

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

Elizabeth Sepper*

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 Presidents¹

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 membership 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, 1984²

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

INTRODUCTION

Thirty-five years ago, the Supreme Court confronted the issue of sex segregation in membership organizations.³ 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

* Professor of Law, University of Texas at Austin School of Law. My thanks to the participants and organizers of the *William & Mary Bill of Rights Journal* Symposium on *Constitutional Rights: Intersections, Synergies, and Conflicts* for the helpful discussion and to Robert Tsai, Willy Forbath, and Deborah Dinner for their generous comments on drafts. I’m grateful to Allie Amado, Caine Caverly, Brooke Lowell, and rest of the *BORJ* editorial staff for their excellent edits.

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 petition for rehearing en banc), *rev’d sub nom. Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

³ *See generally Roberts*, 468 U.S. 609.

admitted women.⁴ 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.⁵

This Symposium on the intersections, synergies, and conflicts between rights—what Professor Timothy Zick calls rights dynamism⁶—largely focuses on constitutional rights and their relationships in judicial decisions.⁷ 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.⁸ Critics claim that the Court treated these aggregated constitutional rights too lightly and weighed women's interest in public accommodations equality too heavily.⁹ 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.¹⁰ In what Zick calls the “distinct, active, dynamic process in which

⁴ *Id.* at 613–15.

⁵ *Id.* at 611–12.

⁶ See Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. 791, 792–93 (2017).

⁷ TIMOTHY ZICK, *THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS* 84, 86 (2017).

⁸ *Id.* at 86 (discussing *Roberts* only briefly as an example of a case that made freedom of association dependent on speech).

⁹ See generally Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in *FREEDOM OF ASSOCIATION* 75 (Amy Gutmann ed., 1998); John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010) (critiquing the decision and proposing ways to reduce some of the uncertainty engendered); Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878 (1984) (arguing that the opinion sacrifices communitarian values).

¹⁰ This is consistent with WILLIAM ESKRIDGE, JR. & JOHN FERREJOHN, *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).

meanings of rights are elaborated over time [I]awyers, activists, judges, reporters, civic institutions, and constitutional movements”¹¹ 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.¹² The landmark employment protections in the Civil Rights Act of 1964 had become entrenched in legal and popular culture.¹³ Title VII intersected with and fueled ordinary women’s entry into civic membership organizations.¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸ 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.¹⁹

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.²⁰ Justice O’Connor’s noted concurrence and Justice Brennan’s majority opinion respectively adopt these frames.²¹ Justice O’Connor’s concurrence best reflects the mainstream understanding of public

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. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 3–7 (2014).

¹⁴ *See* Sepper & Dinner, *supra* note 10, at 100.

¹⁵ *See id.* at 100, 102.

¹⁶ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 637–38 (1984).

¹⁷ *See infra* Part I.

¹⁸ *See infra* Part II.

¹⁹ *See infra* notes 111–17 and accompanying text.

²⁰ *See infra* Part III.

²¹ *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 *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 *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 See *infra* note 197 and accompanying text.

²³ See *infra* note 206 and accompanying text.

²⁴ See *infra* notes 244–52 and accompanying text.

²⁵ See U.S. DEP'T OF LABOR & U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 1, 8 (Dec. 2010), <https://www.bls.gov/cps/wlf-databook-2010.pdf> [<https://perma.cc/324X-KSBW>].

²⁶ ANN K. BOULIS & JERRY A. JACOBS, THE CHANGING FACE OF MEDICINE: WOMEN DOCTORS AND THE EVOLUTION OF HEALTH CARE IN AMERICA 42–43 (2008); Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 15 (2009).

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 See generally Sepper & Dinner, *supra* note 10.

²⁹ Ruth Bader Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 HUM. RTS. 1, 15 (1976).

³⁰ See Sepper & Dinner, *supra* note 10, at 80–85.

³¹ See *id.* at 87.

