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PRIVATE CLUBS AND EMPLOYMENT DISCRIMINATION: DOES FEDERAL LAW APPLY?

I. Introduction

From April 1977 to December 1977, Alfred A. Hudson worked as a maintenance man for the Charlotte Country Club.¹ The day after he was fired from that job, he filed a complaint with the Equal Employment Opportunity Commission² (the Commission). Hudson alleged that his termination was racially motivated³ and thus in violation

1. See *Hudson v. Charlotte Country Club*, 535 F. Supp. 313, 314 (W.D.N.C. 1982).

2. The Equal Employment Opportunity Commission (the Commission) was created by title VII of the Civil Rights Act of 1964 (Title VII), Pub. L. No. 88-352, 78 Stat. 241, 258 (codified at 42 U.S.C. § 2000e-4 (1982)), and became operational July 2, 1965. The Commission has responsibility for enforcing Title VII as well as the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (1982)) and the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986)). The Commission maintains its headquarters in Washington, D.C., but staffs offices throughout the country. See OFFICE OF THE FEDERAL REGISTER, THE UNITED STATES GOVERNMENT MANUAL 1987/1988, at 528-33.

In 1984, the most recent year for which an annual report is available, the Commission received 93,751 charges of racial discrimination of which the greatest number (33,108) were claims of discharge based on race. The next highest number of complaints based on race related to terms and conditions of employment (14,579). The total of all charges for 1984 was 207,542. Most complainants, however, claim a number of areas of discrimination. For example, Alfred Hudson claimed racial discrimination in both discharge and terms and conditions of employment. Therefore, the number 207,542 is larger than the number of complainants. See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NINETEENTH ANN. REP. 20 (1984) (available at the *Fordham Urban Law Journal* office).

3. See *Hudson*, 535 F. Supp. at 314. Under Title VII, one of the federal laws which the Equal Employment Opportunity Commission enforces, the term "race" has caused few problems of interpretation. This clarity stems from Title VII's use of additional terms, "color" and "national origin," to designate types of persons against whom one may not discriminate in employment. See, e.g., 42 U.S.C. § 2000e-2(a)(1) (1982) (making it unlawful for employers to discriminate on the basis of race, color, religion, sex or national origin). Thus, Title VII clearly protects American Indians, Mexican Americans, Hispanics, blacks and whites. See A. LARSON, EMPLOYMENT DISCRIMINATION § 68.00, at 13-9 to -10 (1987) [hereinafter LARSON]. The Commission has stated that a discriminatory preference for a light-skinned black over a dark-skinned black constitutes discrimination based on color. *Id.* § 68.30, at 13-13. For a discussion of the definition of race under other federal law, see *infra* note 12.

of title VII of the Civil Rights Act of 1964 (Title VII).⁴ In addition, he alleged that the payment and treatment accorded him while employed had been less than that provided to white employees, another Title VII violation.⁵

Ordinarily the filing of such a complaint with the Commission would start a complex administrative procedure.⁶ In Hudson's case, however, the Commission lacked jurisdiction.⁷ Title VII created the Commission and defined those employers within its jurisdiction.⁸ A bona fide private membership club is not an employer within the scope of the statute.⁹ Hence, the Commission dismissed Hudson's charges for lack of jurisdiction over the Charlotte Country Club.¹⁰

Hudson appealed the Commission's decision to a federal court,¹¹ alleging, in addition, a violation of section 1981 of title 42 of the United States Code (section 1981),¹² which also prohibits employment

4. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 258 (codified at 42 U.S.C. § 2000e-4 (1982)). Congress has amended Title VII twice: Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (clarifying that sex discrimination includes discrimination on basis of pregnancy, childbirth or related medical conditions); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (making numerous changes including expansion of coverage to employees of local, state and federal governments).

5. *Hudson*, 535 F. Supp. at 314. For a list of illegal employment practices under Title VII, see *infra* note 22.

6. See *infra* notes 28-35 and accompanying text.

7. *Hudson*, 535 F. Supp. at 314.

8. 42 U.S.C. §§ 2000e-4, 2000e(b) (1982).

9. *Id.* § 2000e(b). For a discussion of what constitutes a bona fide private membership club, see *infra* notes 83-109 and accompanying text.

10. *Hudson v. Charlotte Country Club*, 535 F. Supp. 313, 314 (W.D.N.C. 1982).

11. *Id.* Section 2000e-5(f)(1) of title 42 of the United States Code grants the right to appeal a Commission decision to a federal court.

12. Section 1981 codifies the rights and duties of all persons in the United States:

All persons within the jurisdiction of the United States shall have the same right in every [s]tate and [t]erritory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1982).

Defining "race" under § 1981 has proven more problematic than under Title VII. The Supreme Court has recently settled some of the dispute in *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, *reh'g denied*, 107 S. Ct. 3244 (1987). Justice White wrote that "Congress [in 1866] intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry." *Id.* at 2028. Thus, if the plaintiff in *Saint Francis College* could show that he had been denied tenure because he was an Arab, his § 1981 claim would survive a motion for summary judgment. *Id.*; see also *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019, 2022 (1987) (Jews are protected by § 1982 because they were considered distinct race at time Congress originally adopted § 1982).

discrimination based on race, but does not exempt private clubs from its requirements.¹³ The court found the Charlotte Country Club exempt from the requirements of Title VII and then further held that the Title VII exemption "supercedes and limits [section] 1981 so as to bar [an] employment discrimination suit under [section] 1981 as well."¹⁴ Granting summary judgment for the defendant-employer, the court never reached the merits of Hudson's complaint.

Hudson's case is one of four district court decisions¹⁵ addressing the problem of employment discrimination by private clubs. These

13. At present, § 1981 reaches private acts of racial discrimination, *i.e.*, there is no state action requirement. On April 25, 1988, however, the Supreme Court voted 5-to-4 to invite argument over whether that application of § 1981 (as expressed in *Runyon v. McCrary*, 427 U.S. 160 (1976)) should be overruled. *See Patterson v. McLean Credit Union*, 108 S. Ct. 1419 (1988). Oral argument took place on October 12, 1988. *Patterson v. McLean Credit Union*, 57 U.S.L.W. 3295 (Oct. 25, 1988).

In *Runyon*, parents of children excluded from private schools on racial grounds sued under § 1981. The Supreme Court held that § 1981 covers racial discrimination in private contracts, such as the one between the schools and the public. *Runyon*, 427 U.S. at 172-73. Justice Stewart wrote that it was "well established" that § 1981 reaches private acts of discrimination. *Id.* at 168. The dissent disagreed, stating that *Runyon* was the first Supreme Court case to consider the issue. *Id.* at 192 (White, J., dissenting).

