CONSTITUTIONAL LAW—FREEDOM OF ASSOCIATION—SUPREME COURT UPHOLDS NEW YORK CITY ORDINANCE AIMED AT ALLEVIATING DISCRIMINATION IN ALL-MALE SOCIAL CLUBS BY DEFINING "PUBLIC ACCOMMODATIONS"—*New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988).

> The most natural privilege of man, next to the 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 appears to me almost as inalienable in its nature as the right of personal liberty. No legislature can attack it without impairing the foundations of society.[1]

I. INTRODUCTION

While freedom of association appears almost inalienable in its nature,[2] the United States Constitution affords this right no explicit protection.[3] Nevertheless, the right to associate with those of one's choosing has emerged as a fundamental right deserving constitutional protection.[4] The freedom to associate, however, is not an absolute right, but rather is limited by compelling state interests.[5] The eradication of discrimination has been

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1 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 196 (P. Bradley ed. 1984).

2 *Id.*

3 *See, e.g.*, Note, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 1970 DUKE L.J. 1181, 1191; Note, *Roberts v. United States Jaycees: Does the Right of Free Association Imply an Absolute Right of Private Discrimination?*, 1986 UTAH L. REV. 373, 373-74; 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 (1985).

4 In NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958), the United States Supreme Court recognized that the right to associate emanates from the first amendment and the liberties secured by the due process clause of the fourteenth amendment. While legal scholars no longer question the existence of this right, its constitutional source remains an unresolved dispute. *See* Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964).

Freedom of association continues to be recognized by the Court as a fundamental right. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91 (1982); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977).

5 *See* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940, 1947-48 (1987) (application of California's Civil Rights Act did not unconstitutionally hinder rights of private association); Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (compelling state interests, which are unrelated to the repression of ideas, may justify limitations on expressive association); Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124-26 (1981) (state's interest in preserving the electoral process is not sufficiently compelling so as to justify subordinating first amendment guarantees); Buckley v. Valeo,

judicially recognized by a majority of the Supreme Court as such a compelling interest properly subordinating the right to freely associate.[6] Although private entities are not bound by constitutional constraints, organizations of a public nature are not permitted to discriminate against potential members based soley upon immutable characteristics, such as race or sex.[7]

The precise delineation between public and private institutions has been defined on an ad hoc basis by individual local laws.[8] Challenges to these local laws have given the United States Supreme Court several opportunities to expand upon and

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424 U.S. 1, 25 (1976) (per curiam) (right of association may be demarcated by compelling state interests); Cousins v. Wigoda, 419 U.S. 477, 490 (1975) (selection of applicants for national office is paramount to the state's interest in protecting its electoral process).

6 *See, e.g.*, Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940, 1947 (1987) (California's compelling interest in eradicating discrimination against women justified any infringement on first amendment freedoms); Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (Minnesota's compelling interest in eliminating discrimination against female citizens outweighed any interest in first amendment associational rights).

7 *See* 42 U.S.C. § 2000a (1982). The Civil Rights Act of 1964 bars discrimination in "place[s] of public accommodation." *Id.* at § 2000a(a). Section 2000a(e), however, provides an exemption for private organizations: "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public." *Id.* at § 2000a(e). While private entities may constitutionally discriminate "as a form of exercising freedom of association protected by the First Amendment, . . . it has never been accorded affirmative constitutional protections." Norwood v. Harrison, 413 U.S. 455, 470 (1973).

8 State anti-discrimination laws broadly define "public accomodations" thus allowing many social clubs to fall within the guise of a private institution. For instance, the California Civil Rights Act affords all persons access to full and equal accomodations but nevertheless fails to delimit the scope of full and equal accomodations. The Act generally prohibits bars, restaurants and business establishments from discriminatory practices. CAL. CIV. CODE § 51 (West 1982 & Supp. 1989). A similar Delaware provision defines public accomodation to mean "any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public." DEL. CODE ANN. tit. 6 § 4501 (1975 & Supp. 1986). New Jersey's Civil Rights section prohibits discrimination in any place of public accommodation, N.J. STAT. ANN. § 10:5-12(f) (West 1976), which is defined as "any restaurant, eating house or place where food is sold for consumption on the premises . . . or any auditorium, meeting place, or hall." N.J. STAT. ANN. § 10:5-5(f) (West 1976). The Act provides an exemption for public accommodations that are in their nature "reasonably restricted exclusively to individuals of one sex," including, but not limited to gymnasiums, swimming pools and bathhouses but not including restaurants or places where alcoholic beverages are served. *Id.* at § 10:5-12 (f). The New York Human Rights law includes within its definition of places of public accommodation restaurants and eating houses. N.Y. EXEC. LAW § 292 (McKinney 1982). A similar Pennsylvania statute broadly defines public accomodations to include taverns, roadhouses, hotels, buffets, barrooms and any place where food is sold. PA. STAT. ANN. tit. 43, § 954(l) (Purdon 1964 & Supp. 1989).

refine the distinctions between public and private organizations.[9] The most recent discussion occurred in *New York State Club Association v. City of New York*,[10] in which the Court evaluated the constitutionality of Local Law No. 63, a New York City ordinance (Amendment), that precisely defined a public "institution, club or place of accommodation."[11]

New York City's Human Rights Law (Law),[12] enacted in 1965, prohibited discrimination by any "place of public accommodation, resort or amusement."[13] The Law explicitly exempted any organization essentially private in nature.[14] In 1984, the New York City Council amended this Law.[15] The Amendment's purpose was to enhance equal participation in business and professional opportunities for women and minorities.[16] This enhanced participation was facilitated by expanding the definition of a public organization to include many clubs which had previously enjoyed exemption under the 1965 Law as private institutions.[17] In

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

10 108 S. Ct. 2225 (1988).

11 *Id.* at 2230 (quoting NEW YORK, N.Y., LOCAL LAW No. 63 of 1984, § 1, App. 14-15). The specific law in question was an amendment to New York City's existing Human Rights Law of 1965. *Id.* The Amendment, Local Law No. 63, defines a public accommodation as an "institution, club or place of accommodation [that] 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." *Id.* (quoting NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986)).

