Marquette Law Review

Volume 72
Issue 3 *Spring 1989*

Article 6

Constitutional Law: New York State Club Association v. City of New York, - U.S. -, 108 S. Ct. 2225 (1988)

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NOTE

CONSTITUTIONAL LAW — *New York State Club Association v. City of New York*, — U.S. —, 108 S. Ct. 2225 (1988)

The right of free association, though not specifically enumerated in the United States Constitution, is a judicially recognized right[1] afforded constitutional protection under the first amendment.[2] In *New York State Club Association v. City of New York*,[3] the United States Supreme Court held that a city law[4] prohibiting discrimination by clubs not distinctly private in na-

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1. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). Although the freedom of association is not explicitly guaranteed by the first amendment, the importance of an individual's right to freely associate with others to advance shared beliefs and ideas has long been recognized by legal scholars and political theorists. As Alexis de Tocqueville noted over 100 years ago:

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

1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 196 (1945).

2. The first amendment guarantees that "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 the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The Supreme Court has noted that "[a]ssociation . . . 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." Griswold v. Connecticut, 381 U.S. 479, 483 (1965); *see also* 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, 1055 n.1 (1985).

Although the Supreme Court recognized the right of free association in *NAACP v. Alabama*, one commentator has suggested that the scope of free association remains largely unsettled. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 2 (1964) ("[T]he constitutional source of 'the right of association,' the principles which underlie it, [and] the extent of its reach . . . have never been clearly set forth.").

3. — U.S. —, 108 S. Ct. 2225 (1988).

4. N.Y.C. ADMIN. CODE § 8-102(9) (1986), *reprinted in* Appellant's Brief at 3, New York State Club Ass'n v. City of New York, — U.S. —, 108 S. Ct. 2225 (1986) (No. 86-1836).

ture[5] was constitutional on its face under the first[6] and fourteenth amendments.[7]

The Court, in a unanimous decision,[8] ruled that an amendment to New York City's ("City") human rights ordinance,[9] which prohibited discrimination in those clubs determined to be public in nature,[10] did not infringe upon the New York State Club Association's ("N.Y.S.C.A.") first amendment right of free association.[11] The Court acknowledged that some of N.Y.S.C.A.'s members may have been entitled to constitutional protection,[12] but it affirmed the court of appeal's enforcement of Local Law 63[13] because the Law did not infringe upon the associational rights of every N.Y.S.C.A. member.[14]

This Note begins with a short synopsis of the facts in *New York State Club Association*. A review of the development of the right of free association, including a discussion of the elements and restrictions on free association, will follow. An analysis of the Supreme Court's decision will then be presented, and this Note will conclude with an assessment of the ruling and a discussion of the trends that will impact upon the right of free association in the future.

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5. *Id.* In 1984, New York City amended its Human Rights Law to include Local Law 63, which extended the:

> antidiscrimination provisions of the Human Rights Law to any "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."

New York State Club Ass'n, — U.S. at —, 108 S. Ct. at 2230 (quoting N.Y.C. ADMIN. CODE § 8-102(9) (1986)).

6. *Id.* at 2233-35; *see supra* note 2.

7. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2235-36. The fourteenth amendment provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See generally* Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 SW. U.L. REV. 237 (1982) (applicability of equal protection challenge to state action regulating the benefits of an organization).

8. *New York State Club Ass'n*, 108 S. Ct. at 2229. Justice White delivered the majority opinion. Chief Justice Rehnquist and Justices Brennan, Marshall, Blackmun, Stevens, O'Connor and Kennedy joined. Justice O'Connor filed a concurring opinion in which Justice Kennedy joined. Justice Scalia also filed a concurring opinion. *Id.*

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

10. *See infra* notes 15-17 and accompanying text.

11. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2235.

12. *Id.*

13. *Id.* at 2231, *aff'g* 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987).

14. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2235.

I. STATEMENT OF THE CASE

In October 1984, New York City amended its human rights ordinance to include Local Law 63,[15] which altered the definition of a "distinctly private" organization.[16] Local Law 63 was designed to broaden the scope of the City's public accommodation laws by depriving organizations of the "distinctly private" exclusion[17] if they had more than 400 members, provided regular meal service, and regularly received payments for services from non-members.[18] The amendment affected a substantial number of clubs belonging to N.Y.S.C.A., a consortium of 125 private clubs and associations in the State of New York.[19]

N.Y.S.C.A. filed suit against the City in the New York Supreme Court, New York County,[20] seeking declaratory and injunctive relief from enforcement of Local Law 63 on the grounds that the amendment was unconstitu-

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15. Jurisdictional statement for Appellant at 2, New York State Club Ass'n v. City of New York, — U.S. at —, 108 S. Ct. 2225 (1988) (No. 86-1836). Local Law 63 amended New York City's public accommodation law to provide, in part, that:

> An institution, club or place of 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 non-members for the furtherance of trade or business. For the purposes of this section a corporation incorporated under the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.

