup>72</sup> Thus, in order to prevail in a freedom of expressive association claim, the discriminating club must show more than the fact that new members, with new attitudes and viewpoints, may affect the views of the association as a whole.<sup>73</sup> An association should instead be prepared to show that its expression is actually advanced by the exclusion of certain groups. For example, an association that is formed to advance the views of misogynists or male supremacists, could argue that the exclu-

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69. See *Abood*, 431 U.S. at 233 ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.")

70. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (Justice Holmes states his "market place of ideas" theory. The first amendment prohibits governmental suppression of ideas because the validity of any idea can only be tested by airing it in the public forum.)

71. See *Roberts*, 468 U.S. at 623 (refusing to recognize the right of expressive association as absolute); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49-50 (1961) (Justice Harlan, writing for the Court, rejected the notion that the freedoms of speech and assembly were absolute. The "constitutionally protected freedom of speech . . . [is not] an unlimited license to talk.")

72. See Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654 (1984) (In this often quoted article, Professor Karst contends that the first amendment is not a "generalized presumptive guarantee of the liberty to do anything that has expressive aspects . . ." Adherence to such a doctrine would result in the "First Amendment . . . stretched to cover all constitutional freedoms.")

73. This is the kind of argument set forth by the Jaycees in Brief for Appellee at 20-21, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (No. 83-724). The Jaycees, pointing to empirical data which showed women less likely to support conservative political candidates, argued that admitting women members might have the effect of diluting their support of President Reagan; or might lead to the organization adopting stances on the ERA or abortion, subjects which it had not addressed in the past. *Id.* The Court rejected this argument holding that there was no evidence in the record to show that admitting women would put serious burdens on the male members' ability to continue to exercise their freedom of expression. *Roberts*, 468 U.S. at 627-28.

sion of women affirmatively advances its expressive position.

III. *Roberts v. United States Jaycees, Board of Directors of Rotary International v. Rotary Club of Duarte, and New York State Club Association v. City of New York*

A. *Roberts v. United States Jaycees*

*Roberts v. United States Jaycees* addressed the “conflict between a State’s efforts to eliminate gender-based discrimination against its citizens”<sup>74</sup> through the enforcement of a state public accommodations statute, and the “constitutional freedom of association asserted by members of a private organization.”<sup>75</sup> The Court rejected the Jaycees’ constitutional claims and established a framework for analyzing future claims of associational freedom.<sup>76</sup> The framework established by the Court, however, was not the most significant or far reaching aspect of the case. Before *Roberts*, many clubs, groups, and associations embraced a notion of associational rights in which “[g]overnment may not tell a man or a woman who his or her associates must be. The individual can be as selective as he desires.”<sup>77</sup> The *Roberts* Court helped to dispel this notion by rejecting the Jaycees’ constitutional claims to a right of associational freedom.<sup>78</sup> The criteria the Court established to determine when a constitutionally protected right of association may exist, however, was subjective and, at best, an easily manipulatable precedent.<sup>79</sup> The *Roberts*

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74. *Id.* at 612.

75. *Id.*

76. *Id.* at 612-29.

77. *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)). Though associational rights were never as far reaching as *Gilmore* suggests, or as private organizations embraced, the quote is illustrative of an attitude shared by many Americans and American associations.

78. *Roberts*, 468 U.S. at 628-29. Although the Court did not reject the notion of an independent right of association, the Court concluded that the Jaycees were quasi-public and could not invoke such an associational privilege. *Id.* at 621.

79. While the *Roberts* Court alluded to the parameters of the right of association as if they were clearly defined, it failed to articulate any concrete rules of law for future courts to follow. The confusion of *Roberts* is exemplified by the fact that Local Law 63, the anti-discrimination amendment to New York City’s Public Accommodations statute at issue in *New York State Club Ass’n*, fails to employ many of the criteria employed by

case arose in 1974 and 1975 when two chapters of the Minnesota Jaycees amended their national bylaws to admit women as regular members.<sup>80</sup> In December of 1978, the national organization informed the Minnesota chapters that a motion to revoke the chapters' charters was under consideration.<sup>81</sup> The two chapters responded by filing charges of sex discrimination with the Minnesota Department of Human Rights.<sup>82</sup>

The complaint alleged that the Jaycees' national all-male membership policy violated Minnesota's Human Rights Act.<sup>83</sup> The Commissioner of Human Rights investigated and found probable cause to believe that the imposition of sanctions against the two chapters by the national organization violated Minnesota's Human Rights Act and ordered an evidentiary

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the *Roberts* Court in determining the applicability of anti-discrimination statutes to private organizations. Yet the Supreme Court upheld Local Law 63's departure from the *Roberts* criteria; finding that the standards employed by Local Law 63 were "as significant in defining the nonprivate nature of these associations" as the criteria applied in *Roberts*. *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2233 (1988). The confusion over the significance of *Roberts* is best exemplified in the following journal article published shortly after the *Roberts* decision.

The inconsistencies and ambiguities in *U.S. Jaycees* may in one sense serve the Court well. The Court has kept its options open. Should it choose to do so, *U.S. Jaycees* could be extended to uphold the application of anti-discrimination statutes to organizations as diverse as the Rotary International . . . . More probably, language in the opinion will be used by courts to limit application of anti-discrimination statutes to a handful of organizations which employ the Jaycees' unusually aggressive recruitment policies . . . . The Jaycees is not primarily a social group, its membership policies are very unselective, and expressive activity is of relatively minor importance to the organization. A future case where any of those three factors is not present would be a different case with a very good likelihood of producing a different result.

Linder, *Freedom of Association after Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1900-01 (1984). The irony of Professor Linder's observations is that the clubs in *New York State Club Ass'n* possessed the three factors alluded to in his article: social setting, selectivity, and expressive activity. These factors did not produce a "different result," as Linder predicted, but the same result as *Roberts*, despite the conflicting criteria employed by the Court in each case. See *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988).

80. *Roberts*, 468 U.S. at 614.

81. *Id.*

82. *Id.*

83. MINN. STAT. ANN. § 363.03, subd. 3 (Supp. 1988), which states: "It is unfair discriminatory practice: To 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."

hearing.<sup>84</sup> A hearing before the Minnesota Human Rights Department examiner concluded that the Jaycees organization was a "place of public accommodation"<sup>85</sup> and that the exclusion of women as regular members was an "unfair discriminatory practice."<sup>86</sup> The Minnesota Supreme Court agreed with this finding and held that the Jaycees' organization was a place of public accommodation and fell within the scope of the Human Rights Act.<sup>87</sup>

The national organization responded by filing a complaint against various Minnesota officials in the United States District Court, seeking declaratory and injunctive relief to prevent enforcement of the Act.<sup>88</sup> The district court made findings consistent with the state hearings and held in favor of the state officials.<sup>89</sup>

The district court's opinion was overturned, however, by a divided Court of Appeals for the Eighth Circuit.<sup>90</sup> The court of appeals found that application of the Act to the Jaycees would be a "direct and substantial" interference with the organization's right to select its members as guaranteed by the first amendment,<sup>91</sup> and that the state's interest in eliminating discrimination was not sufficiently compelling to outweigh this interference.<sup>92</sup> The court of appeals further reasoned that Minnesota's failure to provide any criteria distinguishing "private" organizations from "public accommodations" rendered the Act

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

85. *Id.* According to Minnesota's Human Rights Law, a "place of public accommodation" is defined 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. ANN. § 363.01, subd. 18 (West Supp. 1990).

86. *Roberts*, 468 U.S. at 615-16 (citing *Minnesota v. United States Jaycees*, No. HR-79-014-GB (Minn. Office of Hearing Examiners for the Dept. of Human Rights, Oct. 9, 1979)).

87. *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981).

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

89. *McClure*, 534 F. Supp. at 774.

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

91. *Id.* at 1570.

92. *Id.* at 1571-72.

unconstitutionally vague.<sup>93</sup>

In 1984, the *Roberts* case was argued in front of the Supreme Court.<sup>94</sup> The essential conflict in that case was the same conflict the Court would confront in *Board of Directors of Rotary International v. Rotary Club of Duarte* and again in *New York State Club Association v. City of New York* — the state interest in preventing sex discrimination contrasted against the right of association.<sup>95</sup>

The seven Justices who decided this case<sup>96</sup> unanimously agreed that the state had the ability to restrict this right of association, but differed in determining what methodology to apply to the decision.<sup>97</sup> On the one hand, Justice Brennan, writing for the majority, applied a two-part balancing test and concluded that the state's interest in eliminating discrimination outweighed any rights of association claimed by the Jaycees.<sup>98</sup> On the other hand, Justice O'Connor disagreed in part with the majority's analysis, finding it both "overprotective of activities undeserving of constitutional shelter [commercial organizations] and underprotective of important First Amendment concerns [expressive organizations]."<sup>99</sup>

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93. *Id.* at 1576-78.

94. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

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

96. Justices Burger and Blackmun took no part in the decision of the case. Chief Justice Burger was chapter president of the St. Paul Jaycees in 1935 and Justice Blackmun is a former member of the Minneapolis Jaycees. *Minneapolis Star & Tribune*, July 4, 1984, at 10A, col. 4.

97. *Roberts*, 468 U.S. at 611. Justice Brennan delivered the Court's opinion with Justices White, Marshall, Powell and Stevens joining. Justice O'Connor also joined in Parts I and III of the Court's opinion and filed an opinion concurring in part as to Part II of the Court opinion. Justice Rehnquist concurred in the judgment. *Id.*

98. Justice Brennan examined the club's associational rights in two separate and distinct lines of analysis; that of private association and expressive association. *Id.* at 617-18. Justice Brennan dismissed the club's right to private association on the basis that the club had none of the intimate attachments that warranted this kind of constitutional protection. *Id.* at 620-21. While Justice Brennan acknowledged that the Jaycees' activities did involve to some degree a form of expression regarding political, economic, or civic affairs, Justice Brennan found that the State's interest in assuring equal access and opportunity for its citizens outweighed any slight interference the admission of women might have on the Jaycees' freedom of expression. *Id.* at 626-27.