³² See *id.*

Partly out of concern for economic and political opportunity, the feminist movement drew attention to this pervasive pattern.³³ 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.³⁴ By the decade’s end, the majority of states and cities had added “sex” to these laws.³⁵ Bars, restaurants, and athletic organizations came to permit women on equal terms.³⁶

Sex-segregated clubs, however, remained a hard target.³⁷ 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.³⁸ 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.³⁹ 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.”⁴⁰ Government actors also often proved unsympathetic to women’s requests for access.⁴¹ 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.”⁴²

The Junior Chamber of Commerce was symbolic of this struggle. Founded to advance the business of its members,⁴³ the U.S. Jaycees for decades had offered “a key to success for the ambitious middle-class young man . . .”⁴⁴ It provided members

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 Jeannette 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.

⁴³ N.Y.C. Jaycees, Inc. v. U.S. Jaycees, Inc., 512 F.2d 856, 858 (2d Cir. 1975).

⁴⁴ Aaron Epstein, *Justices to Rule on Whether States May Force Jaycees to Admit Women*, PHILA. INQUIRER, Jan. 10, 1984, at A2.

leadership training and opportunities, offered awards and incentives for recruitment and retention of members, and admitted any man eighteen to thirty-five who applied.⁴⁵ 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.⁴⁶ Women had begun to be invited to join the Jaycees in the 1960s as associate members.⁴⁷ 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.⁴⁸ 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.⁴⁹

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.⁵⁰ 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.⁵¹ 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.⁵² She was persuaded not to when it became clear that all the male Justices likewise belonged to single-sex clubs.⁵³

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.⁵⁴ The Jaycees, the Court

⁴⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 613–14 (1984).

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).

⁵² Letter from Justice O'Connor to the Conference, *Roberts v. Jaycees* (Apr. 16, 1984) (Lewis F. Powell, Jr. Papers on file with Washington & Lee School of Law Library).

⁵³ Letter from Justice Powell to Justice O'Connor (Apr. 18, 1984) (on file with the Washington & Lee School of Law Library, Powell Papers) (noting own membership in single-sex clubs); Letter from Justice Brennan to Justice O'Connor (Apr. 17, 1984) (same); Letter from Justice Rehnquist to Justice O'Connor (Apr. 17, 1984) (same).

⁵⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (noting that the state law “has adopted

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

a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct”).

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.

⁶² Norman D. Atkins & Alma Guillermoprieto, *Jaycees Ruling Draws Smiles and Questions*, WASH. POST, July 4, 1984, at A8.

⁶³ *Freedom Not to Associate*, BALT. SUN, July 16, 1984, at 10A.

⁶⁴ Robert F. Drinan, *High Court Holds Line with a Few Civil Rights Decisions*, NAT’L CATH. REP., July 20, 1984, at 1.

⁶⁵ *One Small Step for Womankind*, TIME, Aug. 27, 1984, at 25.

⁶⁶ Sandra 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.⁶⁸ 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.”⁶⁹ A number of chapter leaders welcomed an anticipated boom in membership.⁷⁰ In a few chapters, men resigned rather than continue with potentially integrated membership.⁷¹ 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.”⁷²

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.⁷³ The tie to the aims of Title VII of the Civil Rights Act—a transformative statute that expressed normative commitment to workplace equality⁷⁴—fueled public acceptance of women Jaycees.⁷⁵ 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.⁷⁶ Particularly in urban areas across

POST, Aug. 30, 1984, at MD10. As a result, three of its local chapters walked out in protest. Saperstein, *supra* note 66, at B1.

⁶⁸ Blake, *supra* note 67, at MD10.

⁶⁹ Charles Hillinger & Tom Gorman, *Meeting Marks End of Jaycees’ Ban on Women*, L.A. TIMES, Aug. 21, 1984, at B3.

⁷⁰ *Id.*

⁷¹ Blake, *supra* note 67, at MD10.

⁷² *Jaycees Vote to Admit Women to Membership*, N.Y. TIMES, Aug. 17, 1984, at A8.

⁷³ 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”).

⁷⁴ Professors William Eskridge and John Ferejohn have identified Title VII as a super-statute, analogous to constitutional amendments. ESKRIDGE & FERREJOHN, *supra* note 10, at 26.

⁷⁵ 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).