In *Patterson*, the Supreme Court originally heard arguments as to whether § 1981 reaches racial harassment in the workplace. The decision to hear arguments on the validity of *Runyon* "provoked . . . blistering dissenting opinions by Justice[s] Blackmun and Stevens, widespread media coverage, and grave concern among civil rights advocates concerning the expected longevity of *Runyon*." Schwartz & Kaufman, *Civil Rights in Jeopardy*, N.Y.L.J., May 17, 1988, at 1, col. 1. A decision to overrule *Runyon* "would be the first time in modern history, and perhaps ever, that [the Supreme Court] had overturned a major precedent expanding the rights of racial minorities." Taylor, *Court, 5-4, Votes to Restudy Rights in Minority Suits*, N.Y. Times, Apr. 26, 1988, at A1, col. 6.

Were *Runyon* overruled, this Note's argument that § 1981 should be viewed as a separate remedy from Title VII would become moot. Section 1981 would be rendered "virtually redundant with [other statutes] that bar states from discriminating against racial minorities in making laws on contracts and other ways." *Id.* at A24, col. 4.

Were *Runyon* overruled, this Note's argument that private clubs should not be exempt from Title VII would become stronger. Without § 1981, private club employees would not even have the possibility of a remedy for employment discrimination. As Justice Blackmun noted, "[a]lthough it is probably true that most racial discrimination in the employment context will continue to be redressable under other statutes [than § 1981], it may be that racial discrimination in certain other contexts is not actionable independently of [§] 1981." *Patterson*, 108 S. Ct. at 1422 (Blackmun, J., dissenting). Private clubs are one of those "other contexts."

14. *Hudson*, 535 F. Supp. at 317.

15. *Baptiste v. Cavendish Club*, 670 F. Supp. 108 (S.D.N.Y. 1987) (former employee alleged violations of Title VII and § 1981); *Guesby v. Kennedy*, 580 F. Supp. 1280 (D. Kan. 1984) (black cook alleged she was fired by club on racial grounds); *Hudson v. Charlotte Country Club*, 535 F. Supp. 313 (W.D.N.C. 1982) (black maintenance

courts are divided¹⁶ on the issue of whether a private club—exempt from employment discrimination suits based on race under Title VII—is also exempt under section 1981.¹⁷ Two courts held that the Title VII exemption for private clubs impliedly amended section 1981 so as to bar an employment discrimination suit against a private club.¹⁸ The other two courts specifically rejected such an implied amendment of section 1981, viewing section 1981, instead, as the source of a separate remedy from that provided by Title VII.¹⁹

Part II of this Note examines the general history and function of Title VII and section 1981. Part III discusses the problems inherent in defining an organization as a private club. Part IV examines whether Title VII impliedly amends section 1981 with respect to the private club exemption. The arguments for and against finding an implied amendment of section 1981 focus on rules of statutory construction and legislative history. The argument for finding an implied amendment stems from a line of cases which holds that a section 1981 plaintiff does not have a cause of action against a private club that denies him membership. Part V argues that these membership discrimination cases differ radically from employment discrimination cases, which address entirely different sets of rights. This Note concludes therefore that courts should consider Title VII and section 1981 as

man alleged his termination was racially motivated and that payment and treatment accorded him was less than that provided white employees); *Kemerer v. Davis*, 520 F. Supp. 256 (E.D. Mich. 1981) (former employee, a white security guard, alleged that black manager of club fired him on racial grounds and that treatment accorded him was less than that received by black employees).

16. *Kemerer* and *Hudson* held that private clubs exempt under Title VII were also exempt under § 1981. *Guesby* and *Baptiste* held that a § 1981 claim could be maintained despite the Title VII exemption.

17. The Supreme Court has not reached the issue of whether the Title II, 42 U.S.C. §§ 2000a-2000a-6 (1982), private club exemption applies in a § 1981 action (Title II covers access to places of public accommodation and thus cases involving membership in and not employment by private clubs). On the three occasions when it might have reached this issue, the Supreme Court found another direction from which to approach the problem presented. See *Runyon v. McCrary*, 427 U.S. 160, 172 n.10 (1976) (private school is neither place of public accommodation nor exempt private club); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438-39 (1973) (recreation association that opened membership to all white people within 3/4 mile area was not genuine private club); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969) (community pool that permitted membership to all white people within area was not bona fide private club; nonwhite plaintiff had right to use it). The only court of appeals presented with the question of whether § 1981 is subject to the private club defense has refused to pass on the continued validity of that holding. *Wright v. Salisbury Club*, 632 F.2d 309, 311 n.5 (4th Cir. 1980).

18. See *Hudson*, 535 F. Supp. at 317; *Kemerer*, 520 F. Supp. at 260.

19. See *Baptiste*, 670 F. Supp. at 110; *Guesby*, 580 F. Supp. at 1286.

two separate remedies. Finally, this Note recommends that because nothing in the legislative history supports the private club exemption and because club members' right to freedom of association does not extend to their relationships with club employees, Congress should repeal that part of Title VII that provides such an exemption.

II. An Overview of Title VII and Section 1981

A brief comparison of the history²⁰ and regulatory framework²¹ of Title VII and section 1981 sheds light on the potential availability of each statute to the plaintiff claiming employment discrimination generally, and more specifically, to the plaintiff alleging that a private club has engaged in employment discrimination.²²

A. The Purpose of Title VII

Congress enacted title VII of the Civil Rights Act of 1964 (Title VII) to achieve equality of employment opportunity by eliminating discrimination based on race.²³ Other titles of the 1964 Act aim to

20. See *infra* notes 23-27, 40-53 and accompanying text.

21. See *infra* notes 28-39, 54-59 and accompanying text.

22. Title VII defines unlawful discrimination by an employer:

[It shall be unlawful for an employer to] fail or refuse to hire or to discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or . . . limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a) (1982).

Title VII also outlines unlawful employment practices by employment agencies, *id.* § 2000e-2(b), labor organizations, *id.* § 2000e-2(c), and training programs, *id.* § 2000e-2(d). In addition, other requirements of the statute protect employees from reprisals resulting from their opposition to illegal employer practices or their cooperation in Commission proceedings. *Id.* § 2000e-3(a). Finally, Title VII proscribes employment advertisements that indicate any preference based on race, color, religion, sex or national origin. *Id.* § 2000e-3(b).