N.Y.C. ADMIN. CODE § 8-102(9) (1986).

16. Jurisdictional statement for Appellant at 3, *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2225.

17. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2230. The Civil Rights Act of 1964 was enacted to prohibit discrimination in "place[s] of public accommodation." *Id.* at —, 108 S. Ct. at 2229-30. However, clubs that were "distinctly private" in nature were exempt from compliance with public accommodation laws and were allowed to engage in discriminatory practices. *Id.* at —, 108 S. Ct. at 2230. Many states, like New York, have amended the public accommodation laws to include clubs that are "determined to be sufficiently 'public' in nature that they do not fit properly within the exemption" for private clubs. *Id.* Characterizing an organization as being public in nature enables the state to prohibit those organizations from engaging in discriminatory practices. *Id.* However, by depriving an organization of its exemption from public accommodation laws, the state infringes upon the organization's right of free association. The conflict between a club's right to freely associate and a state's interest in eradicating discrimination was before the Supreme Court in *New York State Club Ass'n. See also* Case Comment, Board of Directors of Rotary International v. Rotary Club of Duarte: *Prying Open the Doors of the All-Male Club*, 11 HARV. WOMEN'S L.J. 117 (1988).

18. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2230.

19. *Id.* at —, 108 S. Ct. at 2231; *see also supra* notes 15-17 and accompanying text.

20. New York State Club Ass'n v. City of New York, No. 25028/84 (N.Y. Sup. Ct., N.Y. County: Special Term, Part 1, Nov. 28, 1985) (unreported decision), *aff'd*, 118 A.D.2d 392, 505 N.Y.S.2d 152 (N.Y. App. Div. 1986), *aff'd*, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987), *aff'd*, — U.S. —, 108 S. Ct. 2225 (1988).

tional on its face under the first and fourteenth amendments.[21] The trial court upheld Local Law 63[22] and N.Y.S.C.A. appealed. Both the New York Supreme Court, Appellate Division,[23] and the New York Court of Appeals upheld the trial court's decision.[24] The New York Court of Appeals reasoned that the City's compelling interest in eliminating discrimination justified any potential infringement of associational rights.[25] The N.Y.S.C.A. appealed the decision.

The United States Supreme Court noted probable jurisdiction[26] and affirmed the decision.[27] The Court rejected N.Y.S.C.A.'s facial challenge, ruling that Local Law 63 did not infringe upon the intimate and expressive associational rights of all of N.Y.S.C.A.'s members.[28]

II. FIRST AMENDMENT — FREEDOM OF ASSOCIATION: BACKGROUND, ELEMENTS, AND RESTRICTIONS

A. Background

Freedom of association is the fundamental right to associate with others for the purpose of advancing commonly held beliefs and ideas.[29] Although the right of free association is not expressly guaranteed by the Constitution,[30] the Supreme Court has ruled that free association is an independent

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21. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2231.

22. New York State Club Ass'n v. City of New York, No. 25028/84 (N.Y. Sup. Ct., N.Y. County: Special Term, Part 1, Nov. 28, 1985) (unreported decision).

23. New York State Club Ass'n v. City of New York, 118 A.D.2d 392, 505 N.Y.S.2d 152 (N.Y. App. Div. 1986), *aff'd*, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987), *aff'd*, 108 S. Ct. 2225 (1988).

24. New York State Club Ass'n v. City of New York, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987), *aff'd*, 108 S. Ct. 2225 (1988).

25. 69 N.Y.2d at 223, 505 N.E.2d at 921, 513 N.Y.S.2d at 355.

26. New York State Club Ass'n v. City of New York, — U.S. —, 108 S. Ct. 62 (1987).

27. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2231.

28. *Id.* at —, 108 S. Ct. at 2234-35.

29. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958). The Supreme Court, since 1958, has consistently noted the existence of a right of free association. *See, e.g.*, Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986); Roberts v. United States Jaycees, 468 U.S. 609 (1984); Democratic Party of United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107 (1981); Runyon v. McCrary, 427 U.S. 160 (1976); Healy v. James, 408 U.S. 169 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960).

