Hastings Constitutional Law Quarterly

Volume 16
Number 4 *Summer 1989*

Article 5

1-1-1989

New York State Club Association v. City of New York: Ending Gender-Based Discrimination in Private Clubs--Are Associational Rights Still Protected

Anthony L. Leto

New York State Club Association v. City of New York: Ending Gender-Based Discrimination In Private Clubs— Are Associational Rights Still Protected?

Introduction

Over one hundred years ago, Alexis de Tocqueville wrote that the "most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of Association therefore . . . [is] as inalienable in its nature as the right of personal liberty."[1]

The United States Supreme Court has found certain constitutional rights implicit within the First Amendment,[2] one such right being freedom of association. "[T]he Supreme Court has repeatedly described [freedom of association] as among the preferred rights derived by implication from the First Amendment's guarantees of speech, press, petition, and assembly."[3] The Court formally recognized freedom of association as a fundamental right in *NAACP v. Alabama.*[4]

A recent controversy involving freedom of association has revolved around discriminatory practices of all-male private clubs and organizations, including the United States Jaycees and Rotary International.[5] These clubs have challenged state and local statutes requiring them to accept applications from women for full membership,[6] and have unsuccessfully argued that their right to freedom of association has been violated by the enactment of these statutes.[7] In both *Roberts v. United States*

1. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 196 (1985).

2. The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

3. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1010 (1988).

4. 357 U.S. 449 (1958). The Court made references to freedom of association in decisions previous to *NAACP v. Alabama. See* Note, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy,* 1970 DUKE L.J. 1181, 1192.

5. *See infra* text accompanying notes 19-65.

6. See *infra* note 69 for an example of one such statute.

7. *See* N.Y. Times, June 21, 1988, at A1, col. 4; N.Y. Times, January 31, 1988, § 1 at 42, col. 3.

Jaycees[8] and *Board of Directors of Rotary International v. Rotary Club of Duarte*,[9] the Court upheld state civil rights laws banning gender-based discrimination, ruling that neither organization had had its associational rights violated.[10]

In June of 1988 the Supreme Court issued its decision in *New York State Club Association, Inc. v. City of New York*,[11] again holding that the right to freedom of association does not protect "private clubs"[12] from local laws making it illegal to discriminate on the basis of gender.[13] In this case, however, the Court addressed the issue in a somewhat different manner than it had in either *Roberts* or *Rotary*. The Court for the first time stated that some organizations subject to anti-discrimination statutes may nevertheless be entitled to associational protection.[14] Thus, *NYSCA* may mark the turning point in this area of constitutional law.

This Comment will explore how the Supreme Court has limited the expressive associational rights of private clubs. It will also examine the possible emergence of a new interpretation of intimate associational protection. Part I describes the two leading cases that preceeded *NYSCA*, *Roberts v. United States Jaycees*[15] and *Board of Directors of Rotary International v. Rotary Club of Duarte*.[16] Part II presents the facts and holding of *New York State Club Association, Inc. v. City of New York*.[17] Part III analyzes the Court's restriction of associational rights within private organizations. The Comment concludes that although the Court has indicated a new willingness to extend association rights to members of private clubs under limited circumstances, it has also voiced its reluctance to accept another such case in the near future, suggesting that the states should resolve these challenges on a case-by-case basis.

8. 468 U.S. 609 (1984).

9. 481 U.S. 537 (1987).

10. *See infra* Parts I and II for a detailed description of the holding in each case.

11. 108 S. Ct. 2225 (1988) [hereinafter *NYSCA*].

12. In this case, private clubs were defined as those clubs that meet the three pronged test of the New York City statute. *Id.* at 2230. See *infra* note 69 for the specific language of the New York City statute.

13. *NYSCA*, 108 S. Ct. at 2231. The U.S. Supreme Court affirmed the New York Court of Appeals judgment, New York State Club Ass'n v. City of N.Y., 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987), upholding Local Law 63 against a facial attack on its constitutionality.

