SEX SEGREGATION, ECONOMIC OPPORTUNITY, AND
ROBERTS V. U.S. JAYCEES

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Would the woman please leave. I can’t teach leadership to a woman.
—J. Terryl Bechtol, 1980 U.S. Jaycees President,
Meeting of Jaycees Chapter Presidents

Young women are entitled to share in the good jobs in our society
according to their abilities. They will not share fully in these jobs,
however, as long as young men are exclusively eligible for mem-
bership in the “right business organization,” which gives them an edge
in hiring for and promotion to leadership positions.
—Judge Gerald Heaney, Eighth Circuit Court of Appeals, 1984

INTRODUCTION .................................................489
I. FROM A SEX-SEGREGATED PUBLIC TO ROBERTS V. U.S. JAYCEES ......... 492
II. THE DYNAMIC PULL OF EMPLOYMENT OPPORTUNITY ................. 496
III. THE LITIGATION OF ROBERTS V. U.S. JAYCEES ....................... 503
A. The Confluence of Membership in the Club and Opportunity in
Employment ............................................. 505
B. An Antisubordinating First Amendment ................................. 510
CONCLUSION ................................................... 514

INTRODUCTION

Thirty-five years ago, the Supreme Court confronted the issue of sex segregation
in membership organizations. The U.S. Jaycees—a national organization with roughly
300,000 members—defended its freedom to associate as a men’s organization against
the state of Minnesota and the Minneapolis and St. Paul Jaycee chapters which had

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1 Vin McLellan, “We’re Going to Be Right Again!,” SAVVY, July 1982, at 54.
2 U.S. Jaycees v. McClure, 709 F.2d 1560, 1583 (8th Cir. 1983) (Heaney, J., dissenting from
3 See generally Roberts, 468 U.S. 609.
admitted women. The U.S. Jaycees policy dictated that women be granted an inferior class of membership without opportunities for leadership positions or awards. In *Roberts v. U.S. Jaycees*, a unanimous Court held that the state’s efforts to eliminate gender-based discrimination in public accommodations outweighed the constitutional freedom of association asserted by the Jaycees.

This Symposium on the intersections, synergies, and conflicts between rights—what Professor Timothy Zick calls rights dynamism largely focuses on constitutional rights and their relationships in judicial decisions. From this perspective, *Roberts*—and the issue of sex-segregated clubs more generally—stands at the intersection of First Amendment rights to association, expression, assembly, and privacy. The central issue is the dynamism (or lack thereof) of the Jaycees’ freedom to associate—a right treated by the courts as requiring aggregation with another. Critics claim that the Court treated these aggregated constitutional rights too lightly and weighed women’s interest in public accommodations equality too heavily. But rights construction, or dynamism, is not so neatly bound by the Constitution.

The decade-long movement to integrate the Jaycees, culminating in the *Roberts* decision, forged connections between legal frameworks—federal and state, statute and constitution—that shaped the meaning of the rights at stake. Judicial narrowing of state action under the Equal Protection Clause had constrained the ability of local Jaycee chapters and feminist groups to assert constitutional claims to the integration of organizations they saw as central to professional and civic participation. Litigation came to set mere statute against constitutional freedom of association. But the statutory and cultural commitments of the time influenced the construction of those constitutional rights. In what Zick calls the “distinct, active, dynamic process in which

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4 *Id.* at 613–15.
5 *Id.* at 611–12.
8 *Id.* at 86 (discussing *Roberts* only briefly as an example of a case that made freedom of association dependent on speech).
10 This is consistent with W ILLIAM ESKRIDGE, JR. & JOHN F. FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 9 (2010) (“Constitutional law’s evolution is generally—and ought to be— influenced by the norms entrenched in other ways” and the Supreme Court’s “triumphs have been in cases where the Court enforced Constitutional norms consistent with clear statutory consensus, reached after repeated public deliberations and reflecting an overlapping consensus within the polity.”). See generally Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78 (2019).
meaning of rights are elaborated over time [,]lawyers, activists, judges, reporters, civic institutions, and constitutional movements united categories that law keeps separate.

In the campaign against the U.S. Jaycees, public accommodations equality under state statutes coalesced with federal and state laws prohibiting discrimination in employment. What was dynamic and synergistic in Roberts was not the Jaycees’ constitutional interests, but rather women’s statutory rights to economic opportunity and to equal membership. The landmark employment protections in the Civil Rights Act of 1964 had become entrenched in legal and popular culture. Title VII intersected with and fueled ordinary women’s entry into civic membership organizations. The public, social movement actors, and eventually the judiciary understood public accommodations equality as congruent with and central to women’s economic opportunity and career prospects. The link to employment led decision makers to see the Jaycees as analogous to unions and firms, whose rights to choose their associates went unprotected by the First Amendment.

As Part I describes, within a decade, the public discourse and, governmental and judicial perspectives shifted from pervasive and unexamined acceptance of a sex-segregated public to the integration of clubs like the U.S. Jaycees. As Part II argues, a social movement of working women, local Jaycee chapters, and feminist groups connected full membership in civic and commercial organizations to rights to employment equality. Through litigation, media, and advocacy, the link between landmark employment law protections under the Civil Rights Act of 1964 and membership in Jaycees was cemented.

As Part III contends, the litigation campaign asserted dual harms in the U.S. Jaycees’ treatment of women. First, it represented an affront to fair play, keeping women from professional and business opportunities. Second, women’s second-class membership maintained their subordination, creating a gender hierarchy within the organization and contributing to society-wide hierarchies.

Justice O’Connor’s noted concurrence and Justice Brennan’s majority opinion respectively adopt these frames. Justice O’Connor’s concurrence best reflects the mainstream understanding of public

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11 Zick, supra note 6, at 802; see also id. at 821 (noting that “this synergistic and stereoscopic process occurred not only in courthouses, but in the streets, at lunch counters, in newspapers and other publications, in academic circles, and in homes and workplaces”).

12 See id. at 792–93.

13 Bruce Ackerman has long urged scholars to consider framework federal civil rights statutes as constructive of American constitutionalism. See infra notes 111–17 and accompanying text.

14 See id. at 100, 102.


16 See infra notes 195–205 and accompanying text.
accommodations equality as essential to economic opportunity and fair play in the labor force and of the U.S. Jaycees as primarily commercial.\(^{22}\) While recognizing the link between employment and Jaycee membership, the majority opinion adds an antisubordination approach, embracing the state’s arguments about the integrated but hierarchical nature of the Jaycees that assigned women to second-class status in the organization and the business world.\(^{23}\) Although the Jaycees might seem a relic of a time long past, the social and legal movements leading to the Supreme Court opinion proves relevant for ongoing debates about the permissibility of segregated organizations, the emergence of #MeToo, and the tactics of effective movements.\(^{24}\)

I. FROM A SEX-SEGREGATED PUBLIC TO \textit{ROBERTS V. U.S. JAYCEES}

As the 1970s began, 29 million women were in the workforce, but rarely in positions of power.\(^{25}\) Women were 7.6\% of doctors and 4\% of attorneys, although those proportions would soon rise.\(^{26}\) Indeed, “[t]here were so few women executives that when the \textit{Harvard Business Review} planned to ‘study’ them in 1966, the editors gave up because ‘there were not enough to study.’”\(^{27}\) Public accommodations reaffirmed women’s exclusion from and unequal treatment in the labor market.\(^{28}\) As Ruth Bader Ginsburg wryly noted, when it passed the public accommodations provision of the Civil Rights Act in 1964, “[a] Congress ready to end the White Café was not prepared to close down the Men’s Grill.”\(^{29}\) Middle-class working women found that their colleagues, clients, and bosses met to dine and deal in a wide array of restaurants, bars, athletic centers, and leisure clubs that closed their doors to women.\(^{30}\) Many operated under the label of “club,” but were in fact open to any man.\(^{31}\) Civic organizations and professional associations likewise frequently denied women membership.\(^{32}\)

\(^{22}\) \textit{See infra} note 197 and accompanying text.

\(^{23}\) \textit{See infra} note 206 and accompanying text.

\(^{24}\) \textit{See infra} notes 244–52 and accompanying text.


\(^{27}\) Memorandum from Karen DeCrow to Timothy Costello, Vice Chairman, Liberal Party of N.Y. State 3 (May 9, 1970) (on file with Northwestern University Library, Karen DeCrow Papers).