12 NEW YORK, N.Y., ADMIN. CODE § 8-107(2) (1986). The Human Rights Law (Local Law No. 97 of 1965) provides in part:

> [It shall be] an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin or sex of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . on account of race, creed, color, national origin or sex.

Id. New York City adopted this law shortly after the federal government's enactment of the Civil Rights Act in 1964. *New York State Club*, 108 S. Ct. at 2229-30.

13 *Id.* at 2229 (quoting NEW YORK, N.Y., ADMIN. CODE § 8-107(2) (1986)). The Human Rights Law broadly defined this term to encompass, inter alia, "hotels, restaurants, retail stores, hospitals, laundries, theatres, parks, public conveyances, and public halls." *Id.* (quoting NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986)).

14 *Id.* Specifically, the exemption excludes from coverage " 'any institution, club or place of accommodation which proves that it is in its nature distinctly private.' " *Id.* (quoting NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986)).

15 *Id.* at 2230.

16 *Id. See* NEW YORK, N.Y., LOCAL LAW No. 63 of 1984, § 1, App. 14-15.

17 *New York State Club*, 108 S. Ct. at 2230. *See* NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986).

amending the Law, the City Council recognized a compelling state interest in protecting all of its citizens, regardless of race, origin or sex, positing that women and minorities had not achieved equal opportunities in the business world.[18] The City Council contended that valuable contacts and business deals were frequently made within organizations that excluded women and minorities.[19] Consequently, the lawmakers concluded that the state's interest in equal opportunity outweighed any interest in private association asserted by club members.[20]

The Amendment declared that any institution exceeding four hundred members which provided regular meal service and received regular payments for dues from nonmembers in furtherance of business, did not qualify as a private institution.[21] The Amendment, however, specifically denoted religious organizations and benevolent orders as distinctly private.[22]

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[18] *New York State Club*, 108 S. Ct. at 2230. The City Council stated:

> It is hereby found and declared that the city of New York has a compelling interest in providing its citizens an environment where all persons, regardless of race, creed, color, national origin or sex, 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. Although city, state, and federal laws have been enacted to eliminate discrimination in employment, women and minority group members have not attained equal opportunity in business and the professions. One barrier to the advancement of women and minorities 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. While such organizations may avowedly be organized for social, cultural, civic or educational purposes, and while many perform valuable services to the community, the commercial nature of some of the activities occurring therein and the prejudicial impact of these activities on business, professional and employment opportunities of minorities and women cannot be ignored.

Id. (quoting NEW YORK, N.Y., LOCAL LAW No. 63 of 1984, § 1, App. 14-15).

[19] *Id.* The Council recognized the educational and social value of some clubs. *Id.* The Council, however, found the commercial nature of some institutions prejudicial to women and minorities. *Id.*

[20] *Id.* The Law, according to the Council, does not prevent clubs from selecting members, only from denying membership to individuals solely on the basis of characteristics such as race or sex. *Id.*

[21] *Id.* (quoting NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986)). *See supra* note 11 (text of statute).

[22] *New York State Club*, 108 S. Ct. at 2230 (quoting NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986)). Religious organizations include corporations incorporated under the religious corporation or education laws. *Id.* (quoting NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1986)). Benevolent orders are charitable institutions formed under the benevolent orders law or incorporated under other state laws conforming with the benevolent orders law. *Id.* (quoting NEW YORK, N.Y., ADMIN.

The New York State Club Association (Association)[23] filed suit to enjoin enforcement of the Amendment, attacking it as facially invalid under both the first and fourteenth amendments of the federal Constitution as well as challenging it on various state grounds.[24] Rejecting both the federal and state challenges, the state trial court upheld the statute.[25] The intermediate appellate division affirmed with one dissent.[26] In a unanimous decision, the New York Court of Appeals affirmed, maintaining that the pressing need for protecting women and minorities outweighed any violation of first amendment associational rights.[27] Moreover, the court of appeals stressed that the "Law employ[ed] the least restrictive means to achieve its ends because it interfere[d] with the policies and activities of private clubs only 'to the extent necessary to ensure that they do not automatically exclude persons from membership or use of the facilities on account of invidious discrimination.' "[28] The court summarily dismissed the equal protection claim without discussion.[29]

The United States Supreme Court noted probable jurisdic-

CODE § 8-102(9) (1986)). Additionally, the City Council concluded that such organizations, regardless of size, did not conduct business regularly, hence such places were essentially private. *Id.* (quoting NEW YORK, N.Y., LOCAL LAW No. 63 of 1984, § 1, App. 15).

23 The Association is a nonprofit corporation consisting of some 125 clubs located in New York. *Id.* at 2231.

24 *Id.* The Supreme Court's opinion focused only on the federal constitutional issues and did not address the state claim. The state claim charged that the New York City Human Rights Law, NEW YORK, N.Y., LOCAL LAW No. 63 of 1984 § 1, App. 14-15, violated the "home rule" provision of the state constitution, N.Y. CONST. art. IX, § 2(c), because it was inconsistent with the New York State Human Rights Law, N.Y. EXEC. LAW § 290-301 (McKinney 1982). New York State Club Ass'n 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).

25 *New York State Club*, 108 S. Ct. at 2231.

26 *Id.* The appellate division affirmed the trial court's ruling in New York State Club Ass'n v. City of New York, 118 A.D.2d 392, 505 N.Y.S.2d 152 (1986). There, the dissent argued that the exception for benevolent orders violated the equal protection clause of the fourteenth amendment because it failed to yield equal protection to similarly situated individuals. New York State Club Ass'n v. City of New York, 118 A.D.2d at 396, 505 N.Y.S.2d at 155 (Kupferman, J., dissenting).