14. *See generally* notes 100-108 and accompanying text.

15. 468 U.S. 609 (1984).

16. 481 U.S. 537 (1987).

17. 108 S. Ct. 2225 (1988).

I. Background: Existing Law

A. *Roberts v. United States Jaycees*[18]

In *Roberts*, the Court was required to "address a conflict between a State's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization."[19] The Court upheld the Minnesota Human Rights Act[20] against claims that it violated the first and fourteenth amendment rights of the organization's members.[21]

Justice Brennan, writing for a majority of the Court, began by analyzing freedom of association "in two distinct senses."[22] According to Brennan, these distinct associational rights are the rights of "intimate association" and "expressive association."[23] Brennan explained that "[i]n one line of decisions, [this] Court has concluded that choices to enter into and maintain certain human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[24] In another set of decisions, addressing expressive association, the Court has recognized the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[25]

Brennan pointed out, however, that "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect . . . of the constitutionally protected liberty is at stake in a given case."[26] Therefore, the Court considered separately the effect the statute had on the Jaycees' freedom of intimate association and on their freedom of expressive association.

1. Freedom of Intimate Association

The Court left open the exact criteria necessary for intimate association protection, noting only that family relationships are definitely pro-

18. 468 U.S. 609 (1984).

19. *Id.*, at 612.

20. The Minnesota statute provided, in pertinent part, that "[i]t 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." MINN. STAT. § 363.03, subd. 3 (1982).

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

22. *Id.* at 617.

23. *Id.* at 618.

24. *Id.* at 617-18.

25. *Id.* at 618.

26. *Id.*

tected.[27] In considering and then rejecting the Jaycees' claim, the Court listed a number of relevant factors "[w]ithout precisely identifying every consideration that may underlie this type of constitutional protection . . . ."[28] These factors "include[d] size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."[29] The Court found that "[i]n this case, however, several features of the Jaycees clearly place the organization *outside* of the category of relationships worthy of this kind of constitutional protection."[30]

The Court noted that undisputed facts revealed the Jaycee chapters were large and unselective.[31] No criteria for judging applicants was used except age and gender.[32] Furthermore, women attended meetings and participated in various functions despite being unable to hold office, vote, or receive certain awards.[33] The Court thus concluded that "[i]n short, the local chapters of the Jaycees are neither small nor selective [and] much of the activity . . . involves the participation of strangers . . . . 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."[34]

2. *Freedom of Expressive Association*

The Court next examined whether the Jaycees were entitled to protection of their expressive association rights.[35] The Court explained that it has "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."[36] It then stated, without analysis, that the Jaycees did in fact participate in various "protected activities."[37] Therefore, a central question of the case became the weight the Court was willing to give these protected activities.

The Court noted that certain government actions can infringe upon

27. *Id.* at 619-20.
28. *Id.* at 618.
29. *Id.* at 620.
30. *Id.* (emphasis added).
31. *Id.* at 621.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 622.
36. *Id.*
37. *Id.* Later in the opinion, the Court acknowledged that the Jaycees regularly engage in lobbying, fundraising, and other activities "worthy of constitutional protection under the First Amendment . . . ," but nonetheless concluded that admitting women as full voting members would not impair the Jaycees' ability to continue these activities. *Id.* at 626-27. *See also infra* notes 47-50 and accompanying text.

this right of expressive association.[38] Such infringements include penalties or withholding of benefits from individuals because of membership in an organization,[39] and forced disclosure of membership lists;[40] the government may also "try to interfere with the internal organization or affairs of a group."[41] The Court acknowledged that the Minnesota law in question "works as an infringement of the last type."[42] It then stated that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[43]

Despite acknowledging that an infringement of associational rights had taken place, the Court emphasized that "[t]he right to associate for expressive purposes *is not . . . absolute*."[44] Infringements are allowed if the statute is adopted to serve compelling state interests, does not relate to suppression of ideas, and cannot be achieved through less restrictive means.[45] The Court then held that Minnesota's "compelling interest" in eradicating gender-based discrimination justified any impact the statute might have on the Jaycee members' associational freedoms.[46]