23. Although racial discrimination was the impetus for the enactment of Title VII, the statute also prohibits discrimination on the basis of religion, national origin or sex. 42 U.S.C. § 2000e-2(a) to -2(d) (1982). The House Report on the 1964 Civil Rights Act, in explaining the reasons for the Act, states the following: "In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our [n]ation." H.R. REP. NO. 914, 88th Cong., 2d Sess. 3, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2393.

eliminate discrimination in the areas of voting,²⁴ education²⁵ and access to public accommodations.²⁶ Moreover, Congress intended that all of these protected rights complement each other.²⁷

B. Procedure Under Title VII

Title VII sets up a formal procedure with strict deadlines which all claimants must follow.²⁸ After deferral, when appropriate, to a state or local agency and after investigation of a claim of discrimination,²⁹

24. 42 U.S.C. § 1971 (1982). Title I of the 1964 Civil Rights Act was intended to "meet problems encountered in the operation and enforcement of the Civil Rights Acts of 1957 and 1960, by which the Congress took steps to guarantee to all citizens the right to vote without discrimination as to race or color." 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2394. The 1964 Act gave priority to voting rights litigation and addressed the problem of literacy tests. *See id.*

25. 42 U.S.C. §§ 2000c to 2000c-9 (1982).

26. *Id.* §§ 2000a to 2000a-6.

27. *See, e.g.*, Additional Views on H.R. 7152 of Hon. William M. McCulloch, 1964 U.S. CODE CONG. & ADMIN. NEWS 2487, 2513.

"The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or a hotel is a shallow victory where one's pockets are empty." *Id.*

28. Any person who believes he has been discriminated against may file a charge in writing with the Equal Employment Opportunity Commission (the Commission) within 180 days of the perceived discrimination, 42 U.S.C. § 2000e-5(e) (1982), as long as the employer is not excluded from the Commission's jurisdiction by the terms of Title VII. An "employer" is "a person engaged in an industry affecting commerce who has [15] or more employees [but not] the United States, a corporation wholly owned by the [g]overnment of the United States, an Indian tribe, [certain departments and agencies] of the District of Columbia . . . or a bona fide private membership club" *Id.* § 2000e-(b). The Commission then serves notice of the charge on the employer within [10] days. *Id.* § 2000e-5(b). Before investigating the claim, the Commission refers charges to state or local fair employment practices agencies for 60 days if that state or local government has a relevant fair employment practices law. *Id.* § 2000e-5(c). Congress designed this procedure to allow the states "every opportunity to employ their expertise and experience without premature interference by the [f]ederal government." 110 CONG. REC. 12,725 (1964) (remarks of Sen. Humphrey).

A discrimination complainant cannot bring a Title VII action in a federal court after a state court has reviewed and affirmed a state administrative agency's unfavorable decision. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 (1981) (5-4 decision) (applying 28 U.S.C. § 1738 which requires federal courts to afford same full faith and credit to state court judgments that would apply in state's own court).

29. *See supra* note 22 for a listing of discriminatory practices under Title VII. The deferral to a state or local agency is provided for by 42 U.S.C. § 2000e-5(c) (1982). It reads as follows:

In the case of an alleged unlawful employment practice occurring in a [s]tate, or political subdivision of a [s]tate, which has a [s]tate or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a [s]tate or local authority to grant or seek relief from such

the Commission³⁰ determines whether there is reasonable cause to believe the employee's charges.³¹ If it finds cause, the Commission initially attempts to remedy the alleged unlawful practice through "conference, conciliation and persuasion."³² If the Commission is unable to secure a conciliation agreement that it finds acceptable, it has the power to bring a civil action.³³ If the Commission chooses not to sue, the complainant may sue independently.³⁴ In addition, the Commission may initiate suits or may intervene in civil actions brought by private parties.³⁵

To encourage complainants to seek a remedy under Title VII, Congress attempted to simplify the complaint process. A complainant may begin the process without the assistance of counsel. Alternatively, Title VII provides for the appointment of an attorney for the complainant and for a waiver of fees or other court costs.³⁶ A court may order "such affirmative action as may be appropriate."³⁷ Potential remedies include reinstatement, hiring or up to two years of back pay.³⁸ Neither compensatory nor punitive damages are available in a Title VII action.³⁹

practice . . . no charge may be filed [with the Commission] . . . before the expiration of [60] days after proceedings have been commenced under the [s]tate or local law.

Id.

30. See *supra* note 2 for a discussion of the Commission.

31. 42 U.S.C. § 2000e-5(b) (1982).

32. *Id.*

33. *Id.* § 2000e-5(f)(1); see also *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 868 (5th Cir. 1975) (Commission has "broad discretion" to determine which suits it will bring and which it will leave to private plaintiffs), *cert. denied*, 425 U.S. 944 (1976).

34. 42 U.S.C. § 2000e-5(f)(1) (1982). The complainant must file his civil action within 90 days of receiving a right-to-sue letter from the Commission. A party may demand such a letter from the Commission 180 days after the charge was first filed.
Id.

35. *Id.* § 2000e-6(a). The statute originally provided that where there was a pattern or practice of discrimination, the Attorney General could bring a suit on his own initiative. See *United States v. Jordan*, 302 F. Supp. 370, 379 (E.D. La. 1969) (Attorney General properly instituted suit against restaurant that had become "club" in order to exclude blacks); see also *Palmer v. Thompson*, 403 U.S. 217, 268-69 (White, J., dissenting) (discussing 42 U.S.C. § 2000b(a), a similar provision to § 2000e-6(a)). With respect to discrimination by private employers, the right to bring suit was transferred to the Commission in 1972. 42 U.S.C. § 2000e-6(e) (1982). The Attorney General still has the right to initiate litigation with respect to discrimination by state or local governments or political subdivisions. See *Reorganization Plan No. 1 of 1978*, § 5, 92 Stat. 3781 (codified at 42 U.S.C. § 2000e-4 (1982)).

36. 42 U.S.C. § 2000e-5(f)(1) (1982).

37. *Id.* § 2000e-5(g).

38. *Id.*

39. See, e.g., *White v. Washington Pub. Power Supply Sys.*, 692 F.2d 1286, 1290

C. History of Section 1981

Section 1981⁴⁰ originated in the Civil Rights Act of 1866.⁴¹ Congress enacted the 1866 Act during the post-Civil War Reconstruction period⁴² to protect the rights of the newly-freed slaves.⁴³ The law was later reenacted as a part of the Enforcement Act of 1870.⁴⁴

Because courts interpreted the statute restrictively, before 1968 very few plaintiffs brought suit under section 1981.⁴⁵ In that year,

(9th Cir. 1982) (punitive damages are not recoverable under Title VII); *Robinson v. City of Lake Station*, 630 F. Supp. 1052, 1064 (N.D. Ind. 1986) (damages for pain and suffering are compensatory and not recoverable under Title VII).

40. See *supra* note 12 for the text of § 1981.

41. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. Section 1 of the Act contains the following:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [t]hat all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every [s]tate and [t]erritory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

Id. § 1 (codified as amended at 42 U.S.C. § 1981 (1982)).

