REDEFINING THE PRIVATE CLUB: *NEW YORK STATE CLUB ASSOCIATION, INC. v. CITY OF NEW YORK*, 108 S. Ct. 2225 (1988)

The first amendment of the United States Constitution implicitly guarantees the right to freedom of association.[1] Private associations defend their discriminatory policies by claiming the right to associate[2] and the right to privacy.[3] Recently, courts have used public accommodation laws to narrow the scope of associational rights and to increase the role of the government in eliminating discrimination.[4] In *New*

1. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1010 (1988) (stating that the Supreme Court considers the freedom of association to be a preferred right derived by implication from the express first amendment guarantees); *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (noting that the right of association is necessary to make the express guarantees of the first amendment meaningful); *see also infra* note 24 (discussing interpretations of the first amendment).

2. *See, e.g.*, Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940, 1945 (1987) (Rotary International claimed that the fellowship enjoyed by male members is protected by a constitutional right of association); Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (recognizing that freedom of association receives protection as a fundamental element of personal liberty).

3. The fourth amendment states in pertinent part: "The right of the people to be secured in their persons, houses, paper, and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. CONST. amend. IV. *See Griswold*, 381 U.S. at 483 (noting that the right of privacy extends to groups as a right of association); *but 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, 347 (1983) (arguing that the right to privacy does not include the right to exclude women from clubs).

4. *See* Note, *Rotary International v. Duarte: Limiting Associational Rights to Protect Equal Access to California Business Establishments*, 19 PAC. L.J. 399 (1988) (discussing the evolution of antidiscrimination laws and their effect on private clubs). Courts have broadly interpreted the meaning of "public accommodation." *E.g.*, United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981) (holding the Jaycees to be a place of public accommodation within the meaning of the state statute); United States Power Squadrons v. State Human Rights Appeal Bd., 59 N.Y.2d 401, 452 N.E.2d 1199, 465

York State Club Association, Inc. v. City of New York[5] the United States Supreme Court held that the City[6] may constitutionally restrict discrimination in certain business-oriented private clubs.[7]

In *New York State Club Association (NYSCA)*, the City Council of New York City passed Local Law 63[8] banning discrimination in business-oriented clubs[9] that are not distinctly private.[10] The law provides

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N.Y.S.2d 871 (1983) (holding boating clubs to be places of public accommodation). For sources providing a comprehensive list of 39 states which have public accommodation laws, see *infra* notes 41-42.

5. 108 S. Ct. 2225 (1988).

6. *See* Local Law No. 63 of 1984 § 1 app. at 14-15. The law amends New York City's Human Rights Law, a public accommodation law which forbids discrimination based on race, creed, sex, and other grounds by any "place of public accommodation, resort or amusement." N.Y. ADMIN. CODE § B1-2.0(9) (1976). The Human Rights Law includes hotels, restaurants, retail stores, hospitals, laundries, theatres, parks, public conveyances, and public halls. *Id.* at § 8-102(9) (1986). However, the law exempts from its coverage "any institution, club, or place of accommodation which proves that it is in its nature distinctly private." *Id.* Local Law 63 provides:

> An institution, club, or place of public 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 his trade or business. . . . [B]enevolent orders . . . [and] . . . religious corporations shall be deemed in nature distinctly private.

Local Law No. 63 of 1984 § 1 app. at 14-15.

7. 108 S. Ct. at 2234.

8. The City Council passed the law after determining that professional women did not have an equal opportunity to succeed in business because influential private clubs imposed all-male membership restrictions. *NYSCA*, 108 S. Ct. at 2230. The City Council found that the public interest in equal opportunity outweighed the interest in private association asserted by club members. Thus, the City Council found this interest sufficiently compelling to justify any incidental infringement on associational rights. *Id. But see* Brief of NYSCA at 7, New York State Club Ass'n, Inc. v. City of New York, 108 S. Ct. 2225 (1988) (No. 86-1836) (arguing that the requirements adopted by Local Law 63 will not necessarily equalize access to the business networking that occurs in private clubs).

