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New York State Club Associations, Inc. v. City of New York: as Distinctly Private Is Defined, Women Gain Access

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NEW YORK STATE CLUB ASSOCIATION, INC. V. CITY OF NEW YORK: AS "DISTINCTLY PRIVATE" IS DEFINED, WOMEN GAIN ACCESS

I. INTRODUCTION

Society and the judicial system have struggled to determine to what extent personal liberty and freedom of association should be sacrificed to provide fairness in the workplace.[1] Federal and state civil rights acts and public accommodation laws[2] have attempted to find an equitable balance between the two clashing values.[3] Until 1984, no state or city had enacted an ordinance that modernized business opportunities for women in our society.[4]

In *New York State Club Association, Inc. v. City of New York*,[5] the United States Supreme Court unanimously upheld a New York City ordinance containing a "three-prong test" used to determine if a club or association qualifies as a "private exemption" under the public accommodation laws.[6] The Court's decision, which upheld the New York City ordinance against freedom of association and equal protection facial attacks, leaves society with a model ordinance to follow in its attempt to curb discrimination against women in the business world.[7] This Comment will trace the historical development of the constitutional right of freedom of association and outline the evolution of public accommodation laws which have attempted to define "distinctly private." It will then analyze the Supreme Court's holding in *New York Club Association* and its impact on opportunity for women in the work place. Finally, this Comment will show why the decision is proper from a constitutional and a societal standpoint.

II. BACKGROUND

A. *History of the Right of Association*

Freedom of association is fundamental to the liberty of every individual[8] and has been recognized to embody the choice not to associate with others.[9] Though freedom of association is not an enumerated con-

1. *See infra* notes 9-69 and accompanying text.
2. *See infra* notes 40-64 and accompanying text.
3. *Id.*
4. *See infra* notes 71-76 and accompanying text.
5. 108 S. Ct. 2225 (1988).
6. *See infra* notes 83-103 and accompanying text.
7. *See infra* notes 112-128 and accompanying text.
8. *See* Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) ("freedom of association receives protection as a fundamental element of personal liberty").
9. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) (recognized the right of the individual to "refuse to associate").

stitutional right,[10] it has evolved from the first amendment.[11] The right of association was first recognized in 1958 by the United States Supreme Court in *NAACP v. Alabama ex rel. Patterson*.[12] In *Patterson*, the NAACP refused to disclose the names and addresses of its members to the state of Alabama.[13] The Supreme Court found the NAACP members' right of association would be violated by an involuntary disclosure of the NAACP membership lists.[14] The Court concluded that any state action attempting to infringe upon freedom of association is subject to a review of "the closest scrutiny."[15] Additionally, the Court, in using the strict scrutiny test, found the state's disclosure requirement was not adequately compelling to allow an infringement on the NAACP members' freedom of association.[16] Thus, in *Patterson*, the Supreme Court created a constitutionally protected freedom of association which groups could assert, similar to the protection given to individual members of a group under the first amendment.[17]

Following its decision in *Patterson*, the Supreme Court extended the freedom of association to protect political parties[18] and organizations[19] from attempted government restrictions.

In *Griswold v. Connecticut*,[20] the United States Supreme Court broadened the scope of the right of association. In the majority opinion, Justice Douglas declared the right of association as belonging to the penumbra of the first amendment,[21] and used the right as a safeguard

10. Since the Supreme Court's decision in Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (right of privacy protected from state interference is a fundamental interest within the first, third, fourth and fifth amendments), the Court has recognized and expanded rights not enumerated in the Constitution. *See infra* notes 20-38 and accompanying text; *see also* Roe v. Wade, 410 U.S. 113, 152-54 (1973) (legislation prohibiting abortion in state found to be a violation of individual privacy rights).

11. *See id.* at 483 (holding freedom of association as a necessity to make the enumerated first amendment guarantees significant).

12. 357 U.S. 449 (1958).

13. 10 ALA. CODE § 192-98 (1940).

14. *Patterson*, 357 U.S. at 450.

15. *Id.* at 460-61.

16. *Id.*

17. *Id.* at 465-66 (citing Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)). In *Sweezy*, the Supreme Court found that the first amendment protects a citizen's right to take part in political associations. The Court recognized that the subordinating interest of the State must be compelling.