\(^{28}\) \textit{See generally} Sepper & Dinner, \textit{supra} note 10.


\(^{30}\) \textit{See} Sepper & Dinner, \textit{supra} note 10, at 80–85.

\(^{31}\) \textit{See id.} at 87.

\(^{32}\) \textit{See id.}
Partly out of concern for economic and political opportunity, the feminist movement drew attention to this pervasive pattern. Over the first half of the 1970s, they convinced state legislators across the country to amend their laws requiring nondiscrimination in public accommodations—a legal term of art that typically includes any place open to the public from bakeries to sports clubs. By the decade’s end, the majority of states and cities had added “sex” to these laws. Bars, restaurants, and athletic organizations came to permit women on equal terms.

Sex-segregated clubs, however, remained a hard target. The country had slowly come around to the idea that membership organizations that welcomed most of the male public could not—or should not—exclude potential members based on their religion or race, though the principle remained honored in the breach. But the exclusion of women from clubs was still so accepted as to be ignored or justified by reference to women’s different interests and men’s privacy concerns. In 1975, the New York City Human Rights Commission, chaired by Eleanor Holmes Norton, found that the public at large “tended to consider access to club membership a trivial problem.” Government actors also often proved unsympathetic to women’s requests for access. For example, having crossed a line of women journalists picketing the Gridiron dinner in Washington, which assembled the nation’s most powerful public figures and media members but excluded women, Justice William O. Douglas remarked of the Gridiron’s traditions: “They’re covered by the First Amendment.”

The Junior Chamber of Commerce was symbolic of this struggle. Founded to advance the business of its members, the U.S. Jaycees for decades had offered “a key to success for the ambitious middle-class young man . . . .” It provided members

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33 See id. at 101–02.
34 See id. at 103–04.
35 See id. at 104.
36 See id. at 101–04.
37 See id. at 88.
38 E.g., Robert Stevens Miller, Jr., Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877, 888–89 (1967) (noting that race separation in membership organizations usually denoted inferiority of black people and has been recognized as invidious).
39 See, e.g., Note, Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy, 1970 DUKE L.J. 1181, 1188 (1970) (noting women’s exclusion, but failing to treat as discriminatory); see also Miller, supra note 38, at 889 (“[S]eparation ordinarily rests on valid differences in the biological and psychological composition of the two sexes. . . . Few question the propriety of a men’s club . . . .”).
40 EDITH LYNTON, N.Y.C. COMM’N ON HUMAN RIGHTS, BEHIND CLOSED DOORS: DISCRIMINATION BY PRIVATE CLUBS 2 (May 1975).
41 See Jeanette Smyth & Abbot Combs, Gridiron Fare, WASH. POST, Apr. 10, 1972, at B1.
42 Id. at B3. Justice Harry Blackmun also crossed the picket line to attend.
leadership training and opportunities, offered awards and incentives for recruitment and retention of members, and admitted any man eighteen to thirty-five who applied. With roughly 300,000 members, the national organization relied on a web of state and local chapters to consistently recruit and generate dues and programming. Women had begun to be invited to join the Jaycees in the 1960s as associate members. But these memberships explicitly bestowed second-tier status. Associates could not hold office, receive awards, or vote in an organization that stressed leadership and accolades. In the early 1970s chapters in urban areas came to welcome women to full membership—launching a decade of negotiation, advocacy, and litigation of local Jaycees versus U.S. Jaycees.

When the issue of men’s membership clubs reached the Supreme Court in 1984 with Roberts v. U.S. Jaycees, clubs—and the Jaycees—remained an important part of professional life. Chief Justice Warren Burger and Justice Harry Blackmun had been president and member, respectively, of the local Jaycee chapters before the Court and ultimately did not participate in the decision. Justice Sandra Day O’Connor—the first and, at the time, only woman on the Court—raised the issue of recusing herself because she belonged to several women-only clubs. She was persuaded not to when it became clear that all the male Justices likewise belonged to single-sex clubs.

In the end, the Court unanimously upheld the application of Minnesota’s antidiscrimination law to the U.S. Jaycees and concluded that the organization’s freedom of association had not been unconstitutionally infringed. The Jaycees, the Court

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46 See id.
47 Id. at 613.
48 See id. (explaining the limitations placed on associate members).
49 Id. at 614.
50 See Sepper & Dinner, supra note 10, at 105–06 (noting the importance of professional clubs and the career opportunities provided by membership).
51 Linder, supra note 9, at 1880. Justice Powell’s conference notes indicate that the Chief Justice would have affirmed the Eighth Circuit’s decision at the Court’s April 20, 1984 conference. See Conference Notes of Justice Powell, Roberts v. U.S. Jaycees, No. 83-724, Apr. 20, 1984 (on file with Washington & Lee School of Law Library, Lewis F. Powell, Jr. Papers). But the Chief Justice subsequently wrote: “[As a Jaycees’ officer] [w]ith some others I advocated that business and professional women be admitted on the same basis as men. It was an idea whose time had not arrived. It has now, even though the Minnesota opinion leaves something to be desired.” Memorandum from Chief Justice Burger to the Conference, Roberts v. U.S. Jaycees (June 12, 1984) (on file with Washington & Lee School of Law Library, Lewis F. Powell, Jr. Papers).
recognized, was a “large and basically unselective group[ ]” and did not qualify as an intimate association entitled to constitutional protection.\(^{55}\) It lacked the “attributes [of] relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”\(^{56}\) The majority concluded that the U.S. Jaycees’ rights to expression and association were at stake, and thus engaged in strict scrutiny of Minnesota’s law.\(^{57}\) Given the Jaycees’ economic and commercial importance, the Court concluded that aims of ensuring women equality in public life clearly outweighed the organization’s interest in expressive association.\(^{58}\) Having accepted women as associate members, the organization’s goal of promoting young men’s interests would not be seriously burdened by their full membership.\(^{59}\) In a noteworthy concurrence, Justice O’Connor instead would have drawn a line between expressive associations entitled to constitutional shelter for their membership decisions and commercial associations entitled to none.\(^{60}\) The U.S. Jaycees, she concluded, easily fell in the latter category.\(^{61}\)

The response to the decision was generally positive, The Washington Post reported.\(^{62}\) The Baltimore Sun wrote that the Court took “the commonsense approach to the meaning of association and privacy”—drawing a line between unselective organizations like the Jaycees and private, selective associations.\(^{63}\) Other outlets called Roberts a “bright spot”\(^{64}\) and “one small step for womankind.”\(^{65}\)

The day after the decision, the U.S. Jaycees executive committee unanimously recommended amending its by-laws to admit women in all fifty states.\(^{66}\) At the annual meeting, not all chapters agreed; some preferred to adopt a genuinely selective membership process in an attempt to become a bona fide private club permitted to exclude women (or other groups) under public accommodations law.\(^{67}\) Nonetheless, the

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55 Id. at 621.
56 Id. at 620.
57 Id. at 623.
58 Id. at 623–29.
59 Id. at 627.
60 See id. at 634 (O’Connor, J. concurring).
61 Id. at 640.
63 Freedom Not to Associate, BALT. SUN, July 16, 1984, at 10A.
65 One Small Step for Womankind, TIME, Aug. 27, 1984, at 25.
66 Saundra Saperstein, Md. Jaycees Set to Oppose Admission of Female Members, WASH. POST, Aug. 8, 1984, at B1.
67 Maryland Jaycees voted to cast all the state’s chapters ballots in support of making membership more restrictive. Harriet L. Blake, Area Women Now Full-Fledged Jaycees, WASH.
amendment passed. Many members shrugged. An officer of the Oceanside (CA) Jaycees remarked: “We don’t care if the person has three eyes and 15 toes, so long as he (or she) will benefit the community . . . . it’s just that until now we were told we couldn’t have women members.” A number of chapter leaders welcomed an anticipated boom in membership. In a few chapters, men resigned rather than continue with potentially integrated membership. Tommy Todd, the U.S. Jaycees president, adopted a tone of resigned acceptance: “I think we were moving in that direction anyway . . . . Our goal for the future is to become America’s greatest young people’s organization.”