For discussion of the importance of club membership, see Note, *Sex Discrimination in Private Clubs*, 29 HASTINGS L.J. 417, 418 (1977) (denying women access to and participation in private clubs perpetuates women's dependence and inferiority); Note, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 1970 DUKE L.J. 1181, 1189 (discussing the difference between business networking in country clubs and city clubs).

9. Although many private clubs have "understood" rules that forbid the discussion of politics or business on club premises, such topics are inevitably discussed. Alpern, *Clubs: The Ins and Outs*, NEWSWEEK, Jan. 10, 1977, at 18-19. The Cosmos Club, a male-only club in Washington, D.C., "prides itself on being the site of discussions that later develop into public policy." Note, *Sex Discrimination in Private Clubs*, 29 HAS-

a three-part test: an association is not "distinctly private" if it has more than four hundred members,[11] provides regular meal service,[12] and receives regular payment from nonmembers.[13] The law specifically exempts benevolent orders[14] and religious organizations.[15] NYSCA[16] filed suit seeking a declaratory judgment that Local Law 63 violated club members' first amendment right of association[17] and their fourteenth amendment guarantee of equal protection.[18] The New York State Supreme Court upheld the constitutionality of the law.[19]

TINGS L.J. 417, 420 (1977). *But see* St. Louis Post Dispatch, June 28, 1988, at 1A, cols. 5-6 (reporting that the Cosmos Club voted to end its 110-year-old men-only policy two days before the *NYSCA* decision).

10. *NYSCA*, 108 S. Ct. at 2230.

11. In Roberts v. United States Jaycees, 468 U.S. 609 (1984), the Supreme Court established that an organization with more than 400 members was too large and unselective to invoke a right of intimate association. *Id.* at 621.

12. The New York City Commission on Human Rights Regulations (Commission) defined "regular meal service" as "the provision, either directly or under contract with another person, of breakfast, lunch or dinner on three or more days per week during two or more weeks per month during six or more months per year." Brief of NYSC, *supra* note 8, at 4 n.2.

13. The Commission defined "regularly receives payment" as "the receipt of as many payments during the course of a year as the number of weeks the club is available to members or nonmembers." *Id.* at 4 n.3.

14. *NYSCA*, 108 S. Ct. at 2230. The court cited N.Y. INS. LAW § 4501(a) (McKinney 1985), which defines benevolent order as one "formed, organized, and carried on solely for the benefit of its members and of their beneficiaries." *NYSCA*, 108 S. Ct. at 2236.

15. *Id.* at 2230. The court cited N.Y. RELIG. CORP. LAW § 2 (McKinney 1987), which defines religious corporations as those created for purposes of group worship or observance. *NYSCA*, 108 S. Ct. at 2236.

16. Brief of NYSCA, *supra* note 8, at 2 (citing GALES ENCYCLOPEDIA OF ASSOCIATIONS (1980)). The NYSCA is an association of 125 private clubs and associations in the State of New York, a substantial number of which are located in New York City. More than 60,000 people in New York State are members of formal organizations which limit their membership on grounds of race, religion, sex, or national origin. *Id.*

17. *NYSCA*, 108 S. Ct. at 2231. *See supra* notes 1-2 for text and discussion of the first amendment.

18. *Id.* at 2231. NYSCA claimed that the exemption in Local Law 63 for benevolent orders and religious corporations, which deems them "distinctly private" in nature, violates the equal protection clause. *Id.* Section 1 of the fourteenth amendment states in pertinent part: "No State shall to any person within its jurisdiction deny the equal protection of the laws. . . ." U.S. CONST. amend. XIV, § 1.

19. In an unreported opinion, the court found that the law did not violate the first amendment. Moreover, the City's compelling interest in eradicating discrimination justified its narrowly drawn regulation of constitutional associational interests. Brief of NYSCA, *supra* note 8, at 14.

Upon direct appeal, both the Appellate Division of the Supreme Court of the State of New York[20] and the Court of Appeals of the State of New York affirmed.[21]

The first amendment's implicit guarantee of freedom of association[22] fails to delineate the types of association protected.[23] Therefore, courts have interpreted the right of association in the context of other constitutional amendments[24] as well as federal[25] and state legislation.[26]

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20. 118 A.D.2d 392, 505 N.Y.S.2d 152 (1986) (focusing on the law's exemption for religious corporations and benevolent orders).