27 *New York State Club*, 108 S. Ct. at 2231. (citing New York State Club Ass'n v. City of New York, 69 N.Y.2d at 223, 505 N.E.2d at 921, 513 N.Y.S.2d at 355). The New York Court of Appeals relied on the Supreme Court's holdings in Board of Directors of Rotary Int'l v. Rotary Club, 107 S. Ct. 1940 (1987), and Roberts v. United States Jaycees, 468 U.S. 609 (1984). *Id.*

28 *Id.* (quoting New York State Club Ass'n v. City of New York, 69 N.Y.2d at 223, 505 N.E.2d at 921, 513 N.Y.S.2d at 355).

29 *Id.*

tion[30] and thereafter affirmed the judgment of the New York Court of Appeals.[31] The Court held that while the Association had standing to challenge the Amendment's constitutionality on behalf of its member associations, the legislation was, nevertheless, constitutional.[32] Specifically, the Court found that on its face the challenged statute violated neither the Association's private associational rights nor each club members' expressive associational rights.[33] Additionally, the Court determined that the Amendment did not foster an impermissible classification under the fourteenth amendment's equal protection clause.[34]

II. FREEDOM OF ASSOCIATION: A FUNDANMENTAL RIGHT

While the freedom to associate has its roots in ancient philosophical thought,[35] it was not until 1958 that the United States Supreme Court interpreted the Constitution as implicitly endorsing the right to associate, or conversely, not to associate.[36] Specifically, freedom of association stems from the intricate nexus linking the freedoms of speech and assembly.[37] As such, the freedom to associate is viewed as essential to the guarantees reserved in the first amendment and embraced by the liberties secured in the fourteenth amendment.[38]

A. Formal Recognition of the Right to Associate

The United States Supreme Court formally established the right to associate in large groups as an implicit fundamental right in *NAACP v. Alabama ex rel. Patterson*.[39] The *NAACP* Court addressed the question of whether a state could constitutionally compel the production of membership lists of the National Association for the Advancement of Colored People (NAACP).[40] The

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30 *See* 108 S. Ct. 62 (1987).

31 *New York State Club*, 108 S. Ct. at 2231.

32 *See id.*

33 *Id.* at 2233-34.

34 *Id.* at 2234-37.

35 *See* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (discussing association as an ancient philosophical principle).

36 *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

37 *Id.*

38 *Id. See* Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 20-21 (1964).

39 357 U.S. 449 (1958). The Court had, however, referred to a constitutional right of association in earlier cases. *See, e.g.*, American Communications v. Douds, 339 U.S. 382, 400 (1950); Schneider v. State, 308 U.S. 147, 161 (1939); Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (concurring opinion).

40 *NAACP*, 357 U.S. at 451. The NAACP was a nonprofit organization incorpo-

Alabama Attorney General, acting under state law, sought to enjoin the NAACP from conducting business within the state[41] and moved for disclosure of the NAACP's membership lists.[42] The NAACP argued that compelled disclosure would violate its members' right "to engage in lawful association" and that the state had failed to show any compelling interest that would override this fundamental right.[43]

Justice Harlan, writing for a unanimous Court, observed that effective advocacy of controversial viewpoints is "undeniably enhanced by group association."[44] This logic, according to the Justice, stemmed from the intricate nexus linking the freedoms of speech and assembly.[45] The Court also recognized that the freedom to associate is an inseparable part of the liberty guaranteed by the fourteenth amendment "which embraces freedom of speech."[46] The Court posited that compelled disclosure of membership lists would likely curtail the NAACP's advocacy of dissident beliefs.[47] Additionally, Justice Harlan subjected the state's

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rated under the laws of New York. *Id.* The organization's purposes, as stated in their bylaws, was to promote equality of rights and to eradicate discrimination against black Americans. *Id.* The NAACP acts through independent unincorporated groups. *Id.* at 452.

41 *Id.* at 451-52.

42 *Id.* at 451.

43 *Id.* at 460. The NAACP did not contend that the disclosure of these lists would directly suppress associational rights, however, the NAACP argued that the consequential effects would be to suppress a constitutionally guaranteed right. *Id.*

44 *Id.* *See also* De Jonge v. Oregon, 299 U.S. 353, 364 (1936) (holding that the concept of government implies a right of its citizens to gather for peaceful consultations).

45 *NAACP*, 357 U.S. at 460. *See also De Jonge*, 299 U.S. at 364 (maintaining that "[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental").

46 *NAACP*, 357 U.S. at 460. These liberties implicitly protected by the first amendment, according to the Court, included speech, press, and association. *Id.* at 461. The Court held it "immaterial whether the beliefs sought to be advanced by association pertained to political, economic, religious or cultural matters." *Id.* at 460.

47 *Id.* at 462. The Court observed that by sanctioning the type of disclosure sought by the state, the Court would be approving a course of behavior which had been shown in the past to adversely impact rank-and-file members. The Court stated:

> [Disclosure may subject members] to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of

purported interest in the membership data to strict scrutiny.[48] Deeming the state's interest as less than compelling,[49] the Court upheld the NAACP's right to privacy in its membership lists.[50]

B. *Expansion of Freedom of Association*

In the decades following *NAACP*, the United States Supreme Court struggled to define this newly recognized right and to deal with its implications. Consequently, the Court has identified two types of associational rights: "intimate" and "expressive."[51]

i. *Intimate Association*

In one line of decisions, the Court has defined intimate association as a "fundamental element of personal liberty."[52] The Court consistently and vigilantly protects these highly personal, intimate relationships against state interference.[53] This protection is predicated on the concept that such private relationships foster "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life."[54] Intimate relationships

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their beliefs shown through their associations and of the consequences of this exposure.

Id. at 462-63.

48 *Id.* at 461. The state's purported interest in the membership list was to "determine whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute." *Id.* at 464.

49 *Id.* at 465. The Court recognized that the NAACP had already substantially complied with most of the production order, and therefore, there was no showing of absolute necessity. *Id.*

50 *Id.* at 466.

51 Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940, 1945 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984).