99. *Id.* at 632 (O'Connor, J., concurring). The basic premise of Justice O'Connor's argument was that Justice Brennan's analysis offered unequal protection when applied on a wider scope. Commercial organizations should not enjoy any constitutional shelter, despite their expressive activity, and expressive associations should enjoy complete pro-

### 1. Justice Brennan's Opinion

Justice Brennan identified two kinds of association which can be a basis for a constitutional right to discriminate:<sup>100</sup> intimate association<sup>101</sup> and expressive association.<sup>102</sup>

Analyzing the first interest of private association, Justice Brennan recognized that the Constitution protects certain intimate relationships from "unjustified" state interference.<sup>103</sup> These intimate relationships are distinguished by such characteristics as "relative smallness, a high degree of selectivity in decision to begin and maintain an affiliation, and seclusion from others in critical aspects of the relationship."<sup>104</sup> Justice Brennan

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tection, despite competing state interests. For Justice O'Connor, the Jaycees' decision was "relatively easy." *Id.* at 638. Justice O'Connor would have decided this opinion along the grounds of whether the Jaycees were commercial or expressive. *Id.* at 638-39. Since they were engaged in the business of selling memberships, they were commercial and deserved no constitutional protection. *Id.*

100. *Id.* at 617-18. Justice Brennan also notes that these two separate associational rights may coincide, and that freedom of association in both forms could be implicated. *Id.* For example, an individual's choice of intimate acquaintances may be inextricably tied with a mutual endeavor of political expression. *Id.*

101. *Id.* at 618. This freedom of association receives its protection as a "fundamental element of personal liberty." *Id.* Justice Brennan notes further that: "[t]he Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* For a more complete analysis of the right of independent association, see *supra* notes 56-58 and accompanying text.

102. *Id.* at 622. Throughout the opinion, Justice Brennan traces a line of precedents where the Court was prepared to recognize a right of expressive association in order to engage in the constitutionally protected activities of speech, petition, and assembly. *Id.* at 622-29. Justice Brennan affirms this right of expressive association by recognizing that:

[a]ccording protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority . . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. *Id.* at 622. (*citations omitted*). For a more detailed discussion on the right of expressive association, see *supra* notes 64-73 and accompanying text.

103. *Id.* at 618. Justice Brennan acknowledges that personal association is deserving of constitutional protection because the formation of these "personal bonds" have been instrumental in forming 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." *Id.* at 618-19.

104. *Id.* at 620. Justice Brennan contrasts the most intimate of relationships with a

determined that the Jaycees had not shown the kind of intimate attachments necessary to warrant constitutional protection.<sup>105</sup> Justice Brennan states:

In short, the local chapters of the Jaycees are neither small nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship. Accordingly we conclude that the Jaycees Chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women.<sup>106</sup>

Justice Brennan next discussed the issue of expressive association and applies the balancing test discussed above.<sup>107</sup> First, Justice Brennan recognized that implied within the first amendment is a "corresponding right" to associate with others.<sup>108</sup> Although a number of the Jaycees' activities constituted a form of protected expression,<sup>109</sup> Justice Brennan found no evidence that the admission of women would in any way alter or interfere with this expression.<sup>110</sup> Therefore, the Court upheld the application of Minnesota's Human Rights Act because the state interest was legitimate and abridged no more speech or associational freedom

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large business enterprise, or any other association, lacking in the requisite characteristics. *Id.* While the characteristics Justice Brennan lists seem to be exclusively associated with familial relationships, he suggests that other, less intimate relationships may be entitled to some form of protection under the right of private association:

Between these poles, of course, lies a broad range of human relationships . . .

Determining the limits of state authority over an individual's freedom to enter into a particular association . . . entails a careful assessment of where the relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.

*Id.* See also *supra* notes 60-63 and accompanying text.

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

106. *Id.*

107. See *supra* note 98 and accompanying text.

108. *Roberts*, 468 U.S. at 622.

109. *Id.* at 626 (examples of Jaycees activities constituting protected expressive activities include: endorsement of President Reagan, regular engagement in "civic, charitable, lobbying, fundraising and other activities worthy of constitutional protection under the First Amendment."). *Id.* at 626-27.

110. *Id.* at 627. As Justice Brennan points out, conformance with Minnesota's Human Rights Act would not impose "restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id.*



than was necessary to accomplish its purpose.<sup>111</sup>

## 2. Justice O'Connor's Concurring Opinion

According to Justice O'Connor, the real issue for the Court to determine was whether the organization is primarily dedicated to activity involving first amendment expression<sup>112</sup> or whether the organization is primarily commercial and only incidentally, or minimally, partakes in first amendment expression.<sup>113</sup>

Justice O'Connor recognized that some associations cannot "readily be described as purely expressive or purely commercial," and that a standard cannot be outlined with "simple precision."<sup>114</sup> To Justice O'Connor, an association becomes commercial when its "activities are not predominantly that of the type protected by the First Amendment."<sup>115</sup> Once an organization makes the choice of leaving the marketplace of ideas for the marketplace of commerce, it is subject to rationally related state regulation and it loses its "complete control over its membership."<sup>116</sup>

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111. *Id.* at 628-29. Acts of invidious discrimination which deny the public equal access to goods, services or advantages, "cause unique evils that the government has a compelling interest to prevent . . ." *Id.* at 628.

112. *Id.* at 633 (O'Connor, J., concurring). According to Justice O'Connor, an organization which is involved exclusively in expression, "enjoys First Amendment protection of both the content of its message and the choice of its members." *Id.* Justice O'Connor suggests that in this case, the Court would examine any legislation impeding association with the same scrutiny it would examine legislation impeding speech. *Id.*

113. *Id.* at 634. Justice O'Connor states: "there is only minimal constitutional protection of the freedom of commercial associations." *Id.* (emphasis omitted).

114. *Id.* at 635. Justice O'Connor concedes a flaw in her analysis:

Clearly the standard must accept the reality that even the most expressive of associations is likely to touch, in some way or other, matters of commerce. The standard must nevertheless give substance to the ideal of complete protection for purely expressive association, even while it readily permits state regulation of commercial affairs.

*Id.* While Justice O'Connor reflects on what an appropriate standard for determining the right of expressive associations should do, she never articulates what that standard should be.

115. *Id.* According to Justice O'Connor, an association cannot endeavor to be both commercial and expressive: "An association must choose its market." *Id.* at 636.

116. *Id.* at 636. Justice O'Connor concedes that the determination of just when an association leaves the market place of ideas for the market place of commerce is "often . . . difficult." *Id.* In examining this issue, the Court should consider the "purposes of an association, and the purposes of its members in adhering to it." *Id.* The difficulty in

B. Board of Directors of Rotary International v. Rotary Club of Duarte

*Board of Directors of Rotary International v. Rotary Club of Duarte*<sup>117</sup> is most significant for its application of the analysis of *Roberts v. United States Jaycees* to a smaller, more selective organization.<sup>118</sup> One of the effects of the *Rotary* decision was to demonstrate that the Court did not intend to limit its decision in *Roberts* to a narrow scope. Some commentators believed that the *Roberts* decision, if narrowly drawn, would not apply to smaller associations with more selective criteria.<sup>119</sup> In fact, rather than narrowly drawing the *Roberts* decision, the *Rotary* Court applies every major point raised in *Roberts* in the *Rotary* opinion, and yet the two organizations are in many ways, dissimilar.<sup>120</sup>

Rotary International is a nonprofit, worldwide corporation whose membership is made up of 20,000 local Rotary Clubs in 157 countries.<sup>121</sup> Members are selected to join a local Rotary Club on the basis of their profession and the leadership role that the individuals assumed within their profession.<sup>122</sup> The aim of the membership criteria is to ensure that within each Rotary Club there are two representatives of "every worthy and recognized business, professional, or institutional activity in the com-

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making this kind of determination is further exacerbated when Justice O'Connor points out that while "[l]awyeering to advance social goals may be speech," the practice of law is not. *Id.* Justice O'Connor concedes the lines between expression and commercialization can be "fluid and uncertain." *Id.* at 637.

117. 481 U.S. 537 (1987).

118. Unlike the Jaycees in *Roberts*, whose members totaled over 250,000 nationwide, the size of a local Rotary Club can vary from 10 to more than 900 members. *Rotary*, 481 U.S. at 546. In addition, the members of a Rotary Club belong to individual local clubs and are not themselves members of the international organization. *Id.* at 539. The Jaycees, in comparison, are members not only of their individual chapters but also members of the state and national chapters. *Roberts*, 468 U.S. at 613-14.

119. See, e.g., Linder, *supra* note 79, at 1878. The principal purpose of Linder's article was to examine the implications of *Roberts* to other associations with restrictive membership policies. *Id.* at 1878. While recognizing that *Roberts* could have enormous long-term implications, Linder surmised that "[m]ore probably, language in the opinion will be used to limit application of anti-discrimination statutes to a handful, of organizations which employ the Jaycees' unusually aggressive recruitment policies." *Id.* at 1901. For a discussion of the *Roberts* opinion, see *supra* notes 74-116 and accompanying text.

120. See *supra* note 118 and accompanying text.

121. *Rotary*, 481 U.S. at 540.

122. *Id.*

munity."<sup>123</sup> According to the International Rotary Club Constitution, membership is open only to men.<sup>124</sup>

In 1977, the Rotary Club of Duarte, California decided to admit three women to active membership.<sup>125</sup> Rotary International responded by revoking the local club's charter.<sup>126</sup> Rotary Club of Duarte and its three women members filed a complaint in the Superior Court of California alleging that Rotary International's actions were a violation of the Unruh Civil Rights Act,<sup>127</sup> which provides in pertinent part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."<sup>128</sup>

The superior court, in an unpublished opinion, held that neither Rotary International nor Rotary Club was a business establishment under the Act<sup>129</sup> and that any business benefits derived from the club's membership are incidental to the club's principal purpose.<sup>130</sup> The California Court of Appeals reversed the superior court's finding,<sup>131</sup> holding that for the purposes of the Unruh Act, both Rotary International and the local chapter

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123. *Id.* However, there is no limit to the number of clergymen, journalists or diplomats who can be admitted into membership. *Id.* (citing Rotary Manual of Procedure 31, 33 (1981)).

124. *Rotary*, 481 U.S. at 541 (citing Standard Rotary Club Constitution, art. V, § 2). Although women are not permitted to become members, they are invited to attend meetings, give speeches and receive awards. *Id.*

125. *Id.* at 541. The local Rotary Club had the freedom to make this decision because "each local Rotary Club is free to adopt its own rules and procedures for admitting new members." *Id.* at 540 (citing Rotary Manual of Procedure 7 (1981)).

126. *Rotary*, 481 U.S. at 541. The charter was revoked after an internal hearing between the International Club's Bd. of Directors and Rotary Club of Duarte. *Id.*

127. *Id.*

128. CAL. CIV. CODE § 51 (West 1982).

129. *See Rotary*, 481 U.S. at 542 (citing Appendix to Jurisdictional Statement at B-3, Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (No. 86-421)).