21. 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987). The court primarily addressed NYSCA's contention that the law violated the state constitution because it conflicted with the State Human Rights Law. The court found that the City Council could define the term "distinctly private" despite the absence of a state law definition. *Id.* at 215, 505 N.E.2d at 919, 513 N.Y.S.2d at 353. In essence, the court concluded that those clubs which meet the law's three-prong test lose the "essential characteristic of selectivity" and become "affected with a public interest." *Id.* at 216, 505 N.E.2d at 920, 513 N.Y.S.2d at 354. Hence, they would no longer qualify as "distinctly private." *Id.*

22. *See supra* note 1 for text of the first amendment.

23. *See* Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (discussing the varied interpretations the Court has given the first amendment). *See also* Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l, 52 A.D.2d 906, 383 N.Y.S.2d 383 (1976) (Shapiro, J., dissenting), *aff'd*, 41 N.Y.2d 1034, 363 N.E.2d 1378, 395 N.Y.S.2d 633 (1977) (stating that it is not enough to define a private club as one which is not in fact open to the public).

24. *See* Comment, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460, 465 (1970). The first amendment is one source of the right to freedom of association that provides a constitutional defense for private clubs' discrimination. *Id.* Other sources of the freedom of association right include the ninth amendment and traditional concepts of substantive due process under the fourteenth amendment. *Id.* at 465-66. *See also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that the due process clause protects first amendment rights against state abridgement).

See also Griswold v. Connecticut, 381 U.S. 479 (1964). The Court recognized that at least one facet of the right to freedom of association grows out of the "penumbra" of the Bill of Rights. *Id.* at 484. The specific provisions which support the right of intimate association are: the first amendment (freedom of religion, speech, press, assembly, and the right to petition the government); the third amendment (prohibiting the quartering of soldiers); the fourth amendment (the right to be secure in person, houses, and papers and the freedom from unreasonable searches and seizures); the fifth amendment (freedom from self-incrimination); and the ninth amendment (retention of rights by the people). *Id.* at 479-99.

25. *See infra* notes 35-40 and accompanying text. For a discussion of the federal statutory development in the area of private clubs, see Note, *Sex Discrimination in Private Clubs*, 29 HASTINGS L.J. 417, 434-37 (1977).

26. *See infra* notes 41-42 and accompanying text. *See also* Note, *Private Club Membership - Where Does Privacy End and Discrimination Begin?*, 61 ST. JOHNS L. REV.

Courts must balance the right of association and the fourth amendment right of privacy[27] against guarantees of equality in the Constitution and in legislation.[28]

The United States Supreme Court first expressly recognized a constitutional right of association[29] in *NAACP v. Alabama ex rel. Patterson*.[30] In *NAACP*, the Court formally established that an association could assert the same first amendment rights as the individual members of the association.[31] Applying a close scrutiny standard,[32] the Court

474, 487-99 (1987) (discussing the impact of state public accommodation laws on private clubs).

27. *See supra* note 3 for text of the fourth amendment. A series of bans on governmental interference with certain personal decisions has developed the right to privacy. *E.g.*, Doe v. Bolton, 410 U.S. 179 (1973) (freedom from bodily constraint); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (education and rearing of children).

28. *See* Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1880 (1984) (discussing the tension between associational freedom and equality with regard to *Roberts*).

29. *But cf.* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). The Court held generally that the constitutional right to freedom of association does not necessarily include a right to disassociate from others. 431 U.S. at 227. More specifically, the Court stated that compelling school teachers to support the political purposes of a union "works no less an infringement of constitutional rights" than prohibiting teachers from supporting the union. *Id.* at 234.

30. 357 U.S. 449 (1958). In *NAACP* the state attempted to compel the NAACP to disclose membership lists. *Id.* at 451. The Court held that such compulsion inhibited the exercise of the fourteenth amendment right to freedom of self-expression. *Id.* at 462-63. The Court noted that the freedom to associate for the advancement of beliefs and ideas is "beyond debate." *Id.* at 460.