The Court next explained why, despite an admitted infringement of associational rights, the Minnesota law did not interfere with the organizations' ideologies or philosophies.[47] The majority deemed this an important issue in balancing the State's compelling interest against the organizations' associational rights.[48] Noting once again that the Jaycees already allowed women to participate in a broad range of the organizations' activities,[49] the Court concluded that the Jaycees' claim that the admission of women to their membership would impair or alter the organization's message was "attenuated at best."[50]

After discussing the lack of merit in the Jaycees' claims, the Court declared, "In any event, even if enforcement of the [Minnesota] Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the state's legitimate

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

39. *Id.* at 622-23 (citing Healy v. James, 408 U.S. 169, 180-84 (1972)).

40. *Id.* (citing Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982)).

41. *Id.* at 623 (citing Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975)).

42. *Id.*

43. *Id.*

44. *Id.* (emphasis added).

45. *Id. See, e.g.*, Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982).

46. *Roberts*, 468 U.S. at 623.

47. *Id.* at 626-27.

48. *Id.* at 626.

49. *Id.* at 627.

50. *Id.*

purposes."[51] In effect, the Court created a balancing test weighing the state's compelling interests in eliminating invidious discrimination against the associational rights of the Jaycees.[52] In so doing, the Court announced for the first time that the state's goal of eradicating invidious discrimination was to be considered a compelling interest.[53]

B. *Board of Directors of Rotary International v. Rotary Club of Duarte*[54]

This 1987 case involved the California Unruh Civil Rights Act,[55] which had been challenged in the same manner as the Minnesota statute in *Roberts*.[56] Justice Powell, writing for the majority, followed the same two part analysis of freedom of intimate and expressive association as the Court had in *Roberts*,[57] and similarly declined to offer freedom of association protection to the Rotarians.[58]

The majority again recognized that family relationships were the type of relationship that deserved intimate association protection,[59] noting, however, that "[o]f course, we have not held that [this] constitutional protection is restricted [only] to relationships among family members."[60] The Court restated the distinctive characteristics necessary to qualify for such protection, including size, purpose, and exclusion of others from activities.[61] The Court found that the evidence indicated the relationship among the Rotary members was not the kind that deserved intimate association protection, noting that the size of chapters ranged from twenty to more than 900 members, that there was a high drop-out rate, and that many activities were carried out in the presence of strangers.[62]

---

51. *Id.* at 628.

52. Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106, 116 (1986).

53. *Roberts*, 468 U.S. at 623; *see* Note, Roberts v. United States Jaycees: *Discriminatory Membership Policy Of A National Organization Held Not Protected By First Amendment Freedom Of Association*, 34 CATH. U.L. REV. 1055, 1080 (1985).

54. 481 U.S. 537 (1987).

55. The Unruh Civil Rights Act 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, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

CAL. CIV. CODE § 51 (West Supp. 1989).

56. *Rotary*, 481 U.S. at 539.

57. *Id.* at 544-45.

58. *Id.* at 546.

59. *Id.* at 545.

60. *Id.*

61. *Id.* (citing *Roberts*, 468 U.S. at 620). *See also supra* notes 27-30 and accompanying text.

62. *Rotary*, 481 U.S. at 546-47.

On these facts, the Court also held that Rotary was not entitled to expressive association protection, stating, "Even if the Unruh Act does work some slight infringement on [a] Rotary member's right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women."[63] Thus, the California Rotary chapters could be subjected to the provisions of the Unruh Act.[64]

In addition to solidifying the Supreme Court's stand in this area of law, and giving weight to *Roberts* as a precedent, the *Rotary* opinion is significant for its statement in footnote six. The Court stated that "we have no occasion in this case to consider the extent to which the First Amendment protects the rights of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country."[65] It was this footnote that prompted the attorney for the New York State Club Association to declare that "[the NYSCA] appeal presents to the Court the very question expressly left open in *Rotary*."[66]

II. *New York State Club Association, Inc. v. City of New York*[67]

A. The Facts

On October 23, 1984, the mayor of New York City signed Local Law 63, which amended New York City laws prohibiting invidious discrimination by organizations that are not in their nature "distinctly private."[68] The amendment[69] specifically defined three criteria that would automatically make a club or organization a public accommodation, thus

63. *Id.* at 549.