130. *Id.* The purported purpose of the club is to "provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." *Rotary*, 481 U.S. at 539 (quoting Rotary Manual of Procedure 7 (1981)).

131. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986), *aff'd*, 481 U.S. 537 (1987).

were business establishments<sup>132</sup> and membership is an “advantage” or “privilege” that was being denied individuals on the basis of sex.<sup>133</sup> The court held further that application of the Unruh Act did not violate the first amendment associational rights of its male members.<sup>134</sup>

In a 7-0 decision, the United States Supreme Court affirmed the California Court of Appeals.<sup>135</sup> In a two-part analysis, similar to that found in *Roberts*,<sup>136</sup> Justice Powell upheld the California statute and ordered reinstatement of the local Rotary Club’s charter.<sup>137</sup>

The first part of the Court’s analysis entailed recognition of the freedom to enter into and carry on intimate association under the first amendment.<sup>138</sup> Using *Roberts* as a framework, the Court held that the relationship among the Rotary Club members was not the kind of intimate nature that the first amend-

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132. *Id.* at 1055, 224 Cal. Rptr. at 226. Citing the testimony of the Rotary Club of Duarte, the court held that there is “no doubt that business concerns are a motivating factor in joining local clubs.” *Id.* at 1057, 224 Cal. Rptr. at 226. As business establishments, both the International Rotary and the Rotary Club of Duarte were prohibited from arbitrarily discriminating. CAL. CIV. CODE § 51 (West 1982).

133. *Rotary* at 1059, 225 Cal. Rptr. at 277. Under the Unruh Act, all persons are entitled to full and equal access to “advantages” and “privileges.” CAL. CIV. CODE § 51 (West 1982). After examining Rotary literature and listening to testimony, the court of appeals found Rotary membership to be an advantage or privilege because of the “business benefits enjoyed upon by Rotarians and their businesses or employers.” *Rotary* at 1057, 225 Cal. Rptr. at 226.

134. *Id.* at 1062-65, 224 Cal. Rptr. at 229-31. The court found that Rotary was not entitled to any rights under private association. *Id.* at 1064, 224 Cal. Rptr. at 230. While the court noted that the membership criteria is highly selective, the fact that the ultimate purpose of the membership is to increase membership, and the fact that local Rotary clubs are required to admit any visiting Rotarians, negates any concept of an intimate relationship. *Id.* The court also found that Rotary was not entitled to constitutional protection under the freedom of expressive association. *Id.* at 1064, 224 Cal. Rptr. at 230. Stating that the right of expressive association is not absolute, the court held that an infringement on Rotary’s right is justified due to the compelling State interest in abolishing sex discrimination in business establishments. *Id.* at 1065, 224 Cal. Rptr. at 231.

135. *Board of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). Justice O’Connor and Justice Blackmun did not participate in this case. *Id.* at 538.

136. *Rotary*, 481 U.S. at 544-45. For a discussion on the two-part analysis employed by the *Roberts* Court, see *supra* note 98 and accompanying text.

137. *Rotary*, 481 U.S. 537 (1987).

138. *Id.* at 545-47. For more on the right of intimate association, see *supra* notes 61-63 and accompanying text.

ment was designed to protect.<sup>139</sup> First, while the club maintains a selective membership policy, it also encourages expansion of its membership.<sup>140</sup> Further, the club's central activities are conducted in the presence of strangers<sup>141</sup> and members are encouraged to invite business associates to its meetings.<sup>142</sup>

The second part of the Court's analysis dealt with the right of expression.<sup>143</sup> As Justice Powell pointed out, the admission of women would not require the Rotary Clubs to abandon their activities, but may even aid them, since the clubs would have a broader capacity for service and a more representative cross section of the community.<sup>144</sup> Justice Powell went on to invoke *Roberts'* balancing test,<sup>145</sup> stating that even if the implementation of the Unruh Act works some "slight infringement on Rotary Member's right of expressive association,"<sup>146</sup> California's interest in eliminating discrimination against women justifies this infringement.<sup>147</sup>

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139. *Rotary*, 481 U.S. at 546. In making this determination the Court applied the same factors as that of *Roberts*: "size, purpose, selectivity, and whether others are excluded from the critical aspects of the relationship." *Id.* See also, *Roberts*, 468 U.S. at 620.

140. *Rotary*, 481 U.S. at 546. Justice Powell points out that local chapters are instructed to "keep a flow of prospects coming" to . . . gradually enlarge membership." *Id.* (quoting 1 Rotary Basic Library, Focus on Rotary 60-61). In addition, each club is instructed to not set arbitrary limits on the number of members it admits and to "establish and maintain a membership growth pattern." *Rotary*, 481 U.S. at 547 (citing Rotary Manual of Procedure 139 (1981)).

141. *Rotary*, 481 U.S. at 547. While club meetings are not open to the general public, any Rotary member from another club may attend another club's meetings. *Id.* In addition, the club seeks out coverage of its activities from the local papers. *Id.*

142. *Id.* at 547. "In sum, Rotary Clubs, rather than carrying on their activities in an atmosphere of privacy, seek to keep their 'windows and doors open to the whole world.'" *Id.*

143. *Id.* at 548. For more on the right of expression see *supra* notes 64-73 and accompanying text.

144. *Rotary*, 481 U.S. at 548. While the clubs engage in a number of service activities, protected under the first amendment, it is the Rotary Clubs' policy not to take positions. *Id.* (citing Rotary Manual of Procedure 115 (1981)). Justice Powell appears to suggest that since the activity in which the club engages is not directly linked with Rotary's all-male membership policy, the admission of women would not work any substantial hardship on the exercise of their first amendment rights.

145. *Rotary*, 481 U.S. at 549. See *supra* note 98 and accompanying text for a more detailed discussion on the balancing test adopted in *Roberts*.

146. *Id.*

147. *Id.* The Court elevates public accommodations laws to "compelling state interests of the highest order." *Id.* (quoting *Roberts*, 468 U.S. at 624).

### C. New York Club Association v. City of New York

*New York State Club Association v. City of New York* is the most recent attempt by the Supreme Court to address the conflict between state and local enforcement of anti-discrimination public accommodations statutes and the associational rights of private organizations to select their own members. Although addressing the same issues as *Roberts v. United States Jaycees* and *Board of Directors of Rotary International v. Rotary Club of Duarte*, *New York State Club Association* concerned application of Local Law 63 to organizations with far more selective membership criteria than the Jaycees or Rotary Club.<sup>148</sup> Moreover, the New York City Public Accommodations Act, scrutinized in *New York State Club Association*, employed a rigid three-part standard to determine whether or not a club was distinctly private.<sup>149</sup> These criteria were in marked contrast to the fluid criteria endorsed by the Court in *Roberts* and *Rotary*.<sup>150</sup> The Court in *Roberts* and *Rotary* rested a large part of their opinion on the fact that both the Jaycees and the Rotary Club employed unselective membership criteria.<sup>151</sup> In comparison, the clubs at issue in *New York State Club Association* are considered to be exclusive and exercise rigid standards as to whom

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148. Brief for Appellant at 22, *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988) (No. 86-1836) [hereinafter Brief for Appellant]. The brief argues that the selective membership criteria employed by the member clubs of NYSCA distinguish it from groups like the Jaycees and Rotary Club:

A club in which membership is determined by subjective, rather than objective, criteria is one which was aimed to assure congeniality by purposefully including persons of similar styles and tastes. In such a club, members are not fungible; indeed, the loss or addition of even one can indelibly change the association's character.

*Id.*

149. NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986). For a description of the three-part criteria employed by Local Law 63, see *supra* notes 44-47 and accompanying text.

150. In both *Roberts* and *Rotary*, the analysis focused on: the club's objective characteristics and purpose, size, membership criteria, and the degree to which outsiders were excluded from membership activity. *Rotary*, 481 U.S. at 546; *Roberts*, 468 U.S. at 620.

151. In *Roberts*, the Court noted that "new members are routinely recruited and admitted [into the Jaycees] with no inquiry into their backgrounds." *Roberts*, 468 U.S. at 621. In *Rotary*, the Court noted that the Rotary Clubs are "instructed to 'keep a flow of prospects coming' . . . and . . . 'to produce an inclusive, not exclusive, membership.'" *Rotary*, 481 U.S. at 546 (quoting 2 Rotary Basic Library, Club Service 9-11 (1981, App. 88)).

they accept into membership.

### 1. *Procedural History*

#### a. *The Parties*

Appellant, New York State Club Association (hereinafter NYSCA), is an incorporated association representing 125 of New York State's private clubs and associations — a substantial number of which are located in New York City.<sup>152</sup> Appellees are the City of New York, the Mayor of the City of New York, the City Human Rights Commission (the enforcement agency for New York City's public accommodations law), and the members of the City Human Rights Commission.<sup>153</sup>

#### b. *Supreme Court of New York, New York County*

The day after the enactment of Local Law 63, NYSCA filed a complaint with the Supreme Court of New York, New York County, seeking a declaratory judgment that Local Law 63 was unconstitutional.<sup>154</sup> NYSCA also moved for a preliminary injunction to enjoin appellees from enforcing the law pending a decision by the court as to the constitutionality of the law.<sup>155</sup>

NYSCA challenged Local Law 63 on three grounds: 1) that the statute unconstitutionally infringes upon the individual member's right of free association; 2) that the statute is in conflict with state law; and 3) that the statute is overbroad and unconstitutionally vague.<sup>156</sup> After cross motions for summary judgment, Judge Greenfield upheld Local Law 63 and denied NYSCA's motion for a preliminary injunction stating that NYSCA had failed to demonstrate "a likelihood of success on

152. *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2231 (1988). The principal purpose of NYSCA is to promote its members' common interests by providing a structured forum in which to enhance communication and dissemination of information among its memberships. NYSCA represents only the clubs, not the clubs' members. See Brief for Appellant, *supra* note 148, at 4.

153. See Brief for Appellant, *supra* note 148, at 5.

154. See Brief for Appellee, *supra* note 30, at 16.

155. *New York State Club Ass'n*, 108 S. Ct. at 2231.