31. *Id.* at 459. *See also Griswold*, 381 U.S. at 483. Justice Douglas noted that the act of joining an organization could itself be a form of expression:

> The right of association . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group. . . . Association in that context is a form of expression of opinion; and while it is not expressly included in the first amendment its existence is necessary in making the express guarantees fully meaningful.

Id.

32. *NAACP*, 357 U.S. at 460-61. The Court generally applies a strict scrutiny standard to any state action that attempts to abridge the freedom of association. *Id.* at 460. *See also* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.41 (1986) (extensively describing the strict scrutiny test); *but cf.* M. NIMMER, FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMEMDMENT § 2.05[B][4] (1984). Besides "strict scrutiny," other levels of scrutiny include "mid-tier" balancing and "rational basis" analysis. But suspicion remains that such labels are not so much prescriptive directions as "shorthand labels for

found the interests of the state not sufficiently compelling to justify infringement on freedom of association.[33] While the Court in *NAACP* established a constitutional right to freedom of association, the Court failed to articulate the scope of its protection.[34]

The federal public accommodation law[35] contained in the Civil Rights Act of 1964[36] gave broad definition to the associational rights established in *NAACP*. The Act, however, had minimal effect on discrimination in private clubs. While the Act clearly prohibits discrimination in public accommodations, Title II of the Act provides an exemption for private clubs.[37] By failing to define "private," the legislature invited broad interpretation of this term.[38] Moreover, the statute only applies to clubs that affect interstate commerce[39] and does not extend to sex discrimination.[40] Although the Act did not have a direct

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unarticulated balancing. They simply rationalize the balance once it has been achieved." *NAACP*, 357 U.S. at 460.

33. *Id.* at 463-64.

34. Note, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 1970 DUKE L.J. 1181, 1194 (1970). The relationship between freedom of association and express first amendment rights remains unclear. The Court did not specifically address the type or degree of expression required for protection. In dicta, the Court suggested that the freedom of association included the right to advance beliefs and ideas in economic, religious, or cultural, as well as political matters. *Id.* at 1194.

35. 42 U.S.C. § 2000a(a) (1982). The public accommodation provision states: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin." *Id.*

36. 42 U.S.C. § 2000a (1964).

37. 42 U.S.C. § 2000a (1982) states in part:

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

Id.

38. *See, e.g.*, Garner v. Louisana, 368 U.S. 157, 181 (1961) (Douglas, J., concurring) (stating that the proprietor of a restaurant may not define "public" to include only the people of the proprietor's choice); Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l, 52 A.D.2d 906, 909, 383 N.Y.S.2d 383, 387 (1976) (objecting to a definition of private club as one which merely bars a portion of the public); Wright v. Cork Club, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970) (describing factors for determining private clubs under federal civil rights law).

39. 42 U.S.C. § 2000a(c) (1982).

40. 42 U.S.C. § 2000a(b) (1982). Title VII of the Civil Rights Act provides protection against sexual discrimination in employment. 42 U.S.C. § 2000(e) (1982). For a discussion of the relation between Title VII and state regulations and their combined

impact on private clubs, it influenced the drafting of state public accommodation laws.[41]

State public accommodation laws have imposed the most significant restrictions on private club discrimination.[42] Historically, state legislation broadly recognized associational interests,[43] and virtually all antidiscrimination legislation contained exemptions for private associations.[44] Thus, state courts have had to interpret the statutory terms to determine which organizations fell within these exemptions.

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effect on private clubs, see Garcia, *Title VII Does Not Preempt State Regulation of Private Club Employment Practices*, 34 HASTINGS L.J. 1107 (1983); *see also* Bohemian Club v. Fair Employment & Hous. Comm'n, 187 Cal. App. 3d 1, 231 Cal. Rptr. 769 (1986) (preservation of camaraderie in all-male clubs does not justify sexually discriminatory hiring practices); Guesby v. Kennedy, 580 F. Supp. 1280, 1284 (D. Kan. 1984) (right of association more limited in employment context than club membership context).

41. *See* Comment, *The Unruh Act: An Uncertain Guarantee*, 31 UCLA L. REV. 443, 445 (1983) (states adopted public accommodations laws in response to Supreme Court's invalidation of federal public accommodation law). *See generally* 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); Note, *The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U. L. REV. 1112 (1969) (detailed review of developing state standards used to determine status of assertedly private clubs within context of racial discrimination actions under Title VII).