II. THE DYNAMIC PULL OF EMPLOYMENT OPPORTUNITY

How had popular and legal culture shifted so dramatically within a decade? As this Part explores, through approximately twelve years of media coverage, court litigation and internal debate over women’s status, local Jaycee chapters, ordinary women, and feminist groups joined equality within membership organizations to economic opportunity in the workforce. The dynamism of employment and marketplace equality led the public, and eventually the judiciary, to newly conceptualize the practices of these men’s organizations as discrimination. The tie to the aims of Title VII of the Civil Rights Act—a transformative statute that expressed normative commitment to workplace equality—fueled public acceptance of women Jaycees. Media coverage, litigation, and public advocacy made visible the harms to women from their subordination in the Jaycees and other membership organizations.

The seeds of this dispute were planted toward the end of the 1960s when the Jaycees began to admit women as “associate member[s],” a category open to anyone from corporate entities to men over thirty-five. Particularly in urban areas across

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68 Blake, supra note 67, at MD10.
69 Saperstein, supra note 66, at B1.
70 Blake, supra note 67, at MD10.
72 Id.
74 See Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984) (recognizing that “the changing nature of the American economy and if the importance . . . . of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women”).
75 Professors William Eskridge and John Ferejohn have identified Title VII as a super-statute, analogous to constitutional amendments. Eskridge & Ferejohn, supra note 10, at 26.
76 Cary Franklin has described the role of “intersectional impacts” in the passage of the Fair Housing Act of 1968; Congress and proponents of the act focused on the harms to education and employment from housing discrimination. Cary Franklin, Separate Spheres, Yale L.J. 2878, 2900–01 (2014).
77 McLellan, supra note 1, at 58.
the country, male Jaycees invited and recruited working women to join. Women associate members often became quite active in programming, but could not vote, hold office, or receive the awards that the Jaycees touted. In the early 1970s a number of chapters from New Orleans and Kansas City to Minneapolis and St. Paul, the chapters at issue in *Roberts*, went further, voting to admit women to regular membership.

Where it detected these rebellious chapters, the U.S. Jaycees threatened to revoke their charters. In response, some chapters filed suit on the ground that revocation constituted state action in violation of the Equal Protection Clause. They advanced ambitious theories of state action—arguing that the Jaycees’ extensive use of federal and state funding, events in government venues, or performance of civic functions rendered it a public entity subject to constitutional constraints. They sometimes won in the district courts. But, by the mid-1970s, just as constitutional doctrine barring sex discrimination had begun to emerge, the Supreme Court brought the brief period of robust state action doctrine to an end, foreclosing equal protection claims against public accommodations. Each of the local Jaycees’ victories in district court was reversed when appellate courts found no state action. Future litigation would set mere statute against constitutional right.

The failure of the local Jaycees’ constitutional claims, however, increased public recognition of the degree to which economic opportunity and men’s clubs intertwined.

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77 Id.
78 Id. at 55.
80 Id.
82 See id.
85 See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176–77 (1972) (requiring that the state “foster or encourage racial discrimination” or be “a partner or even a joint venturer in the club’s enterprise” in order to find state action); Millenson v. New Hotel Monteleone, Inc., 475 F.2d 736, 737 (5th Cir. 1973) (relying on *Moose Lodge* to reject equal protection claim against a hotel’s sex-discriminatory policy filed by Ruth Bader Ginsburg of the ACLU).
86 See, e.g., Junior Chamber of Commerce of Kan. City, 508 F.2d 1031 (finding no state action); Junior Chamber of Commerce of Rochester, 495 F.2d 883 (same); *N.Y.C. Jaycees*, 512 F.2d 856.
The head of the Rochester Jaycees, which mounted one of the lawsuits, explained that less than full membership denied women advantages of management training and prestige.87 “Business and Government leaders look for rising young leaders” within the ranks of the Jaycees, he said.88 “If women cannot be members, they are denied this chance to be noticed.”89 The president of the newly integrated Boston Jaycees observed, “corporate doors open when you say you’re from the Boston Jaycees.”90

Women seeking to fully participate in these organizations made mainstream the understanding of Jaycees membership as commercial rather than social.91 Major newspapers profiled the women in integrated chapters.92 One subject of the legal battle—Avia Kinard, a black twenty-seven-year-old nurse—had been elected the first vice president of the Jaycees chapter when it integrated, having previously served as president of the New York City Jaycettes (the Jaycees’ women’s auxiliary).93 Another member, a manager at the American Institute of Certified Public Accountants, Linda Valente—described as “dark haired, miniskirted and 26”—valued the training: “You learn to run a meeting and express yourself clearly.”94 These women frequently denied having any feminist tendencies,95 but insisted, as the first female president of the Massachusetts Jaycees, Sally Funk, put it, that “[u]nder age 35, there isn’t a company around to give you the gamut of experience you get in Jaycees.”96

Local membership organizations and women seeking to join them began to, as Douglas NeJaime calls it, win through losing.97 Court battles generated publicity and

87 Taylor, supra note 81.
88 Id.
89 Id.
91 Id. at 2 (explaining how organizations, like the Jaycees, are “places for profitable exchange”).
92 See Taylor, supra note 81.
93 Id.
94 Id.
95 Edward De Angelo, Chorus of Protest Surfaces over Jaycees’ Ban on Women, HARTFORD COURANT, May 13, 1979, at 37A (describing Bev Bedard of Willimantic, a business owner who did a lot of work for local Jaycees and wanted to join but “[didn’t] consider herself a feminist by any means”); Bert Mann, Women’s Appeal for Membership Shakes Jaycees, L.A. TIMES, Jan. 12, 1975, at SG2 (quoting applicant to Pasadena Jaycees as saying “I am not a women’s libber”); Miss Hipple Is Headed for History as President of Jaycees, BALT. SUN, Sept. 28, 1976, at B2 (describing Margi Hipple who joined Philadelphia Jaycees in 1972 and became president in 1976 but “[didn’t] regard herself as a gung-ho feminist”).
96 Scott Armstrong, Don’t Count the Women Out of Jaycees Yet, CHRISTIAN SCI. MONITOR, Oct. 18, 1978, at 1 (internal citations omitted).
garnered sympathy for women marginalized in the clubs that shaped economic and civic life. With the defeat of their equal protection claims, women and feminist organizations funneled energies into other strategies.\(^98\) They pressured city and state officials to drop their memberships at men-only clubs.\(^99\) Governmental employers barred participation of personnel in meetings at exclusionary locales—still common practice into the 1980s.\(^100\) Some employers stopped paying employee dues and professional organizations pulled events.\(^101\) By the date of the Roberts decision, the federal government prohibited federal contractors from paying dues for discriminatory club memberships for employees.\(^102\) While these efforts made clubs less attractive as business places for men, they also provided evidence of the commercial function of membership organizations.\(^103\) These extrajudicial strategies transformed the normative context in which the Jaycees issue would reach the Court.

The litigation also showcases the role of constitutional and statutory claims in prompting and sustaining intraorganizational negotiations. As the equal protection litigation came to an end, local chapters achieved a brief détente with the national organization. The 1975 U.S. Jaycees president defanged sanctions and permitted chapters to retain their affiliation in return for agreeing not to vote at the national meetings or to run members for national office.\(^104\) Even as the U.S. Jaycees voted against women’s regular membership in 1975, it also launched a three-year pilot program that allowed chapters in Massachusetts, Alaska, and D.C. to admit women to full membership.\(^105\) For chapters outside of pilot program states, the U.S. Jaycees Membership Study Committee suggested a “holding company” option, whereby women became members of a holding company, male Jaycees were affiliates, and all could participate as full equals.\(^106\)

\(^98\) Armstrong, supra note 96 (explaining that women began to lay the groundwork for fundraising, lobbying, and legal action).

\(^99\) See id.

\(^100\) Brief for Nat’l Org. for Women, Minn. State Chapter as Amicus Curiae Supporting Respondent at x, U.S. Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983) (No. 82-1493-MN) [hereinafter NOW Amicus Brief to Eighth Circuit] (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, NOW LDEF Papers) (citing federal personnel manual, memorandum from the Government of New York, and Philadelphia Code barring meetings at and funding for sex discriminatory facilities).

\(^101\) Hon. Ruth Bader Ginsburg, American University Commencement Address, May 10, 1981, 30 AM. U. L. REV. 891, 896 (1981) (noting ABA and major law firms “have avoided conducting official business, holding dinners or luncheons, or providing lodging for guests at Clubs that exclude, mindless of individual merit, and solely on the basis of race, religion, national origin, or sex”).

\(^102\) NOW Amicus Brief to Minnesota Supreme Court, supra note 90, at 3.

\(^103\) See id. at 34–35.