52 *See, e.g.*, *Roberts*, 468 U.S. at 618.

53 *Id.* at 617-22. The types of relationships protected by the Court are familial in nature, such as, marriage, *e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978); cohabitation with relatives, *e.g.*, Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503-04 (1977); bearing and begetting children, *e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977); child rearing and education, *e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

54 *Roberts*, 468 U.S. at 620. The Court noted that the ability to "define one's identity . . . is central to any concept of liberty." *Id.* at 619. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Smith v. Org. of Foster Families, 431 U.S. 816, 844 (1977); Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

center upon a "high degree of selectivity" and smallness in size.[55] In assessing the limitations of state authority over an individual's associational rights, the Court has specifically examined the relationship's objective characteristics "on a spectrum from the most intimate to the most attenuated of personal attachments."[56] The intimate relationships typically protected by the first amendment include "marriage, procreation, contraception, family relationships, and child rearing and education."[57]

For example, in 1965, the Court in *Griswold v. Connecticut*[58] held unconstitutional a Connecticut statute that prohibited the dissemination of contraceptive information to married persons.[59] In reaffirming the right to marry as one of fundamental importance, the Court expanded the right of association established in *NAACP* to include, not only political associations, but social relationships as well.[60]

Justice Douglas, writing for the Court, commented that marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty; not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions,"[61] and is protected by the fundamental rights of privacy and association included in the peripheral first amendment guarantees.[62] According to the Court, without these "peripheral rights the specific rights [enumerated] would be less secure."[63]

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55 *Roberts*, 468 U.S. at 620. Specifically, the Court has recognized such factors as "size, purpose, policies, selectivity, [and] congeniality" as essential in defining intimate associations. *Id.*

56 *Id.* (citing Runyon v. McCrary, 427 U.S. 160, 187-89 (1976) (Powell, J., concurring)).

57 *Id.* at 631 (O'Connor, J., concurring in part and concurring in the judgment) (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)). *See also supra* note 53 and accompanying text.

58 381 U.S. 479 (1965).

59 *Id.* at 485. The two statutes involved provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." CONN. GEN. STAT. ANN. § 53-32 (repealed 1969). The other statute provided that "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." CONN. GEN. STAT. ANN. § 54-196 (repealed 1969).

60 *Griswold*, 381 U.S. at 483-86. *See generally* Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963) (discussing *Griswold* as it relates to the freedom of intimate association).

61 *Griswold*, 381 U.S. at 486.

62 *Id.* at 484-86.

63 *Id.*

Two years later in *Carey v. Population Services International*,[64] the Court similarly invalidated a New York law that restricted the distribution of contraceptive devices to individuals over sixteen.[65] In extending the right to privacy to include minors as well as adults, Justice Brennan declared that "[t]he decision whether . . . to beget or bear a child" is a fundamental right deserving constitutional protection.[66]

Moreover, the Court in *Moore v. City of East Cleveland, Ohio*,[67] invalidated a zoning ordinace that strictly limited the occupancy of a home to members solely belonging to one nuclear family,[68] thus expanding the right of intimate association to include cohabitation with non-immediate family members.[69]

ii. *Expressive Association*

Expressive association, unlike intimate association, affords protection to group activity designed to advocate shared beliefs and controversial viewpoints.[70] This fundamental right, as guaranteed by the Court, preserves "political and cultural diversity" by allowing a citizen to associate with those of one's choosing.[71] Infringements on expressive associational rights may be justified by overriding governmental interests "unrelated to the suppression of ideas," tailored sufficiently narrow to achieve the desired ends.[72] The government may seek to limit these rights by compelling disclosure of membership lists[73] or by interfering with the internal structure of membership organizations.[74] The latter type of infringement has pervaded the Court's analysis with respect to associational freedom in recent years.[75] Most challenges center on antidiscrimination laws designed to alleviate discrimi-

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64 431 U.S. 678 (1977).

65 *Id.* at 682.

66 *Id.* at 685.

67 431 U.S. 494 (1977).

68 *Id.* at 499.

69 *Id.* at 502-06.

70 Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

71 *Id. See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-09 (1982); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

72 *Roberts*, 468 U.S. at 623. *E.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam).

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

74 Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940 (1987); *Roberts*, 468 U.S. at 623. *E.g.*, Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975).

75 *See, e.g.*, *Rotary*, 107 S. Ct. 1940 (1987); *Roberts*, 468 U.S. 609 (1984).

nation in organizations, particularly in all male social clubs.[76]

In 1984, the Supreme Court in *Roberts v. United States Jaycees*,[77] dealt with the Minnesota Human Rights Act (Act)[78] which prohibited discrimination by any place of public accommodation on the basis of sex.[79] The national organization of the Jaycees, contrary to the Act, permitted women in the clubs as only associate members.[80] Consistent with the Act, but adverse to organizational policy, two local chapters admitted women as regular members.[81] The national organization subsequently notified the local chapters that a motion to revoke their charters, in accordance with the national bylaws, would be considered at an upcoming meeting.[82] Consequently, both local chapters filed complaints with the Minnesota Department of Human Rights against the national organization alleging discrimination.[83] Confronting the issue of whether a state could, consistent with the first and fourteenth amendments, directly interfere with an organization's membership policies, *Roberts* answered in the affirmative.[84] Justice Brennan first discussed the right of intimate association, positing that this right protects only relationships of a highly personal nature.[85] The Court then determined that the

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76 *Id.*

77 468 U.S. 609 (1984).

78 MINN. STAT. § 363.03. (West 1982). The Act states in 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.* at subd. 3.

79 *Roberts*, 468 U.S. at 614-15. A " 'place of public accommodation' is defined in the Act 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.' " *Id.* (quoting MINN. STAT. § 363.01, subd. 18 (West 1982)).

80 *Id.* at 613. Women were allowed as associate members while men aged eighteen to thirty-five were admitted to regular membership. *Id.* Associate members as distinguished from regular members, could not vote, hold office or participate in leadership activities. *Id.*

81 *Id.* at 614.