64. *Id.* at 547, 549 & n.8.

65. *Id.* at 547-48 n.6.

66. Appellant's Jurisdictional Statement at 6, New York State Club Ass'n, Inc. v. City of New York, 108 S. Ct. 2225 (1988) (No. 86-1836).

67. 108 S. Ct. 2225 (1988).

68. Brief for Appellant at 5, New York State Club Association, Inc. v. City of New York, 108 S. Ct. 2225 (1988) (No. 86-1836).

69. Local Law 63 of 1984 amended § B1-2.0(9) of the N.Y. CITY ADMIN. CODE to add the following definition:

> An institution, club or place of accommodation shall not be considered in its nature distinctly private if [1] it has more than four hundred members, [2] provides regular meal service and [3] regularly receives payment for dues, fees, usage 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 purposes 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 corporations law shall be deemed to be in its nature distinctly private.

New York State Club Ass'n, Inc. v. City of New York, 118 A.D.2d 392, 393, 505 N.Y.S.2d 152, 153 (A.D. 1986).

falling within the anti-discrimination laws.[70]

Immediately after the amendment was passed, a consortium of 125 private clubs, calling itself the New York State Club Association, filed suit seeking a declaratory judgment that Local Law 63 was unconstitutional under the New York Constitution.[71] The lower court ruled against the association,[72] and the association lost its appeals both to the Supreme Court Appellate Division and to the New York Court of Appeals.[73] The association then appealed the New York decision to the United States Supreme Court,[74] seeking a declaratory judgment that Local Law 63 was unconstitutional on its face because the statute violated the consortium's first and fourteenth amendment rights to freedom of association.[75]

B. The Holding

Although the Court ruled on several areas of substantive law, this Comment will discuss only the freedom of association issues. After making an initial determination of standing,[76] Justice White, writing for the majority,[77] addressed the issue of facial challenges to statutes.

1. Facial Challenges

The Court first stated that since this was a facial challenge to the statute, the appellant could attack the constitutionality of Local Law 63

70. The New York State Club Association claimed in its brief that an irrebuttable presumption was established by meeting the three criteria established by Local Law 63. Brief for Appellant, *supra* note 68, at 6. Therefore, clubs meeting the three criteria would automatically be subject to the law. *Id.* The City of New York claimed that lower court rulings characterized the criteria in Local Law 63 as "permissive" and as such the law did not create an irrebuttable presumption. Brief for Appellee at 18, New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988) (86-1836). *See also* Brief for Appellant, *supra* note 68, at 23 n.11.

71. New York State Club Ass'n, Inc. v. City of New York, 69 N.Y.2d 211, 216, 505 N.E.2d 915, 917, 513 N.Y.S.2d 349, 351 (1987).

72. New York State Club Ass'n, Inc. v. City of New York, 118 A.D.2d 392, 505 N.Y.S.2d. 152 (A.D. 1986).

73. New York State Club Ass'n, Inc. v. City of New York, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d. 349 (1987); New York State Club Ass'n, Inc. v. City of New York, 118 A.D.2d 392, 505 N.Y.S.2d 152 (A.D. 1986).

74. *NYSCA*, 108 S. Ct. at 2229.

75. Brief for Appellant, *supra* note 68, at 8-11.

76. The Court established that the consortium had standing to sue by applying its three part test established in Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343 (1977). The Court held that appellant met all three criteria even though appellee objected to standing only on the first part of the *Hunt* test. *NYSCA*, 108 S. Ct. at 2232.