\(^104\) McLellan, supra note 1, at 59.


Many chapters used this workaround.\textsuperscript{107} This flexibility permitted continued conversations about reform and seemed to promise incremental change within the national organization.

Inclusion of integrated chapters under the umbrella of U.S. Jaycees also changed the image of who a Jaycee was. By 1978, somewhere between 150 and 300 chapters—in big cities in particular—invited women as full members.\textsuperscript{108} In addition to the pilot program and holding company option, other chapters integrated surreptitiously and escaped scrutiny by designating members in their rolls by a first initial and last name.\textsuperscript{109} Women joined and became leaders.\textsuperscript{110}

Women’s Jaycees membership and their professional success built on one another. The 1970s and ’80s saw a transformation of women’s workforce participation. Enforcement of Title VII of the Civil Rights Act and the enactment of Title IX of the Education Amendments drove women’s entry into professional schools and higher-status jobs.\textsuperscript{111} Between 1972 and 1985, women’s share of professional jobs doubled.\textsuperscript{112} The passage of the Equal Credit Opportunity Act of 1974 aided women to start businesses and secure loans.\textsuperscript{113} As more women joined the ranks of business, more women were qualified for and sought to join the Jaycees.\textsuperscript{114} This phenomenon also meant civic and fraternal organizations needed women to ensure adequate membership, especially in urban areas where women had achieved a measure of success.\textsuperscript{115} Local chapter leaders and media began to perceive the integration of the Jaycees as


\textsuperscript{108} Id. (noting existence of women Jaycees in Des Moines, Minneapolis, Louisville, Pittsburgh, Atlanta, and San Francisco); Ewart Rouse, *To the U.S. Jaycees, She’s a Troublemaker*, PHILA. INQUIRER, Sept. 17, 1978, at 20J (noting at least ten “rebellious” chapters in New Jersey and an estimated 150 to 300 nationwide).

\textsuperscript{109} One Small Step for Womankind, *supra* note 65, at 25.

\textsuperscript{110} Mall, *supra* note 107, at G14 (reporting that Massachusetts saw major growth under the pilot going from the fortieth to the thirteenth largest organization).

\textsuperscript{111} BOULIS & JACOBS, *supra* note 26, at 25 (“In the late 1960s and early 1970s, activists from the feminist and civil rights movements were working collaboratively, lobbying Congress and suing public institutions to address discrimination against women and minorities, including those applying to medical school.”); see id. at 26 (“Between 1970 and 1974, two years after passage of Title IX, the number of women applicants to medical school more than tripled . . . ”).


\textsuperscript{114} De Angelo, *supra* note 95, at 3719.

\textsuperscript{115} See McLellan, *supra* note 1, at 58 (reporting that urban chapters struggling with membership in the early 1970s were bolstered due to women’s membership).
“logical” and fair. One proponent said his chapter’s decision to give young women awards previously reserved for “outstanding young men” was “not a matter of equal rights, . . . but of giving due credit where people deserve it.” The Jaycees were attractive to working women because, although women had always been involved in community service, the Jaycees were “more professionally relevant,” a place “where one could polish business know-how and develop the social skills Dale Carnegie so correctly associated with business success.” In turn, women’s membership in the Jaycees advanced their professional lives and made Jaycees more appealing to other women.

As women climbed the career ladder, the public and Jaycees leadership seemed to take women’s eventual full membership as inevitable. More than a decade before Roberts, U.S. Jaycees’ then-president, Samuel D. Winter, said women should be admitted to full membership. In 1975, even as the organization voted against women’s full status, its spokesperson predicted that, “Eventually, women may come to be Jaycees members . . . .” According to U.S. Jaycees’ officials, opposition to women’s membership was “not on chauvinist grounds,” but “mostly for inertial reasons.”

The turn from the 1970s to 1980s, however, saw a retrenchment on women’s membership. Conservatives took the helm of the national organization. In 1978, U.S. Jaycees again voted against women’s full membership. Barry Kennedy, the newly elected president, ended the pilot program and announced that women had to be purged from full member rolls and reinscribed as associates. The 1980 president,

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116 Hartford Jaycees Open Door for Women Members, HARTFORD COURANT, Jan. 5, 1973, at 24 (“Surely, logical is the correct word to use in view of the excellent qualifications of many women now in the fields of business and the professions.”).


118 McLellan, supra note 1, at 58.

119 Id.

120 Jaycees May Admit Women, BOS. GLOBE, Jan. 21, 1973, at 13. The press reported that “[w]hatever the decision may be in 1973, in time women are sure to be welcomed on equal terms, if only because that is the trend of our time in all areas.” Hartford Jaycees Open Door for Women Members, supra note 116, at 24.

121 No Women Members, Jaycees Say 3 Times, GLOBE & MAIL, June 27, 1975, at 11.


124 See McLellan, supra note 1, at 54.

125 See id.

126 Of course, the chapters that had admitted women were under sanction and could not vote. Id. at 60.

127 Id. at 54.
J. Terryl Bechtol, subsequently repudiated the holding company option, resulting in the disaffiliation of major chapters.128

Chapters in D.C., Massachusetts, Alaska, and Minnesota, where Roberts originated, were threatened with revocation of their charters and the right to use the Jaycees’ name.129 Blindsided by the decision to demote women members, they turned to public accommodations law to preserve their integrated membership.130 By that time, the majority of states and cities had added “sex” to their laws prohibiting discrimination in public accommodation.131 In each case, the fact-finder determined the U.S. Jaycees to be a public accommodation, actively recruiting and accepting all male applicants and providing leadership opportunities to the male public in exchange for dues—only to be reversed.132

Conservative leaders in the late 1970s took the success of their defenses against equal protection claims as a signal they were in the right, politically and legally.133 Consistent with theories that movement actors bring legal norms to bear outside courts,134 conservative Jaycees employed judicial decisions in their favor to affect the internal deliberations of the organization. One report, for example, attributed the 1975 vote against women’s full membership to the organization’s “flush” of victory in the Eighth Circuit Court of Appeals, which rejected local chapters’ constitutional claims.135 The constitutional decisions emboldened resistance to women’s membership as intraorganizational debate continued. Proposals of a local option permitting individual chapters to decide the issue died.136 Rather than negotiate internally, U.S. Jaycees began to pursue trademark infringement claims against local chapters.137 And, after the public accommodations lawsuits proceeded, the organization’s in-house lawyer, Carl Hall, repeatedly cited the these rulings on state action as proof

129 See McLellan, supra note 1, at 55–57, 59.
130 See, e.g., U.S. Jaycees v. McClure, 305 N.W.2d 764, 765 (Minn. 1981) (noting that the litigation originated with the St. Paul and Minneapolis chapters filing public accommodations complaints in 1978 against the National Chapter, which had threatened their charters).
131 Sepper & Dinner, supra note 10, at 104.
133 See Mall, supra note 107, at G14.
135 Mall, supra note 107, at G14.
136 See McLellan, supra note 1, at 54.
that the organization was not public and was free to deny women membership for purposes of public accommodation law—a distinctly different legal issue.\(^\text{138}\)

The political economy of the late 1970s and early 1980s helped fuel this opposition. Conflicts between the Jaycees organizational membership resulted from a rural-urban schism.\(^\text{139}\) As a 1978 U.S. Jaycees white paper acknowledged, in metro areas “men and women of Jaycee age interact and compete in the business world on a daily basis”—and wanted to work as equals in the Jaycees.\(^\text{140}\) Resistance came from “small-town, conservative middle America, places where women tend to have low-level jobs.”\(^\text{141}\) Those chapters least likely to have qualified women applicants thus were most fearful of sex integration.\(^\text{142}\)

Conservative Jaycee leaders saw the election of Ronald Reagan as president in 1980 as an endorsement of their position. J. Terryl Bechtol, then–U.S. Jaycees president insisted, “If we stop right now and vote female membership in, . . . U.S. Jaycee leadership would be taking this organization totally out of step with the way the country is going. . . . We’re back to the point where people are saying the Jaycees are right. . . . They didn’t use to say that.”\(^\text{143}\) The unification of the anti-feminist Religious Right and the libertarian New Right, and their effectiveness in electing President Reagan, signaled social and political resistance to an overbearing government.\(^\text{144}\) Bechtol expected that his conservatism would be vindicated in short order in litigation wins and social acceptance.\(^\text{145}\) As the public accommodations litigation proceeded, the Jaycees’ leadership rejected offers to settle for a local option and determined to fight all the way to the top.\(^\text{146}\)

### III. THE LITIGATION OF ROBERTS V. U.S. JAYCEES

*Roberts v. Jaycees* originated when the U.S. Jaycees threatened the St. Paul and Minneapolis chapters with imminent charter revocation in December of 1978.\(^\text{147}\) The


\(^{139}\) Fine, *supra* note 105, at B1 (noting that over the last decade Jaycees have shrunk in metro areas and grown in rural and more conservative areas); Mall, *supra* note 107, at G14 (Los Angeles chapter president noting that differences between big cities and small towns is real divide).

