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

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

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


3. The fourth amendment states in pertinent part: "The right of the people to be secured in their persons, houses, paper, and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. CONST. amend. IV. See Griswold, 381 U.S. at 483 (noting that the right of privacy extends to groups as a right of association); but see Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 HARV. C.R.-C.L. L. REV. 321, 347 (1983) (arguing that the right to privacy does not include the right to exclude women from clubs).


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

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

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


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

An institution, club, or place of public accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of his trade or business. . . . [B]enevolent orders . . . [and] . . . religious corporations shall be deemed in nature distinctly private. Local Law No. 63 of 1984 § 1 app. at 14-15.

7. 108 S. Ct. at 2234.

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

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

9. Although many private clubs have "understood" rules that forbid the discussion of politics or business on club premises, such topics are inevitably discussed. Alpern, Clubs: The Ins and Outs, NEWSWEEK, Jan. 10, 1977, at 18-19. The Cosmos Club, a male-only club in Washington, D.C., "prides itself on being the site of discussions that later develop into public policy." Note, Sex Discrimination in Private Clubs, 29 HAS-
a three-part test: an association is not "distinctly private" if it has more than four hundred members, and receives regular payment from nonmembers. The law specifically exempts benevolent orders and religious organizations. NYSCA filed suit seeking a declaratory judgment that Local Law 63 violated club members' first amendment right of association and their fourteenth amendment guarantee of equal protection. The New York State Supreme Court upheld the constitutionality of the law.

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

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

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

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

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

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

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

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

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

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

19. In an unreported opinion, the court found that the law did not violate the first amendment. Moreover, the City's compelling interest in eradicating discrimination justified its narrowly drawn regulation of constitutional associational interests. Brief of NYSCA, supra note 8, at 14.
Upon direct appeal, both the Appellate Division of the Supreme Court of the State of New York and the Court of Appeals of the State of New York affirmed.21

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


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

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

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

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


26. See infra notes 41-42 and accompanying text. See also Note, Private Club Membership - Where Does Privacy End and Discrimination Begin?, 61 ST. JOHNS L. REV.
Courts must balance the right of association and the fourth amendment right of privacy against guarantees of equality in the Constitution and in legislation.

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

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

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

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

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

*Id.*

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

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

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

33. *Id.* at 463-64.

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

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


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

*Id.*


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

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


43. Linder, supra note 28, at 1881 (noting that states recognize strong associational interests by broadly exempting private clubs from antidiscrimination legislation).
Until recently courts have had minimal guidance in defining the proper scope of statutory exemptions for private associations. 45

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

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

48. MINN. STAT. § 363.03(3) (1982). The Act provides in pertinent part: "It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, or sex..." *Id.*


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

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

52. *See supra* note 50.

53. The Court, finding no support in the record, did not address potential changes in the basic philosophy of the organization which might necessarily result if women became full voting members. *Roberts*, 468 U.S. at 626-27.
associations. 54

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

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

54. Id. at 619-22. The Roberts court merely held that the limits of private associations fall somewhere on a “spectrum ranging from intimate to the most attenuated of personal attachments.” Id.
56. Id. at 1945-48. See supra notes 46-51 and accompanying text.
57. CAL. CIV. CODE § 51 (West 1982). The Unruh Act reads in pertinent part: “All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” Id. Currently, many California all-male clubs have tried to “privatize” their policies in order to evade the Act’s prohibition. To accomplish this, the clubs claim they accept personal checks only, permit no business activity, and screen all nonmembers. Commentary of Herma Hill Kay, The Washington University School of Law Shelley v. Kraemer Conference (Sept. 30, 1988).
58. Rotary, 107 S. Ct. at 1946. The Court explicitly stated that it did not limit the right of private associations to family relations. Id. However, the Court held that relationships among Rotary Club members were not sufficiently intimate to warrant constitutional protection. Id. The Court reasoned that Rotary Club membership procedures emphasized unlimited full representation of the business and professional community. Id. Moreover, Rotary Club sought publicity and joint participation in activities with other clubs. Id. at 1946-47. Thus, the Court found that the Rotary Club was neither selective nor exclusive. Id.
59. Id. at 1946-47. The Court found that the Rotary Club conducts significant business activity. Also, no evidence indicated Rotary Clubs promote public issues or other traditional first amendment speech topics. Thus, the Court found that the state’s interest in eliminating discrimination against women extended to equal access of leadership skills, business opportunities, and tangible goods and services. Id.
parameters of private associations. Writing for the majority, Justice White granted the NYSCA standing to pursue a facial attack on Local Law 63, but ultimately denied the challenge.