30. *See, e.g., Griswold*, 381 U.S. at 482. "The association of people is not mentioned in the Constitution nor in the Bill of Rights." *Id.*

right[31] derived from the first amendment guarantees of free speech, peaceable assembly, and freedom of religion.[32]

Recognition by the Supreme Court of the freedom of association[33] has also necessitated recognition of the freedom to associate exclusively.[34] Justice Douglas has argued that the right of exclusive association permits discrimination in private groups since "[t]he associational rights which our system honors permit all white, all black, all brown and all yellow clubs to

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31. NAACP v. Alabama, 357 U.S. at 460. It has been suggested that the " 'freedom of association' has been little more than a shorthand phrase used by the Court to protect traditional first amendment rights of speech and petition as exercised by individuals in groups." Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1, 1 (1977).

Since the Supreme Court's recognition of the right of free association in 1958, the Court has expanded free association to encompass a broad spectrum of first amendment activities. *See, e.g., Tashjian*, 479 U.S. 208 (closed primary statute interfered with a political party's first amendment right to define its associational boundaries); Hishon v. King & Spaulding, 467 U.S. 69 (1984) (right of free association did not extend to a law firm practicing gender-based discrimination in partnership selection); Brown v. Hartlage, 456 U.S. 45 (1982) (agreements to engage in illegal conduct have elements of associational conduct, but are not afforded constitutional protection under the right of free association); Zablocki v. Redhail, 434 U.S. 374 (1978) (state statute requiring demonstration by marriage applicants supporting minor children, of compliance with support obligation violated the applicants' free associational rights); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (zoning ordinance prohibiting any non-family members from residing in a household violated residents' right of free association by regulating the persons designated as family); *Runyon*, 427 U.S. 160 (civil rights statutes did not infringe upon the associational rights of a private school attempting to deny admission on the basis of race); *Healy*, 408 U.S. 169 (universities are not exempt from abiding by the first amendment right of free association); *Griswold*, 381 U.S. at 482-83 (state law prohibiting use of contraceptives invaded marital privacy and violated penumbral right of free association); *Button*, 371 U.S. 415 (group's activities were expressional in nature and were therefore protected by the right of free association as guaranteed under the first and fourteenth amendments); *Shelton*, 364 U.S. 479 (statute compelling teachers hired on a yearly basis to submit affidavits listing all organizations to which they belonged or contributed in prior five years violated the teachers' right of free association); *cf.* Village of Belle Terre v. Boraas, 416 U.S. 1, 14 (1974) (Marshall, J., dissenting). Justice Marshall noted that "[i]t is inconceivable to me that we would allow the exercise of zoning power to burden First Amendment freedoms, as by ordinances that restrict occupancy to individuals adhering to particular religious, political, or scientific beliefs." *Id.*

32. *See supra* note 2.

33. *See supra* notes 1 and 29.

34. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) (Justice Goldberg noted that "[p]rejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person."); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-23, at 700-01 (1978); Note, *supra* note 2, at 1066 ("[T]he constitutional right to associate necessarily suggests a parallel right to be free from association.").

be formed . . . . Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."[35]

The freedom of association, however, is not an absolute right.[36] Although the Constitution protects against "unjustified governmental interference" with an individual's exclusive associations,[37] this protection may be infringed upon if a state has a compelling interest in restricting the associational rights of a group.[38]

B. *Elements of the Right of Free Association: Intimate Association and Expressive Association*

As a means of balancing free association and compelling state interests, the Supreme Court has recognized the existence of two distinct elements of free association.[39] Finding both "intrinsic and instrumental features of constitutionally protected association,"[40] the Court has recognized the freedom of intimate association[41] and the freedom of expressive association.[42]

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35. *Moose Lodge No. 107*, 407 U.S. at 179-80 (1972) (Douglas, J., dissenting). In *Moose Lodge No. 107*, the Supreme Court recognized the constitutionality of discrimination by individuals in private organizations. *Id.* at 171-72 (majority opinion).

Currently, the Court appears to have narrowed the scope of free association in an effort to eradicate discrimination in clubs found not to be distinctly private in nature. *See, e.g.*, Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (application of state antidiscrimination law to local chapters of a nonprofit corporation did not infringe upon the members' right of free association); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (local chapters of a service organization were not distinctly private in nature and could not exclude women from regular membership on the basis of free association). *See generally* 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 (1983) (an analysis of discrimination in private men's clubs and an assessment of the impact of freedom of association on the future of those clubs).