\(^{140}\) Clarity, *supra* note 122, at A20.

\(^{141}\) See Mall, *supra* note 107, at G14.

\(^{142}\) See id.

\(^{143}\) McLellan, *supra* note 1, at 58.


\(^{145}\) See McLellan, *supra* note 1, at 54–55.

\(^{146}\) See id. at 58.

chapters and some women Jaycees filed a complaint with the Minnesota Department of Human Rights, alleging that the U.S. Jaycees was a public accommodation discriminating against women in the goods, privileges, and advantages it offered the public. This case quickly became more high profile than those in other states, because it involved the state attorney general, resulted in a ruling from the state supreme court, and quickly brought constitutional claims front and center.

Given the importance of the case, the Office of the Attorney General solicited the involvement of the National Organization for Women (NOW) as amicus. Founded in 1966 as an “NAACP for women,” NOW listed among its leaders and founders civil rights lawyer Pauli Murray and author Betty Friedan. Its members, who were primarily white and middle class, had lobbied and litigated nationwide against sex discrimination in employment, public accommodations, credit, and beyond. NOW had a particular interest in the private men’s clubs that held back women’s professional careers and it had been involved in softer efforts to press Jaycees toward voluntary cessation of its exclusion of women since the early 1970s. The state hoped, would provide “insight into the importance of early ‘contacts’ and entrance to the ‘old boy’ network” and bring to the courts’ attention “evidence that the exclusion of women from this infrastructure reinforces stereotypical notions as to their inferiority.”

Minnesota and women’s groups took a two-pronged approach typical of the litigation against the Jaycees. First, as Section A argues, they conceptualized of the Jaycees’ policies as an impediment to fair play in the labor market. Second, as Section

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148 Id.
149 See id. at 611–12, 616.
150 Letter from Richard L. Varco, Jr., Special Assistant Minn. Att’y Gen., to Phyllis Segal, NOW Legal Def. & Educ. Fund (Mar. 31, 1980) [hereinafter Letter from Richard L. Varco, Jr.] (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, NOW LDEF Papers).
151 Carol Giardina, MOW to NOW: Black Feminism Resets the Chronology of the Founding of Modern Feminism, 44 FEMINIST STUD. 736, 737, 753 (2018); see also DOROTHY SUE COBBLE ET AL., FEMINISM UNFINISHED: A SHORT SURPRISING HISTORY OF AMERICAN WOMEN’S MOVEMENTS 61 (2014) (describing NOW as the “NAACP for women”).
153 See, e.g., Letter from Wilma Scott Heide, President NOW, to Von Kerik, President Tulsa NOW (Feb. 14, 1974) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, Wilma Heide Scott Papers) (noting attempts to meet with U.S. Jaycees’ leadership to counter women’s subordination).
154 Letter from Richard L. Varco, Jr., supra note 150, at 2.
B contends, women’s second-class status maintained a gender hierarchy both within the organization and the workforce.\textsuperscript{155}

More pragmatist than idealist, they advanced arguments for what Professor Robert Tsai, another participant in this Symposium, calls practical equality.\textsuperscript{156} Exclusion from full membership was problematic because it impaired women’s careers and relegated them to a marginal and lesser role.\textsuperscript{157} This long campaign largely portrayed the Jaycees, not as ill-intentioned wrongdoers, but as part of a structural problem, rooted in and adding to employment inequality and society-wide hierarchy.\textsuperscript{158} As this strategy suggests, the state decentered some of the parallels to race segregation that other actors (like the NAACP) subsequently would press.\textsuperscript{159} This strategy effectively avoided discussions of the U.S. Jaycees’ intent or animus and instead allowed for scrutinizing the structural dimensions of the organization and the hierarchy it maintained.

Both the economic aspect and the subordinating function of the Jaycees proved determinative to court decisions in favor of women’s full Jaycees membership. Connected to labor participation and promotion, Jaycees invited comparisons to hiring firms and unions—whose associational interests must cede to equal status for minorities.\textsuperscript{160} The economic aspects of the Jaycees made evident the harms of its two-tiered membership structure.\textsuperscript{161} Unlike male full members, female associate members could not vote, hold office or directorship, or receive the awards that bestowed community and employer recognition.\textsuperscript{162} They were subordinated as second-class Jaycees.

\textit{A. The Confluence of Membership in the Club and Opportunity in Employment}

As in the court of public opinion, litigation against the U.S. Jaycees took the position that public accommodations equality could not be isolated from other goals. The state of Minnesota pointed to women’s increasing labor outside the home as an advance that depended on their access to “the organizational and leadership skills

\begin{itemize}
  \item \textsuperscript{155} NOW Amicus Brief to Minnesota Supreme Court, \textit{supra} note 90, at 2, 5.
  \item \textsuperscript{156} ROBERT TSAI, \textit{PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION} 7–8 (2019) (arguing that fair play or rationality can act as effective substitutes for more inherently judgmental assertions of equality).
  \item \textsuperscript{157} NOW Amicus Brief to Minnesota Supreme Court, \textit{supra} note 90, at 2, 5.
  \item \textsuperscript{158} See Tsai, \textit{supra} note 156, at 18–19 (arguing that a focus on fair play and rationality avoids finger-pointing and the identification of, and offense to, a wrongdoer).
  \item \textsuperscript{159} In her work on the Jaycees, Linda McClain argues that the question of whether the discrimination was of an invidious nature of the discrimination brought analogies between race and sex front and center in briefs by parties and amici to the Supreme Court. Linda C. McClain, “’Male Chauvinism’ is Under Attack from All Sides at Present”: Roberts v. United States Jaycees, \textit{Sex Discrimination, and the First Amendment}, 87 FORDHAM L. REV. 2385, 2388–89 (2019). In the longer movement for Jaycees integration, however, the analogy to race, though present in the briefs, was marginal or tertiary.
  \item \textsuperscript{161} See Taylor, \textit{supra} note 81, at 48.
  \item \textsuperscript{162} See McLellan, \textit{supra} note 1, at 55.
\end{itemize}
which they can obtain from equal participation in the U.S. Jaycees.”  Minnesota and its amici reminded the courts that the Jaycees’ impact on business development and career success was not subtle. As NOW noted, benefits accrued to employers in the form of outsourcing of management skill training and publicity for awards for public service.  In a market where almost one-third of jobs held by men, and an even higher share of high-status jobs, came through personal contacts, individuals gained “a network of upwardly mobile peers and access to the business and civic leaders of the community” through the Jaycees. Jaycees chapter presidents sometimes sat on the chamber of commerce ex officio. The Jaycees advertised that the annual dues of $25 would be more than made up by the $25/month increase in salary that members gained through its programs. Many employers paid dues and recommended that their employees join the Jaycees. Women’s full membership in the Jaycees advanced their statutory right to economic opportunity and labor market participation.

As Minnesota and its amici saw the case, the commitment to equality expressed by federal and state civil rights law should inform constitutional interpretation. The construction of the public accommodations law sought by the Jaycees, the state warned, would stymie progress in employment, “gra[ing] harshly against the grain” of the state civil rights act as a whole. Its approach reflected the increasing recognition among government actors that, while “not as crippling perhaps as exclusion from higher education or skilled work,” exclusionary clubs worked to “threaten public policy barring job discrimination today.” The state urged courts to interpret the Jaycees’ constitutional freedom of association with sensitivity to the statutory and cultural commitments of the time.