18. *See, e.g.*, Tashjian v. Republican Party of Conn., 479 U.S. 208, 211-12 (1986). The Republican Party challenged the state requirement which permitted only members of that party to vote in the party primary. The party prevailed by asserting that the requirement, which directly conflicted with Republican aspirations to permit the independent voter to vote in its primaries, violated the party's freedom of association. *See also* Democratic Party of United States v. Wisconsin *ex. rel.* La Follette, 450 U.S. 107, 112 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975).

19. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428 (1963) (the Court held that litigation is protected as a form of political expression); Brotherhood of R.R. Trailman v. Virginia *ex. rel.* Va. State Bar, 377 U.S. 1, 6 (1964) (assembly and petition rights include the right to legal help from an association).

20. 381 U.S. 479 (1965).

21. *Id.* at 484. *See supra* notes 10-11 and accompanying text.

while concluding his discussion on marital privacy.[22] In recognizing marital privacy as a fundamental right of privacy, the Court based its decision on general principals inherent in the Constitution, rather than on particular constitutional language.

Thus, the Supreme Court introduced a right of expressive association in *Patterson*,[23] where individuals obtain standing when acting through organizations. In addition, the Court in *Griswold* recognized a right of intimate association protected by the first amendment, which exists to protect marital couples who plan to procreate.[24]

In 1984, the Supreme Court decided *Roberts v. United States Jaycees*,[25] which distinguished between the two aspects of freedom of association.[26] The Court held that freedom of intimate association exists to protect highly personal relationships.[27] Additionally, the Court defined the freedom of expressive association as the right to associate with others while exercising express first amendment activities.[28]

Thus, through history, the Supreme Court has recognized that the rights of intimate and expressive association are subject to different standards of review.[29] Freedom of intimate association is given a higher level of constitutional protection because it involves the fundamental nature of personal liberty.[30] This freedom has not been extended to protect unrelated individuals from government actions.[31] The Supreme Court has held that a state may only infringe on the freedom of expressive association when such a freedom conflicts with a compelling state interest.[32] Yet, according to the Court's decision in *Roberts*, the infringement will not be allowed if the state interest can be achieved through a less restrictive means.[33]

In 1987, the Supreme Court was once again confronted with a freedom of association claim. In *Board of Directors of Rotary International v. Rotary Club of Duarte*,[34] the Supreme Court adopted the standard of review used in *Roberts*.[35] Justice Powell's majority opinion replaced intimate association with the term "private association." The opinion

22. *Griswold*, 381 U.S. at 486. (receiving information on contraceptives is imperative to exercising the fundamental right to make procreational choices).

23. *See supra* notes 12-17 and accompanying text.

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

25. 468 U.S. 609 (1984). *See infra* notes 53-59 and accompanying text.

26. *Roberts*, 468 U.S. at 618.

27. *See id.* at 619 (protecting highly personal relationships from unjustified state interference "safeguards the ability independently to define one's identity that is central to any concept of liberty.").

28. *See id.*; *see also* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940, 1945 (1987).

29. *See Roberts*, 468 U.S. at 617-18.

30. *See id.* at 618 (affords "personal relationships a substantial measure of sanctuary"); *see, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 503-06 (1977).

31. *See* Bowers v. Hardwick, 478 U.S. 186, 189-90 (1986); Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974).

32. Buckley v. Valeo, 424 U.S. 1, 25 (1976).

33. *Id.*

34. 107 S. Ct. 1940 (1987).

35. *See supra* notes 25-33.

expressly stated that private association is not limited to family relations; rather, the Court found that it applies to a variety of personal relations.[36] However, the Court established that there is no clear boundary for activities protected under private association.[37] While reviewing the appellant's right of expressive association, the Court followed the procedure set forth in *Roberts*.[38]

B. *The Evolution of Ascertaining "Distinctly Private"*

The Civil Rights Act of 1964[39] bans discrimination supported by state action or affected by interstate commerce.[40] The United States Congress, through the commerce clause, is empowered to prohibit private discrimination from affecting interstate commerce.[41] Congress has utilized its power under the commerce clause to regulate private race and sex discrimination in education,[42] employment,[43] and housing.[44] However, Title II of the Civil Rights Act only prohibits discrimination based on color, race, religion, or national origin.[45] Furthermore, Title II exempts "private clubs" from its scope of enforcement,[46] and this has enabled a great number of groups and associations to be protected by the exemption.[47] Though the Act prohibits discrimination against particular groups,[48] it fails to protect gender-based discrimination and leaves the definition of "private club" open for broad interpretation.