77. Justice White wrote the opinion for a unanimous Court in parts I, II, and III and an opinion of the Court for part IV, in which all the justices joined except Justice Scalia. Justice O'Connor wrote a concurring opinion in which Justice Kennedy joined. Justice Scalia wrote an opinion concurring in part and concurring in the judgment.

in only two established ways,[78] by demonstrating that "the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to the [appellant] and others, it nevertheless is so broad it 'may inhibit the constitutionally protected speech of third parties.' "[79]

In order for the first type of facial challenge to succeed, a court must find that " 'every application of the statute create[s] an impermissible risk of the suppression of ideas.' "[80] The second type of challenge will succeed only if the statute is " 'substantially' overbroad, which requires the court to find 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.' "[81] The Court was unpersuaded that appellant could make a valid claim for either facial challenge.[82]

2. *Intimate and Expressive Associational Rights*

Before beginning its analysis of associational rights, the Court noted that the association had conceded at oral argument that Local Law 63 "could be constitutionally applied at least to some of the large clubs, under this Court's decisions in *Rotary* and *Roberts*."[83] Therefore, at the outset, at least some of appellant clubs could not claim a violation of their constitutional rights.

Regarding lack of intimate association, the Court stated that these "characteristics [the requirements of Local Law 63] are at least as significant in defining the nonprivate nature of these associations, because of the kind of role that strangers play in their ordinary existence, as is the regular participation of strangers at meetings, which we emphasized in *Roberts* and *Rotary*."[84] Although conceding that "there may be clubs that would be entitled to constitutional protection despite the presence of these characteristics . . .[,]"[85] the Court asserted that "it cannot be said that Local Law 63 is invalid on its face because it infringes the private associational rights of each and every club covered by it."[86]

The Court used similar reasoning regarding the contention that Local Law 63 infringed upon every club member's right of expressive association, stating that it might be possible for an association to show it is organized for expressive purposes, thus deserving constitutional protec-

78. *NYSCA*, 108 S. Ct. at 2233.
79. *Id.* (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984)).
80. *Id.* (quoting City Council v. Taxpayers for Vincent, 466 U.S. at 798 n.15).
81. *Id.* (quoting City Council v. Taxpayers for Vincent, 466 U.S. at 801).
82. *Id.* at 2233-34.
83. *Id.* at 2233.
84. *Id.*
85. *Id.* at 2234.
86. *Id.*

tion.[87] The Court noted, however, that since the record before it showed no specific evidence of any such purposes, it could "hardly hold otherwise" than finding there was no violation of the club's constitutional rights.[88]

III. Constitutional Analysis

In *New York State Club Association, Inc. v. City of New York*, the Supreme Court for the third time denied intimate or expressive association rights to a private organization. Yet the Court has not definitively established a test for determining associational rights under these circumstances. This is not to say, however, that the Court does not provide some guidance.[89] One commentator defended the Court's reluctance to be more definitive:

> The Court's reluctance to formulate a categorical response to the antidiscrimination/private organization question is understandable. The issue may prove to be one of the most problematic areas in constitutional law because . . . it is an issue beset with inherent conflict and tension. The most obvious conflict raised, for example, involves the two virtual first principles of contemporary constitutional law: freedom and equality. The right to choose one's associates (freedom) is pitted against the right to equal treatment (equality), a most fundamental conflict.[90]

Drawing a line between freedom and equality is difficult "[b]ecause the interests on both sides are so strong . . . . [Therefore,] resolving the issue with a per se rule vindicating only one side is not possible."[91]

The Court's decisions in *Rotary* and *NYSCA* have established a somewhat restrictive view of expressive association rights. Despite this pattern of restriction, the Court's latest language in *NYSCA* suggests that the Court will go no further in restricting associational rights and may possibly allow a more expansive use of intimate association rights.

A. Intimate Association Rights

The Court held in *Roberts* that the U.S. Jaycees, a large organization with great public exposure, did not have the "distinctive characteristics"[92] to obtain constitutional protection of intimate association.[93]

87. *Id.*

88. *Id.*

89. The Court referred to certain criteria in all three opinions such as size and selectivity. See *supra* notes 28-34 and accompanying text for a detailed description of these criteria.