In its defense, the U.S. Jaycees asserted a sort of half constitutional right. Prior precedent treated freedom of association as a mechanism to advance other constitutional rights—rights to petition, expression, exercise religion, make decisions about

164 NOW Amicus Brief to Minnesota Supreme Court, supra note 90, at 4–5.
165 Id. at 22–23 (citing U.S. Bureau of Labor Statistics bulletin).
166 Id. at 21.
167 Id. at 27–28 (noting that the St. Paul chapter president did so).
168 Id. at 14 (quoting Jaycees recruitment manual).
169 See also Samuel Rabinove, Clubs Under Siege, SKANNER (Portland, Or.), Aug. 5, 1981, at 10 (reporting national survey of 700 banks in 1980 that found that 419 of them regularly paid for employee dues to private clubs); Taylor, supra note 81, at 48 (“Corporations usually encourage membership and some pay the members’ dues.”).
170 Brief on Certified Issue, supra note 163, at 19.
171 Lynton, supra note 40, at 3, 7; see also NOW Amicus Brief to Minnesota Supreme Court, supra note 90.
172 Brief on Certified Issue, supra note 163, at 17.
family, and pursue intimate relationships.\(^{174}\) As a “cumulative,” “aggregate,” or “dynamic” right, association required a link to privacy or speech.\(^{175}\) The question of whether a membership organization like the Jaycees fell within the definition of a public accommodation under the state statute was a genuinely difficult one.\(^{176}\) But that question was for the Minnesota Supreme Court and had been answered in the affirmative.\(^{177}\) By contrast, the Jaycees’ constitutional claim seemed weak.\(^{178}\)

The Jaycees’ organizational form belied intimacy or privacy. Unlike bona fide private clubs—a category into which many selective, exclusive, relatively small men’s clubs fell—Jaycees was, in Justice O’Connor’s words, “not ‘private’ in any meaningful sense of that term.”\(^{179}\) With approximately 300,000 members, it recruited strangers through door-to-door solicitations and television ads and had never turned away an applicant.\(^{180}\) The commercial nature of the Jaycees made its claim of being an expressive association like the NAACP less than convincing.\(^{181}\)

As the case wound through administrative bodies and state and federal courts, the heft of women’s interests in economic opportunity made the U.S. Jaycees’ freedom to exclude appear flimsy.\(^{182}\) Fact-finders in Minnesota were convinced of the outsized commercial and economic aspects of the Jaycees.\(^{183}\) The human rights examiner interpreted the public accommodations provision through the lens of employment discrimination statutes: “It would make little sense to guarantee women an equal opportunity in employment while denying them access to activities designed

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\(^{174}\) See, e.g., NAACP v. Alabama, 357 U.S. 449, 460 (1958) (characterizing freedom of association as stemming from the “close nexus between the freedoms of speech and assembly”).


\(^{176}\) See generally U.S. Jaycees v. McClure, 305 N.W. 2d 764 (Minn. 1981) (struggling to come to terms with various questions involved in this case).

\(^{177}\) Id. at 765.

\(^{178}\) Id. (ruling the United States Jaycees a place of public accommodation).


\(^{180}\) See id. at 621 (majority opinion).

\(^{181}\) Id. at 620–21.

\(^{182}\) See William P. Marshall, Discrimination and the Right of Association, 81 NW. U. L. REV. 68, 74 (1986) (“While the associational rights of the Jaycees were considered to be virtually nonexistent, the state interests were found to be particularly weighty because of the social and business prominence of the Jaycees organization.”).

\(^{183}\) See U.S. Jaycees v. McClure, 709 F.2d 1560, 1555–65 (8th Cir. 1983).
to help in career advancement.\footnote{Findings of Fact, Conclusions of Law & Order, McClure v. U.S. Jaycees, No. 1800-7802, 1979 WL 61037, *15 (Minn. Off. Admin. Hrgs.) (Oct. 9, 1979) [hereinafter Findings of Fact, Conclusions of Law & Order]. He further noted that the big business nature of the organization might distinguish it from others. \textit{Id.} at *18.} The Supreme Court of Minnesota then sided with the state on the issue of whether the Jaycees was a public accommodation, concluding that the Jaycees promised and sold to men business contacts and employment promotions.\footnote{U.S. Jaycees v. McClure, 305 N.W.2d 764, 772 (Minn. 1981).}

As courts took up the Jaycees’ constitutional defense, they saw state statute and federal civil rights protections as interrelated and interdependent. Having secured favorable rulings in state adjudication, the state at first prevailed on the constitutional issue. District Judge Diana Murphy concluded that the state’s interest in sex equality outweighed any associational right on the part of the U.S. Jaycees.\footnote{U.S. Jaycees v. McClure, 534 F. Supp. 766, 774 (D. Minn. 1982).} Her opinion made explicit the ways in which legal and social commitment to the Civil Rights Act primed the adjudication of the men’s club issue.\footnote{\textit{Id.} at 771–72.} The passage of Title VII—she said—lent support to seeing the state’s interest in ending sex discrimination in public accommodations as compelling.\footnote{\textit{Id.}} Judge Murphy drew an analogy to a recent district court case applying Title VII to a law firm partnership’s decisions and rejecting defenses based on freedom of association.\footnote{\textit{Id.} at 772.} She perceived the federal Civil Rights Act and the state public accommodation law as fostering a shared vision of a sex-egalitarian marketplace (notwithstanding the fact that the public accommodation title of the Civil Rights Act did not reach sex discrimination).

The Court of Appeals for the Eighth Circuit reversed, finding that the application of public accommodation law violated U.S. Jaycees’ freedom of association.\footnote{U.S. Jaycees v. McClure, 709 F.2d 1560, 1576 (8th Cir. 1983).} But the court indicated that it might uphold a statute that instead forbade membership discrimination in “groups of more than a certain size that derived a substantial amount of support from business.”\footnote{\textit{Id.} at 1573.} It also agreed that a sufficiently developed record of significant connection to business opportunity would remove a membership organization from the protection of the First Amendment.\footnote{\textit{Id.} at 1576 (further indicating that it might uphold a statute that forbade membership discrimination in “groups of more than a certain size that derived a substantial amount of support from business”).}

At the Supreme Court, the combined weight of economic opportunity and membership organization equality again tipped the scales in favor of the female Jaycees.\footnote{See generally Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).}
Like the Eighth Circuit, Justice Brennan, writing for the majority, determined the U.S. Jaycees amounted to an expressive association. But, unlike the lower court, he credited the Jaycees’ commercial and marketplace function. In a nod to the direct relationship between employment and membership organizations, the Court noted “the changing nature of the American economy” and the role of public accommodations law in “removing the barriers to economic advancement.” The Court concluded that assuring women access to the leadership skills, business contacts, and employment promotions promised by the U.S. Jaycees clearly furthered compelling state interests.

It is Justice O’Connor’s concurrence, however, that best captures the social and legal moment and its recognition of men’s clubs as, alternately, gateways or barriers to economic opportunity. She chided the majority for adopting “a test that unadvisedly casts doubt on the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society” and that insufficiently safeguards associations engaged predominantly in protected expression. While “an association engaged exclusively in protected expression” enjoys wide-ranging First Amendment protections to select its membership and discriminate, a commercial association retains “only minimal constitutional protection” in this regard. She said forthrightly: “An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.” O’Connor determined that Jaycees was decidedly on the commercial side, reflecting little expressive value.

Like Judge Murphy, Justice O’Connor analogized the case to Title VII claims against employers and unions, another institution mediating labor force promotion. She reminded the Court that just six weeks prior, the Court had “readily rejected a large commercial law firm’s claim to First Amendment protection for alleged gender-based discriminatory partnership decisions for associates of the firm.” O’Connor determined that Jaycees was a relatively easy case. The organization, O’Connor wrote,

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194 Id. at 622.
195 Id. at 626.
196 Id.
197 Id. at 632, 640 (O’Connor, J. concurring).
198 Id. at 632.
199 Id. at 633–34.
200 Id. at 636.
201 Id. at 638–40.
202 Id. at 637–38 (citing Ry. Mail Ass’n v. Corsi, 326 U.S. 88, 94 (1945) (holding that a labor union could not assert a right to choose its membership contrary to state employment discrimination law)).
203 Id. at 637 (citing Hishon v. King & Spalding, 467 U.S. 69 (1984)).
204 Id. at 638.
“is, first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management.” Title VII applied to the glass ceilings on women’s progress within firms without raising constitutional concerns. So too could the public accommodation statute apply to Jaycees’ economically significant exclusionary policies without First Amendment scrutiny.