⁷⁶ McLellan, *supra* note 1, at 58.

the country, male Jaycees invited and recruited working women to join.⁷⁷ Women associate members often became quite active in programming, but could not vote, hold office, or receive the awards that the Jaycees touted.⁷⁸ 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.⁷⁹

Where it detected these rebellious chapters, the U.S. Jaycees threatened to revoke their charters.⁸⁰ In response, some chapters filed suit on the ground that revocation constituted state action in violation of the Equal Protection Clause.⁸¹ 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.⁸² They sometimes won in the district courts.⁸³ But, by the mid-1970s, just as constitutional doctrine barring sex discrimination had begun to emerge,⁸⁴ the Supreme Court brought the brief period of robust state action doctrine to an end, foreclosing equal protection claims against public accommodations.⁸⁵ Each of the local Jaycees’ victories in district court was reversed when appellate courts found no state action.⁸⁶ 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.

⁷⁷ *Id.*

⁷⁸ *Id.* at 55.

⁷⁹ Epstein, *supra* note 44, at A2.

⁸⁰ *Id.*

⁸¹ Angela Taylor, *Women vs. Jaycees: It’s Up to the Courts*, N.Y. TIMES, Apr. 24, 1974, at 48.

⁸² *See id.*

⁸³ *See, e.g.*, *Junior Chamber of Commerce of Kan. City v. Mo. State Junior Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975) (reversing district court order granting preliminary injunction in favor of local Jaycees based on finding of no state action); *N.Y.C. Jaycees, Inc. v. U.S. Jaycees, Inc.*, 377 F. Supp. 481 (S.D.N.Y. 1974) (finding that national Jaycees’ revocation of local chapter’s charter constituted state action and its sex discrimination violated the Fifth Amendment). *But see* *Junior Chamber of Commerce of Rochester, Inc. v. U.S. Jaycees*, 495 F.2d 883 (10th Cir. 1974), *cert. denied*, 419 U.S. 1026 (1974) (affirming district court’s dismissal due to no state action).

⁸⁴ *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (rejecting sex classification in the award of military benefits). A majority of the Court would first apply intermediate scrutiny to sex. *See* *Craig v. Boren*, 429 U.S. 190, 218 (1976).

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.*

⁹⁰ Brief for Minn. State Chapter Nat’l Org. for Women as Amici Curiae Supporting Appellant at 30, *U.S. Jaycees v. McClure*, 305 N.W2d 764 (Minn. 1981) (No. 51171) (internal reference and quotation omitted) [hereinafter NOW Amicus Brief to Minnesota Supreme Court].

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*, BALTIMORE 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).

⁹⁷ Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 959 (2011) (“Litigation loss shapes advocates’ strategies. . . . [T]hey cultivate the loss to advance the complex process of reform.”).

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.

¹⁰⁵ Mary Jane Fine, *Old Ways Prevail as Mail Line Jaycees Jilt Woman*, PHILA. INQUIRER, Jan. 1, 1983, at B1.

¹⁰⁶ *See, e.g.,* U.S. Jaycees v. Superior Court of Santa Clara, 195 Cal. Rptr. 517, 518 (Cal. Ct. App. 1983).

Many chapters used this workaround.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.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.¹⁰⁹ Women joined and became leaders.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.¹¹¹ Between 1972 and 1985, women's share of professional jobs doubled.¹¹² The passage of the Equal Credit Opportunity Act of 1974 aided women to start businesses and secure loans.¹¹³ As more women joined the ranks of business, more women were qualified for and sought to join the Jaycees.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.¹¹⁵ Local chapter leaders and media began to perceive the integration of the Jaycees as

¹⁰⁷ Janice Mall, *About Women: Jaycees Vote to Keep Women Out—Again*, L.A. TIMES, Aug. 20, 1978, at G14.

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).

¹⁰⁹ *One Small Step for Womankind*, *supra* note 65, at 25.

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).

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 . . .").

¹¹² George Guilder, *Women in the Work Force*, ATLANTIC, Sept. 1986, <https://www.theatlantic.com/magazine/archive/1986/09/women-in-the-work-force/304924/> [<https://perma.cc/8F5S-ZNXD>] (women's share of management and banking/finance jobs went from 20 to 36% and from 9 to 39%, respectively).