42. Reconstruction refers to the era following the Civil War when the former Confederate states were closely controlled by the federal government. See generally J. RANDALL & D. DONALD, *THE CIVIL WAR AND RECONSTRUCTION* (1969).

43. From late 1865 through early 1866, the Southern states passed laws referred to as the Black Codes. H. BELZ, *EMANCIPATION AND EQUAL RIGHTS* 113-14 (1978). The Codes represented an attempt to keep the former slaves in an inferior position "by restricting their access to ordinary civil rights and liberties that white persons enjoyed." *Id.* at 114. The Black Codes proscribed ownership of arms by blacks and criminalized the act of educating former slaves. See Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 40 n.37 (1980) [hereinafter *Section 1981*].

44. See HON. C. RICHEY, *MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL DISTRICT COURTS D1-1* (1985). The Act of May 31, 1870, ch. 114, 16 Stat. 144 reads as follows: "And be it further enacted, [t]hat the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby reenacted . . ." See also *Section 1981, supra* note 43, at 36.

45. See *Hurd v. Hodge*, 334 U.S. 24, 31 (1948) (§ 1982 focuses on governmental action and "does not invalidate private restrictive agreements"). In *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926), *Corrigan*, the white defendant, covenanted not to sell her property to a black buyer but later contracted to do so. The Supreme Court in *Corrigan* held that legislation enacted to enforce the thirteenth amendment

however, the Supreme Court interpreted a related statute,⁴⁶ section 1982 of title 42 of the United States Code (section 1982),⁴⁷ as reaching private discrimination in the sale of rental property. In *Jones v. Alfred H. Mayer Co.*,⁴⁸ Justice Stewart wrote that the congressional intent behind section 1982 was "to prohibit all racially motivated deprivations of the rights enumerated in the [Civil Rights Act of 1866]."⁴⁹

Immediately following *Jones*, courts refused to apply section 1981 to private actions—despite *Jones*' determination that section 1982 applied to private actions.⁵⁰ These courts reasoned that sections 1981

only protects blacks against slavery and "does not in other matters protect the rights of persons of the negro race." *Id.* at 330; *The Civil Rights Cases*, 109 U.S. 3, 17 (1883) ("civil rights, such as are guaranteed by the Constitution . . . cannot be impaired by the wrongful acts of individuals, unsupported by [s]tate authority . . . [Such an act by an individual] is simply a private wrong, or a crime of that individual"); *see also* *Hodges v. United States*, 203 U.S. 1, 16 (1906) (legislation enacted to enforce thirteenth amendment can only punish conduct that actually enslaves someone), *overruled in pertinent part*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968).

46. Sections 1981 and 1982 both derive from the original 1866 statute. *See* *Runyon v. McCrary*, 427 U.S. 160, 170 (1976). For the texts of §§ 1981 and 1982 and the original statute, *see supra* note 12, *infra* note 47 and *supra* note 41, respectively.

47. 42 U.S.C. § 1982 (1982) provides the following: "All citizens of the United States shall have the same right, in every [s]tate and [t]erritory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

48. 392 U.S. 409 (1968).

49. *Id.* at 426. Justice Stewart reasoned that because § 2 of the Civil Rights Act of 1866 provided criminal penalties for anyone who deprived another, "under color of law," of the rights enumerated in the statute, § 1, which did not use the language "under color of law," must apply to all—public and private—discriminatory deprivations of rights. *See id.* at 424-26.

Justice Stewart stated that Congress' power to enact § 1982 derived from the thirteenth amendment. *Id.* at 439. The thirteenth amendment to the United States Constitution states as follows: "Section 1: Neither slavery nor involuntary servitude . . . shall exist within the United States. Section 2: Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII.

When Congress reenacted the Civil Rights Act of 1866 through the Enforcement Act of 1870, the words "all persons born in the United States" became "all persons within the jurisdiction of the United States" in what is now § 1981. *See supra* notes 12, 41. Similar language, however, in § 1982 stayed the same. *See supra* notes 41, 47. Because the fourteenth amendment, but not the thirteenth distinguishes citizens from noncitizens, some believe that § 1981 enforces the former rather than the latter. *See Section 1981, supra* note 43, at 36. Others disagree. *See Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1197 n.25 (D. Conn. 1974).

50. *See Harrison v. American Can Co.*, 2 Fair Empl. Prac. Cas. (BNA) 1 (S.D. Ala. 1969) (§ 1981 not intended to reach private conduct; nor does § 1981's

and 1982 were two separate statutes covering different areas of discrimination.⁵¹ Subsequently, several appellate courts read *Jones* to hold that if section 1982 reached all racial discrimination, section 1981 must also reach such discrimination—including racial discrimination in private employment.⁵² The Supreme Court later affirmed this position in *Johnson v. Railway Express Agency*.⁵³

D. Procedure Under Section 1981

While section 1981 clearly prohibits racial discrimination, the statute does not provide for methods of enforcement.⁵⁴ Therefore, courts

language, "to make and enforce contracts," plainly apply to employment discrimination charges).

In *Patterson v. McLean Credit Union*, 108 S. Ct. 1419 (1988), the Supreme Court will reconsider whether § 1981 should apply to private acts of racial discrimination. See *supra* note 13 for a discussion of the *McLean* case. Another recent case illustrating the continuing controversy over the scope of § 1981 is *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987) (en banc). There, the Fifth Circuit held that § 1981 permits drawing distinctions between citizens and aliens, *i.e.*, that it is acceptable to discriminate against a party (here, a plaintiff seeking credit) on the basis of his noncitizen status. *Id.* at 1345. The opinion, foreshadowing the *McLean* case, noted that three present members of the Supreme Court believe § 1981 should not reach private racial discrimination. *Id.* at 1351 (three members noted were Justices Stevens, White and then Justice Rehnquist). In *Bhandari*, Judge Gee stated that he believes § 1981 "directs [s]tates and [t]erritories to grant each and every group of humans, no matter how defined or classified, the same rights in their courts and under their laws as they grant white citizens—no more, no less." *Id.* at 1345; see also McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529, 530 (1984) (legislative history shows § 1981 was not intended "to promote the civil rights of the nation's newly emancipated black citizens, but rather to respond to the plight of another aggrieved racial minority—the Chinese of California").

51. See *Runyon v. McCrary*, 427 U.S. 160, 192-214 (1976) (White, J., dissenting) (discussing the legislative history of § 1981 and concluding that the construction of § 1982 in *Jones v. Alfred H. Mayer Co.* does not require that § 1981 be construed in a similar manner). But see *Runyon*, 427 U.S. at 190 (Stevens, J., concurring) ("incongruous to give those two sections a fundamentally different construction").