Following the enactment of the Civil Rights Act of 1964, most states instituted their own anti-discrimination laws. The California[49] and Minnesota[50] public accommodation laws have been subjected to strict judi-

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36. *Duarte*, 107 S. Ct. at 1947.

37. *Id.* at 1944-45. The Court recognized begetting and bearing children, child rearing, education, marriage, and co-habitation with relatives as examples of protected private association activities.

38. *See infra* notes 53-59 and accompanying text.

39. 42 U.S.C. § 2000a (1982) [hereinafter "Civil Rights Act" or "Act"].

40. 42 U.S.C. § 2000a(c) (1982).

41. Daniel v. Paul, 395 U.S. 298 (1969); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

42. 20 U.S.C. § 1681(a) (1982) (makes sex discrimination unlawful in educational activities that are federally funded); 42 U.S.C. § 1982 (1982) (prohibits discrimination based on race in contracts for educational services); *see also* Runyon v. McCrary, 427 U.S. 160, 172 (1976).

43. *See* Civil Rights Act of 1964 (Title VII addresses employment benefits); *see also* Hishon v. King & Spalding, 467 U.S. 69 (1984).

44. 42 U.S.C. § 3604 (1964).

45. 42 U.S.C. § 2000a (1983). The law 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."

46. 42 U.S.C. § 2000a(e) (1982). This section of the law provides:

> 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.

47. *See generally* Note, *The Private Club Exemption To The Civil Rights Act of 1964: A Study In Judicial Confusion*, 44 N.Y.U. L. REV. 1112 (1969).

48. *See supra* notes 40-41 and accompanying text.

49. CAL. CIV. CODE § 51 (West 1982).

50. MINN. STAT. ANN. § 363.03(3) (West Supp. 1988).

cial review,[51] and are responsible for the first actual step toward defining "distinctly private." The Minnesota Human Rights Act prohibits unfair discriminatory practice based on sex, race, color and other categories.[52] Thus, the law was one of the first state public accomodation statutes to include "sex" as a forbidden basis of discrimination. As such, it was inevitable that the Minnesota provision would be the focus of a constitutional challenge.

The United States Supreme Court reviewed the struggle amidst the equal access rights of women and the associational rights of a presumably private club for the first time in *Roberts v. United States Jaycees*.[53] The Court's review of the Minnesota public accommodation law is the first step toward defining "distinctly private." In *Roberts*, the St. Paul and Minneapolis chapters of the Jaycees admitted women in 1974 and 1975;[54] subsequently, the United States Jaycees threatened to revoke the local chapters' charters.[55] In response, members of the local chapters filed complaints with the state department of human rights asserting discrimination in violation of the Minnesota Human Rights Act.[56] The Supreme Court of Minnesota found that the Human Rights Act applied to any "public business facility" and concluded the Jaycees fell within that classification because they solicited membership on a nonselective basis. After a federal district court affirmed the Minnesota Supreme Court decision and the Eighth Circuit Court of Appeals reversed,[57] the United States Supreme Court upheld the Minnesota legislation and found that Minnesota's highest court correctly applied the law to the Jaycees.[58]

In *Roberts*, the Supreme Court created a bifurcated framework for the analysis of associational freedom.[59] The Court failed to thoroughly evaluate what characterized the Jaycees as a "public accommodation." The *Roberts* Court simply accepted the findings of the Supreme Court of Minnesota, thus leaving the legitimate parameters of defining "distinctly private" unresolved.

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51. *See* 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).

52. MINN. STAT. ANN. § 363.03(3) (West Supp. 1988). The public accommodation law makes it unlawful "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.*

53. *Roberts*, 468 U.S. at 609. The United States Jaycees, founded in 1920, is a nonprofit corporation which was traditionally known as a mens club. Women are allowed as associate members, but are not permitted to vote, hold office, or participate in all activities.