42. *See* N.Y. Times, June 21, 1988, at 1A, col. 5 (reporting states which have public accommodation laws and noting the laws' success); *see also* Project, *supra* note 41, at 264 (providing a comprehensive list of the public accommodation laws enacted in 39 states). The equal protection clause of the fourteenth amendment, however, is usually ineffective in contesting discrimination by private clubs because the fourteenth amendment is interpreted to require that acts of discrimination involve "state action." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 n.1 (1972) (Douglas, J., dissenting). In *Moose Lodge*, a black guest challenged the lodge's refusal to serve him. The plaintiff conceded the right of a private club to discriminate, but argued that the state's issuance of a license to sell alcoholic beverages at the lodge was "state action" implicating the protection of the fourteenth amendment. *Id.* at 171-72. Consequently, the Court did not have to decide whether a private club could discriminate. *Id.* at 177-78.

In his dissent, Justice Douglas appeared to support the right of private clubs to discriminate against minorities of all types, but he argued that there was sufficient state action to bar further discrimination against blacks. *Id.* at 179-83.

A party can establish state action by showing that the actor is the state or that the actor occupies a public function. *E.g.*, Marsh v. Alabama, 326 U.S. 501, 506 (1946). The party can also satisfy the state action requirement by showing a nexus between the actor and the state, such as state enforcement of a private discriminatory act. Shelly v. Kraemer, 334 U.S. 1 (1948).

43. Linder, *supra* note 28, at 1881 (noting that states recognize strong associational interests by broadly exempting private clubs from antidiscrimination legislation).

44. *See supra* notes 36-42 and accompanying text.

Until recently courts have had minimal guidance in defining the proper scope of statutory exemptions for private associations.[45]

The Supreme Court in *Roberts v. United States Jaycees*[46] established a comprehensive framework to determine which clubs could be exempt from state public accommodation laws.[47] The *Roberts* Court held that the Minnesota Human Rights Act[48] compelled the Jaycees to accept women as regular members.[49] The Court distinguished two constitutionally protected associations: intimate associations[50] and expressive associations.[51] The Court found that the Jaycees did not qualify as an intimate association because its activities were substantially open to nonmembers and because club membership was large and nonselective.[52] The Jaycees also failed to qualify as an expressive association because it could not prove that admitting women would change the character of the organization's message.[53] While the Court in *Roberts* established a workable analysis for other courts to follow, it failed to define specifically the boundaries of constitutionally protected

45. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

46. 468 U.S. 609 (1984).

47. *Id.* at 618. The *Roberts* Court established a three-part analysis for constitutional challenges against freedom of association rights. *Id.* at 618-31. First, the Court evaluated the Jaycees' right to intimate association. *Id.* at 618-21. Next, the Court considered the Jaycees' right of expressive association. *Id.* at 621-29. Finally, the Court balanced any intrusion on the Jaycees' right of expressive association with the government's compelling interest. *Id.* at 629-31.

48. MINN. STAT. § 363.03(3) (1982). The Act provides in pertinent part: "It is an 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. . . ." *Id.*

49. *Roberts*, 468 U.S. at 630-31.

50. *Id.* at 618-22. To determine whether an intimate association exists, the Court considers size, degree of selectivity in admissions and retention, and the need for privacy in certain key aspects of the relationship. *Id.* at 620. The Court stated that the Bill of Rights grants highly personal relationships substantial freedom from state interference. *Id.* at 618. The Court intimated that these relationships do not extend far beyond the family. *Id.* at 619.

51. *Id.* at 622-29. To establish the defense of freedom of expressive association, the group must show that it is engaged in a protected first amendment activity such as political speech, education, or religion. The government must then prove that its interference is the least intrusive means to further a compelling state interest. *Id.*

52. *See supra* note 50.