52. See, *e.g.*, *Long v. Ford Motor Co.*, 496 F.2d 500, 503 (6th Cir. 1974) ("[i]t is settled that [§] 1981 prohibits racial discrimination in private employment"); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621, 623 (8th Cir. 1972) (court follows reasoning of *Jones* decision); *Caldwell v. National Brewing Co.*, 443 F.2d 1044, 1046 (5th Cir. 1971) (court assumes § 1981 covers private employment for purposes of plaintiff's complaint), *cert. denied*, 405 U.S. 916 (1972).

53. 421 U.S. 454, 459-69 (1975). But see *supra* note 13 for a discussion of *Patterson v. McLean Credit Union*, where on April 25, 1988, the Supreme Court requested reargument on the issue of whether § 1981 should apply to private acts of racial discrimination.

54. See *supra* note 12 for the text of § 1981.

themselves have evolved procedures for applying the Civil Rights Act of 1964 (the Act).⁵⁵ For example, section 1981 does not specify a statute of limitations.⁵⁶ Courts thus import the relevant state statute of limitations from the jurisdiction in which the complaint was filed.⁵⁷ Similarly, section 1981 does not specify what remedies are available to a plaintiff suing under its provisions.⁵⁸ Courts have held that a section 1981 plaintiff may seek compensatory and punitive damages, as well as those remedies available to a Title VII plaintiff.⁵⁹

E. Title VII and Section 1981: Relative Advantages and Disadvantages

Two federal private remedies are available to a person who has been the victim of employment discrimination on the basis of race.⁶⁰ First, one can begin the administrative proceedings provided for under Title VII.⁶¹ In addition, one can bring suit under section 1981.⁶²

1. Title VII

Title VII aims to prohibit all acts of employment discrimination based on race⁶³ and national origin.⁶⁴ Therefore, for a Title VII

55. See *infra* notes 57-59 and accompanying text.

56. See *supra* note 12 for the text of § 1981.

57. See *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2620-21 (1987) (state statute of limitations for personal injury actions applies to claims arising under § 1981).

58. See *supra* note 12 for the text of § 1981.

59. See *Rowlett v. Anheuser Busch*, 832 F.2d 194, 206-07 (1st Cir. 1987) (§ 1981 plaintiff will receive \$300,000 in punitive damages rather than \$3 million awarded by jury); *White v. Washington Pub. Power Supply Co.*, 692 F.2d 1286, 1290 (9th Cir. 1982) (punitive damages available under § 1981); *Allen v. Amalgamated Transit Union*, 554 F.2d 876, 883 (8th Cir.) (same), *cert. denied*, 434 U.S. 891 (1977). For the Title VII remedies, see *supra* notes 37-39 and accompanying text.

60. A plaintiff also has state and local remedies. See, e.g., N.Y. EXEC. LAW §§ 290-301 (McKinney 1982). Section 292(9) excludes "any institution, club or place of accommodation which is in its nature distinctly private" from the definition of a place of public accommodation for purposes of the statute. *Id.* § 292(9). Section 292(5), however, defines an employer as anyone with four or more employees, failing to exempt private clubs. *Id.* § 292(5).

61. 42 U.S.C. § 2000e (1982).

62. *Id.* § 1981.

63. *Id.* § 2000e-2(a)(1). See *supra* note 3 for a discussion of the meaning of "race" under Title VII.

64. *Id.*; see also *supra* note 23. The Fifth Circuit has recently held that § 1981 does not extend to discrimination based on citizenship. See *supra* note 50. The

plaintiff, initial determinations as to whether discrimination is "racial" are not likely to be necessary.

In addition, whereas Title VII covers practices neutral on their face, that adversely impact one race over another, section 1981 does not cover such practices—rather, it requires that the discrimination be purposeful.⁶⁵

Further, unlike section 1981, Title VII includes specific provisions that facilitate enforcement of the Act's policies. For example, both the Attorney General and the Commission may bring suit to require compliance with Title VII.⁶⁶ Moreover, Title VII is set up so that a complainant may proceed without counsel. If the complainant chooses to retain counsel, however, the Act provides for payment of attorney's fees.⁶⁷ Because the process of settling a complaint under Title VII is conciliatory rather than adversarial, a Title VII plaintiff is not precluded from seeking such remedies as reinstatement or hiring.⁶⁸

2. Section 1981

By contrast, section 1981 does not provide specific procedural guidelines and thus access to the courts is gained more quickly for a section 1981 plaintiff.⁶⁹ In addition, the statute of limitations in a section 1981 action is longer than the length of time a Title VII complainant has to file charges of discrimination with the Com-

Equal Employment Opportunity Commission, however, believes that Title VII covers such discrimination when the practice has the purpose or effect of discriminating on the basis of national origin. Equal Employment Opportunity Commission Tape #309 (telephone no. 1-800-USA-EEOC; taped message as played Mar. 1988) (regarding relationship between Title VII and Immigration Reform & Control Act of 1986).

65. See *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982) (practices of trade associations and contractors did result in discriminatory effect on operation of union hiring hall but since there was no intent to discriminate, § 1981 action could not be brought). The idea that Title VII proscribes practices which are "fair in form, but discriminatory in operation," derives from *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). There the Supreme Court held that Title VII requires the elimination of employment practices that, while neutral on their face, adversely impact one race over another.

66. See *supra* note 35 and accompanying text.

67. See *supra* note 36 and accompanying text.

68. See *supra* note 38 and accompanying text; cf. LARSON, *supra* note 3, § 48.24, at 9A-117 (employer benefits from pre-investigative settlement by obviating Commission finding of cause to believe employer discriminated and concomitant stigma).

69. Compare *supra* notes 28-34 and accompanying text with *supra* notes 54-55.

mission.⁷⁰ Further, unlike a Title VII plaintiff, a section 1981 plaintiff may proceed against an employer who employs less than fifteen persons.⁷¹ In addition, because Title VII is an equitable remedy, a jury is not available, whereas an action under section 1981 is, by nature, legal and must be tried by a jury on demand.⁷² Most importantly, while Title VII expressly exempts private clubs, section 1981 does not speak to the issue. In fact, two courts have concluded that section 1981 is available to an employee alleging discrimination on the part of a private club.⁷³

III. The Private Club Exemption of Title VII

Title VII excludes from the definition of employer "a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of [t]itle 26."⁷⁴ Thus, employers that fit this definition are exempt from the requirements of Title VII.⁷⁵

70. The length of time a complainant has to file charges is set by statute:

A charge under this section shall be filed within [180] days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a [s]tate or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within [300] days after the alleged unlawful employment practice occurred, or within [30] days after receiving notice that the [s]tate or local agency has terminated the proceedings under the [s]tate or local law, whichever is earlier.