54. *Id.*

55. *See id.* at 614.

56. *See supra* note 52 and accompanying text [hereinafter "Human Rights Act"].

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

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

59. *Id.* at 629-30. *See* Linder, *Freedom of Association after Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1901 (1984); *see also* Note, *Private Club Discrimination Can Be Outlawed: Roberts v. United States Jaycees*, 19 U.S.F. L. REV. 413, 423-24 (1985); *see supra* notes 25-33 and accompanying text.

The California Unruh Act broadly defines public accommodations to encompass "all business establishments of whatever kind."[60] The law also prohibits discrimination based on sex,[61] similar to the Minnesota public accommodation law. In *Board of Directors of Rotary International v. Rotary Club of Duarte*,[62] the United States Supreme Court affirmed a California Court of Appeals decision ordering the reinstatement of a local Rotary club that refused to abide by a male-only membership policy.[63] The Supreme Court limited its review of the case to determine if the Unruh Act violated the first amendment freedom of association as applied to Rotary International and its member clubs.[64] The Court adopted the standard of review established in *Roberts*[65] to determine if Rotary International was susceptible to the law. The Supreme Court considered the exclusivity, purpose, selectivity, and size of the association.[66] Recognizing that Rotary's activities include representation of the business community, the Court found that the activities constituted public purposes rather than exclusive private ends.[67] In addition, the Court found Rotary's willingness to seek publicity and to participate with other organizations to attribute to its public purpose. Therefore, the Supreme Court found the Unruh Act did not improperly infringe upon the Rotary Club members' freedom of association.[68]

In *Duarte*, the United States Supreme Court recognized the authority of the states to prohibit sex discrimination through means of public accommodation laws. The Court considered the club's purpose, size, exclusivity, and selectivity to determine if it was "distinctly private."[69] The Court's failure to clearly define the characteristics of "distinctly private" left an open door for further attempts to ascertain a standard test.

III. INSTANT CASE

A. *Facts:* New York State Club Association, Inc. v. City of New York[70]

In reaction to the alleged networking and business conducted at its

60. CAL. CIV. CODE § 51 (Deering Supp. 1987).

61. The Civil Rights Act reads: "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." CAL. CIV. CODE § 51 (West Supp. 1982).

62. Rotary Club of Duarte v. Board of Directors of Rotary Int'l, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986), *aff'd*, 107 S. Ct. 1940 (1987).

63. *See Duarte*, 178 Cal. App. 3d at 1067-68, 224 Cal. Rptr. at 214-15.

64. The Court did not review the issue of overbreadth and vagueness which Rotary International claimed. *Rotary*, 107 S.Ct. at 1945.

65. *See supra* notes 57-58 and accompanying text.

66. *Roberts*, 468 U.S. 609, 620-21 (1984).

67. *See Duarte*, 107 S. Ct. at 1945-46 (local club membership is unlimited); *see also* STANDARD ROTARY CLUB CONSTITUTION art. V, ¶ 3.

68. *Duarte*, 107 S. Ct. at 1947.

69. *See Roberts*, 468 U.S. at 620-21.

70. 108 S. Ct. 2225 (1988).

exclusive, male only private clubs, the New York City Council enacted Local Law 63[71] on October 9, 1984. The law was an attempt to ascertain and distinguish private clubs from public clubs.[72] The 1984 amendment (Local Law 63) goes one step further than the City's Human Rights Law[73] in illustrating the difference between public and private organizations. New York City's original Human Rights Law prohibits discrimination in any "place of public accommodation, resort, or amusement" based on sex, race, creed and other categories,[74] but broadly exempts places that are "distinctly private."[75] Local Law 63 fills the "distinctly private" void by providing three requirements which must not exist for a club, or other place of accommodation to be deemed "distinctly private."[76] If a club has more than 400 members, furnishes regular meal service, and receives payment directly or indirectly on behalf of or from non-members, it is no longer protected by the "distinctly private" exemption.

Immediately following the New York City Council's enactment of Local Law 63, the New York Club Association[77] filed suit in state court seeking, *inter alia*, a declaratory judgment contending that under the first and fourteenth amendments Local Law 63 was unconstitutional on its face.