156. *New York State Club Ass'n v. City of New York*, No. 25028/84 (N.Y. Sup. Ct. Nov. 8, 1984), *aff'd*, 118 A.D.2d 392, 505 N.Y.S.2d 152 (1st Dep't 1986), *aff'd*, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987), *aff'd*, 108 S. Ct. 2225 (1988).

the merits."<sup>157</sup>

Judge Greenfield began his decision by pointing out that both the federal government<sup>158</sup> and New York State<sup>159</sup> have already "entered the field" by enacting statutes to eliminate discrimination in public accommodations.<sup>160</sup> Such statutes are in fact a constitutionally valid exercise of police power.<sup>161</sup> The individual interest in freedom of association is superseded by the more compelling governmental interest in preventing discrimination against individuals.<sup>162</sup>

Judge Greenfield held further, that the State Human Right's Law<sup>163</sup> did not "purport to pre-empt the field, [thereby] leaving . . . cities . . . the right to create their own commission on human relations."<sup>164</sup> Local Law 63 is not in conflict with the state law but in fact, through its three-part test, supplements the law by giving meaning to the term "distinctly private."<sup>165</sup>

Judge Greenfield dismissed NYSCA's overbreadth arguments by stating "there . . . [is no] merit to the contention that the statute is overbroad."<sup>166</sup> In addressing NYSCA's vagueness argument, Judge Greenfield pointed out that the Local Law 63 is actually less vague than New York's State statute and by implication passes "constitutional muster."<sup>167</sup>

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157. *Id.* at 9.

158. 42 U.S.C. § 2000-A(e) (1982).

159. N.Y. EXEC. LAW § 290-301 (McKinney 1983). Judge Greenfield explains in his opinion that the law attempts to minimize any potential conflict with the right of association by exempting "distinctly private clubs." Because the Law does not include a definition of what is "distinctly private," the term becomes a question of fact to be settled on a case by case basis. *New York State Club Ass'n*, No. 25028/84, slip op. at 4.

160. *New York State Club Ass'n v. City of New York*, No. 25028/84, slip op. at 2 (N.Y. Sup. Ct. Nov. 8, 1984).

161. *Id.* at 3. Judge Greenfield describes the right of association as a "lesser right" in light of the State's overriding interest in eliminating invidious discrimination. *Id.*

162. *Id.*

163. N.Y. EXEC. LAW § 292(9) (McKinney 1983).

164. *New York State Club Ass'n*, No. 25028/84 slip op. at 4.

165. *Id.* at 5. See also *supra* note 12 for the relevant text of Local Law 63.

166. *New York State Club Ass'n*, No. 25028/84 slip op. at 7.

167. *Id.*



c. *New York Supreme Court, Appellate Division*

On direct appeal, the case went to the Appellate Division of the Supreme Court.<sup>168</sup> The court affirmed the lower court decision, with one judge dissenting on the basis that Local Law 63's exemption of religious and benevolent orders violates the equal protection clause.<sup>169</sup> The majority opinion gives only a brief affirmation of the lower court's decision and devotes most of its energies countering the reasoning of Justice Kupferman, the lone dissenter.

In his dissent, Justice Kupferman argued that Local Law 63, in its effort to eradicate discrimination, is itself discriminatory by denying equal protection to persons similarly situated.<sup>170</sup> By shielding benevolent and religious organizations from the reach of Local Law 63, the legislature has favored a similarly situated class and thus, the due process and equal protection clauses of both the New York State Constitution<sup>171</sup> and the United States Constitution<sup>172</sup> have been violated.<sup>173</sup>

The majority countered Justice Kupferman's argument by noting that it is statutorily recognized<sup>174</sup> that benevolent and religious orders are founded primarily for the protection of their members.<sup>175</sup> They are, by their very nature, not public.<sup>176</sup> The court reasoned further that such distinctions between ordinary associations and benevolent and religious orders are not constitutionally suspect.<sup>177</sup> "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."<sup>178</sup>

168. *New York State Club Ass'n v. City of New York*, 118 A.D.2d 392, 505 N.Y.S.2d 152 (1st Dep't 1986), *aff'd*, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987), *aff'd*, 108 S. Ct. 2225 (1988).

169. *Id.* at 393, 505 N.Y.S.2d at 153.

170. *Id.* at 396, 505 N.Y.S.2d at 155.

171. N.Y. CONST. art. I, § 11 which states in relevant part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall . . . be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution . . . ."

172. U.S. CONST. amend. XIV.

173. *New York State Club Ass'n*, 118 A.D.2d at 397, 505 N.Y.S.2d at 152.

174. N.Y. INS. LAW § 4501(a) (McKinney 1983).

175. *New York State Club Ass'n*, 118 A.D.2d at 393-94, 505 N.Y.S.2d at 154.

176. *Id.*

177. *Id.* at 394, 505 N.Y.S.2d at 153.

178. *Id.* (quoting *Tigner v. Texas*, 310 U.S. 141 (1940)).

d. *Court of Appeals of New York*

In an opinion by Chief Justice Wachtler, the New York State Court of Appeals affirmed the lower courts' decisions in favor of the appellees.<sup>179</sup> The initial issue addressed by the Court of Appeals was whether Local Law 63 is inconsistent with New York State's public accommodations law.<sup>180</sup> If the two laws are not compatible, the passage of Local Law 63 is an invalid exercise of New York City's police power and a violation of the "home rule" provision<sup>181</sup> of the New York State Constitution.<sup>182</sup>

Under the "home rule" provision, local governments are given broad police power relating to the welfare of their citizens.<sup>183</sup> However, this broad grant of authority to local governments has two exceptions.<sup>184</sup> First, the city can not pass a law pursuant to its police power that is explicitly or implicitly inconsistent with state constitutional or general law.<sup>185</sup> Second, the local government cannot exercise its police power in an area where the state legislature has explicitly or implicitly preempted the area of regulation.<sup>186</sup>

179. *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987).

180. N.Y. EXEC. LAW § 290 (McKinney 1983). This law is New York's public accommodations statute. Similar to its New York City counterpart, the New York State law makes it an unlawful discriminatory practice for any person in a place of public accommodation to deny another on the basis of sex "any of the accommodations, advantages, facilities, or privileges thereof." *Id.* at § 296(2)(a). In the tradition of virtually every public accommodations statute that has come before or after it, the statute also excludes from its definition of public accommodation any "institution, club, or place of accommodation which is in its nature distinctly private." *Id.* at § 292(9); *see also New York State Club Ass'n*, 69 N.Y.2d at 218, 505 N.E.2d at 918, 513 N.Y.S.2d at 352.

181. N.Y. CONST. art. IX, § 2(c) (McKinney 1983) which provides in pertinent part: In addition to powers granted in the statute of local governments or in any other law . . . (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government:

. . . .  
(10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.

182. *New York State Club Ass'n*, 69 N.Y.2d at 216, 505 N.E.2d at 917, 513 N.Y.S.2d at 351.

183. *Id.* at 217, 505 N.E.2d at 917, 513 N.Y.S.2d at 351.

184. *Id.*

185. *Id.*

186. *Id.*

In determining whether New York City had in fact violated "home rule," Justice Wachtler put particular emphasis on the state legislature's failure to define the term "distinctly private" in its exclusion of private clubs from the ambit of the public accommodations statute.<sup>187</sup> Justice Wachtler concluded that this omission by the state legislature implies an intention to allow local government to adopt its own definition of what is distinctly private, so long as the definition is not inconsistent with the broad meaning of the term in the state statute.<sup>188</sup>

NYSCA argued that the rigid criteria outlined in the three-part test of Local Law 63<sup>189</sup> conflicts with the more flexible criteria applied to the state statute in *United States Power Squadrons v. State Human Rights Appeal Board*.<sup>190</sup> In *Power Squadrons*, the New York Court of Appeals set forth a flexible test detailing five factors which may be considered in determining whether a club is "distinctly private."<sup>191</sup> These five factors include whether the club (1) Has permanent machinery established to carefully screen applicants . . . ; (2) limits the use of the facilities and the services of the organization to members and bona fide guests of members; (3) is controlled by the membership; (4) is nonprofit and operated solely for the benefit and pleasure of its members; and (5) directs its publicity exclusively and only to members for their information and guidance.

The crucial factor behind the *Power Squadrons* decision was whether the association practiced selectivity in its membership.<sup>192</sup> In contrast, local Law 63 significantly departs from this emphasis and does not include selective membership as a factor

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187. *Id.* at 218-19, 505 N.E.2d at 917-18, 513 N.Y.S.2d at 351-52.

188. *Id.* at 219, 505 N.E.2d at 918, 513 N.Y.S.2d at 352-53. New York State's Public Accommodations statute defines public accommodations as "any institution, club or place of accommodation which is in its nature distinctly private." N.Y. EXEC. LAW § 290 (McKinney 1983).

189. See *supra* note 12 and accompanying text.

190. 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871, *appeal dismissed*, 60 N.Y.2d 682, 455 N.E.2d 666, 468 N.Y.S.2d 107 (1983). *Power Squadrons* involved the all-male membership policy of a nonprofit corporation whose purposes included promotion of safety and skill in boating. *Id.* at 407, 452 N.E.2d at 1201, 513 N.Y.S.2d at 350.

191. *Power Squadrons*, 59 N.Y.2d at 412-13, 452 N.E.2d at 1215, 465 N.Y.S.2d at 880.

192. *New York State Club Ass'n*, 69 N.Y.2d at 221, 505 N.E.2d at 917, 513 N.Y.S.2d at 351. See also, *Power Squadrons*, 59 N.Y.2d at 412, 452 N.E.2d at 1215, 465 N.Y.S.2d at 879.

to be considered.<sup>193</sup> Nevertheless, Justice Wachtler determined that Local Law 63's three-part test was consistent with the meaning of New York's Human Rights Law as interpreted in *Power Squadrons*.<sup>194</sup> The three part test is not exclusive and nothing in Local Law 63 prohibits the consideration of membership selectivity or any of the other criteria outlined in *Power Squadrons*.<sup>195</sup>

The court then addressed the issue of whether "Local Law 63 violates . . . [NYSCA] members' right to privacy, free speech and association under the Federal Constitution."<sup>196</sup> Addressing first the right of intimate association,<sup>197</sup> the court followed the precedent established under *Roberts v. United States Jaycees*.<sup>198</sup> The court reasoned that both the criteria outlined in *Power Squadrons*, and the objectives of Local Law 63's three-part test, adequately assess the objective characteristics outlined in *Roberts* for determining whether an organization's activities are entitled to the protected freedom of intimate association.<sup>199</sup> Applying a balancing test, similar to that in *Roberts*,<sup>200</sup> the court of appeals determined that the application of Local Law 63 would not violate the rights of expressive association afforded to the members of NYSCA's clubs.<sup>201</sup> First, any incidental infringement of the members' first amendment rights is justified since the city has a greater, more compelling interest, in ensuring equal access to "advantages" and "privileges" for all people.<sup>202</sup>

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193. *New York State Club Ass'n*, 69 N.Y.2d at 221, 505 N.E.2d at 917, 513 N.Y.S.2d at 351. See also, *Power Squadrons*, 59 N.Y.2d at 412, 452 N.E.2d at 1215, 465 N.Y.S.2d at 879.