42 U.S.C. § 2000e-5(e) (1982).

71. Title VII governs employers with 15 or more employees. 42 U.S.C. § 2000e(b) (1982). Section 1981 is silent as to the types of employers covered. See *supra* note 12 for the text of § 1981.

72. See *Lincoln v. Board of Regents*, 697 F.2d 928, 934 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983); *O'Brien v. King World Prods.*, 669 F. Supp. 639, 642 (S.D.N.Y. 1987).

73. See *Baptiste v. Cavendish Club*, 670 F. Supp. 108 (S.D.N.Y. 1987); *Guesby v. Kennedy*, 580 F. Supp. 1280 (D. Kan. 1984).

74. 42 U.S.C. § 2000e(b)(2) (1982). Organizations exempt from taxation under § 501(c) include those that are clearly not private membership clubs such as nonprofit cemetery companies, professional football leagues, religious foundations and associations for the prevention of cruelty to animals. 26 U.S.C. § 501(c) (1982). Sections 501(c)(7) and (8) refer to the types of organizations one would expect to be exempted. Section 501(c)(7) exempts "[c]lubs organized for pleasure, recreation and other non-profitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder." *Id.* § 501(c)(7). Section 501(c)(8) exempts "[f]raternal beneficiary societies, orders or associations . . ." *Id.* § 501(c)(8).

75. 42 U.S.C. § 2000(b)(2) (1982).

Title VII is not the only title of the 1964 Civil Rights Act (the Act) to exempt private clubs. Such clubs are also exempt from the requirements of title II (Title II),⁷⁶ which guarantees equal access to places of public accommodation.⁷⁷ Under Title II, "a private club or other establishment not in fact open to the public" is not considered a place of public accommodation.⁷⁸

Courts construing the Title VII exemption turn to Title II cases for definitions of "private club" as well as for general precedential value.⁷⁹ The distinction between the two, however, is important: Title II applies where a complainant seeks membership in an organization while Title VII applies where a complainant seeks employment.⁸⁰

A. Legislative History of the Title VII Exemption

The legislative history of Title VII does not address the Act's exclusion of private clubs from within its scope.⁸¹ In the absence of such legislative history, one court has concluded that the exemption was included to make it "possible, in this limited setting, for those who wish to restrict the universe of their personal associates [as

76. *Id.* §§ 2000a-2000a-6.

77. *Id.* § 2000a.

78. *Id.* § 2000a(e).

79. *See, e.g.,* *Hudson v. Charlotte Country Club*, 535 F. Supp. 313 (W.D.N.C. 1982); *Mills v. Fox*, 421 F. Supp. 519 (E.D.N.Y. 1976).

80. *Compare* 42 U.S.C. § 2000a (1982) (Title II) *with id.* § 2000e (Title VII).

81. *See* LARSON, *supra* note 3, § 5.37(a), at 2-94; *see also* *Fesel v. Masonic Home of Del.*, 428 F. Supp. 573, 577 (D. Del. 1977), *aff'd without opinion*, 591 F.2d 1334 (3d Cir. 1979). The debate over private clubs in both the House and Senate focused on the Title II (public accommodations) exemption for private clubs and fears that these clubs would be forced to admit anyone as members if, for example, the clubs allowed members to bring in nonmembers for a meal. Industry officials feared that by bringing in nonmembers for these limited purposes, the clubs would become places of public accommodation. Senator Humphrey firmly stressed that as long as the use of club facilities was limited to members and their guests, the clubs would remain exempt from Title II. 110 CONG. REC. 6006-08, 9079-81 (1964).

Senators Humphrey and Smathers were conscious of their role in later interpretations of Title II's private club exemption. Senator Smathers was reading an article critical of the exemption into the record when the two Senators had this exchange: "Mr. Humphrey: Why does not the Senator finish the article and then we will make some legislative history. Mr. Smathers: Yes, let us make some legislative history. I am for it." *Id.* at 6007.

A newspaper article reprinted in the *Congressional Record*, critical of the Title II exemption, expressed skepticism regarding the Title VII exemption: "[E]ven the provisions [for private clubs] in this section [Title VII] of the proposed bill are by no means clear." Lawrence, *Private Clubs and Civil Rights*, Wash. Evening Star, Mar. 3, 1964, reprinted in 110 CONG. REC. 6636 (1964).

fellow members of a private club] to also determine with whom they would associate in their employer/employee relationships.”⁸²

B. Defining a Title VII Private Membership Club

Only a handful of federal courts have interpreted the meaning of a Title VII “private membership club.”⁸³ The earliest decisions did not focus on the “club” aspect of the definition. For example, one court, finding that a hospital was both private and had members, concluded that it was exempt from Title VII.⁸⁴

Later decisions, cognizant of judicial interpretations of Title II’s “private club,”⁸⁵ concluded that Title II and Title VII were meant to cover the same organizations.⁸⁶ For example, in *Mills v.*

82. *Fesel*, 428 F. Supp. at 577. An attorney with the legal unit of the New York City branch of the Equal Employment Opportunity Commission agreed with this rationale for the exemption. He suggested, as an example of the exemption at work, that the members of an all-women’s club might choose to create an all-women’s environment by employing only women at the club. Telephone interview with William Rodriguez, Staff Attorney, Equal Employment Opportunity Commission (Mar. 4, 1988). But for a discussion of a case holding that an all-men’s club did not have the right, under state law, to refuse employment to women, see *infra* notes 162-71 and accompanying text.

83. See *infra* notes 84-93 and accompanying text; see also Annotation, “Employer” As Defined in Title VII, 69 A.L.R. FED. 191, § 10(c), at 229 (1984) (discussing cases defining Title VII “private membership clubs”). Though not mentioned in any of the federal court decisions discussed above, the Commission, in a 1983 decision, delineated six factors to be considered in determining if an organization is a bona fide private membership club: (1) status as a club in the ordinary sense of the word; (2) requirements of meaningful conditions of limited membership; (3) reservation of its facilities and services to members and their guests; (4) control and ownership by the members; (5) operation for profit; and (6) use of public advertisement to solicit members or promote use of facilities by the general public. EEOC Decision No. 83-10, 31 Fair Empl. Prac. Cas. (BNA) 1862, 1864 (1983). These factors roughly match those that have developed in the Title II cases. See *infra* notes 94-104 and accompanying text.

84. See *Barrister v. Stineberg*, 1 Empl. Prac. Dec. (CCH) ¶ 9806, at 845 (S.D.N.Y. 1967) (Mount Sinai Hospital held exempt as “private membership corporation” without explanation) (emphasis added). *But see* *United States v. Medical Soc’y*, 298 F. Supp. 145, 152 (D.S.C. 1969) (Roper Hospital held to be employer as it “ha[d] approximately 523 employees”). A hospital is clearly not a private club; the court in *Medical Society* correctly concluded that because the hospital employed more than the minimum number of employees (15), it was subject to the requirements of Title VII.