82 *Id.*

83 *Id.* Specifically, the local chapters contended "that the exclusion of women from full membership required by the national organization's bylaws violated the Minnesota Human Rights Act. . . ." *Id.*

84 *Id.* at 612. The conflict addressed by the Court required a balancing of competing interests—"a [s]tate's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization." *Id.*

85 *Id.* at 618. The Court posited that the Bill of Rights ensured liberty as fundamental, affording personal relationships sanctuary against the state. *Id. See, e.g.*,

local chapters of the Jaycees were not the type of "intimate relationships" afforded constitutional protection because of the clubs' large and nonselective nature and because their daily activities regularly involved the participation of strangers.[86]

Justice Brennan also acknowledged that the right to associate with others in pursuit of political, social and educational ends could be constitutionally protected by the first amendment.[87] However, the Court placed limitations on expressive associations, observing that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[88] The Court espoused the view that the state's compelling interest in eliminating discrimination justified any infringement on the Jaycees' associational rights.[89] Determining that organizations must make a substantial showing that the admission of unwelcome members would alter the association's message, Justice Brennan charged the Jaycees as failing to meet this burden.[90] Thus, the majority concluded that the admission of women as regular members would not impede the Jaycees' expressive right to disseminate its preferred views.[91]

Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

86 *Roberts*, 468 U.S. at 620-21. The majority indicated that the Jaycees employed no selective criteria for judging new applicants and regularly admitted members with no investigation into their backgrounds. *Id.* at 621.

87 *Id.* at 622. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-09, 932-33 (1982); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

88 *Roberts*, 468 U.S. at 623. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982); Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124 (1981); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam); Cousins v. Wigoda, 419 U.S. 477, 487-89 (1975); American Party of Texas v. White, 415 U.S. 767, 780-81 (1974); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 486, 488 (1960).

89 *Roberts*, 468 U.S. at 623. The majority upheld the Act as consistent with federal legislative efforts designed to eliminate discrimination. *Id.* at 624-26. The Court contended that the Act employed the least restrictive means to achieve its ends. *Id.* at 626. Additionally, Justice Brennan stated that the Jaycees failed to establish that the Act imposed any serious burdens on the male members' associational rights. *Id. See* Hishon v. King & Spalding, 467 U.S. 69, 81 (1984) (Powell, J., concurring) (concluding that a law firm failed to demonstrate that the admission of women to partnership status would hinder preferred views).

90 *Roberts*, 468 U.S. at 626. Justice Brennan advocated that the Act imposed no restrictions on the exclusion of women members with contrary views. *Id.* at 627.

91 *Id.* at 627. The Court rejected the idea that admission of women as full voting members would hinder any "symbolic message" conveyed by the Jaycees. *Id.* Furthermore, the Justice opined that "[i]n any event, even if enforcement of the Act causes some incidental abridgment of the Jaycees' protected speech, that effect is

In a concurring opinion, Justice O'Connor, parted with the Court's analysis but, nonetheless, agreed with the majority's holding.[92] The Justice contended that the Court "adopted a test that unadvisedly casts doubt on the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society."[93] Justice O'Connor took issue with the majority's fashioning of a burden of proof that required the Jaycees to demonstrate that opening its membership to women would substantially change its public message.[94] The Justice posited that the test should not focus on "what the association says or why its members say it,"[95] but rather should distinguish expressive from commercial organizations.[96] This approach, according to the Justice, would insure an organization engrossed in purely first amendment endeavors protection for both the content of speech and the selection of its members while yielding minimal protection to primarily commercial activities.[97] Justice O'Connor also acknowledged that because application of the proposed test might prove to be difficult, relevant considerations in assessing commercial versus expressive activities should include the purposes of the organization and its members' reasons for belonging.[98]

Three years later in *Board of Directors of Rotary International v. Rotary Club of Duarte*,[99] the Court rejected Justice O'Connor's test and reaffirmed the *Roberts'* analysis when it upheld California's Unruh Civil Rights Act[100] which barred sex discrimination in all

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no greater than is necessary to accomplish the State's legitimate purposes." *Id.* at 628. The Court also rejected the overbreadth and vagueness claims. *Id.* at 629-31.

92 *Id.* at 631 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor agreed with the majority's conclusion that a "295,000-member organization whose activities are not 'private' in any meaningful sense" is not the type of relationship afforded associational protection. *Id.*

93 *Id.* at 632. (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor further advocated that the Court afforded insufficient protection to expressive associations while placing inappropriate burdens on organizations claiming first amendment prtection. *Id.*

94 *Id.*

95 *Id.* at 633. (O'Connor, J., concurring in part and concurring in the judgment).

96 *Id.* at 634. (O'Connor, J., concurring in part and concurring in the judgment).

97 *Id.* at 634-35. (O'Connor, J., concurring in part and concurring in the judgment).

98 *Id.* at 636. (O'Connor, J., concurring in part and concurring in the judgment).

99 107 S. Ct. 1940 (1987).

100 CAL. CIV. CODE § 51 (West 1982). The Unruh Civil Rights Act provides in part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accomodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Id.*

state business establishments.[101] Rotary International (International) was an organization of business and professional men who provided "humanitarian service, encourage[d] high ethical standards in all vocations, and help[ed] build good-will and peace in the world."[102] The Rotary Club of Duarte was a California affiliation belonging to the national membership corporation.[103] Rotary Club of Duarte admitted women to active membership in contravention of International policy.[104] Consequently, International revoked Duarte's membership charter and terminated its membership.[105] Thereafter, two women members and the local Duarte Club filed suit alleging that International's policy of excluding women from active membership violated the Unruh Civil Rights Act.[106]

The Supreme Court first rejected International's contention that the male-only membership rule represented an intimate associational choice of a highly personal or private nature.[107] Justice Powell based the Court's holding on the size of the clubs, the fact that members were encouraged to bring strangers to the meetings and because the clubs were encouraged to publicize their activities, thereby keeping their "windows and doors open to the whole world."[108] Additionally, the Court held that Rotary

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101 *Rotary*, 107 S. Ct. at 1945.