194. *Id.*

195. *Id.* For a listing of the five factors listed in *Power Squadrons*, see *supra* note 191 and accompanying text.

196. *Id.*

197. See *supra* notes 61-63 and accompanying text.

198. 468 U.S. 609 (1984). See *supra* notes 103-06 and accompanying text.

199. *New York State Club Ass'n*, 69 N.Y.2d at 222, 505 N.E.2d at 920, 513 N.Y.S.2d at 355. The Court in *Roberts* stated that criteria such as "size, purpose, policies, selectivity, [and] congeniality" are relevant considerations in determining whether an association is private. 468 U.S. at 620. See also *supra* notes 61-63 and accompanying text for more on private association.

200. *Roberts*, 468 U.S. at 626-29; see *supra* note 98 and accompanying text.

201. *New York State Club Ass'n*, 69 N.Y.2d at 223, 505 N.E.2d at 921, 513 N.Y.S.2d at 355.

202. *Id.*

Second, Local Law 63 is designed to achieve its ends through the least restrictive means and interferes with the policies and activities of NYSCA's members only to the extent necessary to prevent invidious discrimination.<sup>203</sup> In fact, the court found that NYSCA has failed to show that any of its members' free speech rights would actually be abridged or chilled by the admission of women.<sup>204</sup> Finally, the court reminded NYSCA and its members that, although they may have a right to engage in first amendment activity, they do not have a corresponding right to practice invidious discrimination against women.<sup>205</sup>

## 2. *The Supreme Court of the United States*

### a. *Majority Opinion*

In a unanimous decision, the United States Supreme Court affirmed the decision of the New York Court of Appeals.<sup>206</sup> Justice White, writing for the majority,<sup>207</sup> held that: first, NYSCA had standing to challenge Local Law 63;<sup>208</sup> second, Local Law 63 does not infringe upon NYSCA's individual member's rights of private or expressive association;<sup>209</sup> third, Local Law 63 is not overbroad;<sup>210</sup> and finally, Local Law 63's exemption of benevolent and religious corporations does not violate the equal protection clause of the fourteenth amendment.<sup>211</sup>

The Court began its opinion by addressing the issue of whether NYSCA had standing to sue on behalf of individual club members who are not technically members of NYSCA.<sup>212</sup> Appellees argued that NYSCA lacked standing because it was an

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203. *Id.*

204. *Id.*

205. *Id.* at 224, 505 N.E.2d at 921, 513 N.Y.S.2d at 356.

206. *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988).

207. *Id.* at 2229. Justice O'Connor, joined by Justice Kennedy, filed a separate concurring opinion. Justice Scalia also filed a separate opinion concurring in part and concurring in the judgment.

208. *Id.* at 2232.

209. *Id.* at 2234.

210. *Id.* at 2234-35.

211. *Id.* at 2235-37.

212. *Id.* at 2231. See *supra* note 152 and accompanying text for a description of NYSCA and its membership. NYSCA represents only the clubs themselves and not the individuals who make up the club's membership.

association made up of clubs, and not an association made up of the individuals whose first amendment rights were being asserted.<sup>213</sup> "In other words, [NYSCA] . . . is twice removed from any individual and is attempting to assert the constitutional rights of these individuals, that are not themselves members of [NYSCA]."<sup>214</sup> The Court, citing *Hunt v. Washington Apple Advertising Commission*,<sup>215</sup> held that an association has standing to sue on behalf of its members when those members would have had standing to bring the same suit.<sup>216</sup> Justice White determined that NYSCA had standing in this case because the individual clubs that make up NYSCA would have had standing to bring this same suit on behalf of their members.<sup>217</sup>

The opinion went on to respond to NYSCA's argument that Local Law 63 is facially unconstitutional.<sup>218</sup> Justice White began

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213. *New York State Club Ass'n*, 108 S. Ct. at 2232. See also, Brief for Appellee, *supra* note 30, at 20.

214. See Brief for Appellee, *supra* note 30, at 20.

215. 432 U.S. 333 (1977). The Court upheld the standing of what was technically a state agency but actually a trade association to sue on behalf of its member apple growers to challenge the constitutionality of another state's law affecting the apple growers. *Id.* In *Hunt*, the Court outlined a three-part test to determine when an association has standing to sue on behalf of its members: When (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* at 343.

Appellees tried to argue that NYSCA had not satisfied part (a) of the test. Appellees interpreted part (a) to require that the clubs which make up NYSCA must have standing to sue on behalf of themselves, irrespective of standing to sue on behalf of their members. *New York State Club Ass'n*, 108 S. Ct. at 2232.

216. *New York State Club Ass'n*, 108 S. Ct. at 2233. The Court noted that the first part of the *Hunt* test was a means to weed out plaintiffs, who otherwise would not have standing to bring suit, from manufacturing standing by posing as a representative. *Id.*

217. *Id.* at 2232. The Court noted further that NYSCA's member clubs also have standing to bring suit against appellees on behalf of their individual members since the individual members "are suffering immediate or threatened injury" to their associational rights. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

218. *New York State Club Ass'n*, 108 S. Ct. 2233. NYSCA could have waited until the City of New York had, under Local Law 63, issued a cease-and-desist order against one of its club members for its discriminatory practices. At this point, the club, or NYSCA as its representative, could have sought judicial review of the order. *Id.* Instead, NYSCA chose to institute this action upon immediate passage of Local Law 63, claiming the Law was facially unconstitutional. *Id.* This type of strategy, however, places a heavy burden on the challenger, who must show that either every application of the statute is unconstitutional, or that the statute is a threat to the exercise of first amendment activity—that its mere presence "on the books" has a serious chilling effect. *Id.*

his analysis by explaining that when confronted with a facial challenge, NYSCA has the burden to demonstrate<sup>219</sup> that either, the statute “‘could never be applied in a valid manner’ or even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it ‘may inhibit the constitutionally protected speech of third parties.’”<sup>220</sup>

The Court determined that NYSCA was unable to prevail on either of these challenges.<sup>221</sup> NYSCA conceded during oral arguments that Local Law 63 could be constitutionally applied to some clubs.<sup>222</sup> This concession by plaintiff’s counsel virtually ended any possibility of a successful facial attack on the grounds that it “‘could never be applied in a valid manner.’”<sup>223</sup>

Justice White then considered whether Local Law 63 affects in “any significant way” an individual’s right of intimate association.<sup>224</sup> By conducting what could be coined a “side by side” analysis, the Court determined that the criteria used in Local Law 63’s three-part test<sup>225</sup> was “at least as significant in defining the non-private nature of these associations” as the criteria the Court applied in *Roberts and Rotary*.<sup>226</sup>

219. This kind of facial challenge will not succeed unless plaintiff can show that “every application of the statute created an impermissible risk of suppression of ideas.” *Id.* at 2233 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984)).

220. *New York State Club Ass’n*, 108 S. Ct. at 2233 (quoting *Vincent*, 466 U.S. at 798). This second type of facial challenge, called the “overbreadth doctrine,” springs from the recognition by the courts that first amendment expression is as likely to be inhibited by the threatened use of power as the actual use of power. *Id.* This type of challenge will not succeed unless the court finds the statute to be substantially overbroad. *Id.* (citing *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)).

221. *New York State Club Ass’n*, 108 S. Ct. at 2233-34.

222. *Id.* at 2233. Alan Mansfield, a partner at Philips, Nizer, Benjamin, Krim & Ballon represented NYSCA. N.Y.L.J., Feb. 24, 1988, at 1, col. 1. Mr. Mansfield underwent repeated questioning by Justices White, Scalia and Kennedy about whether Local Law 63 could ever be applied constitutionally. *Id.* at 3, col. 1. “Only after Justice Kennedy followed up on Justice White’s question whether there might be a case where the statute could be applied without offending the constitution, did Mr. Mansfield yield ground and recognize that such a class of cases was ‘conceivable.’” *Id.* at 3, col. 2.

223. *New York State Club Ass’n*, 108 S. Ct. at 2233. See *supra* note 219 and accompanying text.

224. *Id.* at 2234. For a detailed discussion on the right of intimate association, see *supra* notes 61-63 and accompanying text.

225. See *supra* note 12 and accompanying text.

226. *New York State Club Ass’n*, 108 S. Ct. at 2233. Justice White also stated that the fact that intimate association may occur in this setting does not mean that the setting itself is entitled to constitutional protection. *Id.* at 2234. See *supra* notes 104 and

For example, the Court did not find Local Law 63's 400 member requirement<sup>227</sup> to be unreasonable.<sup>228</sup> Four hundred is roughly consistent with the size of the Jaycees organization in *Roberts*. The Court determined in *Roberts* that the size of a group is a significant factor in determining whether that group can claim a legitimate right of intimate association.<sup>229</sup> In fact, Local Law 63's 400 member requirement is less of a restriction on the right of intimate association than *Board of Directors of Rotary International v. Rotary Club of Duarte*. In *Rotary*, the Court found that an association of approximately twenty people was not private enough to warrant the protection of the right of intimate association.<sup>230</sup>

Similarly, the Court drew a parallel between the statute's requirements of "regular meal service"<sup>231</sup> and the regular receipt of payments "directly or indirectly from or on behalf of non-members,"<sup>232</sup> with the Court's emphasis in *Roberts* and *Rotary* of the fact that strangers regularly participated at the Jaycees and Rotary Club meetings.<sup>233</sup> Justice White explained that both sets of criteria, while seemingly quite different, are aimed at the same goal — to determine the non-private nature of these associations.<sup>234</sup>

The Court drew similar conclusions when determining whether Local Law 63 significantly infringes upon an individual's right of expressive association.<sup>235</sup> Justice White recognized

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139 and accompanying text for a discussion of the criteria the Court applied in *Roberts* and *Rotary*.

227. See *supra* note 12 and accompanying text.

228. *New York State Club Ass'n*, 108 S. Ct. at 2233. For a discussion concerning the New York City Council's motivation in choosing the number "four hundred" for their membership criteria, see *supra* note 45.

229. *Id.* at 620.

230. *Id.* at 546-47. Of course, the *Rotary* Court took more into account than the size of the clubs at issue. Other factors considered included "purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Id.* at 546 (citing *Roberts*, 468 U.S. at 620).

231. See *supra* note 12 and accompanying text.

232. *Id.* See also *supra* notes 45-47 and accompanying text for a discussion as to why the New York City Council adopted this criteria for Local Law 63.