85. See *infra* notes 94-104 and accompanying text.

86. See *Fesel v. Masonic Home of Del.*, 428 F. Supp. 573, 577 (D. Del. 1977) (holding that Title VII exemption was meant as companion to Title II exemption), *aff’d without opinion*, 591 F.2d 1334 (3d Cir. 1979); *Mills v. Fox*, 421 F. Supp. 519, 523 (E.D.N.Y. 1976) (because both definitions use the words “private” and “club,” Congress intended to exempt same organizations); see also EEOC Decision

Fox,⁸⁷ the court stated that no case law specifically defined a Title VII private club.⁸⁸ The court held that a nursing home providing services to the elderly for a fee failed to meet any of the tests for defining a private club set up by Title II cases.⁸⁹ Other courts attempted to determine whether an organization was exempt by using the criteria developed in the Title II cases⁹⁰ without identifying them as such.⁹¹ While some courts held that Title VII applies to a narrower group of organizations than Title II,⁹² others focused on the language of Title VII which requires that an organization be tax-exempt. Viewing tax-exemption as the most important feature, such courts applied the private club exemption more broadly.⁹³

C. Defining a Title II Private Membership Club

Courts generally consider eight factors in determining whether an organization is a private club for Title II purposes.⁹⁴ "Each factor should be considered and [may] either [tip] the balance for or against [determining that an organization be given] private club status."⁹⁵ Classified as membership practices, the first three factors

76-128 (Aug. 4, 1976) (WESTLAW, Database: FLB-EEOC) (in defining Title VII private club it is helpful to examine body of law that has arisen under Title II); LARSON, *supra* note 3, § 5.37(a), at 2-98 (when act uses same term in different sections, courts should give similar meaning to both).

87. 421 F. Supp. 519 (E.D.N.Y. 1976).

88. *Id.* at 522.

89. *Id.* at 523. See *supra* note 83 for six factors the Commission has enumerated for determining whether a club is private.

90. See *infra* notes 94-104 and accompanying text.

91. See *Guesby v. Kennedy*, 580 F. Supp. 1280, 1282 (D. Kan. 1984) (noting that candidate must apply, be screened and approved, that club does not advertise and that dues must be paid, in holding that club was private for Title VII purposes).

92. See *Quijano v. University Fed. Credit Union*, 617 F.2d 129, 131-32 (5th Cir. 1980) (Title VII exemption would apply to narrower group because Title II does not use adjectives "bona fide" and "membership" to modify "private club").

93. See *Hudson v. Charlotte Country Club*, 535 F. Supp. 313, 315 (W.D.N.C. 1982) (affidavit of president of club, its articles of incorporation and proof of its status under § 501(c) are enough to qualify defendant as private club). *But see Quijano*, 617 F.2d at 133 (tax exemption alone is insufficient to render organization private membership club under Title VII); *Ahmad v. Independent Order of Foresters*, 81 F.R.D. 722, 728 (E.D. Pa. 1979) (defendant, tax-exempt under § 501(c), must also be bona fide private membership club; this determination requires evidentiary hearing), *aff'd without opinion*, 707 F.2d 1399 (3d Cir. 1983).

94. See *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974).

95. See *Durham v. Red Lake Fishing & Hunting Club*, 666 F. Supp. 954, 959-60 (W.D. Tex. 1987) (quoting *Wright v. Cork Club*, 315 F. Supp. 1143, 1150 (S.D. Tex. 1970)).

are the most important:⁹⁶ (1) how selective the club is in admitting new members;⁹⁷ (2) whether there are formal membership procedures;⁹⁸ and (3) how much control there is over new members.⁹⁹ The remaining factors are: (4) to what extent club facilities are used by nonmembers;¹⁰⁰ (5) whether there are dues and how large they are;¹⁰¹ (6) whether the club was created or its structure changed in order to avoid civil rights laws;¹⁰² (7) whether the club advertises;¹⁰³ and (8) whether there is a profit motive in the club's day-to-day activities.¹⁰⁴

A recent district court case illustrates how a court might weigh these factors. In *Durham v. Red Lake Fishing & Hunting Club*,¹⁰⁵ the plaintiff was denied membership in the defendant club.¹⁰⁶ Factors

96. See *Durham*, 666 F. Supp. at 960; *United States v. Fraternal Order of Eagles*, 472 F. Supp. 1174, 1175-76 (E.D. Wis. 1979).

97. See *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973) (when club is open to any white person and so only selective regarding race, club is not truly selective); *Wright v. Salisbury Club*, 632 F.2d 309, 312 (4th Cir. 1980) (only persons denied membership are black so club is not selective); *Durham*, 666 F. Supp. at 960 (in 50 years, club only rejected two white applicants so club is not truly selective).

98. See *Stout v. YMCA*, 404 F.2d 687, 688 (5th Cir. 1968) (when 50 cents of \$1.50 room charge was "membership fee" and no membership application was required, YMCA was not private club).

99. See *Daniel v. Paul*, 395 U.S. 298, 302 (1969) (amusement area is not truly private when some 100,000 whites are allowed to visit each season).

100. See *Durham*, 666 F. Supp. at 960 (roads on club property paved and open to public); *Williams v. Rescue Fire Co.*, 254 F. Supp. 556, 563 (D. Md. 1966) (pool was open to the general public—except blacks—prior to the 1964 Act); see also 110 CONG. REC. 6008 (1964) (remarks of Sen. Humphrey) ("if the club were trying to make ends meet . . . and the board of directors decided that a substantial section of the club's facilities should be open to the public . . . it thereby would lose its special exemption").

101. See *United States v. Jordan*, 302 F. Supp. 370, 378 (E.D. La. 1969) (fact that club charges initiation fee and annual dues is point in its favor); *Williams*, 254 F. Supp. at 563 (25 cent annual membership fee is insignificant).

102. See *Jordan*, 302 F. Supp. at 379 (public restaurant attempted to become whites-only restaurant club); see also 110 CONG. REC. 6008 (1964) (remarks of Sen. Humphrey) ("[i]f a club were established as a way of bypassing or avoiding the effect of the [Title II exemption], and it was not really a club . . . then that kind of club would come under the language of the bill").

103. See *Runyon v. McCrary*, 427 U.S. 160, 172 n.10 (1976) (schools advertised in Yellow Pages so therefore were appealing to any and all parents whose children met their academic requirements, thus were not truly private) (Supreme Court is reconsidering *Runyon*; see *supra* note 13); *Wright v. Salisbury Club*, 632 F.2d 309, 312 (4th Cir. 1980) (club solicits members through public advertising in local paper so is not truly private).