¹¹³ *See* Courtney G. Joslin, *Discrimination in and out of Marriage*, 98 B.U. L. REV. 1, 22 (2018) (exploring the advocacy for the passage of the Equal Credit Opportunity Act of 1974).

¹¹⁴ De Angelo, *supra* note 95, at 3719.

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”¹¹⁶ 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.”¹¹⁷ 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.”¹¹⁸ In turn, women’s membership in the Jaycees advanced their professional lives and made Jaycees more appealing to other women.¹¹⁹

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.¹²⁰ In 1975, even as the organization voted against women’s full status, its spokesperson predicted that, “Eventually, women may come to be Jaycees members”¹²¹ According to U.S. Jaycees’ officials, opposition to women’s membership was “not on chauvinist grounds,”¹²² but “mostly for inertial reasons.”¹²³

The turn from the 1970s to 1980s, however, saw a retrenchment on women’s membership.¹²⁴ Conservatives took the helm of the national organization.¹²⁵ In 1978, U.S. Jaycees again voted against women’s full membership.¹²⁶ 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.¹²⁷ The 1980 president,

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.”).

¹¹⁷ Gloria Negri, *Janet Murphy Moves Among the Lawmakers*, BOS. GLOBE, Mar. 26, 1973, at 19.

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.

¹²² James F. Clarity, *Jaycees Retain Ban on Women Members: National Meeting Overwhelmingly Votes Against Allowing Full Participation by Females*, N.Y. TIMES, June 22, 1978, at A20; *see also* Nicholas C. Chriss, *Ban on Women Members Splits Jaycees: Urban-Rural Schism Deepens with Dec. 1 Confrontation Looming*, L.A. TIMES, Oct. 5, 1978, at E1 (indicating that the quote came from Jaycees’ headquarters).

¹²³ Lawrence Feinberg, *Annapolis Jaycee Chapter Punished on Women Issue*, WASH. POST, Oct. 9, 1975, at A8.

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 these rulings on state action as proof

¹²⁸ See *id.*; see also *U.S. Jaycees v. Superior Court of Santa Clara*, 195 Cal. Rptr. 517, 518–19 (Cal. Ct. App. 1983).

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.

¹³² *U.S. Jaycees v. McClure*, 709 F.2d 1560, 1561 n.1 (8th Cir. 1983) (citations omitted) (collecting sources articulating that the Jaycees are public accommodations). *But see* *U.S. Jaycees v. Bloomfield*, 434 A.2d 1379, 1381 (D.C. 1981) (holding that a Jaycees chapter "is not a place of public accommodation").

¹³³ See Mall, *supra* note 107, at G14.

¹³⁴ See generally Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

¹³⁵ Mall, *supra* note 107, at G14.

¹³⁶ See McLellan, *supra* note 1, at 54.

¹³⁷ See, e.g., *U.S. Jaycees v. Phila. Jaycees*, 490 F. Supp. 688, 689 (E.D. Pa. 1979); *U.S. Jaycees v. Superior Court of Santa Clara*, 195 Cal. Rptr. 518, 519 (Cal. Ct. App. 1983).

that the organization was not public and was free to deny women membership for purposes of public accommodation law—a distinctly different legal issue.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.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.¹⁴⁰ Resistance came from “small-town, conservative middle America, places where women tend to have low-level jobs.”¹⁴¹ Those chapters least likely to have qualified women applicants thus were most fearful of sex integration.¹⁴²

Conservative Jaycee leaders saw the election of Ronald Reagan as president in 1980 as an endorsement of their position. J. Terry 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.”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.¹⁴⁴ Bechtol expected that his conservatism would be vindicated in short order in litigation wins and social acceptance.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.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 1978.¹⁴⁷ The

¹³⁸ *U.S. Jaycees v. McClure*, 534 F. Supp. 766, 772 (D. Minn. 1982) (noting this argument and the distinction between the two questions).

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.