The trial court declared the ordinance constitutional and the state's intermediate appellate court affirmed.[78] The state's highest court, the

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71. N.Y.C. ADMIN. CODE § 8-102(9) (1986).

72. LEGISLATIVE DECLARATION LOCAL LAWS NO. 63 OF CITY OF NEW YORK § 1 (1984). According to the findings of the City Council, the importance of this legislation was to make apparent the City's "compelling interest in providing its citizens . . . regardless of race, creed, color, national origin or sex . . . a fair and equal opportunity to participate in the business and professional life of the City." *Id.*

73. N.Y.C. ADMIN. CODE § 8-102(9) (1986).

74. *See* N.Y.C. ADMIN. CODE § 8-107(2). The New York City Human Rights Law enacted in 1965 makes it:

> [a]n 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, or directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin or sex of that the patronage or custom threat of any person belonging to or purporting to be of any particular race, creed, color, national origin, or sex is unwelcome, objectionable or not acceptable, desired or solicited.

75. *See id.*

76. *See* N.Y.C. ADMIN. CODE § 8-102(9) (1986). Local Law 63 provides that any:

> institution, club or place of accommodation, other than a benevolent order or a religious corporation, shall not be considered in its nature distinctly private if it [1] has more than four hundred members, [2] provides regular meal service, and [3] regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business.

77. The New York State Club Association, Inc. is a non-profit corporation made up of a consortium of 125 private clubs and associations.

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

Court of Appeals of New York also affirmed,[79] holding that the law does not violate club members' freedom to privacy, free speech or association.[80] The court declared that through Local Law 63, the city facilitated the least restrictive means to achieve its end,[81] and that the law was but a mere intrusion on protected freedom of association.[82] The New York State Club Association appealed to the United States Supreme Court, and the Court granted certiorari.

B. *Reasoning*

1. Majority Opinion

Justice White's majority opinion addressed four separate issues.[83] Among these issues the first amendment's freedom of association and the fourteenth amendment's equal protection were the most relevant constitutional concerns. The appellant's facial attack of Local Law 63's constitutionality was found to have no merit and the law was upheld.[84] Addressing appellant's private association claim,[85] the Court recognized that when the first amendment's freedom of speech is at stake, it will often allow a facial attack. Using the tests espoused in *City Council v. Taxpayer for Vincient*,[86] the Court cautioned a facial attack would only prevail if the appellant could demonstrate one of two exceptions. Thus, under the exceptions the appellant was responsible for proving that Local Law 63 could either "never be applied in a valid manner" or be so broad that it "may inhibit the constitutionally protected speech of third

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

80. *Id.* at 920-22. Without discussing it, the court also denied relief on the equal protection claim.

81. *Id.* at 921. The court held the law abridges on the policies and activities of the 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." *Id.*

82. *Id.* at 921-22. The court stated that "[a]ny incidental intrusion on protected free speech rights accomplished by the local measure is no greater than necessary to fulfill the state's legitimate purpose in extending to them equal opportunity in employment." *Id. See* Roberts v. United States Jaycees, 468 U.S. 609, 628-29 (1984).

83. New York Club Ass'n. v. City of New York, 108 S. Ct. 2225 (1988). The first issue addressed by the Court was one of standing. Relying on Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977), the Court held the club association had standing to sue for the benefit of its members because "(a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit." *See also* Warth v. Seldin, 442 U.S. 490, 511 (1975). The Court cited *Warth* while rejecting appellees contention that the appellant's membership associations must have standing only to sue for their own benefit, and not on anyone's behalf. In addition, the Court found that the appellant's member associations have standing to bring the same suit on behalf of their own members because these individuals "are suffering immediate or threatened injury" to their first amendment rights as a consequence of the ordinances enactment. *Id.*

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

85. *See* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. at 1947 (in reference to Court's past view of "private association").

86. *New York Club Ass'n*, 108 S. Ct. at 2233 (citing City Council v. Taxpayers for Vincient, 466 U.S. 789, 798 (1984)).

parties regardless of its legal application."[87] In its analysis, the Court acknowledged that both exceptions were narrow.[88] To qualify under the first exception, every application of the law must create "an impermissible risk of suppression of ideas."[89] To fall within the second exception the Court must find the law to be substantially overbroad, posing a "realistic danger that the statute itself will significantly compromise recognized first amendment protections of parties not before the Court."[90] Subsequent to the appellant conceding that Local Law 63 could constitutionally apply to some of the larger clubs under the Court's decisions in *Rotary* and *Roberts*,[91] the Court found the appellant's private association attack failed.