90. Marshall, *Discrimination and the Right of Association*, 81 NW. U.L. REV. 68, 69 (1986).

91. *Id.* at 71.

92. *Roberts*, 468 U.S. 609, 621 (1984); *see supra* note 34 and accompanying text.

93. *See supra* notes 31-34 and accompanying text.

Though initially applauded by some,[94] the opinion drew critical comment. One commentator wrote that "[i]f hard cases make bad law, easy cases sometimes do no better, and [*Roberts*] is a good example. . . . [N]either Justice Brennan's balancing approach nor Justice O'Connor's commercial/expressive dichotomy adequately captures the competing values."[95]

Another commentator wrote that

> [b]ecause it recognizes the legitimacy and importance of the competing interests, the *Roberts* case is useful 'as a point of orientation.' It is not adequate, however, as a guide to deciding future cases. This is true primarily because the case for the state, as interpreted by the Court, was so one-sided."[96]

The Court's holding in *NYSCA* was similar to its holding in *Roberts*. It afforded no intimate association protection and liberally cited *Roberts* in making its decision.[97] Nonetheless, both the opinion of the *NYSCA* Court and Justice O'Connor's concurrence contain language that goes beyond *Roberts* regarding intimate association rights, and may therefore influence future rulings.

The Court first noted that the three characteristics required by Local Law 63[98] were at least as significant as the criteria in *Roberts* and *Rotary* in determining "the nonprivate nature of these associations."[99] The Court then stated:

> *Although there may be clubs that would be entitled to constitutional protection* despite the presence of these characteristics [the three parts of Local Law 63], surely it cannot be said that Local Law 63 is invalid on its face because it infringes the *private associational rights of each and every club* covered by it.[100]

In both *Roberts* and *Rotary*, the Court acknowledged that freedom of intimate association was not limited to family relationships, but then cited only cases dealing with family relations.[101] In *NYSCA*, however, the Court acknowledged for the first time that a specific organizational relationship may be entitled to intimate association protection.[102] Therefore, one interpretation of the *NYSCA* holding is that, although the

94. *See* Sitomer, *Club Doors Pushed Open a Bit More for Women*, Christian Science Monitor, June 21, 1988, at 1, col. 1.

95. Rhode, *supra* note 52 at 117. O'Connor's test is discussed more fully *infra* in text accompanying notes 103-121.

96. Marshall, *supra* note 94, at 74 (quoting Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878 (1984)).

97. *See supra* notes 78-88 and accompanying text.

98. See *supra* note 69 for the criteria of Local Law 63.

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

100. *Id.* at 2234 (emphasis added).

101. Roberts v. United States Jaycees, 468 U.S. 609, 618-20 (1984); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 545-46 (1987).

102. *See supra* text accompanying note 100.

Court ruled that a facial attack would not succeed in this case, it left open the invitation to an individual private club to make a fact-based claim that it has the distinctive characteristics sufficient to claim intimate association protection.

Justice O'Connor's concurrence also suggests a new direction in this area of law.[103] O'Connor stated that

> [i]n a city as large and diverse as New York City, there *surely will be* organizations that fall within the potential reach of Local Law 63 and yet are deserving of constitutional protection. For example, in such a large city a club with over 400 members *may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence.*[104]

O'Connor thus seems willing to extend associational rights beyond the intimate relationships of family life.[105]

In her next sentence O'Connor continued: "Similarly, there may well be organizations whose expressive purposes would be substantially undermined . . . ."[106] From the context of this statement it is clear that O'Connor distinguishes the two distinct associational rights. It therefore appears that the Court[107] may be willing to extend intimate association rights to private clubs under proper circumstances.[108]

B. Expressive Association Rights

As with intimate association rights, the *NYSCA* opinion and O'Connor's concurrence suggest an easing of the Court's restrictive

---

103. Justice O'Connor wrote a concurrence in *Roberts* that set forth her test for these cases. Those clubs organized primarily for expressive purposes would receive constitutional protection, whereas those clubs organized primarily for commercial purposes would receive "only minimal constitutional protection of the freedom of *commercial* association." *Roberts*, 468 U.S. at 633-34 (O'Connor, J., concurring) (emphasis in original). See also *infra* notes 115-126 and accompanying text for a further discussion of O'Connor's concurrences.