53. The Court, finding no support in the record, did not address potential changes in the basic philosophy of the organization which might necessarily result if women became full voting members. *Roberts*, 468 U.S. at 626-27.

associations.[54]

In *Board of Directors of Rotary International v. Rotary Club of Duarte*,[55] the Supreme Court refined the freedom of association analysis presented in *Roberts*. Applying the *Roberts* Court's intimate-expressive dichotomy,[56] the Court held that California's Unruh Civil Rights Act[57] did not violate the Rotary Club's right of association. *Rotary* expanded the definition of intimate associations to include a spectrum of personal attachments and refused to confine the term to family relations.[58] With regard to expressive associations, the Court found no evidence that the admission of women would unduly interfere with the present purposes of club members.[59] Although the Court expanded the categorical distinctions, it did not specifically limit private associational rights.

New York State Club Association, Inc. v. City of New York[60] presented the Supreme Court with an opportunity to define clearly the

54. *Id.* at 619-22. The *Roberts* court merely held that the limits of private associations fall somewhere on a "spectrum ranging from intimate to the most attenuated of personal attachments." *Id.*

55. 107 S. Ct. 1940 (1987) (holding that sex discrimination policies violated a California public accommodation law notwithstanding the freedom of association rights of Rotary members).

56. *Id.* at 1945-48. *See supra* notes 46-51 and accompanying text.

57. CAL. CIV. CODE § 51 (West 1982). The Unruh Act reads 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." *Id.* Currently, many California all-male clubs have tried to "privatize" their policies in order to evade the Act's prohibition. To accomplish this, the clubs claim they accept personal checks only, permit no business activity, and screen all nonmembers. Commentary of Herma Hill Kay, The Washington University School of Law *Shelley v. Kraemer* Conference (Sept. 30, 1988).

58. *Rotary*, 107 S. Ct. at 1946. The Court explicitly stated that it did not limit the right of private associations to family relations. *Id.* However, the Court held that relationships among Rotary Club members were not sufficiently intimate to warrant constitutional protection. *Id.* The Court reasoned that Rotary Club membership procedures emphasized unlimited full representation of the business and professional community. *Id.* Moreover, Rotary Club sought publicity and joint participation in activities with other clubs. *Id.* at 1946-47. Thus, the Court found that the Rotary Club was neither selective nor exclusive. *Id.*

59. *Id.* at 1946-47. The Court found that the Rotary Club conducts significant business activity. Also, no evidence indicated Rotary Clubs promote public issues or other traditional first amendment speech topics. Thus, the Court found that the state's interest in eliminating discrimination against women extended to equal access of leadership skills, business opportunities, and tangible goods and services. *Id.*

60. 108 S. Ct. 2225 (1988).

parameters of private associations. Writing for the majority,[61] Justice White granted the NYSCA standing to pursue a facial attack[62] on Local Law 63, but ultimately denied the challenge.[63]

The Court initially addressed NYSCA's contention that Local Law 63 could never be applied in a valid manner.[64] Relying on *Roberts* and *Rotary*, the Court found that the law's antidiscrimination provisions could be constitutionally applied to at least some large New York clubs.[65] The Court noted that *Roberts* upheld similar laws regulating clubs with at least four hundred members[66] and that *Rotary* allowed restrictions on groups with even fewer members.[67] Additionally, the Court held valid the law's application to clubs with regular meal service and regular nonmember involvement because these provisions clearly pinpointed clubs with a commercial nature.[68] While some clubs may be entitled to constitutional protection despite the presence of these characteristics,[69] the Court concluded that the law could validly apply to other associations.[70]

The Court also addressed NYSCA's contention that the law was

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61. *Id.*

62. *Id.* at 2232 (noting that an association has standing to sue on behalf of its members when those members would have standing to bring the same suit).

63. *Id.* at 2232-35. The Court established that in order to make a facial attack on the law, NYSCA must prove that the law could never be applied in a valid manner. NYSCA must also prove that even if the law could be applied validly, it would be so broad that it would inhibit the free speech of others. *Id.*

64. *Id.* at 2233-34. NYSCA contended that because a significant amount of private or intimate association could occur in clubs meeting the three-prong test, the test failed to measure adequately a club's nonprivate status. *Id.* For a review of the three-prong test, see *supra* text accompanying notes 11-13.

65. *NYSCA*, 108 S. Ct. at 2233.