Citing *Roberts*, the Court denounced appellant's expressive association claim and held that on its face Local Law 63 in no considerable way affects the capability of individuals to develop associations that promote public or private viewpoints.[92] While upholding the law, the Supreme Court found that it could "hardly hold otherwise," because appellants' facial attack offered no evidence of the characteristics of any of the clubs it represented.[93] The Court concluded its discussion of freedom of expressive association by finding that the law does not mandate clubs to "abandon or alter" any freedoms protected by the first amendment.[94] Also, the Court found Local Law 63 to be "no obstacle" to a club that attempts to exclude individuals that do not hold the same views which the club's members support.[95] Recognizing the compelling interest of the city, the Court found the law "merely prevents" a club or association from using sex, race and other distinct characteristics as requirements "in place of what the city considers to be more legitimate criteria for determining membership."[96]

Finally, the Court found the club association failed in its facial equal protection attack on Local Law 63.[97] The club association's claim was premised on the exemption under the law which declares benevolent orders and religious corporations to be "distinctly private."[98] Relying

87. *Id.* (quoting *Taxpayer for Vincent*, 466 U.S. at 798).
88. *Id.*
89. *Id.* (quoting *Taxpayers for Vincent*, 466 U.S. at 798, 801).
90. *Id.*
91. *See supra* notes 53-69 and accompanying text.
92. *New York Club Ass'n*, 108 S. Ct. at 2234.
93. *Id.* at 2234-35
94. *Id.* at 2234 (quoting *Rotary*, 107 S. Ct. at 1945).
95. *Id.*
96. *Id.*
97. *See id.* at 2235. Prior to addressing the issue of equal protection, the Court discussed appellant's "overbreadth" and "irrebuttable" presumption contention. Using the test set forth in Broaderick v. Oklahoma, 413 U.S. 601, 615 (1973) ("a law is constitutional unless it is substantially overbroad"), the Court found the overbreadth doctrine could not apply because the appellant made no indication that any club's ability to associate or to support private or public viewpoints was impaired by the law. The Court rejected appellants "irrebuttable" presumption contention by finding the administrative and judicial proceedings under the law are adequate to guarantee that whatever overbreadth that exists "will be curable through case-by-case analysis of specific facts." *Id. See also* Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619, 629 (1986).
98. *New York Club Ass'n*, 108 S. Ct. at 2235.

on *Cleburne v. Cleburne Living Center*, appellant asserted that benevolent orders and religious corporations should be treated equal to private associations because appellee presented no evidence that one was actually different from the other.[99] Using the rational basis test, the Court did not find appellant's argument to be convincing.

First, the Court supported the city council's reasoning that identified benevolent orders and religious corporations to be unique.[100] It paralleled the city's logic with the decision in *Bryant* which upheld a state law that similarly exempted benevolent orders.[101] Second, the Court recognized that legislative classifications are assumed to be constitutional, and held that the party challenging the constitutionality of a statute has the burden of showing it is unconstitutional.[102] The club association failed because it did not provide evidence that indicated benevolent orders and religious corporations are identical to its private clubs which fall under Local Law 63's anti-discrimination provision.[103]

2. Concurring Opinions

Justice O'Connor and Justice Scalia each wrote concurring opinions, with Justice Scalia concurring in part and in judgment. Agreeing with the majority, the Justices' recognized that the appellant's facial freedom of association attack on Local Law 63 must fail. Justice O'Connor's concurrence, joined by Justice Kennedy, assured that the majority opinion does not threaten the significance of associational interests that may be at stake.[104] Justice O'Connor's concurrence recognized the importance of balancing the states' power of ensuring "nondiscriminatory access to commercial opportunities in our society" against an "association's First Amendment right to control its membership."[105] Acknowledging that the amount of commercial activity varies with each organization, Justice O'Connor stated that there will definitely be clubs that fall within the law's reach, but will be entitled to constitutional protection.[106] However, the Justice concluded by stating that those organizations which are predominately commercial will not be protected by the first amendment's associational or expressive right to be free.[107]

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

100. *See id.* (citing New York *ex. rel.* Bryant v. Zimmerman, 278 U.S. 63, 73-74 (1928)). In *Bryant* the Court upheld a law which exempted benevolent orders from filing certain documents that most associations and corporations had to file with the state. *See* N.Y. CIV. RIGHTS LAW § 53 (McKinney 1976).