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

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

61. Id.
62. Id. at 2232 (noting that an association has standing to sue on behalf of its members when those members would have standing to bring the same suit).
63. Id. at 2232-35. The Court established that in order to make a facial attack on the law, NYSCA must prove that the law could never be applied in a valid manner. NYSCA must also prove that even if the law could be applied validly, it would be so broad that it would inhibit the free speech of others. Id.
64. Id. at 2233-34. NYSCA contended that because a significant amount of private or intimate association could occur in clubs meeting the three-prong test, the test failed to measure adequately a club's nonprivate status. Id. For a review of the three-prong test, see supra text accompanying notes 11-13.
65. NYSCA, 108 S. Ct. at 2233.
66. Roberts v. United States Jaycees, 468 U.S. 609 (1984). The state law applied to the Jaycees, which had approximately 295,000 members in 7,400 local chapters. Id. at 613.
68. NYSCA, 108 S. Ct. at 2233. The Court affirmed the City Council's findings that these two characteristics reflect the degree of business deals and contacts made at clubs. Id.
69. Id. at 2234. The Court rejected NYSCA's claim that the law created an irrebuttable presumption that clubs covered under the law are not private in nature. Instead, the Court allowed for judicial review of administrative enforcement proceedings. Id. On appeal, courts could make a case-by-case analysis of the facts. Id. at 2235.
70. Id. at 2234.
overbroad because it impaired individuals' rights to associate and to advocate public or private viewpoints. Finding that NYSCA could not prove that the law threatened any particular club's constitutional rights, the Court rejected the claim. It noted, however, that future courts could cure any overbreadth in the law on a case-by-case basis.

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

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

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

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71. Id. at 2234-35.
72. Id. The overbreadth analysis applies when a litigant, whose own activities are unprotected, challenges a statute by showing that it substantially abridges the first amendment rights of other parties not before the court. See Brief of NYSCA, supra note 8, at 23. To prove overbreadth in this case, the Court required NYSCA to show that the law would deny first amendment guarantees to a substantial number of individuals. NYSCA, 108 S. Ct. at 2234.
73. Id. at 2234-35. The Court upheld the City Council's argument that Local Law 63 does not violate a right of expressive association, since affected clubs may espouse ideologies basic to their formation or existence and may freely select and exclude members on that basis. Id. The Court held that Local Law 63 does not regulate speech but merely restricts conduct which is not entitled to constitutional protection. Id.
74. Id. at 2235.
75. Id. at 2235-37. See supra notes 14-15.
76. Id. at 2236-37.
77. Id. at 2237.
78. Id. Justice O'Connor stated that even if a club falls within the three-prong test, the Court will permit the club to prove that it deserves constitutional protection. Id.
79. Id.
80. Id. See infra note 89 listing an additional subjective factor.
81. Id. at 2238.
must be more than "unique" to fall within Local Law 63's exemption. 26 He contended that a reasonable connection must exist between the special characteristics of the association and the purpose of the law. 27 Justice Scalia supported the Court's decision, however, because he agreed that the exempted organizations were unlikely to foster business transactions. 28

The NYSCA decision is an important symbolic victory. 29 The Court has given new encouragement and guidance to advocates of similar laws in other states. 30 Unlike the broad standards established in earlier cases, 31 Local Law 63 enumerates objective characteristics which define private associations. 32 To protect truly private associations that may fall within the law's three-part test, the Court considered subjective variables. 33 By firmly establishing that cities may constitutionally ban discrimination in private clubs, the decision will affect private associations nationwide. 34

The NYSCA decision opens the door to professional advancement for minorities and women, 35 but provides no automatic assurance that
women will benefit from the valuable business networking that all-male clubs foster.\textsuperscript{92} Opening membership to women does not guarantee that private clubs will treat women equally once they are admitted.\textsuperscript{93} Thus, \textsc{NYSCA} may present merely the first step toward equalizing business opportunities in private clubs.\textsuperscript{94}

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

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

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

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


\textsuperscript{94} \textit{Id.}

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

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

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

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

\textsuperscript{99} \textit{Id.} \textit{See also} Roberts v. United States Jaycees, 468 U.S. 609 (1984). In her concurring opinion, Justice O'Connor noted that many associations cannot readily be described as purely expressive or purely commercial. She suggested that the analysis should focus almost exclusively on whether the activities of the association are predominately expressive or commercial. \textit{Id.} at 635.
state public accommodation laws to ban discrimination in business-oriented clubs. Consequently, the Court contributes to establishing greater equality among all professionals in the business world.

Nancy G. Kornblum