66. Roberts v. United States Jaycees, 468 U.S. 609 (1984). The state law applied to the Jaycees, which had approximately 295,000 members in 7,400 local chapters. *Id.* at 613.

67. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940 (1987). The state law applied to Rotary clubs having less than 20 members. *Id.* at 1946.

68. *NYSCA*, 108 S. Ct. at 2233. The Court affirmed the City Council's findings that these two characteristics reflect the degree of business deals and contacts made at clubs. *Id.*

69. *Id.* at 2234. The Court rejected NYSCA's claim that the law created an irrebuttable presumption that clubs covered under the law are not private in nature. Instead, the Court allowed for judicial review of administrative enforcement proceedings. *Id.* On appeal, courts could make a case-by-case analysis of the facts. *Id.* at 2235.

70. *Id.* at 2234.

overbroad[71] because it impaired individuals' rights to associate and to advocate public or private viewpoints.[72] Finding that NYSCA could not prove that the law threatened any particular club's constitutional rights, the Court rejected the claim.[73] It noted, however, that future courts could cure any overbreadth in the law on a case-by-case basis.[74]

Finally, the Court rejected NYSCA's claim that the law violates the equal protection clause because it exempts benevolent orders and religious organizations.[75] The Court reasoned that because such groups did not have the same business proclivity as private clubs, Local Law 63 properly exempted them.[76]

In her concurring opinion, Justice O'Connor agreed with the Court's conclusion that the facial challenge to Local Law 63 must fail.[77] She wrote separately to emphasize that the Court was not undermining the importance of any associational interests involved.[78] She clarified that the constitutional right of association does not protect predominantly commercial organizations.[79] Moreover, she noted that when future courts examine the commercial nature of a club, they should also consider subjective factors — such as an organization's purpose, policies, selectivity, and congeniality — on a case-by-case basis.[80]

Justice Scalia concurred with the majority's opinion, but disagreed with the equal protection analysis.[81] He argued that benevolent orders

71. *Id.* at 2234-35.

72. *Id.* The overbreadth analysis applies when a litigant, whose own activities are unprotected, challenges a statute by showing that it substantially abridges the first amendment rights of other parties not before the court. *See* Brief of NYSCA, *supra* note 8, at 23. To prove overbreadth in this case, the Court required NYSCA to show that the law would deny first amendment guarantees to a substantial number of individuals. *NYSCA*, 108 S. Ct. at 2234.

73. *Id.* at 2234-35. The Court upheld the City Council's argument that Local Law 63 does not violate a right of expressive association, since affected clubs may espouse ideologies basic to their formation or existence and may freely select and exclude members on that basis. *Id.* The Court held that Local Law 63 does not regulate speech but merely restricts conduct which is not entitled to constitutional protection. *Id.*

74. *Id.* at 2235.

75. *Id.* at 2235-37. *See supra* notes 14-15.

76. *Id.* at 2236-37.

77. *Id.* at 2237.

78. *Id.* Justice O'Connor stated that even if a club falls within the three-prong test, the Court will permit the club to prove that it deserves constitutional protection. *Id.*

79. *Id.*

80. *Id. See infra* note 89 listing an additional subjective factor.

81. *Id.* at 2238.

must be more than "unique" to fall within Local Law 63's exemption.[82] He contended that a reasonable connection must exist between the special characteristics of the association and the purpose of the law.[83] Justice Scalia supported the Court's decision, however, because he agreed that the exempted organizations were unlikely to foster business transactions.[84]

The *NYSCA* decision is an important symbolic victory.[85] The Court has given new encouragement and guidance to advocates of similar laws in other states.[86] Unlike the broad standards established in earlier cases,[87] Local Law 63 enumerates objective characteristics which define private associations.[88] To protect truly private associations that may fall within the law's three-part test, the Court considered subjective variables.[89] By firmly establishing that cities may constitutionally ban discrimination in private clubs, the decision will affect private associations nationwide.[90]

The *NYSCA* decision opens the door to professional advancement for minorities and women,[91] but provides no automatic assurance that

82. *Id.*

83. *Id.*

84. *Id.*

85. "This case clears the way for cities in which the city council perceives the same invidious discrimination that the New York City Council perceived to regulate the so-called private clubs if they meet these same or similar criteria." N. Y. Times, June 21, 1988, at 1A, col. 5 (quoting Benna Ruth Solomon, attorney for the City of New York).