102 *Id.* at 1942 (quoting Rotary Manual of Procedure 7 (1981) App. 35). Rotary International admitted members according to a classification system which served the avowed purpose of ensuring "that each Rotary Club include[d] a representative of every worthy and recognized business, professional, or institutional activity in the community." *Id.* at 1943 (quoting 2 Rotary Basic Library; Club Service 67-69, App. 86)).

103 *Id.* Individual members belonged to a local Rotary Club which in turn belonged to Rotary International. *Id.*

104 *Id.* Active membership in Rotary Clubs was limited to men. *Id.* (citing Standard Rotary Club Constitution, Art. V, § 2, Record 97). Women could however "attend meetings, give speeches, and receive awards." *Id.* According to the testimony of the Secretary of Rotary International, this policy promoted an " 'aspect of fellowship . . . that is enjoyed by the present male membership.' " *Id.* (quoting App. to Juris. Statement G-52) (deposition of Herbert A. Pigman, General Secretary of Rotary International).

105 *Id.*

106 *Id.* The trial court held for International, concluding that neither International nor the local club were business establishments within the meaning of the statute. *Id.* at 1944. The California Court of Appeals reversed holding both affiliations' business organizations subject to the statute. *Id.* The Supreme Court of California "denied appellants' petition for review." *Id.* at 1945.

107 *Id.* at 1946.

108 *Id.* at 1946-47 (quoting 1 Rotary Basic Library, Focus on Rotary 60-61, App. 85). The Justice stressed that there was no limit to the number of members admitted into any Rotary Club. *Id.* at 1946 (citing Rotary Manual 139, App. 61-62). Specifically, the clubs ranged "from fewer than 20 to more than 900." *Id.* (citing App.

Clubs did not meet *Roberts'* definitional test of an expressive association because there was no showing that the clubs' purposes would be thwarted by the admittance of women.[109] The Court concluded by stating that "[e]ven if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women."[110]

III. Defining the Parameters of a Public Accommodation

It was against this background of defining intimate and expressive associations deserving constitutional protection that the Court in *New York State Club Association v. City of New York*,[111] upheld a New York City ordinance that expressly listed three characteristics for defining a public accommodation.[112] Writing for a unanimous Court, Justice White first addressed the issue of standing.[113] The Court examined the requirements necessary to have standing under the federal Constitution.[114] Specifically, Justice White relied on *Hunt v. Washington State Apple Advertising Commission*.[115] Rejecting the city of New York's interpretation of *Hunt*, the Court reaffirmed that "an association has standing to sue on behalf of its members when those members would have standing to bring the same suit."[116] Noting that each individual

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to Juris. Statement G-15) (deposition of Herbert A. Pigman, General Secretary of Rotary International).

109 *Id.* at 1947.

110 *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam)).

111 108 S. Ct. 2225 (1988).

112 *Id.* at 2230-31.

113 *Id.* at 2231.

114 *Id.* at 2232. The Court noted that the state trial court addressed the issue of standing and neither appellate courts raised the issue on appeal. *Id.* at 2231 n.2. An independent determination of standing was necessary, according to the Court, due to the imposition of the special requirements imposed by Article III of the federal Constitution. *Id.* The Court recognized, however, that states were free to determine their own procedural law and could issue advisory opinions. *Id.*

115 432 U.S. 333 (1977). In *Hunt*, the Court stated:

> [A]n association has standing to bring suit 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. *See also* Automobile Workers v. Brock, 477 U.S. 274 (1986).

116 *New York State Club*, 108 S. Ct. at 2232. Specifically, the Court rejected the city's argument that the phrase, "would otherwise have standing to sue in their own right" meant that the member associations were required to have standing "only on behalf of themselves, and not on behalf of anyone else, such as their own individual

member club suffered an immediate or threatened injury to their associational rights as the result of the Amendment's enactment, Justice White concluded that the Association had standing to challenge the Amendment.[117]

The Court then moved to the underlying constitutional issues, rejecting the Association's facial challenge of the Amendment.[118] Justice White observed that a facial challenge could succeed only if the Association could show either that the Amendment could never be applied in a valid manner or could demonstrate that, although valid as to itself, the Amendment was so broad that it might impair the first amendment rights of third parties not before the Court.[119] In holding that the first test was not satisfied, the Court pointed out that the Amendment could constitutionally be applied under either an "intimate" or "expressive" analysis found in prior decisions.[120] Justice White noted that government restrictions on groups with large memberships and those clubs which regularly interacted with nonmembers had previously withstood constitutional scrutiny in the *Roberts* and *Rotary* decisions.[121]

The Justice agreed with the city's contention that clubs providing regular meal service and which regularly received payments "directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business," were commercial in nature and, therefore, not private associations.[122] The majority quoted with approval the City Council's finding that clubs with

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members." *Id.* (quoting Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)).

117 *Id.* (citing Warth v. Seldin, 422 U.S. 490, 511 (1975)).

118 *Id.* at 2233.

119 *Id.* Noting that the latter challenge was an exception to ordinary standing requirements, Justice White opined that the challenge would be justified only when the threatened or potential use of the law inhibited speech as easily as the actual use of that law. *Id.* (citing Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)). Asserting that both exceptions were narrow, Justice White stated that each and every application of the law must create "an impermissible risk of suppression of ideas." *Id.* (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 798, n.15 (1984)). Moreover, the Justice maintained that the statute must be "substantially" overbroad yielding a realistic danger that the law will "significantly" compromise first amendment guarantees of persons not before the court. *Id.* (citing *Taxpayers for Vincent*, 466 U.S. at 801).

120 *Id.* The Court observed that appellants conceded this fact at oral argument. *Id.* (citing Tr. of Oral Arg. 11-12).