101. *New York Club Ass'n*, 108 S. Ct. at 2236 (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)). (Challenging party must convince the court that the legislative facts upon which the classification is based could not reasonably be thought to be true by the government body).

102. *Id.*

103. *Id.* at 2236-37.

104. *Id.* at 2237 (O'Connor, J., concurring).

105. *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 635 (1984) (O'Connor, J., concurring in part)) (O'Connor, J., concurring).

106. *Id.* at 2237 (O'Connor, J., concurring).

107. *Id.* (O'Connor, J., concurring).

Justice Scalia's concurrence in part found the majority's equal protection rationale to be weak. He expressed dissatisfaction toward the Court's reliance on the New York appellate division's statement defining benevolent orders as "unique" because, as he pointed out, the statement was cited incorrectly and does not define benevolent orders but rather "fraternal benefit societies."[108] According to Justice Scalia, the "mere fact that benevolent orders are unique" does not suffice to determine that a rational basis is present to allow an exemption.[109] Additionally, the Justice maintained that some reasonable connection must exist between the respect in which they are unique and the objective of the law. Therefore, Justice Scalia argued that the equal protection analysis of the Court was not well-founded.[110]

IV. ANALYSIS

Over a period of four years, the United States Supreme Court, in three decisions, finally recognized that associational discrimination in alleged private clubs can be prohibited.[111] A unanimous Supreme Court held that nothing in the Constitution makes New York City's "three-prong test" unlawful.[112] *New York Club Association* opened the door for women to become members of the once exclusive men's clubs. Our society cherishes personal liberty in one's home[113] and in private association,[114] but at the same time fairness in the marketplace has become a compelling state interest.[115] In an attempt to remedy these conflicting values, the Supreme Court recognized a legitimate definition of "distinctly private,"[116] and in doing so, the Court has left many members of society with mixed feelings.

Associational rights have suffered a great loss due to the interests of the state. Focusing on the size and commercial activities of clubs,[117] New York City structured a paradigm for other cities and states to follow. In fact, numerous other cities have enacted similar laws, including the District of Columbia, Chicago, Buffalo, Los Angeles, and San Francisco.[118] Justices Samuel Warren's and Louis Brandeis' "right to be left alone"[119] has been compromised by the Court's acknowledgment of the

108. *See id.* at 2238 (Scalia, J., concurring in part).
109. *Id.*
110. *Id.*
111. *See* New York Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988); 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).
112. *See supra* notes 70-109 and accompanying text.
113. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
114. NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449 (1958).
115. *See supra* note 72 and accompanying text.
116. *See supra* notes 70-109 and accompanying text.
117. *See* LEGISLATIVE DECLARATION, *supra* note 75. The City relied on considerations which guided the Court in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), to uphold Local Law 63.
118. WASHINGTON, D.C., CODE § 1-2502; CHICAGO, ILL., MON. CODE ch. 199A; BUFFALO, N.Y., CITY ORD., Art. XXIII of Chap. VII; LOS ANGELES, CA., MUN. CODE §§ 44.95.00-44.95.04; SAN FRANCISCO, CA., POLICE CODE, §§ 3300B1-3300B.7.
119. *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). There is

changing role of women in our society. No longer will men be capable of enjoying the "right to be left alone" at their once private clubs. Alexis de Tocqueville, in his commentary on the role of democracy in America, found that the propensity in the United States to establish private associations derives from and is preserved by the inalienable right of private association, which he cautioned against limiting:

> The most natural privilege of man next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them. The right of association therefor appears to be almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.[120]

Therefore, it could be tempting to conclude that the Court in *New York Club Association*[121] should have weighed the right of association to be greater than the compelling interest of the City. However, the Court was correct in finding Local Law 63 valid on its face.