¹⁴⁴ See KEVIN M. KRUSE & JULIAN E. ZELIZER, *FAULT LINES: A HISTORY OF THE UNITED STATES SINCE 1974*, at 88–100 (2019) (describing the rise of religious right and new right and their embrace of Ronald Reagan as their messenger).

¹⁴⁵ See McLellan, *supra* note 1, at 54–55.

¹⁴⁶ See *id.* at 58.

¹⁴⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 609 (1984).

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.¹⁴⁸ 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.¹⁴⁹

Given the importance of the case, the Office of the Attorney General solicited the involvement of the National Organization for Women (NOW) as amicus.¹⁵⁰ Founded in 1966 as an “NAACP for women,” NOW listed among its leaders and founders civil rights lawyer Pauli Murray and author Betty Friedan.¹⁵¹ Its members, who were primarily white and middle class, had lobbied and litigated nationwide against sex discrimination in employment, public accommodations, credit, and beyond.¹⁵² 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.¹⁵³ NOW, 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.”¹⁵⁴

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

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”).

¹⁵² *See generally* KATHERINE TURK, EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE (2016) (describing legal campaigns with regard to women’s employment); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2011) (discussing NOW’s role in Title VII enforcement and protections for maternity and pregnancy); Sepper & Dinner, *supra* note 10 (documenting the campaign against sex discrimination in public accommodations during the 1970s).

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.¹⁵⁵

More pragmatist than idealist, they advanced arguments for what Professor Robert Tsai, another participant in this Symposium, calls practical equality.¹⁵⁶ Exclusion from full membership was problematic because it impaired women's careers and relegated them to a marginal and lesser role.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.¹⁵⁸ As this strategy suggests, the state decentered some of the parallels to race segregation that other actors (like the NAACP) subsequently would press.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.¹⁶⁰ The economic aspects of the Jaycees made evident the harms of its two-tiered membership structure.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.¹⁶² They were subordinated as second-class Jaycees.

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

¹⁵⁵ NOW Amicus Brief to Minnesota Supreme Court, *supra* note 90, at 2, 5.

¹⁵⁶ ROBERT TSAI, 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).

¹⁵⁷ NOW Amicus Brief to Minnesota Supreme Court, *supra* note 90, at 2, 5.

¹⁵⁸ See TSAI, *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).

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, 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.

¹⁶⁰ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 637–38 (1984).

¹⁶¹ See Taylor, *supra* note 81, at 48.

¹⁶² See McLellan, *supra* note 1, at 55.

which they can obtain from equal participation in the U.S. Jaycees.”¹⁶³ 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.¹⁶⁴ 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,¹⁶⁵ individuals gained “a network of upwardly mobile peers and access to the business and civic leaders of the community”¹⁶⁶ through the Jaycees. Jaycees chapter presidents sometimes sat on the chamber of commerce *ex officio*.¹⁶⁷ 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.¹⁶⁸ Many employers paid dues and recommended that their employees join the Jaycees.¹⁶⁹ 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, “grat[ing] harshly against the grain” of the state civil rights act as a whole.¹⁷⁰ 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.”¹⁷¹ The state urged courts to interpret the Jaycees’ constitutional freedom of association with sensitivity to the statutory and cultural commitments of the time.¹⁷²

In its defense, the U.S. Jaycees asserted a sort of half constitutional right.¹⁷³ Prior precedent treated freedom of association as a mechanism to advance other constitutional rights—rights to petition, expression, exercise religion, make decisions about

¹⁶³ Respondent’s Brief on Certified Issue at 19, *U.S. Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981) (No. 51171) [hereinafter Brief on Certified Issue] (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, NOW LDEF Papers).

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.

¹⁷³ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 609 (1984).

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

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”).

¹⁷⁵ See, e.g., Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1324–43 (2017); Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1080 (2016); Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 48–55 (2012). Before the Eighth Circuit, Minnesota made this argument: “[F]reedom of association is a derivative right which protects the enumerated first amendment rights of speech, press, petition, and assembly, as well as the judicially recognized right of privacy. It is not an independent constitutional right.” Brief of Appellees Marilyn E. McClure et al. at 8, *U.S. Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983) (No. 82-1493-MN) [hereinafter Brief of Appellees Marilyn E. McClure et al.] (on file with the Mudd Library, Princeton University, American Civil Liberty Union Papers).