36. *See, e.g.*, *Roberts*, 468 U.S. at 623. The Supreme Court ruled that the application of a state antidiscrimination law to local chapters of the Jaycees did not violate the organization's freedom of association when balanced against the compelling interest of the state in eliminating gender-based discrimination. *Id.* at 626.

37. *Rotary Club of Duarte*, 481 U.S. at 544; *see also Roberts*, 468 U.S. at 619 ("Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.").

38. *See Roberts*, 468 U.S. at 623.

39. *See* Note, Board of Directors of Rotary Int'l v. Rotary Club of Duarte: *Redefining Associational Rights*, 1988 B.Y.U. L. REV. 141, 142.

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

41. *Id.* The Supreme Court has recognized that the right of intimate association and the right of privacy are penumbral rights guaranteed by the first amendment. *Griswold*, 381 U.S. at 483. Thus, intimate association is regarded as existing within a "zone of privacy" arising from the rights guaranteed in the first amendment. *Id.* at 484. The Court noted that a "zone of privacy" extends:

> "to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence [sic]; but it is the invasion of his

Intimate association is a facet of personal liberty that is guaranteed by the Bill of Rights.[43] The Supreme Court recognized that the ability to form highly personal relationships without unwarranted state intervention was crucial to the development of "one's identity that is central to any concept of liberty."[44] Thus, intimate associations are afforded constitutional protection.[45] Those intimate relationships typically granted constitutional protection[46] include marriage,[47] childbirth,[48] rearing and educating children,[49] and cohabitation with relatives.[50]

Expressive association is derived from the first amendment guarantees of free speech and peaceable assembly.[51] The Supreme Court has noted that the freedom to associate with others "in pursuit of a wide variety of

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indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense . . . any forcible and compulsory extortion of a man's own testimony . . . of crime . . . is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

Id. at 484 n.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). Therefore, the right of intimate association has its foundations not only in the first amendment, but also in the fourth, fifth, and fourteenth amendments. *Id.* at 485.

42. *Roberts*, 468 U.S. at 618. The right of expressive association is an extension of those activities guaranteed by the first amendment. Expressive association, unlike intimate association, is not contained in a zone of privacy. Rather, the right of expressive association is based on the rights enumerated in the first amendment. *Id.* at 622; *see also* Burns, *supra* note 35.

43. *Roberts*, 468 U.S. at 618-19. The Supreme Court noted that:

[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Id. at 617-18.

44. *Id.* at 619.

45. *Rotary Club of Duarte*, 481 U.S. at 545; *see also* Note, Roberts v. United States Jaycees: *Does the Right of Free Association Imply an Absolute Right of Private Discrimination?*, 1986 UTAH L. REV. 373, 375-76.

46. *See Roberts*, 468 U.S. at 619-20. The Supreme Court noted that factors such as "size, purpose, policies, selectivity, congeniality, and other characteristics" are relevant to a determination that an organization is intimate in nature. *Id.* at 620.

47. *See, e.g., Zablocki*, 434 U.S. at 374 (state statute requiring residents who were responsible for support of a minor child to seek court approval prior to marriage was held to be unconstitutional).

48. *See, e.g., Griswold*, 381 U.S. at 479 (state statute forbidding the sale of contraceptives violated the rights of marital property and free association).

49. *See, e.g., Runyon*, 427 U.S. at 160 (civil rights statutes did not infringe upon the freedom of association of a private school attempting to deny admission to students on the basis of race).

50. *See, e.g., Moore*, 431 U.S. at 494 (zoning ordinance prohibiting any non-family members from residing in a household violated residents' right of free association by regulating the persons designated as family).

51. *See* L. TRIBE, *supra* note 34, § 12-26, at 702. The extent of expressive activity was expounded upon:

political, social, economic, educational, religious, and cultural ends"[52] insures the constitutional protection of those rights enumerated in the first amendment.[53] Therefore, constitutional protection is extended to those organizations engaging in expressive activity.[54] However, the right of expressive association is not absolute.[55] An expressive organization's right to associate exclusively may be infringed upon by a state that is advancing a compelling interest.[56]

C. *Restrictions on the Right of Free Association: Compelling State Interest and the Least-Restrictive Means Test*

The Supreme Court has held that infringements upon the right of free association may be "justified . . . to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive."[57] The extent of a state's infringement upon an individual's freedom of association will be determined through a balancing test.[58] The Court has ruled that only those state interests which are compelling in nature will outweigh the

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> In oral argument in *Roberts*, the Justices used two examples to illuminate their understanding of an unconstitutional infringement on the right of expressive association. The first example was an Iranian society devoted to Iranian interests, whose primary position was anti-Iraq. When the Court asked counsel for Roberts whether or not that club could be forced to admit Iraqis, counsel responded that they could not constitutionally be forced to do so, because in that situation being an Iraqi would to a great extent determine your point of view on the Iranian club's position, and so admitting Iraqis would interfere with the expressive rights of the Iranians.