The development of civilization requires change. The needs of human beings are met through communicating, negotiating, implementing, and enforcing laws, or in the extreme event, war. When tradition and individual attitudes stand in the way of the evolution of society, the American legal system must confront the issue.[122] The New York City Council operated as an effective government body by enacting Local Law 63. Though the New York Club Association contended that the law rests on a baseless assumption categorizing clubs as marketplaces for business opportunities, the reality of the situation is that business does take place at both private and public clubs.

The suppression of business opportunities based on gender impairs the economy of the United States. Women make up a large percentage of our workforce and to prohibit their admittance to venues where business is conducted deprives the nation of potential economic growth.[123] In *New York Club Association*, the United States Supreme Court's decision is just from both a moral and economic standpoint. Furthermore, the Supreme Court decision is legally well-founded, giving women the opportunity to compete with their male counterparts.

The United States Supreme Court's decision in *New York Club Association* is equitable and correct for many reasons. First, while attempting a facial expressive association attack on Local Law 63, the club association offered no evidence to the Court displaying the characteristics or pur-

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no express constitutional right to privacy. Justice Brandeis introduced the right into case law in Olmstead v. U.S., 277 U.S. 438, 471 (1928) (Brandeis, J. dissenting).

120. Brief of the Conference of Private Organizations as Amicus Curiae for Appellant at 2, New York Club Ass'n, Inc. v. City of New York, 108 S. Ct. 2225 (1988) (quoting A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 196 (Bradley ed. 1954)).

121. 108 S. Ct. 2225 (1988).

122. Perhaps one of the most important pieces of legislation enacted was the Civil Rights Act of 1964. For a short period of time, the anti-discrimination law was not widely accepted by certain members of society. 42 U.S.C. § 2000a(c) (1983).

123. *Employment in Perspective—Women In The Labor Force*, BUREAU OF LABOR STATISTICS, Rep. 756 (1988) (56.2% of people in the work force are women).

pose of any represented club.[124] Second, in its equal protection facial attack, the club association failed again to provide the Court with any evidence identifying benevolent orders and religious organizations to be identical to private clubs.[125] Therefore, without evidence to the contrary, the Supreme Court had no alternative but to find the club association's claim to be without merit. Third, the club association conceded that Local Law 63 could apply constitutionally to some of the larger clubs, thus making its facial attack untenable.[126] The purpose of a facial attack is to allege that the law is invalid in all applications, yet the club association expressly acknowledged that the law was valid when applied to some clubs. Finally, although the United States Supreme Court struck down the club association's facial attack on the constitutionality of Local Law 63, the Court did recognize that the ordinance could be unconstitutional if applied to certain clubs.[127] The Court stressed a case-by-case analysis of those clubs or associations that provide evidence to demonstrate how their specific purpose is being impaired, proving the ordinance invalid as it applied to that given club.[128] Therefore, clubs that can actually demonstrate how their right to association is being infringed upon by Local Law 63 should be successful in maintaining their exclusive membership.

V. CONCLUSION

The United States Supreme Court's decision in *New York Club Association* has finally defined "distinctly private" as it may be applied in public accommodation laws. At the same time, the decision has infringed upon the right of private and expressive freedom of association. Women have gained access to traditional men-only clubs at the expense of individual privacy. Unfortunately, access will not guarantee business, and only time will tell how women have benefitted from the Court's decision. However, our society as a whole has profited by identifying the equally important role women play in the business world. New York City's "three-prong test" should be adopted by all cities and states, and if a club feels that it has a legitimate argument, it should go forth with evidence and attempt to prove it. The United States Supreme Court has finally brought womens' business opportunities up to date, and in doing so, the Court in *New York Club Association* utilized its power to terminate one of this country's most oppressive traditions.

Kurt Frederick Overhardt

124. *See supra* note 93 and accompanying text.
125. *See supra* note 110 and accompanying text. Compare this argument with Justice Scalia's discussion on equal protection. New York Club Ass'n v. City of New York, 108 S. Ct. 2225, 2238 (1988) (Scalia, J., concurring in part).
126. *See supra* note 91 and accompanying text.
127. *New York Club Ass'n*, 108 S. Ct. at 2234, 2237-38 (O'Connor, J., concurring).
128. *Id.* at 2235.