233. *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2233 (1988).

234. *Id.*

235. *Id.* at 2234. For a detailed discussion on the right of expressive association, see *supra* notes 64-73 and accompanying text.



that expression is enhanced by group association and that there is a “‘close nexus between the freedoms of speech and assembly.’”<sup>236</sup> Justice White concluded, however, that the “selective process or inclusion and exclusion is [not protected in every setting] by the Constitution.”<sup>237</sup> Furthermore, the Court’s opinion concluded that Local Law 63 does not prevent individuals from forming associations for the expression of certain viewpoints.<sup>238</sup> A club formed for the purpose of expressing one point of view may certainly deny membership to an individual expressing a contrary point of view.<sup>239</sup> “Instead, the law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of . . . more legitimate criteria for determining membership.”<sup>240</sup>

Having thoroughly concluded that the first type of facial attack is without merit, the Court turned to the second theory on which a facial attack may be brought, the overbreadth doctrine.<sup>241</sup> The Court determined that NYSCA must fail on this second part of its facial attack.<sup>242</sup> The Court points out that at no time during oral or written testimony did NYSCA inform the Court of the specific characteristics of *any* of its member-clubs, let alone the characteristics of those clubs that stand to suffer

236. *New York State Club Ass’n*, 108 S. Ct. at 2234 (quoting *NAACP v. Alabama ex rel. Patterson*, 347 U.S. 449, 460 (1958)).

237. *New York State Club Ass’n*, 108 S. Ct. at 2234. Just as the freedom of speech is not absolute, neither is the freedom of expressive association. *See supra* notes 71-73 and accompanying text.

238. *New York State Club Ass’n*, 108 S. Ct. at 2234.

239. *Id.* For example, a club which affirmatively expresses a conservative point of view may deny membership to liberals on the basis of their contrary values. But the same club cannot dismiss women per se on the assertion that they tend to be more liberal. *See supra* note 73 and accompanying text.

240. *New York State Club Ass’n*, 108 S. Ct. at 2234. The Court suggests that if the clubs at issue had an affirmative expressive purpose — to promote one gender over another, for example — then the summary dismissal of women on the basis of gender might be a legitimate membership criteria. The Court however, seems to adopt the opinion of the New York City Council and appellees, that the purpose of these clubs is to develop business contacts, (*see supra* notes 49-53 and accompanying text), and the dismissal of women on the basis of their sex is not a legitimate membership criteria to further the clubs’ purpose. *Id.*

241. *Id.* *See supra* note 220 and accompanying text.

242. *Id.* The Court notes that the use of the overbreadth doctrine in a facial attack, is “strong medicine” that should be used “sparingly and only as a last resort.” *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

injury at the hands of "overbroad" legislative criteria.<sup>243</sup>

NYSCA argued, however, that the law was overbroad because it created an "irrebuttable presumption" that clubs covered under the three-part test were not private.<sup>244</sup> Justice White determined that the law's presumption, if it exists at all, is rebuttable since the law allows a hearing in which a defendant club may produce evidence to show that it does not fall within the ambit of the statute.<sup>245</sup> Should the Human Rights Commissioner rule against the club, the club is entitled to seek judicial review.<sup>246</sup> As Justice White concludes, "[t]hese opportunities for individual associations to contest the constitutionality of the

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243. *Id.* at 2235. This was a point that counsel for appellees, Peter L. Zimroth, stressed during his oral arguments before the Court:

Stressing the hypothetical nature of the club association's challenge, Mr. Zimroth added that it is 'hard to think of any club that could claim a constitutional right to be excluded despite falling within the parameters of the statute and Mr. Mansfield [counsel for appellants] has not mentioned a single club that would.

N.Y.L.J., Feb. 24, 1988, at 3, col. 1.

244. *New York State Club Ass'n*, 108 S. Ct. at 2235. Appellants also contended that the effect of this law made it impossible for clubs to argue the constitutionality of the statute in individual administrative and judicial hearings. *Id.* This gives some explanation as to why NYSCA chose to bear the heavy burden of a facial attack on the statute if NYSCA really believed that no other forum was available to them in which to raise a constitutional attack on the statute. Justice White dismissed NYSCA's argument. Justice White stated that even if NYSCA's assertions were true as to the impossibility of raising constitutional issues in administrative hearings, it would not affect his analysis. *Id.* He stated:

Although the city's Human Rights Commissioner may not be empowered to consider the constitutionality of the statute under which it operates, . . . it would be quite unusual if the Commissioner 'could not construe its own statutory mandate in the light of federal constitutional principles.' And even if this were also true, nothing in the law purports to preclude judicial review of constitutional claims that may be raised on appeal from the administrative enforcement proceedings. *Id.* (citations omitted). (quoting *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 629 (1986)).

245. *Id.* at 2232. Local Law 63 authorizes New York City's Human Rights Commissioner, or any injured party, to initiate a complaint against a club which falls within the parameters of the statute and has allegedly discriminated in violation of the Public Accommodations Statute. *NEW YORK, N.Y., ADMIN. CODE § 8-102(9)* (1986). The Commissioner investigates the complaint and if probable cause is found can settle the matter or schedule a hearing in which the club should be prepared to present evidence and answer charges against it. After a hearing the Commissioner can either dismiss the complaint or issue a cease-and-desist order. *Id.* at § 8-109(2).

246. *Id.* at § 8-110 which states in relevant part: "Any complainant, respondent or other person aggrieved by such order of the commission may obtain judicial review thereof, and the commission may obtain an order of court for its enforcement, in a proceeding as provided in this section."

Law as it may be applied against them are adequate to assure that any overbreadth under the Law will be curable through a case-by-case analysis of specific facts."<sup>247</sup>

NYSCA's final contention was that the law's exemption of benevolent and religious corporations<sup>248</sup> is a violation of the equal protection clause.<sup>249</sup> Since no fundamental constitutional interests are at stake,<sup>250</sup> the Court refused to apply heightened scrutiny and instead held that the "equal protection challenge must fail unless the city could not reasonably believe that the exempted organizations are different in relevant respects from appellant's members."<sup>251</sup> The Court accepted as reasonable the City Council's explanation that religious and benevolent organizations are "different in kind" and not centers where business activity is prevalent.<sup>252</sup> Since NYSCA had failed to produce evidence to show that the benevolent and religious organizations are in fact identical to the private clubs covered under Local Law 63, any facial attack under the equal protection clause could not be upheld.<sup>253</sup>

247. *New York State Club Ass'n*, 108 S. Ct. at 2235.

248. NEW YORK, N.Y., ADMIN. CODE § 8-102(9) which states in relevant part: For the purposes of this section a corporation incorporated under the benevolent orders law or described in that benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.

See also *supra* notes 53-54 and accompanying text.

249. *New York State Club Ass'n*, 108 S. Ct. at 2235.

250. *Id.*

251. *Id.*

252. *Id.* at 2236. It is this issue that received some of the greatest skepticism by the Court:

Mr. Zimroth [council for the Appellees] . . . evoked arch replies as he argued that the continued exemption of fraternal and religious organizations from the reach of the statute did not violate the constitution since there was no evidence before the City Council that their conduct had been problematic.

. . .

Similarly, when Mr. Zimroth argued that with a club as large as 10,000 members it is not 'credible' to argue that associational rights exist 'as an extension of one's living room,' Justice Kennedy interjected [in response to their exemption from the statute] "unless you are a member of the American Legion or an Elk."

N.Y.L.J., Feb. 24, 1988, at 3, col. 2.

253. *New York State Club Ass'n*, 108 S. Ct. at 2237.

b. *Justice O'Connor's Concurring Opinion*

The purpose of O'Connor's concurring opinion<sup>254</sup> was to note that nothing in the majority opinion should be construed as a denigration of the "importance of any associational interests at stake."<sup>255</sup> Justice O'Connor reminds the reader that the Court, in upholding Local Law 63, intended for the criteria in the statute's three-part test to be nonexclusive.<sup>256</sup>

The associational interests of a private club have not been denigrated because the club is "permitted to demonstrate that its particular characteristics qualify it for constitutional protection, despite the presence of the three factors specified in Local Law 63."<sup>257</sup> For example, Justice O'Connor hypothesized that in a cosmopolitan city the size of New York, it is likely that an organization could satisfy Local Law 63 and still be so "intimate in nature" to be "deserving of constitutional protection."<sup>258</sup> However, the law is effective since it can identify and be applied against "predominantly commercial organizations" that attempt to hide behind a purported right of association while practicing invidious discrimination.<sup>259</sup>

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254. *Id.* Justice O'Connor's concurrence was joined by Justice Kennedy.

255. *Id.*

256. *Id.* Justice O'Connor points out that these factors should be considered along with other criteria such as "size, purpose, policies, selectivity, congeniality and other characteristics." *Id.*

257. *Id.*

258. *Id.* What Justice O'Connor fails to point out, however, is that if such a club exists, it may be forced to go through several hearings, in front of the Human Rights Commissioner and the courts, before its rights of association are affirmatively recognized. *See supra* notes 246-47 and accompanying text.

259. *New York State Club Ass'n*, 108 S. Ct. at 2237. The majority found Local Law 63's three-part test significant in determining whether a club is private or public. *Id.* at 2233. *See also supra* notes 225-26 and accompanying text. In comparison, Justice O'Connor sees the same criteria as effective in ferreting out commercial organizations, which Justice O'Connor feels *per se* undeserving of constitutional protection. *Id.* Justice O'Connor's analysis in *New York State Club Ass'n*, is consistent with her analysis in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (O'Connor, J., concurring), in which she suggested that the Court's proper method of analysis should be whether the club was predominantly commercial or expressive. *Id.* at 631. *See also supra* notes 112-16 and accompanying text.

### c. *Justice Scalia's Concurring Opinion*

Justice Scalia wrote a concurring opinion in order to add to the Court's analysis of NYSCA's equal protection claim.<sup>260</sup> Justice Scalia points out that the bulk of the benevolent organizations exempt from Local Law 63 are lodges and fraternal organizations.<sup>261</sup> Justice Scalia states that a lodge is not the type of atmosphere where most men are likely to bring business clients.<sup>262</sup>

## IV. Analysis

What kind of importance can we place on *New York State Club Association*? The individuals who are affected by this decision are not part of an economic or socially underprivileged group. The players in this case, even those who are the victims of discrimination, are not the powerless, but the powerful.<sup>263</sup> *New York State Club Association*, however, is significant in several respects. There is little room for doubt that the City Council accurately determined that the exclusive downtown men's clubs were centers of business activity.<sup>264</sup> The ruling in *New York State Club Association* has essentially led to a demise of the downtown all-male club<sup>265</sup> and gaining equal access for

260. *New York State Club Ass'n*, 108 S. Ct. at 2238.