**B. An Antisubordinating First Amendment**

While Justice O’Connor’s concurrence embraced the substantial connection between employment and Jaycees membership, Justice Brennan’s majority opinion added a distinctly antisubordinating approach to the First Amendment. His opinion for the Court emphasized both the second-class status of women within the organization and its impact on gender hierarchy within society. Although the antisubordinating aspects of the case are often overlooked, Professor Susan Appleton has recognized that the real issue was a right to preserve “gender hierarchy,” not to exclude women from the association.

From the moment of the filing of the complaint, Minnesota explicitly characterized the case as about subordination of women. It requested that the hearing examiner restrain Jaycees from “treating its female members in an inferior, second class manner.” The state argued that “[i]t would belabor the obvious to more than note that the role to which women are relegated solely because of their sex within the Jaycees organization is both subordinate and inferior to that assigned men.” At the time the litigation began, the antisubordination theory of equal protection had been articulated.

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205 Id. at 639.  
207 See *Roberts*, 468 U.S. at 625.  
210 Id.  
211 Id. at 2. A “minor but nonetheless striking example of this disparity” the state noted was Jaycees national headquarters is an office building, the Jaycettes’ the “current president’s home.” *Id.* at 2 n.3.; see also Petition for Rehearing En Banc at 1, U.S. Jaycees v. McClure, 709 F.2d 1560, 1583 (8th Cir. 1983) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, NOW LDEF Papers) (noting that at issue were policies that “relegated [women] to the subordinate status of Associate”); NOW Amicus Brief to Eighth Circuit, *supra* note 100, at 19 (noting that Jaycees had chosen “to associate with women but to discriminate against them by offering an inferior membership status”).
only recently, with Owen Fiss’s groundbreaking 1976 article. Fiss argued for an anti–“group disadvantaging” view of equal protection that would oppose caste and find “it undesirable for any social group to occupy a position of subordination for an extended period of time.” Phrased in the language of equal citizenship, anticaste, and antisubordination, these theories advanced a vision of equality that required attacking those social structures that maintained an underclass of historically oppressed. Contrary to claims made by some scholars, the state, local Jaycees, and amici denominated the U.S. Jaycees policy as discriminatory because it reflected and inscribed the “longstanding societal practice whereby women, solely by accident of birth, are relegated to inferior positions in the social and economic order.”

Second-class membership reinscribed hierarchies in employment, society, and family. The men’s club issue seemed to present the Court with a tension between an individual’s statutory right to equal access and the organization’s constitutional freedom of association premised on the ability to exclude others. In advancing a right of association, Jaycees had argued that the antidiscrimination law would “compel the qualified members of Jaycees to accept an unwanted personal relationship with women as peers and companions in the decision-making processes of the organization.” The Eighth Circuit panel to hear the case determined: “It is natural to expect that an association containing both men and women will not be so single-minded about advancing men’s interests as an association of men only. . . . An organization of young people, as opposed to young men . . . will be substantially different . . . .” As Professor Linda McClain argues, whether the Jaycees’ right to expressive association would be impaired through women’s membership depended on whether it “was truly a

\[212\] See Owen M. Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107 (1976). For other theorists predating the Roberts decision, see CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 117–18 (1979) (encouraging courts to consider “whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status”); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1052 (1978) (emphasizing the need to dismantle subordinating social structures).

\[213\] Fiss, supra note 212, at 151.

\[214\] See Mary E. Becker, Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment, 79 GEO. L.J. 1659, 1668 (1991) (“Sexist men do not, as a general rule, try to avoid all contact with women. On the contrary, they desire contact in certain subordinating forms, such as having women as secretaries and dependent wives.”).

\[215\] See John D. Inazu, Factions for the Rest of Us, 89 WASH. U. L. REV. 1435, 1443 (2012) (“I had not characterized the Jaycees’s practices as subordinating (nor, for that matter, did the Court or any of the litigants), but Professor Appleton makes a good argument for construing the case in this way.”).

\[216\] Brief on Certified Issue, supra note 163, at 17.

\[217\] Reply Brief of Appellant the U.S. Jaycees at 2, U.S. Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983) (No. 82-1493-MN) (on file with the Mudd Library, Princeton University, American Civil Liberty Union Papers).

\[218\] U.S. Jaycees v. McClure, 709 F.2d 1560, 1571 (8th Cir. 1983).
‘men’s organization’ with purposes unique to the advancement of young men’s interests and rooted in ideas about gender difference and the desire for all-male or all-female associations.”

The facts, however, belied the U.S. Jaycees’ claimed freedom to associate on an exclusive basis. At the working level, men and women already participated in planning and program implementation with no distinction between individual and associate members. But women were denied leadership opportunities in their local, state, and national chapters, voting at the national level, and recognition through the awards that characterized the Jaycees.

The U.S. Jaycees’ two-tiered structure created—NOW argued—“a ‘together but unequal’ environment with many serious disadvantages to the second-class participants.” As with the workplace, mere access perpetuated women’s subordination. Like the women auxiliaries of men’s organizations throughout the twentieth century, female Jaycees’ associate status sent the message that they were unable to compete as equals in the organization, the community, and the business place. By contrast, the state argued, the experience of Jaycee “men and women meeting as equals” advanced antisubordination goals, by countering stereotypes about women’s capacities and leading to higher-powered jobs for women through personal contacts. Responding to concerns that men would be deprived of opportunity, the plaintiffs advanced a vision of a growing pie, rather than a zero sum game. Because “[a]n essential, if not central function of the organization, is to grow through the acquisition of new members,” a larger pool of new members accrued to the Jaycees benefit, Minnesota argued. Integrated Jaycees chapters had proven that women made significant contributions to the growth and success of the organization, fostering “all of the Jaycees’ goals except that of maintaining a sex-segregated leadership.”

Lawyers proved adept at bringing women’s voices into the courtroom to illuminate the harms of organizational subordination. Just as legal historians have found in contexts of abortion and prenatal leave, the Jaycees cases involved “popular dialogue about the meaning of the Constitution’s guarantees, as citizens try to educate those in power about harms not shared equally across lines of sex, race, and class.” The Minnesota women who had become full members of their local Jaycees testified to

219 McClain, supra note 159, at 240.
220 See NOW Amicus Brief to Minnesota Supreme Court, supra note 90, at 41.
221 Id. at 4–5.
222 Id. at 5.
223 Id.
224 See Epstein, supra note 44, at A2 (quoting Minnesota Attorney General’s office as saying the practice “helps to perpetuate the myth that women are inferior”).
225 Id. at 12 n.14.
226 Brief of Appellees Marilyn E. McClure et al., supra note 175, at 17.
227 Id. at 20.
the benefits.\textsuperscript{229} As a director of the rebel Minneapolis Jaycees, Kathleen Hawn chaired numerous high-profile community events and came to supervise others for the first time.\textsuperscript{230} Taking her supervisors to a Jaycees event where she received an award—an honor that the U.S. Jaycees forbade her—directly contributed to her promotion to a supervisory role.\textsuperscript{231} Interior architect, Kathryn Ebert similarly explained that no other organization would have provided her with the opportunity to lead and supervise at such a young age; the integrated atmosphere was key, providing exposure to how men handled decisions and progressed in their professional careers—information essential to her workplace where ninety percent of decision makers were male.\textsuperscript{232} These working women found their status in the labor force enhanced by their equal membership in the local chapters—a status that U.S. Jaycees would deny them.