121 *Id.* Justice White stressed that this Amendment covered only clubs exceeding 400 members, whereas, associations with as few as 20 members were held not protected in *Rotary*. *Id.*

122 *Id.* (quoting NEW YORK, N.Y., Admin. Code § 8-102(9) (1986)).

these characteristics are places "where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed."[123] Thus, Justice White determined that the commercial nature of the institutions as defined by the second and third parts of the Amendment excluded the clubs from constitutional protection as private intimate associations.[124]

The Court also held that a club member's right of expressive association was not impinged.[125] While noting that the ability to join with others was protected by the first amendment and that advocacy of controversial viewpoints was enhanced by group association, Justice White emphasized that constitutional protection of a club member's "selective process of inclusion and exclusion" was not absolute.[126] The majority distinguished the Amendment, holding that it did not prevent advocacy of ideas or association based on shared beliefs.[127] Instead, the Court noted that the Amendment merely forbade using racial or gender classifications as a sole basis for determining membership.[128]

The Court next addressed the contention that the Amendment was overbroad in reaching truly distinct private clubs.[129] The majority emphasized that the overbreadth doctrine mandates that the Association demonstrate "from the text of the Law and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally."[130] Justice White stated that the Association failed to identify any club whose members' associational guarantees would be substantially

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123 *Id.* (quoting NEW YORK, N.Y., LOCAL LAW No. 63 of 1984, § 1, App. 15). While noting private association does occur in these settings, Justice White opined this "fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the Government has barred it from doing so." *Id.* at 2233-34 (citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (holding that application of Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex, did not violate a law partnership's guaranteed rights of association)). Thus, the Court concluded, although some clubs would be entitled to protection, Local Law 63 does not infringe upon the private associational rights of every club member. *Id.* at 2234.

124 *Id.*

125 *Id.*

126 *Id.* (citing Hishon v. King & Spalding, 467 U.S. 68, 78 (1984); Norwood v. Harrison, 413 U.S. 455, 470 (1972); Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945)).

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

impaired by application of the Amendment.[131] He also rejected the argument that the Amendment erected an irrebuttable presumption that all clubs affected by the Amendment were not distinctly private.[132] The Justice reasoned that constitutionally guaranteed judicial review of appeals from administrative proceedings assured that any overbreadth under the statute would be cured on a case-by-case analysis.[133] Accordingly, the majority sustained the Amendment against the Association's overbreadth challenge.[134]

The Court then determined that the Amendment's exemption for religious and benevolent corporations did not violate the equal protection clause of the fourteenth amendment.[135] Justice White noted that, because the amendment in no way significantly affected constitutionally protected fundamental interests, heightened scrutiny did not apply.[136] The Justice reasoned that the Council exempted religious and benevolent organizations because those groups "ha[d] not been identified in testimony before the Council as places where business activity [was] prevalent."[137] Justice White, in upholding the Council's classification scheme as rational, explained that it was reasonable for the State to assume that such groups were organized along private, noncommercial lines, and therefore, were different from the affected clubs.[138] The majority recognized that the equal protection clause mandates that "all persons similarly situated should be treated alike."[139] The Court, however, also stressed that challengers of "the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmen-

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131 *Id.* at 2234-35.

132 *Id.* at 2235.

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id. See also* Lyng v. Int'l Union, UAW, 108 S. Ct. 1184, 1188 (1988) (statute did not directly and substantially interfere with the right to associate).

137 *New York State Club*, 108 S. Ct. at 2235-36. (quoting NEW YORK, N.Y., LOCAL LAW No. 63 of 1984, § 1, App. 15). The Court in New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928), sustained a New York law exempting benevolent orders from filing documents which most corporations had to file, finding that the legislative exemption "was justified because benevolent orders were judged not to pose the same dangers as other groups." *Bryant*, 278 U.S. at 73-77.

138 *New York State Club*, 108 S. Ct. at 2236.

139 *Id.* at 2236 (quoting Cleburne v. Cleburne Living Center Inc., 473 U.S. 432, 439 (1985)).

tal decisionmaker."[140] The Court observed that legislative classifications are presumed constitutional and that the Association had failed to prove the statute unconstitutional.[141] Justice White stressed the city's contention that a rational basis existed for the exemption of these organizations due to their non-commercial nature.[142] Accordingly, a unanimous Court affirmed the lower court's holding.[143]

In a concurring opinion, Justice O'Connor, joined by Justice Kennedy, acknowledged that the Court's opinion in no way undermined the importance of any first amendment associational rights.[144] Justice O'Connor posited that, while the majority's decision reaffirmed the state's power to eradicate discrimination, the right of association was also an important right deserving protection.[145] The concurrence applauded the Amendment as a sensitive tool designed to balance the two fundamental interests at stake.[146]

Justice O'Connor stressed that the three prongs of the Amendment were not exclusive.[147] The Justice noted that the court below had held that the three factors were to be considered in conjunction with other relevant facts, such as "size, purpose, policies, selectivity, congeniality and other characteristics."[148] Justice O'Connor reiterated the majority's point that because an association could demonstrate that it qualified for constitutional protection under an "intimate" or "expressive" analyses using the above factors the statute was not facially unconstitutional.[149]

Justice Scalia wrote separately to express his disagreemnet with the majority's equal protection analysis.[150] He first noted the Court's assumption of a "constitutional right of private association for other than expressive or religious purposes."[151] Justice Scalia then rejected the majority's conclusion that a rational basis for the exemption existed simply because benevolent or-

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140 *Id.* (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)).
141 *Id.*
142 *Id.*
143 *Id.* at 2237.
144 *Id.* (O'Connor, J., concurring).
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.* (citations omitted) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984)).
149 *Id.* at 2237-38. (O'Connor, J., concurring).
150 *Id.* at 2238. (Scalia, J., concurring in part and concurring in the judgment).
151 *Id.*

ders were unique.[152] A plausible connection, according to the Justice, must link the organization's uniqueness with the intentions of the Amendment.[153] Justice Scalia pointed out that all associations qualifying as benevolent orders were in essence lodges or fraternal organizations.[154] Thus, the Justice attested that "[a] lodge is not likely to be a club where men dine with clients and conduct business."[155] On these grounds, the Justice held the exemption rational.[156]