Case Comment, *supra* note 17, at 138 n.4 (citations omitted) (quoting Proceedings at 7, Roberts v. United States Jaycees, 468 U.S. 609 (1984)).

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

53. *Id.* Recognition of the right of expressive association was relatively unambiguous. However, attempts to define an expressive organization have not been so clear. Justice Douglas contended that just "[j]oining is one method of expression." Lathrop v. Donohue, 367 U.S. 820, 882 (1961) (Douglas, J., dissenting). Other commentators have disagreed with Douglas' argument, noting that:

> Almost everything we do is expressive in one way or another, and thus to say that the First Amendment is a generalized presumptive guarantee of the liberty to do anything that has expressive aspects would be much like saying that the constitutional right of privacy guarantees "the right to be let alone." The First Amendment would, in short, be stretched to cover all our constitutional freedoms.

Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654 (1980).

54. *See* Case Comment, *supra* note 17.

55. *Roberts*, 468 U.S. at 623. The Supreme Court recognized that the "[f]reedom of association therefore plainly presupposes a freedom not to associate. . . . [However,] [t]he right to associate for expressive purposes is not . . . absolute." *Id.*

56. *Id.*; *see also infra* note 59.

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

58. *See* Note, United States Jaycees v. McClure: *Private Organizations and the Right of Association — How Far Does Constitutional Protection Extend?*, 17 CREIGHTON L. REV. 1535 (1984).

constitutional right of an individual to associate exclusively.[59] If an organization is truly intimate or expressive in nature, a state must demonstrate a very significant and compelling reason for infringing upon that organization's right to associate exclusively.[60] In addition, a state must demonstrate that the compelling interests have been advanced in the least restrictive means available to achieve the desired ends.[61]

III. THE *NEW YORK STATE CLUB ASSOCIATION* OPINIONS

A. The Majority Opinion

Justice White, writing for the majority in *New York State Club Association v. City of New York*,[62] acknowledged that N.Y.S.C.A. had standing to challenge the constitutionality of Local Law 63 on behalf of its members.[63] However, the majority concluded that N.Y.S.C.A.'s facial challenge of Local Law 63 could not prevail.[64] The Court noted that in order to prevail on a facial challenge, N.Y.S.C.A. had to demonstrate either that Local Law 63

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59. *Roberts*, 468 U.S. at 628. In *Roberts*, the Supreme Court ruled that the application of a state antidiscrimination statute to the Jaycees was constitutional because the statute reflected "the State's strong historical commitment to eliminating discrimination and . . . [t]hat goal . . . plainly serves compelling state interests of the highest order." *Id.* at 624.

60. *See Rotary Club of Duarte*, 481 U.S. at 537; *see also* Buckley v. Valeo, 424 U.S. 1 (1976) (right of free association can be limited by state statutes necessary to serve a compelling interest unrelated to suppression of ideas).

At this point it is interesting to note the position taken by Justice O'Connor in her concurring opinion in *Roberts*. Justice O'Connor argued that all organizations should be classified as either commercial or expressive. *Roberts*, 468 U.S. at 634-35 (O'Connor, J., concurring). Commercial organizations would be granted only minimal constitutional protection, while expressive organizations would be afforded full constitutional protection under the first amendment. *Id.* However, as Justice O'Connor recognized, "[d]etermining whether an association's activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive." *Id.* at 636; *see also supra* note 57; Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878, 1894 (1984).

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

62. — U.S. —, 108 S. Ct. 2225 (1988).

63. *Id.* at 2231. The Supreme Court held that:

> [A]n association has standing to sue 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 2232 (quoting Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)).

The Court rejected the City's interpretation of *Hunt*. The majority held that N.Y.S.C.A. had standing to sue on behalf of its members as long as those members had standing to challenge Local Law 63 individually. *New York State Club Ass'n*, 108 S. Ct. at 2232; *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 57 (3d ed. 1986).

64. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2233.

could never be constitutionally applied to its members or that the Law was substantially overbroad.[65]

The Court first determined that Local Law 63 could be validly applied to N.Y.S.C.A. members.[66] The majority reached this conclusion by analyzing the intimate[67] and expressive[68] natures of N.Y.S.C.A.'s members. The Court retained the standards that it had used in earlier decisions[69] to define intimate[70] and expressive[71] associations and applied them to N.Y.S.C.A.. The majority found that most N.Y.S.C.A. members were neither intimate[72] nor expressive,[73] but rather commercial in nature.[74] The Court acknowledged that a few N.Y.S.C.A. members may have been intimate[75] or expres-

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65. *Id.* The Supreme Court noted that N.Y.S.C.A. had brought suit contesting the constitutionality of Local Law 63 prior to the initiation of enforcement proceedings against any of its members. *Id.* The Court stated that in order for N.Y.S.C.A. to prevail on a facial attack the plaintiff must demonstrate that the challenged law either "could never be applied in a valid manner" or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected speech of third parties."

Id. (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984)).

66. *Id.* at 2233-34.

67. *Id.* at 2233. The majority compared the size of N.Y.S.C.A.'s members to the size of the local chapter of the Jaycees reviewed in Roberts v. United States Jaycees, 468 U.S. 609 (1984). The Court noted that the two associations were comparable in size and that the Jaycees had not been constitutionally protected private associations. Also, the majority noted that many of the clubs found not to be constitutionally protected intimate associations in Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987), were smaller than many of N.Y.S.C.A.'s members. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2233.

In addition, the majority noted that the associations covered by Local Law 63 provide regular food service and collect regular payments for services from non-members. The Court stated that: "These characteristics are at least as significant in defining the nonprivate nature of these associations, because of the kind of role that strangers play in their ordinary existence, as is the regular participation of strangers at meetings, which we emphasized in *Roberts* and *Rotary*." *Id.* (citations omitted).

68. *Id.* at 2234. The Court noted that combining with others to further one's views was an important means of guaranteeing the security of those activities enumerated in the first amendment. Thus, Local Law 63 does not infringe upon an organization's expressive associational rights because "[o]n its face, Local Law 63 does not affect 'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints." *Id.* (citing *Rotary Club of Duarte*, 481 U.S. at 548).

69. *Id.* at 2233-34; *see also Roberts*, 468 U.S. at 620-22; *Rotary Club of Duarte*, 481 U.S. at 546-47.

70. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2233; *see also supra* notes 41-44 and accompanying text.

71. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2234; *see also supra* note 51 and accompanying text.

72. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2233; *see also supra* note 67.

73. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2234; *see also supra* note 68.

74. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2233; *see also supra* note 60.

75. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2234.

sive associations[76] and therefore were entitled to constitutional protection under the first amendment.[77] However, the majority ruled that since Local Law 63 did not infringe upon the associational rights of every N.Y.S.C.A. member,[78] N.Y.S.C.A.'s facial challenge could not prevail on those grounds.[79]

The Court then turned to an analysis of N.Y.S.C.A.'s claim that Local Law 63 was substantially overbroad.[80] The majority concluded that the Law was not overbroad.[81] In so holding, the Court held that the record did not indicate the characteristics of any club whose associational rights would be infringed upon by the application of Local Law 63 and, therefore, the Law could not be overbroad.[82] The majority concluded that any overbreath of Local Law 63 not evident from the record could be cured on a case-by-case basis[83] and did not require the upholding of N.Y.S.C.A.'s facial challenge.[84]

Finally, the majority undertook an analysis of Local Law 63 with respect to the fourteenth amendment.[85] N.Y.S.C.A. asserted that an exemption in Local Law 63 for benevolent orders and religious corporations[86] was a violation of the equal protection clause.[87] The Court rejected that argu-

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76. *Id.* The Court stated that:

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

Id.

77. *Id.* If an organization is intimate or expressive in nature, its right to freely associate is guaranteed under the first amendment unless the State exhibits a compelling state interest justifying an infringement upon that right. *See supra* notes 59-61 and accompanying text.

78. *New York State Club Ass'n*, 108 S. Ct. at 2234. The Court held that Local Law 63 cannot be deemed "invalid on its face because it infringes the private associational rights of each and every club covered by it." *Id.*

79. *Id.*

80. *Id.* The majority noted that application of the "overbreadth doctrine" is used infrequently and usually as a last resort. *Id.* (citing Broadrick v. Oklahoma, 413 U.S. 601 (1973)).

81. *Id.* at —, 108 S. Ct. at 2235.

82. *Id.* The Court held that the lack of information on the record regarding the characteristics of participating N.Y.S.C.A. members meant that there could be no determination that "the Law threatens to undermine the associational or expressive purposes of any club, let alone a substantial number of them." *Id.*

83. *Id.* The Court reasoned that "[t]hese opportunities for individual associations to contest the constitutionality of the Law as it may be applied against them are adequate to assure that any overbreadth under the Law will be curable through case-by-case analysis of specific facts." *Id.*

84. *Id.*

85. *Id.*; *see also supra* note 7.

86. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2235; *see also supra* note 15.

87. *New York State Club Ass'n*, — U.S at —, 108 S. Ct. at 2235-36. N.Y.S.C.A. asserted that benevolent orders and religious corporations were "in fact no different in nature from the other

ment,[88] holding that New York law indicated that these organizations were unique and thus a rational basis existed for the City's exemption of those organizations in Local Law 63.[89] In addition, the majority noted that there was no evidence in the record which would indicate that benevolent orders and religious corporations were identical to N.Y.S.C.A.'s members in critical respects.[90] Lacking such evidence, the Court found no basis for the equal protection claim.[91]

B. The Concurring Opinions

Justice O'Connor, with whom Justice Kennedy joined, filed a concurring opinion.[92] In concurring, Justice O'Connor emphasized the associational issues addressed by the majority opinion.[93] She reiterated the importance of an organization's right of free association, as well as a state's compelling interest in eliminating public discrimination.[94] Justice O'Connor noted that the factors identified in Local Law 63 are not exclusive, but rather are to be considered in addition to those factors enumerated by the Court in earlier free association cases.[95]

Justice Scalia also filed a concurring opinion.[96] Justice Scalia noted his dissatisfaction with the Court's analysis of benevolent orders.[97] He stated that the fact that benevolent orders are unique does not consequently estab-

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clubs and associations that are now made subject to the city's antidiscrimination restrictions." *Id.* at —, 108 S. Ct. at 2236. Thus, the exemption of those organizations that were similar to N.Y.S.C.A.'s members was a violation of the Equal Protection Clause of the fourteenth amendment. *Id.*

88. *Id.*

89. *Id.* The Court noted examples of various New York laws that recognized benevolent orders and religious corporations as being unique and treated them in a separate body of legislation. *Id.*

90. *Id.* The majority stated that there was no evidence to indicate that benevolent orders and religious corporations were "identical in this and other critical respects to the private clubs that are covered under the City's antidiscrimination provisions." *Id.* at —, 108 S. Ct. at 2237.

91. *Id.*

92. New York State Club Ass'n v. City of New York, — U.S. at —, —, 108 S. Ct. 2225, 2237 (1988) (O'Connor, J. and Kennedy, J., concurring).

93. *Id.*

94. *Id.*

95. *Id.* Justice O'Connor noted that the factors enumerated in *Roberts*, 468 U.S. at 609, distinguishing intimate and expressive associations from commercial associations, still prevail. *New York State Club Ass'n*, — U.S. at —, 108 S. Ct. at 2237. She also noted that those associations designated as commercial in nature would receive the minimum level of constitutional protection. *Id.*; *see also supra* note 60.

96. New York State Club Ass'n v. City of New York, — U.S. —, —, 108 S. Ct. 2225, 2238 (1988) (Scalia, J., concurring).

97. *Id.*

lish that the City acted upon a rational basis.[98] Rather, there must be a stronger connection between the orders' uniqueness and the intent of the law.[99] However, Justice Scalia was satisfied that those organizations exempted by Local Law 63 were exempted on a rational basis.[100]

IV. ANALYSIS

New York State Club Association v. City of New York[101] is, in actuality, a reiteration of the Supreme Court's prior interpretations of the right of free association.[102] While the Court's decision followed the trend of previous decisions in the area of free association, the holding highlighted several problems that have arisen from the Court's analysis of private and commercial associations.[103]

A state's interest in eliminating discrimination in commercial associations is indeed compelling.[104] State legislatures have recognized this need and have enacted statutes designed to deprive those associations, which are commercial in nature, of the private club exemption they enjoyed under public accommodation laws.[105] The Court has upheld the constitutionality of those statutes, recognizing a state's compelling interest in eliminating discrimination.[106]

However, the problem is not with the intent of the Court's decision. Rather, the problem is with the test that the Court has established to distinguish between private and commercial associations. In *Roberts v. United States Jaycees*,[107] the Court noted that the factors used to determine whether a club is distinctly private in nature included "size, purpose, policies, selectivity, congeniality, and other characteristics . . . ."[108] Also rele-

98. *Id.*

99. *Id.* Justice Scalia noted that Local Law 63 was unclear on the factors that made benevolent orders unique. Thus, the rational basis of the City's decision to exempt those organizations was in question. *Id.* However, Justice Scalia stated that it appeared as though the Law was referring to fraternal organizations which, he noted, were not the type of organizations that contributed to the problem of discrimination that the City was attempting to alleviate. *Id.*

100. *Id.*

101. — U.S. —, 108 S. Ct. 2225 (1988).