The integrated, but subordinated nature of the Jaycees proved determinative to the courts’ consideration of the merits of the statutory claim and constitutional defense. The hearing officer in Minnesota concluded that compelling a woman to accept second-class status because of her sex was “perhaps an even more serious concern” than placing women at a competitive disadvantage in the marketplace—the two harms justified the application of the state human rights act to the large, public-facing U.S. Jaycees.\textsuperscript{233} In evaluating the constitutional issue, Chief Judge Lay in the Eighth Circuit disagreed with his colleagues that the Jaycees’ freedom of association was threatened by women’s membership, precisely because the Jaycees imposed gender hierarchy on local chapters.\textsuperscript{234} If the U.S. Jaycees prevailed, male and female members in Minneapolis and St. Paul would continue to associate with each other.\textsuperscript{235} But women would be denied the privileges of full membership and male members who wished to associate with their female counterparts on equal terms would be forbidden that opportunity.\textsuperscript{236}

The Supreme Court notably emphasized the antisubordination values in its construction of the Constitution.\textsuperscript{237} The pre-existing association of men and women together, but unequal, mattered greatly to the Justices. In conference, Justices Brennan and White both voted to reverse the Eighth Circuit’s decision in favor of the Jaycees because women’s membership belied any interest in selective membership or

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\item \textsuperscript{229} Transcript of Hearing at 198, 201–04, Minnesota v. U.S. Jaycees, No. HR-79-014-6B (Off. Hearing Examiners for Dept’ of Hum. Rts.).
\item \textsuperscript{230} Id. at 198, 204.
\item \textsuperscript{231} Id. at 201–03 (testifying that her supervisor’s boss who attended the dinner with her “felt that the leadership abilities and the management skills I had shown through my participation in the Jaycees would make me a good candidate for a position that he had in his department” even though she did not have a college degree as others in the position did).
\item \textsuperscript{232} Id. at 188–95.
\item \textsuperscript{233} Findings of Fact, Conclusions of Law & Order, supra note 184, at *15.
\item \textsuperscript{234} U.S. Jaycees v. McClure, 709 F.2d 1560, 1580 (8th Cir. 1983) (Lay, C.J., dissenting).
\item \textsuperscript{235} See id.
\item \textsuperscript{236} See id.
\end{itemize}
privacy. The opinion notes that in 1981, women associate members represented about two percent of the Jaycees’ total membership. Having “already invite[d] women to share the group’s views” and participate in much of their activity, Jaycees could not complain of their full membership. Women’s equal access would not diminish the opportunities of male Jaycees or destroy its purpose. Invoking its Equal Protection cases, the Court reasoned that, “[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities.” These stereotypes—enforced in Jaycees through second-class membership—harmed individual dignity and affected “participation in political, economic, and cultural life.” Antisubordination values advanced through a long social and legal movement had been vindicated. The connection of the Jaycees to gender hierarchy in employment and across society—once invisible—had been rendered evident.

CONCLUSION

Over the course of the 1970s and early ’80s, the American public and, eventually, the judiciary came to understand statutory rights to public accommodations equality as congruent, overlapping, and dynamic, with efforts toward economic opportunity for women. State public accommodations law and the federal Civil Rights Act—in the words of Professor Zick—“intersect[ed], associate[ed], [and] convers[ed] . . . as part of a dynamic process of adjudication, scholarly examination, and public discourse.” Linked to the labor market, the Jaycees’ structure of including, but subordinating women came to be conceptualized as discriminatory. The dynamism between employment and marketplace inclusion occurred, not through a single court case, but through a widespread social and legal movement that shifted the normative ground and made new realities possible.

238 Conference Notes of Justice Powell, Roberts v. U.S. Jaycees, No. 83-724, Apr. 20, 1984 (on file with Washington & Lee School of Law Library, Lewis F. Powell, Jr. Papers) (noting that Justice Brennan said that not selective and women already participate, Justice White observed that no real privacy because women admitted); see also id. (reporting that Justice Rehnquist said that Jaycees hadn’t “shown sufficient interest in either privacy or in political issues” and “[t]his is a public organization—not privacy case”).

239 Roberts, 468 U.S. at 613.

240 Id. at 627.

241 Id. at 620–21, 625–28.

242 Id. at 625.

243 Id. As Professor Appleton observes, the Court’s repeated references to “dignity” reinforce understanding the opinion as vindicating antisubordination views. Appleton, supra note 208, at 1432.

244 Zick, supra note 6, at 17.
Roberts dramatically shrunk the boundaries of permissible sex segregation, but legal and popular culture remained ambivalent about sex segregation. Indeed, the Supreme Court would have to revisit the issue of men’s clubs in 1987 and again in 1988. It would take another decade from Roberts before men’s clubs fell out of favor. Many people were not persuaded that sex-segregated membership organizations were wrongful in a moral (or legal) sense. They continued to see sex segregation in childhood athletics, scouting, and schools as harmless, natural, or even admirable.

Influential men’s clubs—from the Jaycees to the Elks—sound anachronistic to the modern reader. But viewed through the lens of employment discrimination and economic opportunity, the movement to integrate these clubs and the Court’s decision in Roberts v. U.S. Jaycees become germane to today’s legal and social battles. As Vicki Schultz has long argued, and as the #MeToo and #TimesUp movements now recognize, sex segregation is “a cause and a consequence of harassment” and works to deny women economic opportunities. Regular reports surface about public figures and large employers affirmatively imposing sex segregation in activities outside of the workplace or after business hours. Outside of work, sex-segregated activities,


246 N.Y. State Club Ass’n v. City of New York, 487 U.S. 1 (1988) (holding that the application of a human rights law to a private club was not an unconstitutional infringement on the rights of club members); Bd. of Dirs. of Rotary Int’l v. Rotary Club, 481 U.S. 537 (1987) (deciding that a private organization was covered by the language of a California Civil Rights Act prohibiting discrimination on the basis of sex or race).


248 See, e.g., Boston Jaycees Take a Stand, BOS. GLOBE, Dec. 23, 1978, at 18 (opining that whether or not the Jaycees’ discrimination against women members is legal wrong, it should be ended as inconsistent with equality of opportunity for women); see also John D. Inazu, The Unsettling “Well-Settled” Law of Freedom of Association, 43 CONN. L. REV. 149, 186 (2010) (suggesting that the circumstances facing women and black people may have been sufficiently different so as to warrant constitutional protection for the Jaycees’ sex discrimination but not for clubs discriminating based on race). For contemporaneous and recent scholarly commentary, see Linder, supra note 9, at 1902 (“Most men would also willingly sacrifice a degree of associational freedom in order to provide women with the same economic opportunities that they have long enjoyed. When, however, a state acts to prohibit private discrimination which does not reflect a mean-spiritedness toward the excluded group, the cost may be too much to pay.”).


250 Working Relationships in the #MeToo Era, LEAN IN, https://leanin.org/sexual-harass
athletics, and networks affect women’s career progress. Genuinely exclusive clubs—like the Mar-a-Lago of the Trumps, the Skull and Bones of the Bushes and Yale University, and the Bohemian Club of senators and presidents—hold outsized power over political and economic opportunity. Like the earlier campaign against men’s clubs, the #MeToo and #TimesUp movements resist women’s lack of access to spaces where opportunity is formed and their continued underrepresentation in leadership positions.

The long Jaycees campaign holds lessons for contemporary feminist movements. It demonstrates the role of pragmatism in achieving equality. The focus on fair play and the structures of subordination helpfully sidelined discussions of animus and intent. The movement identified traditions and structures of sex segregation and subordination that held women back in employment, notwithstanding their formal equal access to the workplace. By surfacing the ways public accommodations inequality cut against the grain of framework civil rights protections, the movement convinced the media and many people that integrating men’s clubs was correct as a policy matter. The congruence between economic opportunity and Jaycees membership helped tip the balance at the Supreme Court and resulted in a distinctly antisubordinating decision that might aid today’s movements in their efforts to challenge continued sex segregation.

See Judith G. Oakley, Gender-Based Barriers to Senior Management Positions: Understanding the Scarcity of Female CEOs, 27 J. BUS. ETHICS 321, 328 (2000) (describing “informal male social system that stretches within and across organizations, and excludes less powerful males and all women from membership”); see also Elizabeth H. Gorman & Julie A. Kmec, Hierarchical Rank and Women’s Organizational Mobility: Glass Ceilings in Corporate Law Firms, 114 AM. J. SOC. 1428, 1429 (2009) (finding social networks to retard women’s career mobility in law firms).

See McClain, supra note 159, at 2415 (discussing the meaning of Roberts for social and professional networks that continue to limit women’s access to advancement today).

Tippett, infra note 254, at 5–6.

For examples of scholars considering such possibilities, see Anthony Michael Kreis, Defensive Glass Ceilings, 88 G.W. L. REV. (forthcoming 2020) (arguing that many defensive practices of segregating supervisors from people to whom they might be attracted violate Title VII of the Civil Rights Act); Elizabeth C. Tippett, Opportunity Discrimination: A Hidden Liability Employers Can Fix, EMP. RTS. & EMP. POL’Y J. (forthcoming 2019) (arguing that disparities in informal opportunities related to the work place are legally significant for purposes of Title VII and should be distributed more equitably by employers). See also Theresa M. Beiner, Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?, 37 B.C. L. REV. 643, 663–67 (1996) (discussing employment discrimination cases involving gendered outside-employment activities with bosses and colleagues).

See, e.g., Drinan, supra note 64; One Small Step for Womankind, supra note 65.