261. *Id.* at 2238. Justice Scalia lists several of the lodges and fraternal organizations that are exempted: the American Legion, the Jewish War Veterans of the United States, the Catholic War Veterans, the Disabled American Veterans, AM-Vets, the Veterans of Foreign Wars, Masons, the Independent Order of Odd Fellows, the Loyal Order of Moose, the Knights of Columbus, the Improved Benevolent and Protective Order of the Elks of the World, the Nobles of the Mystic Shrine, and the Knights of Malta. *Id.*

262. *New York State Club Ass'n*, 108 S. Ct. at 2238. During oral arguments in which appellees argued that benevolent and religious orders did not foster the business opportunities of other clubs and were therefore exempt, Justice Scalia observed that the problem with this kind of analysis "is how to insure that the legislators are not 'legislating against my clubs but exempting their own clubs.'" N.Y.L.J., Feb. 24, 1988 at 3, col. 2.

263. The women who are being discriminated against are those who are conceivably qualified for the top executive positions in the largest companies. See *supra* notes 27-30 and accompanying text. The men that are now forced to open their "private sanctum" to women are some of the most powerful and successful men in the country. See *supra* notes 31-32 and accompanying text.

264. See *supra* notes 48-52 and accompanying text.

265. Clubs which have now opened their doors to women include: the University Club of New York City (nine women admitted since June, 1987), the Harmonie Club of New York City (previously open only to wives and widows), and the Friars Club of Beverly Hills (policy open to women in California was not reciprocated in New York) to

women to business opportunities within these clubs is clearly an important accomplishment.<sup>266</sup>

What may be even more important than the achievement of equal access, however, is the destruction of a vehicle that socially stigmatized women.<sup>267</sup> *New York State Club Association* not only desegregates the men's clubs but diffuses them. Once the discriminatory policy is taken away, so is the invidious power that accompanies the all-male policy.<sup>268</sup> There is no longer any just rationalization for relegating women to back stairwells, side entrances, service elevators, or separate dining rooms.<sup>269</sup>

Some critics may argue that sex discrimination against the privileged and educated woman, (the kind of woman that would seek access into these powerful men's clubs), is hardly a matter that can elicit much concern from the average citizen. Sex discrimination, however, in any mode, carries symbolic baggage. The practice of relegating female guests to separate dining rooms, separate entrances, or separate organizations is an assault to a person's self worth and integrity. The demeaning nature of this practice cannot be excused by the argument that this is the interpretation that women choose to attach to the practice, since symbols of inferiority, once believed and internalized, can become self-perpetuating.<sup>270</sup>

When associational policy is governed by sexual stereotyping, the result can be detrimental to the empowered class as well. Those who have little experience accepting women in a social setting are less likely to accept women in the professional setting. It is in this setting that the state and local government

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name but a few. N.Y.L.J., Feb. 22, 1988 at 4, cols. 4 and 5.

266. See *supra* notes 30-32 and accompanying text.

267. See *supra* notes 50-51 and accompanying text.

268. See *supra* notes 27-30 and accompanying text.

269. See *supra* note 51 and accompanying text.

270. Compare *Brown v. Board of Educ.*, 347 U.S. 483 (1954) with *Plessy v. Ferguson*, 163 U.S. 537 (1896). The *Plessy* Court dismissed the argument that separate facilities place a badge of inferiority on blacks by saying that this is a social stigma which can only be overcome by the voluntary consent of society. *Id.* at 551. Fifty-eight years later, the *Brown* Court overruled this kind of rationalization saying that legally tolerated segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown*, 347 U.S. at 494.

have a compelling interest.<sup>271</sup>

The decision in *New York State Club Association* and the passage of Local Law 63, has led to similar legislation throughout the country that could portend a virtual nationwide end to the all-male businessman's club. One important difference between Local Law 63 and its clones, however, is that only New York City excludes from its reach benevolent orders.<sup>272</sup> Other cities that have enacted similar legislation to Local Law 63 include Boston,<sup>273</sup> San Francisco,<sup>274</sup> Los Angeles,<sup>275</sup> Chicago,<sup>276</sup> Washington, D.C.,<sup>277</sup> and Buffalo.<sup>278</sup>

Despite all that *New York State Club Association* accomplishes, however, the case is a disappointment. After *New York State Club Association*, the rights of association are more diffuse than ever before. The Court fails to establish any clear cut guidelines for determining the extent to which this important right exists.<sup>279</sup> Thus, the status of the right of association re-

271. See Rhode, *Association and Assimilation*, 81 Nw. U.L. Rev. 106, 123 (1986) (citing "a substantial array of social science research that indicates that individuals who appear dissimilar are more likely to be disliked and avoided in work-related contexts").

272. See Brief for Appellant, *supra* note 148, at 48 and n.24 which states: "Undoubtedly the only basis for Local Law 63's [exclusion of benevolent and religious orders] . . . was its political expediency. Absent the exemption presumably no law could have passed." The brief also quotes an editorial published in the Daily News discussing an earlier proposal of Local Law 63 which contained the same exclusion. The editorial attacked the law as "blatantly hypocritical." "The American Legion and the Elks are excluded, we're told, because they're benevolent associations. What's benevolent about excluding women? In fact, those organizations are exempted because [Mayor] Koch and [City Council President] Bellamy know they'd lose if they tried to take on the Legion." Daily News, Dec. 28, 1983, at 33, col. 3.

273. Rule of Boston Licensing Board pursuant to MASS. GEN. LAWS ANN. ch. 138 (West 1974). This rule prohibits discrimination by clubs licensed for the sale of alcoholic beverages to members or guests if such club is not distinctly private and employs its facilities and its alcoholic beverages license for commercial purposes. The criteria set down to determine if a club is distinctly private include: 1) size; 2) regular meal service; and 3) payments for dues, fees, use of services, etc. from members or nonmembers in furtherance of professional interests.

274. SAN FRANCISCO, CAL., MUN. CODE art. 33B (1987). The criteria in this code is identical to Local Law 63 except that it exempts only institutions organized exclusively for religious purposes — there is no exemption for benevolent associations.

275. LOS ANGELES, CAL., MUN. CODE art. 5.9 § 45.95.01 (1987). This code is identical to the San Francisco code.

276. CHICAGO, ILL., MUN. CODE ch. 199A (1981).

277. D.C. CODE ANN. § 1-2519 (1981).

278. BUFFALO, N.Y., CITY ORDINANCES art. XXIII, ch. VII (1983).

279. The Court upholds the three-part test set forth in Local Law 63, finding it "at

mains unclear and elusive. The ruling in *New York State Club Association* may serve not only to subrogate this right to more compelling state interests, but may also serve to “chill” the free exercise of activity constitutionally protected under the first amendment.<sup>280</sup>

*New York State Club Association* is an exemplification of the problem inherent in applying anti-discrimination legislation<sup>281</sup> to private organizations. *Roberts*, *Rotary*, and *New York State Club Association* are all examples of the Court’s reluctance, in the face of the compelling state interest to combat invidious discrimination,<sup>282</sup> to establish any clear parameters on the right of association.<sup>283</sup> Instead, each opinion is narrowly tai-

least as significant in defining the nonprivate nature of these associations” as the criteria laid out in *Roberts* and *Rotary*. *New York State Club Ass’n v. City of New York*, 108 S. Ct. 2225, 2233 (1988). Thus, the Court accepts the rigid standard of Local Law 63, while never rejecting the conflicting flexible standard of *Roberts* and *Rotary*.

280. In *Board of Airport Comm’rs of the City of Los Angeles v. Jews for Jesus, Inc.*, 107 S. Ct. 2568 (1987), the Court described the “chill” factor that can occur when state imposed restrictions on constitutional freedoms are not properly narrowed and focused:

Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face “because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially valid.”

*Id.* at 2571 (citations omitted).

In Appellant’s Brief, petitioners also allude to a chilling effect of Local Law 63:

Under Local Law 63 there . . . exists a substantial likelihood that associations which are organized around the most cherished of all constitutional protections, *viz.*, the exercise of political speech and religious freedom, will be chilled by the prospect of the very kind of governmental interference that the first amendment was intended to prohibit . . . . In addition, other groups who are not currently subject to Local Law 63 will have their associational, speech and privacy rights chilled by the local law. For example, a social, political or cultural club presently composed of 373 members will avoid increasing its membership for fear of coming within the provision’s 400 members criterion and exposing its members to an investigation to ascertain whether it is indeed a place of public accommodation.

See Brief for Appellant, *supra* note 148, at 40.

281. See, e.g., *NEW YORK, N.Y., ADMIN. CODE* § 8-109(2) (1986).

282. See, e.g., *Roberts*, 468 U.S. at 625 (holding state’s interest extends beyond the victim of discrimination, society suffers from being denied the “benefits of wide participation in political, economic, and cultural life”). *Id.*

283. The right of association is as equally compelling to the individual as the state’s interest in combating invidious discrimination. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977) (holding freedom of association is deserving of full constitutional protection); *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) (“Government may not tell a man or woman who his or her associates must be. The individual can be as



lored to the facts of the individual case. For example, the Court urged flexibility and adopted a balancing test in *Roberts*<sup>284</sup> and *Rotary*,<sup>285</sup> but then gave constitutional favor to the rigid test laid out in *New York State Club Association* — while never rejecting the criteria of *Roberts* and *Rotary*.<sup>286</sup> As a result, after *New York State Club Association*, several conflicting criteria exist for determining if an organization is entitled to the right of association.<sup>287</sup> On the one hand, the Court's emphasis in *Roberts* and *Rotary* was focused on whether an association had placed itself in a public or private sphere.<sup>288</sup> On the other hand, the criteria in Local Law 63 does not examine the nature of the relationship between the association and the public but instead, undertakes a commercial standard.<sup>289</sup>

In his majority opinion, Justice White tries to draw parallels between the two sets of standards,<sup>290</sup> but his analysis falls short. The Court's inconsistency with prior case law can be exemplified by applying the *Rotary* and *Roberts* standards to the exclusive clubs sought to be eliminated by Local Law 63. Under the *Rotary* and *Roberts* standard, the club's selective membership criteria and their elitist purposes, could remain unscathed.<sup>291</sup> If the

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selective as he desires."); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) ("It is beyond debate that freedom to engage in association . . . is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment . . . [S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

284. *Roberts*, 468 U.S. at 617-18. See also *supra* note 98 and accompanying text.