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 See *id.* (ruling the United States Jaycees a place of public accommodation).

¹⁷⁹ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 631 (1984) (O’Connor, J., concurring).

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.”¹⁸⁴ 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.¹⁸⁵

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.¹⁸⁶ 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.¹⁸⁷ The passage of Title VII—she said—lent support to seeing the state’s interest in ending sex discrimination in public accommodations as compelling.¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰ 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.”¹⁹¹ 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.¹⁹²

At the Supreme Court, the combined weight of economic opportunity and membership organization equality again tipped the scales in favor of the female Jaycees.¹⁹³

¹⁸⁴ 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. *Id.* at *18.

¹⁸⁵ *U.S. Jaycees v. McClure*, 305 N.W.2d 764, 772 (Minn. 1981).

¹⁸⁶ *U.S. Jaycees v. McClure*, 534 F. Supp. 766, 774 (D. Minn. 1982).

¹⁸⁷ *See id.* at 771–72.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 772.

¹⁹⁰ *U.S. Jaycees v. McClure*, 709 F.2d 1560, 1576 (8th Cir. 1983).

¹⁹¹ *Id.* at 1573.

¹⁹² *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”).

¹⁹³ *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.¹⁹⁴ 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."¹⁹⁵ 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.¹⁹⁶

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.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ 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."²⁰⁰ O'Connor determined that Jaycees was decidedly on the commercial side, reflecting little expressive value.²⁰¹

Like Judge Murphy, Justice O'Connor analogized the case to Title VII claims against employers and unions, another institution mediating labor force promotion.²⁰² 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."²⁰³ Like the law firm, the Jaycees posed "a relatively easy case."²⁰⁴ The organization, O'Connor wrote,

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.”²⁰⁵ 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.²⁰⁶ His opinion for the Court emphasized both the second-class status of women within the organization and its impact on gender hierarchy within society.²⁰⁷ Although the anti-subordinating 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.²⁰⁸

From the moment of the filing of the complaint, Minnesota explicitly characterized the case as about subordination of women.²⁰⁹ It requested that the hearing examiner restrain Jaycees from “treating its female members in an inferior, second class manner.”²¹⁰ 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.”²¹¹ At the time the litigation began, the antisubordination theory of equal protection had been articulated

²⁰⁵ *Id.* at 639.

²⁰⁶ See Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2119–20 (2018) (discussing the Supreme Court’s “context-sensitive, substantive-equality-promoting view of the First Amendment” until the 1970s).

²⁰⁷ See *Roberts*, 468 U.S. at 625.

²⁰⁸ Susan Frelich Appleton, *Liberty’s Forgotten Refugees? Engendering Assembly*, 89 WASH. U. L. REV. 1423, 1432 (2012).

²⁰⁹ *McClure v. U.S. Jaycees*, No. 1800-7802, 1979 WL 61037 (Minn. Off. Admin. Hrgs. Oct. 9, 1979) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, NOW LDEF Papers); Complainant’s Brief at 2, 9–10, *McClure v. U.S. Jaycees*, No. 1800-7802, 1979 WL 61037, *18 (Minn. Off. Admin. Hrgs. Oct. 9, 1979) [hereinafter *Minn. Complainant’s Brief Before Hum. Rights Exam’r*] (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, NOW LDEF Papers).

²¹⁰ *Minn. Complainant’s Brief Before Hum. Rights Exam’r*, *supra* note 209, at 9.

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.²¹² 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.”²¹³ Phrased in the language of equal citizenship, anti-caste, and antisubordination, these theories advanced a vision of equality that required attacking those social structures that maintained an underclass of historically oppressed.²¹⁴ Contrary to claims made by some scholars,²¹⁵ 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.”²¹⁶ 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.”²¹⁷ 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”²¹⁸ 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.”²¹⁹

The facts, however, belied the U.S. Jaycees’ claimed freedom to associate on an exclusive basis.²²⁰ At the working level, men and women already participated in planning and program implementation with no distinction between individual and associate members.²²¹ 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.²²²

The U.S. Jaycees’ two-tiered structure created—NOW argued—“a ‘together but unequal’ environment with many serious disadvantages to the second-class participants.”²²³ 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.²²⁴ By contrast, the state argued, the experience of Jaycee “men and women meeting as equals” advanced antistatutory goals, by countering stereotypes about women’s capacities and leading to higher-powered jobs for women through personal contacts.²²⁵ 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.²²⁶ 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.”²²⁷

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.”²²⁸ 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.