102. *See supra* notes 40-45 and accompanying text.

103. *See* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

104. *See supra* notes 59-61 and accompanying text.

105. *Id.* With the enactment of antidiscrimination statutes, the legislatures have been responding to pressure from women and minorities who have been entering the business world in increasing numbers. *See* Burns, *supra* note 35.

106. *See supra* notes 59-61 and accompanying text.

107. 468 U.S. 609 (1984).

108. *Id.* at 620.

vant to a club's distinction as private was the expressive nature of the club.[109] In *New York State Club Association*,[110] the Court appears to disregard many of these factors and instead focuses on the size of a club as determinative of its private or commercial nature.[111] The Court focused on the 400-member limitation of Local Law 63, giving only a nod to the other factors enumerated in previous decisions.

This analysis is problematic because it leaves open the possibility of distinguishing a private association from a commercial association solely on the size of its membership list. With the establishment of a 400-member limit on private clubs, it would not be surprising to see many clubs admit only 399 members. However, extension of constitutional protection to an association should not be made on the basis of one member. Rather, it should be based upon a combination of factors of which size is just one part.

Justice O'Connor alluded to this point in her concurring opinion.[112] She argued that the majority's decision is not a rejection of the criteria that were used to characterize free association in previous cases.[113] Indeed, the decision may not be a rejection of the standards adopted in *Roberts*,[114] but it appears to be a strong indication that the Court regards certain factors to be more indicative than others of the private or commercial nature of an association. The majority recognized size, meal service, and payments to the club by non-members as being indicative of an association's private or commercial nature.[115] One can easily imagine the many ways in which private clubs will attempt to structure their activities to maintain their distinction as private associations.[116]

Unfortunately, it appears that this trend may strongly impact upon the right of free association in the future. The Court's upholding of Local Law 63's constitutionality has alerted other legislatures to the type of antidiscrimination statutes that will be upheld by the courts. Thus, other statutes will be enacted which place a primary emphasis on size rather than on a

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109. *Id.* at 622-23.

110. — U.S. —, 108 S. Ct. 2225.

111. *Id.* at 2233-34.

112. New York State Club Ass'n v. City of New York, — U.S. —, 108 S. Ct. 2225, 2237 (1988) (O'Connor, J., concurring).

113. *Id.* Justice O'Connor stated that she wrote "separately only to note that nothing in the Court's opinion in any way undermines or denigrates the importance of any associational interests at stake." *Id.*

114. 468 U.S. at 620-21.

115. *New York State Club Ass'n*, — U.S. —, 108 S. Ct. at 2233.

116. It is almost amusing to imagine the infinite number of ways in which an association could attempt to frustrate a statute like the one present in this case. Limiting membership to 399 people, having meal service on alternate days at varying sites, and requiring that members pay all club bills are some examples.

consideration of all of the relevant factors.[117] A solution to the problem would be an adherence by the Court to the position advocated by Justice O'Connor.[118] If, for example, the Court would look not only at the size of an association, but also at the association's membership qualifications, policies, and activities, the designation of an association as private or commercial would be much more comprehensive. Thus, instead of focusing on form, by looking primarily at a club's size, the Court would be focusing on substance, the actual composition of the club. Unless the Court chooses to examine these types of factors more closely, the right of free association will be distinguished by associations that have created an outer "private club" shell, while inside they remain "commercial organizations."[119]

V. CONCLUSION

New York State Club Association v. City of New York[120] presented the United States Supreme Court with a case that required the Court to address the right of free association in conjunction with a state advancing a compelling interest. By applying factors that had been previously utilized in right of free association cases, the Court continued to broaden a state's power to eliminate discrimination in private clubs. This decision did not present any new standards to apply to the right of free association, but merely reiterated the trends emphasized in previous decisions. The majority opinion established standards that, in the future, place courts in the position of deciding cases involving the right of free association based on form, rather than substance.

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

118. New York Club Ass'n v. City of New York, — U.S. —, —, 108 S. Ct. 2225, 2237 (1988) (O'Connor, J., concurring).

119. *See* Roberts v. United States Jaycees, 468 U.S. 609, 631 (1984) (O'Connor, J., concurring); *see also supra* note 60.

120. — U.S. —, 108 S. Ct. 2225 (1988).