86. *See* Brief of NYSCA, *supra* note 8, at 7 n.6, listing some of the municipalities, including Detroit, Washington, D.C., Los Angeles, and Philadelphia, which have considered or are considering legislation similar to Local Law 63.

87. *See* Board of Directors of Rotary Int'l v. Rotary Club of Durante, 107 S. Ct. 1940 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

88. *See supra* note 6.

89. *NYSCA*, 108 S. Ct. at 2235. The Court also suggested that an association could show that it is organized for specific expressive purposes by proving that it will not be able to advocate effectively its desired viewpoints without confining its membership. *Id.*

90. Although neither Missouri nor St. Louis has a statute restricting discrimination in private clubs, the *NYSCA* decision influenced the well-established Missouri Athletic Club (MAC) to change its 85-year-old male-only policy and open its doors to women. St. Louis Post Dispatch, Sept. 17, 1988, at 1A, col. 2. The MAC has approximately 5,000 members, offers breakfast, lunch, and dinner seven days a week, and derives part of its income from businesses that pay for their employees' dues or expenses. *Id.* St. Louis Alderman Mary Ross claimed that had the club not changed its membership policy, she would have proposed legislation. *Id.*

91. *See generally* Burns, *supra* note 3 (discussing public apathy toward the exclusion of women from private clubs).

women will benefit from the valuable business networking that all-male clubs foster.[92] Opening membership to women does not guarantee that private clubs will treat women equally once they are admitted.[93] Thus, *NYSCA* may present merely the first step toward equalizing business opportunities in private clubs.[94]

NYSCA may contribute to greater equality in the workplace at the expense of impairing the constitutional right of freedom of association.[95] Future courts might erroneously accept Local Law 63's tripartite test[96] as a definitive indicator of a club's nonprivate status.[97] Thus, courts might overlook other important factors which should render the club constitutionally protected. [98] *NYSCA* could jeopardize the first amendment rights of those associations which actually serve expressive purposes, but incidentally conduct commercial activity.[99]

The holding in *NYSCA* exemplifies the growing trend toward restricting discrimination in private associations. The Court, by specifically defining the scope of the private association, has allowed city and

92. *See* Burns, *supra* note 3, at 325-34 (discussing the enormous influence prestigious clubs provide in business and politics).

93. *See* Comment, *Sex Discrimination in Private Clubs*, 29 HASTINGS L.J. 417 (1977). In many clubs women were permitted to use club facilities only on specified days of the week or only during specified hours; in others, women could use only designated stairways, elevators, and rooms. *Id.* at 419.

California's Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1982), recently compelled San Francisco's influential Press Club to admit women at the chagrin of its male members. Expressing their outrage at the new policy, several male members began swimming naked in the coed pool. Commentary by Professor Herma Hill Kay, The Washington University School of Law *Shelley v. Kraemer* Conference (Sept. 30, 1988).

94. *Id.*

95. *See* Linder, *supra* note 28, at 1902 (commenting that the power to change an association's membership is so dangerous that it should not be exercised even where discrimination may appear unjust).

96. Because the three-prong test is objective and easy to apply, courts may be tempted to rely on it without considering subjective factors.

97. *See* Brief of NYSCA, *supra note* 8, at 20. NYSCA contended that the test was too superficial and failed to consider that the course of human interactions combines business, social, and intimate components. *Id.*

98. *Id.* While the Court stated it would consider other factors, it did not specifically identify them. *But see supra* text accompanying note 80 (identifying Justice O'Connor's consideration of subjective factors).

99. *Id. See also* Roberts v. United States Jaycees, 468 U.S. 609 (1984). In her concurring opinion, Justice O'Connor noted that many associations cannot readily be described as purely expressive or purely commercial. She suggested that the analysis should focus almost exclusively on whether the activities of the association are predominately expressive or commercial. *Id.* at 635.

state public accommodation laws to ban discrimination in business-oriented clubs. Consequently, the Court contributes to establishing greater equality among all professionals in the business world.

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