285. *Rotary*, 481 U.S. at 544-45. See also *supra* note 145 and accompanying text.

286. *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2233 (1988).

287. See *supra* notes 20-21.

288. The criteria the Court considered in determining the private nature of an organization was size, purpose, selectivity in its membership and willingness to involve outsiders in the critical aspects of the relationship. *Rotary*, 481 U.S. at 546; *Roberts*, 468 U.S. at 620.

289. See *New York State Club Ass'n*, 108 S. Ct. at 2233.

290. Justice White claimed for example, that Local Law 63's 400 member requirement was consistent with the Court's examination of size in *Roberts* and *Rotary*. *New York State Club Ass'n*, 108 S. Ct. at 2233; *Rotary*, 481 U.S. at 546; *Roberts*, 468 U.S. at 620. Similarly, the Law's regular meal service requirement and receipt of payment from outside members requirement were parallel to the *Roberts* and *Rotary* examination of whether strangers participated in the critical aspects of the relationship. See *New York State Club Ass'n*, 108 S. Ct. at 2233; *Rotary*, 481 U.S. at 546; *Roberts*, 468 U.S. at 620.

291. See *Roberts*, 468 U.S. at 630 The Court suggests that the criteria adopted in *Roberts*, including whether the club has an exclusive membership policy, would serve to bring such clubs as the Kiwanis International Organization and "other private organiza-

Court's emphasis was still rooted solely on whether an organization was private or public, the selective membership policies of NYSCA's clubs, aimed at excluding the public, would have likely been taken into consideration. Instead, the Court acknowledges Local Law 63's requirements of regular meal service, and even more importantly, the receipt of money on behalf of members or nonmembers for the furtherance of trade or business<sup>292</sup> to be "significant in pinpointing organizations which are 'commercial' in nature"<sup>293</sup> as well as "defining . . . the nonprivate nature of these associations."<sup>294</sup>

In fact, the criteria of Local Law 63,<sup>295</sup> is more akin to a hybrid of the commercial standard for expressive association outlined by Justice O'Connor in her concurring opinion of *Roberts v. United States Jaycees*.<sup>296</sup> Justice O'Connor argued that commercial organizations, like commercial speech, should be subject to a lesser degree of constitutional protection.<sup>297</sup> The Court should instead establish a presumption of validity for regulations affecting the associational activity of commercial organizations.<sup>298</sup> This would not only do away with the burden of subjecting every regulation to first amendment analysis, but would also do away with the unnecessary judicial hurdle the legislature would have to clear in order to demand an end to discrimination in the membership practices of commercial organizations.

Further, the Court's discussion of intimate association in *Roberts* and *Rotary* focused more on the relationships between the members.<sup>299</sup> *Roberts* stated that in determining state authority over intimate association the analysis "unavoidably entails a

tions" outside the ambit of the statute. *Id.*

292. *See supra* notes 46-47 and accompanying text.

293. *New York State Club Ass'n*, 108 S. Ct. at 2233.

294. *Id.*

295. NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986). *See supra* note 12 and accompanying text.

296. *See Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) (The actual issue for the Court is not whether the organization is public or private but whether the organization has entered the commercial marketplace and is thus not entitled to the freedom of association.). *See supra* notes 112-16 and accompanying text.

297. *Roberts*, 468 U.S. at 634.

298. *Id.* Justice O'Connor states: "the State is free to impose any rational regulation on the commercial transaction itself." *Id.* at 634.

299. *Rotary*, 481 U.S. at 546; *Roberts*, 468 U.S. at 618-20.

careful assessment of where that relationship's object characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."<sup>300</sup>

In comparison, the Court in *New York State Club Association* readily acknowledges that "[i]t may well be that a considerable amount of private or intimate association occurs in such [a private club] setting, as is also true in many restaurants and other places of public accommodation, but that fact alone does not afford the constitutional immunity to practice discrimination when the Government has barred it from doing so."<sup>301</sup> This kind of reasoning appears to be in line with what Justice O'Connor stated in *Roberts*: "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership."<sup>302</sup> Similarly, the Court recognizes that effective advocacy is enhanced by group association.<sup>303</sup> The Court nonetheless acknowledges that such expression in some settings, (i.e., commercial settings) does not warrant constitutional protection.<sup>304</sup>

We cannot assume, however, that the Court is clearly departing from its former standards in *Roberts* and *Rotary*. The Court states only that the new criteria approved of in *New York State Club Association* is "at least as significant" in defining the rights of association.<sup>305</sup> The ambiguity as to which standard to apply is further enhanced by Justice O'Connor's cryptic statements that she writes separately "only to note that nothing in the Court's opinion in any way undermines or denigrates the importance of any associational interests at stake" and that the criteria outlined in Local Law 63 are "not exclusive" and should be "considered along with other considerations."<sup>306</sup>

An additional difficulty with the commercial analysis

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300. *Roberts*, 468 U.S. at 620. This reasoning was affirmed in *Rotary*, 481 U.S. at 546.

301. *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2233-34 (1988).

302. *Roberts*, 468 U.S. at 636.

303. *New York State Club Ass'n*, 108 S. Ct. at 2234.

304. *Id.* ("This is not to say, however, that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution.") *Id.*

305. *Id.* at 2233.

306. *Id.* at 2237.

adopted by *New York State Club Association* is that it is inconsistent with prior case law involving the freedom of speech for commercial entities. In *First Nat'l Bank of Boston v. Bellotti*,<sup>307</sup> the Court held that a commercial entity is entitled to first amendment protections of speech when it engages in noncommercial speech.<sup>308</sup> If this same standard is applied to the right of association, then a club may still be able to exclude women in settings that do not deal directly with day-to-day commercial activity.

For example, the prestigious Bohemian Club in San Francisco has an annual event called the summer encampment.<sup>309</sup> This event is well attended by the powerful and affluent. In 1981, the guest list included the president of Union Oil, an outgoing CIA director, and finally, the former Atomic Energy Commission chairman, who in 1981 was the chancellor of the University of California at Berkeley.<sup>310</sup> Bohemian Club members could assert that this two-week powwow is nothing more than a chance to experience "brotherly affection of men for each other, in the style of the old West — men sitting around a fire in rough clothes in the cold night, under the trees, talking, drinking booze, listening to improvised music—such affection eludes definition."<sup>311</sup> Under present case law, women might be excluded from this encampment since it is a noncommercial expression from a commercial entity.

In addition, the confusing result of *New York State Club Association* gives little guidance to lower courts and local legislatures as to how far they can go to restrict the right of association. The decision may give these law making bodies too much ammunition. For example, if the organization claiming a freedom of association is highly selective and secretive in its dealings, the courts may seek to bring it within the ambit of the

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307. 435 U.S. 765 (1978) (overturning a Massachusetts law which prohibited corporate expenditures for the purpose of endorsing citizens to vote on certain referenda).

308. *Id.* at 784-85.

309. See Burns, *supra* note 28, at 337 (stating that "no other single event brings together our nation's ruling class as does the Bohemian Club's summer encampment").

310. See *id.* at 341 (citing Bohemian Club History, Constitution and By-Laws, House Rules, Grove Rules, Guidelines for Sponsors 9 (1980)).

311. See *id.* at 341 (quoting Bohemian Club History, Constitution and By-Laws, House Rules, Grove Rules, Guidelines for Sponsors 9 (1980)).

public accommodations laws through a commercial analysis. Similarly, an organization whose membership criteria actively expresses some form of political speech, may be held to be commercial and entitled to no constitutional protection of speech or association. Conversely, an organization that is non-profit and private but whose main purpose is to engage in political speech can be held to be private and entitled to first amendment protection, even though its discriminatory policies do not further or enhance their political, social, or economic viewpoints.<sup>312</sup>

One can sympathize with the awkward position the Court is in, and its reluctance to formulate any *per se* guidelines on the right of association. In the past, the Court has held up the right of association as vital to a free society.<sup>313</sup> Compromising this right means the possible dilution of enumerated first amendment rights.<sup>314</sup> Yet, the battle against invidious discrimination has been a principal priority of the judiciary.<sup>315</sup> To hold the state interest in battling invidious discrimination as less compelling than associational interests, morally legitimizes and encourages discrimination.

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312. See Marshall, *Discrimination and the Rights of Association*, 81 Nw. U.L. REV. 68, 79 (1986) ("Presumably, a noncommercial advocacy organization such as 'Save the Whales' would, under [either Justice Brennan's public/private approach or Justice O'Connor's commercial/expressive approach] . . . be entitled to exclude . . . females even though the exclusion has nothing to do with the positions that the organization maintains.").

313. See *supra* notes 56-59 and accompanying text; see also, A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 491 (G. Lawrence, ed. 1966) (de Toqueville states that no country but America "makes use of an unlimited freedom of . . . association").

314. See *Roberts*, 468 U.S. 609, 622 (1984) (holding that the right to engage in first amendment activity necessarily implies the right of association in furtherance of those activities); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (Effective advocacy of speech under the first amendment is "undeniably enhanced by group association.").

315. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (In the interest of remedying years of outright and invidious discrimination, a program of admission to institutions of higher education that allows admissions officers to consider race as an affirmative factor without using clear racial quotas will be held constitutional.); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) (recognizing that women have had a history of sexual discrimination and that over the past decade the Court and Congress have become more sensitive to sex-based classifications). See also 42 U.S.C. §§ 2000e-2 (a),(b),(c) (1982) (federal civil rights statute which expressly declares that no employer, union, or other organization shall discriminate against an individual on the basis of "race, color, religion, sex, or national origin").

## V. Conclusion

After *New York State Club Association*, an individual or organization that wishes to determine the parameters of its associational right has no clear guidelines to follow and will have to consult several different lines of reasoning and criteria. The Court's failure to clarify guidelines could put the rights of association in far more jeopardy, in the long term, than its short term decision to open up private men's clubs. When one considers the integral relationship the right of association has with first amendment freedoms and fundamental liberties,<sup>316</sup> the need for some consistent guidelines becomes clear. If the right of association enhances the exercise of first amendment rights, uncertainty as to the extent of the right of association can work to suppress the exercise of enumerated and guaranteed liberties.

*Katherine E. Speyer*

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316. See *Roberts*, 468 U.S. at 629 (right of association is necessary means to act as a buffer between the preservation of intimate and private relationships and interference by the state); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (the right of association is a necessary component of political expression); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 6 (1964) (first amendment rights of petition and assembly necessarily include the right to associate and consult with others concerning these rights); *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460 (1958) (first amendment freedom of speech is undeniably enhanced by the right of association).