Justice O'Connor took no part in the *Rotary* decision because her husband was a member. Note, Rotary International *and Freedom of Association: Better Late than Never*, 15 W. ST. U.L. REV. 217, 238 (1987).

104. *NYSCA*, 108 S. Ct. at 2237 (O'Connor, J., concurring) (emphasis added).

105. *See supra* notes 27 & 59-60 and accompanying text.

106. *NYSCA*, 108 S. Ct. at 2237 (O'Connor, J., concurring).

107. The Court in *NYSCA* also observed that "there may be clubs that would be entitled to constitutional protection despite the presence of these characteristics. . . ." *Id.* at 2234. *See also supra* notes 84-86 and accompanying text. Thus, it appears that all the members of the Court would be willing to give constitutional protection under the proper set of facts.

108. What these proper circumstances are will most likely be the next case to come before the Court. The *NYSCA* decision indicates that only a single private club would have a chance to make the proper showing. A single club, however, may not have sufficient financial resources to litigate a case to the Supreme Court level. One private all-male club in San Francisco has estimated that legal costs in its court battle with the city attorney could top one million dollars. The City of San Francisco is attempting to enforce a statute similar to Local Law 63 against several private clubs. Himelstein, *Bias Suit Defense Fees Loom*, The Recorder, Feb. 23, 1989, at 1, col. 2.

stance regarding expressive association rights. The Court stated that the New York City law does not, "[o]n its face, . . . affect 'in any significant way' the ability of individuals to form associations[,] . . . nor does it require the clubs to 'abandon or alter' any activities that are protected by the First Amendment."[109] The Court added, however, that

> *"[i]t is conceivable,* of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example . . . ."[110]

The Court nonetheless concluded that on the record before it, "it seems sensible enough to believe that many of the large clubs covered by [Local Law 63] are not of this kind."[111] Despite this conclusion, the Court acknowledged that it was possible for some clubs falling within Local Law 63 to still be eligible for expressive association protection.

In her concurrence, Justice O'Connor stated, "[T]here may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, . . . or who share some other such common bond. *The associational rights of such organizations must be respected.*"[112] Although O'Connor concluded that since the New York City law could be applied to at least some of the clubs, it was not invalid on its face,[113] she indicated a willingness to give expressive association protection to at least some clubs.

The Court has acknowledged that there may be some clubs that are entitled to expressive association protection despite the state's compelling interest. Thus, the only definitive ruling in this line of cases is that large, unselective organizations like the Jaycees and Rotary clubs are not entitled to expressive association protection.[114]

C. Justice O'Connor's Expressive-Commercial Test

In *Roberts*, O'Connor suggested that the Court had not gone far enough in allowing States to pursue antidiscrimination actions and had offered insufficient First Amendment protection to those clubs deserving it.[115] Rather than applying the Court's "compelling interest" balancing test,[116] O'Connor would prefer an "expressive-commercial" test.[117] Her

109. *NYSCA*, 108 S. Ct. at 2234 (citations omitted).
110. *Id.* (emphasis added).
111. *Id.*
112. *Id.* at 2237 (O'Connor, J., concurring) (emphasis added).
113. *Id.* at 2237-38 (O'Connor, J., concurring).
114. *See generally supra* Part I.
115. Note, *supra* note 53, at 1082-83; *see also* Roberts v. United States Jaycees, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring).
116. *See supra* notes 44-53 and accompanying text.

test would be one of determining simply whether the organization was involved in commercial or expressive activities.[118]