²²⁸ Reva B. Siegel & Linda Greenhouse, *The Unfinished Story of Roe v. Wade, in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 53, 62 (Melissa Murray et al. eds., 2019).

the benefits.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.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.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.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.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.²³⁴ If the U.S. Jaycees prevailed, male and female members in Minneapolis and St. Paul would continue to associate with each other.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.²³⁶

The Supreme Court notably emphasized the antisubordination values in its construction of the Constitution.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

²²⁹ Transcript of Hearing at 198, 201–04, *Minnesota v. U.S. Jaycees*, No. HR-79-014-6B (Off. Hearing Examiners for Dep't of Hum. Rts.).

²³⁰ *Id.* at 198, 204.

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).

²³² *Id.* at 188–95.

²³³ Findings of Fact, Conclusions of Law & Order, *supra* note 184, at *15.

²³⁴ *U.S. Jaycees v. McClure*, 709 F.2d 1560, 1580 (8th Cir. 1983) (Lay, C.J., dissenting).

²³⁵ *See id.*

²³⁶ *See id.*

²³⁷ *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 610, 638 (1984).

privacy.²³⁸ The opinion notes that in 1981, women associate members represented about two percent of the Jaycees' total membership.²³⁹ 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.²⁴⁰ Women's equal access would not diminish the opportunities of male Jaycees or destroy its purpose.²⁴¹ 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."²⁴² These stereotypes—enforced in Jaycees through second-class membership—harmed individual dignity and affected "participation in political, economic, and cultural life."²⁴³ 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."²⁴⁴ 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.²⁴⁵ Indeed, the Supreme Court would have to revisit the issue of men's clubs in 1987 and again in 1988.²⁴⁶ It would take another decade from *Roberts* before men's clubs fell out of favor.²⁴⁷ Many people were not persuaded that sex-segregated membership organizations were wrongful in a moral (or legal) sense.²⁴⁸ 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.²⁴⁹ Regular reports surface about public figures and large employers affirmatively imposing sex segregation in activities outside of the workplace or after business hours.²⁵⁰ Outside of work, sex-segregated activities,

²⁴⁵ See, e.g., David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 51 (2011) (analyzing sex segregation); see also Katherine Rosman, *Is Women-Only Club the Wing Discriminating in a Bad Way?*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/style/the-wing-investigation.html> [<https://perma.cc/9KD7-WC6A>] (describing women-only workspaces).

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).

²⁴⁷ Fred L. Somers, Jr., *Open or Closed Door? In Club Wars, Privacy and Choice Battle Freedom from Discrimination*, BUS. L. TODAY, Nov./Dec. 1994, at 26–31 (defending the practice of maintaining men-only clubs).

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.”).

²⁴⁹ Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 49 (2018); see also Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1756–60 (1998); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2132–36, 2139–45, 2173–77 (2003).

²⁵⁰ Working Relationships in the #MeToo Era, LEAN IN, <https://leanin.org/sexual-harass>

athletics, and networks affect women's career progress.²⁵¹ 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.²⁵² 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.²⁵³

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.²⁵⁴ 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.²⁵⁵ 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.

ment-backlash-survey-results [<https://perma.cc/PZN9-MZDL>] (last visited Dec. 4, 2019) (reporting that nearly half of male managers surveyed reported feeling “uncomfortable participating in a common work activity with a woman, such as mentoring, working alone, or socializing together”).

²⁵¹ 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).

²⁵² 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).

²⁵³ Tippett, *infra* note 254, at 5–6.

²⁵⁴ 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).

²⁵⁵ See, e.g., Drinan, *supra* note 64; *One Small Step for Womankind*, *supra* note 65.