IV. Conclusion: Impact of Local Law 63 and an Appraisal

In *New York State Club Association v. City of New York*,[157] the Court undertook the difficult task of deciding which of two competing interests was to prevail. In affirming the Amendment as facially valid,[158] the Court properly sacrificed the right to associate with those of one's choosing to the state's compelling interest in eradicating discrimination. Thus, Alexis de Tocqueville's renowned premise that began this article has been compromised by the Court's recognition of the changing role that women and minorities play in our society.[159]

Discrimination against women and minorities has plagued the the business world for decades. Particularly, discrimination has permeated traditional all male social clubs where men gather to enjoy time "away from the office" but nevertheless engage in business deals. Consequently, as the New York City Council aptly noted, women and minorities have enjoyed far less business opportunities and have made few too many business contacts.[160]

In an effort to alleviate the onerous burden and disadvantages facing these groups, several cities have followed New York's lead by enacting similar statutes designed to eradicate discrimination in all male social clubs, including Los Angeles, San Francisco, Chicago and the District of Columbia.[161] Moreover, the American Bar Association (ABA) has similarly stressed that

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152 *Id.*

153 *Id.* The Justice posited that equal protection analysis does not require a perfect fit, merely a reasonable connection. (citing Vance v. Bradley, 440 U.S. 93, 108 (1979)).

154 *Id.*

155 *Id.*

156 *Id.*

157 108 S. Ct. 2225 (1988).

158 *Id.* at 2231.

159 *See supra* note 1 and accompanying text.

160 *See supra* note 18 and accompanying text.

161 *E.g.*, Chicago, Ill., Mun. Code ch 199A; Los Angeles, C.A., Mun. Code

attorneys and firms should no longer conduct business activities in private clubs that employ such discriminatory practices. Indeed, the ABA has recently passed such a resolution.[162]

While the Court in *New York State Club* had no choice but to uphold the Amendment,[163] the Court nonetheless leaves ajar the possibility that these laws will undoubtedly be both over and under inclusive.[164] For example, a 400 member club in New York City is not nearly as likely to be "public" as is that same club in a small midwestern town. Therefore, by focusing on such factors as size, these statutes may constitutionally protect clubs that are in essence public in nature while at the same time prohibit a distinctly private club from protection under an expressive analysis.

Perhaps the Court should have adopted the test suggested by Justice O'Connor in her concurring opinion in *Roberts*. In *Roberts*, Justice O'Connor argued that the test embraced by the Court "unadvisedly casts doubt on the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society."[165] She then posited that the test should distinguish expressive from commercial organizations and should not focus on "what the association says or why its members say it."[166] Relevant factors in such a proposed test, noted the Justice, would include the purposes of the organization and the members' reasons for belonging, not

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§§ 44.95.00-44.95.04; SAN FRANCISCO, C.A., POLICE CODE, §§ 3300B1-3300B.7; WASHINGTON, D.C. CODE § 1-2502.

162 ABA HOUSE OF DELEGATES RESOLUTION, 10 G (August, 1988).

163 The Association attacked the Amendment as facially invalid under both the first and fourteenth amendments of the Constitution. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2231 (1988). In order to prevail, the Court required that the Association demonstrate that every club with over four hundred members was in fact private. *Id.* at 2233. This burden was indeed impossible due to the Association's concession that some of its members were within the purview of the Amendment. *Id.* In addition, the Association could have prevailed if the Amendment was so broad as to impair the expression of ideas of third parties not before the Court. *Id.* Again, because the Association had no facts concerning even their own club members, this was an impossible task. Indeed, as Justice White stated: "We could hardly hold otherwise on the record before us, which contains no specific evidence on the characteristics of *any* club covered by the [Amendment]." *Id.* at 2234 (emphasis in original).

164 Indeed, this possibility was foreshadowed by Justice O'Connor in her concurring opinion in Roberts v. United States Jaycees, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring in part and concurring in the judgment). *See supra* note 93 and accompanying text.

165 *Roberts*, 468 U.S. at 632 (O'Connor, J., concurring in part and concurring in the judgment).

166 *Id.* at 633 (O'Connor, J., concurring in part and concurring in the judgment).

such a useless factor as size. Although Justice O'Connor's concurring opinion in *New York State Club* did not directly refer to this test, she did emphasize the dominant theme—that the right to associate depends on the nature of the organization.[167]

New York State Club is, nonetheless, a logical extension of the *Roberts* and *Rotary* decisions. In *Roberts*, the Court recognized that its past decisions had referred to two constitutionally protected rights of association.[168] Intimate association, according to the Court, preserves those relationships that are truly private in nature.[169] Intimate association is therefore not a right to invidously exclude select groups from public accommodations where those accommodations solicit the business of strangers. As correctly inferred by the Court, these organizations do not fall on the spectrum of the most intimate relationships afforded constitutional protection.

Further, the Court in *New York State Club* appropriately concluded from the evidence before it that the Amendment did not prevent groups from assembling for the purposes of engaging in constitutionally protected speech.[170] Freedom of expressive association, as acknowledged by the Court in *Roberts* and *Rotary* protects an organization only when the organization's purposes would be thwarted by the admittance of members with contrary views. Because the organization offered no evidence to support the proposition that the admittance of unwelcome members would in fact thwart the clubs' purposes, the decision is no surprise. Indeed, the *New York State Club* decision has finally implemented a powerful means for terminating the oppressive conditions in the marketplace.

Deanna Lynne Mueller

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167 *New York State Club*, 108 S. Ct. at 2237 (O'Connor, J., concurring).

168 468 U.S. 609, 617 (1984).

169 *Id.* at 618-19. The right of intimate association is closely related to the right of privacy. *See also* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940, 1945-47 (1987).

170 *New York State Club*, 108 S. Ct. at 2234.