O'Connor conceded, however, that "[n]o association is likely ever to be exclusively engaged in expressive activities, if only because it will collect dues from its members or purchase printing materials or rent lecture halls or serve coffee and cakes at its meetings."[119] Therefore, in her view, "an association should be characterized as commercial, and [thus] subject to rationally related state regulation of its membership and other associational activities, *when, and only when,* the association's activities *are not predominately* of the type protected by the First Amendment."[120]

In her *NYSCA* concurrence, Justice O'Connor did not make her expressive-commercial test the main issue of her opinion. Rather, she used the test to determine that some clubs were not entitled to constitutional protection.[121] O'Connor first acknowledged that the existence of some clubs deserving expressive association protection did not invalidate Local Law 63.[122] Then, without further comment, she stated that

> [p]redominantly commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law. Because Local Law 63 may be applied constitutionally to these organizations, I agree with the Court that it is not invalid on its face.[123]

O'Connor's test, unlike the majority's test, "avoids any requirement that the group demonstrate a change in content or message of its speech."[124] The relative simplicity involved in determining the level of expressive speech versus commercial activity results in a more practical test than forcing defendants to prove that admission of women would alter their protected activities.[125] O'Connor's test may therefore prove more useful to lower courts that have to decide cases based on *NYSCA*.[126]

Conclusion

In the three cases dealing with gender discrimination in private clubs, the United States Supreme Court has demonstrated its willingness to uphold the constitutionality of state antidiscrimination laws. This has

117. Note, *supra* note 53, at 1082.
118. *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring).
119. *Id.*
120. *Id.* (emphasis added).
121. *NYSCA*, 108 S. Ct. at 2237-38 (O'Connor, J., concurring).
122. *Id.* at 2237 (O'Connor, J., concurring).
123. *Id.* at 2237-38 (O'Connor, J., concurring).
124. Note, *supra* note 53, at 1083; *see also supra* notes 47-50 and accompanying text.
125. *Id.*
126. Note, *supra* note 53, at 1084.

provided for some movement within the all-male private clubs toward a more open admission policy.[127] It also has encouraged more cities to pass laws against gender discrimination and prosecute clubs that refuse to adhere to these laws.[128]

On the other hand, *NYSCA* may represent the turning point in this area of constitutional law. While upholding a New York City anti-discrimination law against a facial attack, the Court suggested for the first time that certain clubs, though falling within the coverage of the law, may nonetheless be exempt from it. Furthermore, the Court expressed for the first time a possible willingness to grant intimate association rights to groups other than those involved in family relationships.

The most difficult barrier to pursuing such a case to the Supreme Court is reflected in the Court's strong language that these cases can be settled on a case-by-case basis within the administrative bodies of the states.[129] The Court may be reluctant to take another case soon, and the requirements of appealing the administrative process may well cause many clubs to determine that the cost of appealing a case is prohibitive.[130]

For the moment, a woman's right to admission to previously all-male clubs has been firmly established. Nevertheless, it would be naive to think that eliminating gender-based discrimination by legal fiat will end this social problem. As one commentator noted, "Getting women into the right clubs is far easier than getting them to the right tables."[131]

*By Anthony L. Leto**

127. For example, the Century Association agreed to admit women if the Supreme Court upheld Local Law 63. *See* Norman, *Century Club says It Will Admit Women if City Bias Law is Upheld*, N.Y. Times, Sept. 11, 1986, at B6, col. 3.

128. *See All-Male Clubs Give Ground*, N.Y. Times, Jan. 31, 1988, § 1 (Northeast Journal), at 42, col. 5; Himelstein, *Bias Suit Defense Fees Loom*, The Recorder, Feb. 23, 1989, at 1, col. 2.

129. *NYSCA*, 108 S. Ct. at 2235; *see also* 108 S. Ct. at 2237 (O'Connor, J., concurring).

130. *See*, Himelstein, *Bias Suit Defense Fees Loom*, The Recorder, Feb. 23, 1989, at 1, col. 2.

131. Rhode, *supra* note 52, at 128.

* A.B., Occidental College, 1987; Member, Third Year Class.