104. See *Wright*, 632 F.2d at 313 (club serves commercial interests of developer and so is not truly private).

105. 666 F. Supp. 954 (W.D. Tex. 1987).

106. *Id.* at 956.

in favor of finding the club private included: (1) that the club collected dues; (2) that membership was limited to eighty persons; and (3) that the club had a formal application procedure in which any applicant who received five or more negative votes would be rejected.¹⁰⁷ The *Durham* court, however, found that the club was not truly selective because “[o]nly two white applicants [were] rejected in the past fifty years, and they both had peculiar circumstances.”¹⁰⁸ Further, the court found that when the county opened the club’s roads to the public, the club lost its “private” status.¹⁰⁹

IV. The Arguments For and Against the Implied Amendment Theory

Courts that have considered whether a private club exempt from employment discrimination suits under Title VII is also exempt under section 1981 have issued conflicting decisions. These courts are divided on the issue of whether the Title VII exemption impliedly amends and limits section 1981 so as to bar a section 1981 action against a private club.

A. Arguments For the Implied Amendment Theory

Courts presume that in enacting legislation Congress intended to create a consistent body of law.¹¹⁰ Therefore, it is argued, Congress would not amend an existing law without expressing its intent to do so.¹¹¹ Nonetheless, the presence of an earlier law may create an inconsistent body of law. In such an instance, courts may find an implied amendment of the earlier law.¹¹²

107. *Id.*

108. *Id.* at 960. The court explained these rejections in the following manner: One had violated [c]lub policy as a guest by destroying club property during target practice and by overstaying the guest period of [28] days per year. The second was a leader of the Jehovah’s Witness Church and was in charge of racially integrating the local Jehovah’s Witness Church.

Id.

109. *Id.*

110. 1A J. SUTHERLAND, STATUTORY CONSTRUCTION § 23.09, at 332 (4th ed. 1985) [hereinafter SUTHERLAND].

111. *Id.*; see also *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 471-72 (1982) (Title VII did not impliedly repeal requirement that federal courts give full faith and credit to state court judgments).

112. 1A SUTHERLAND, *supra* note 110, § 23.09, at 332.

In holding that Title VII impliedly amends section 1981, courts have applied three rules of statutory construction.¹¹³ First, when interpreting the reach of an earlier act's broad language, a court may use a later act to determine the scope of that reach.¹¹⁴ Section 1981 is silent as to what sorts of employers it encompasses.¹¹⁵ Because it does not exempt specific employers, section 1981, it is argued, may apply to all employers. Therefore, some courts look for guidance to Title VII¹¹⁶ which, of course, exempts private clubs.¹¹⁷ Thus, courts following that line of reasoning hold that a club exempt under Title VII is also exempt under section 1981.¹¹⁸

The second rule of statutory construction employed by courts in this context is that where "[t]he provisions of one statute specifically focus on a particular problem [they] will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more general in its coverage."¹¹⁹ The provisions of Title VII specifically focus on private clubs¹²⁰ while the provisions of section 1981 do not.¹²¹ There is no legislative history showing an intent that private clubs, exempt under Title VII, should still be liable under section 1981.¹²² Therefore, courts have held that the specific provisions of Title VII prevail over the more general provisions of section 1981.¹²³

113. See *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1201-02 (D. Conn. 1974); see also *Hudson v. Charlotte Country Club*, 535 F. Supp. 313, 317 (W.D.N.C. 1982); *Kemerer v. Davis*, 520 F. Supp. 256, 258 (E.D. Mich. 1981).

114. See *NLRB v. Allis-Chalmers Mfg.*, 388 U.S. 175, 194 (1966) (reach of section of National Labor Relations Act should be determined by referring to recent amendments to Act).

115. See 42 U.S.C. § 1981 (1982). See *supra* note 12 for the text of § 1981.

116. See *Hudson v. Charlotte Country Club*, 535 F. Supp. 313, 316 (W.D.N.C. 1982) ("a suit against a private club could not be brought under § 1981 when it is specifically barred by Title VII").

117. 42 U.S.C. § 2000e(b)(2) (1982); see *supra* note 74 and accompanying text.

118. See *supra* note 116.

119. *Cornelius*, 382 F. Supp. at 1201 (quoting *Kepner v. United States*, 195 U.S. 100, 124 (1904) and citing *General Elec. Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699, 705 (S.D.N.Y. 1966)); see also *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

120. See *supra* note 74 and accompanying text.

121. See *supra* note 12.

122. See *supra* note 81 and accompanying text.

123. See *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1201 (D. Conn. 1974); *Kemerer v. Davis*, 520 F. Supp. 256, 258 (E.D. Mich. 1981); *Hudson v. Charlotte Country Club*, 535 F. Supp. 313, 317 (W.D.N.C. 1982).

In addition to exempting private clubs, Title VII also exempts Indian tribes from those employers who must comply with its provisions. Using the rule that the

Finally, although the partial repeal or limiting of an earlier act "by implication" is not favored as a means of statutory construction, the legislative history of an act may serve as the basis for such a result.¹²⁴ Specifically, when two acts are in "irreconcilable conflict"¹²⁵ and the legislative intent is clear,¹²⁶ the later act may be viewed as impliedly amending the earlier act.¹²⁷

On its face, section 1981 reaches employment discrimination without regard to whether an employer is a private club.¹²⁸ Thus, section 1981 would cover those private clubs otherwise not reachable because of the Title VII exemption.¹²⁹ In essence, section 1981 says private clubs may not discriminate while Title VII says they may. This is

specific provisions of a statute prevail over the more general provisions of another statute, the Tenth Circuit has held that because § 1981 fails to prohibit specifically preferential treatment of tribal members, the specific provisions of Title VII control, and a plaintiff cannot sue an Indian tribe under § 1981 for racial discrimination in employment. *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 673 (10th Cir. 1980); accord *Stroud v. Seminole Tribe*, 606 F. Supp. 678, 680 (S.D. Fla. 1985). In *Wardle*, the Ute Indian tribe fired a nonIndian policeman as part of a program to place qualified tribal members in jobs paid for with tribal funds. *Wardle*, 623 F.2d at 671. *Wardle* alleged he was fired solely because of his race and sued under various federal civil rights provisions, but not under Title VII, presumably because Title VII exempted Indians as employers. The court, however, did not allow him to escape Title VII's exemption and affirmed the lower court's grant of summary judgment to the Utes. For a discussion of the long history of allowing Indians to prefer Indians in their hiring practices, see *Morton*, 417 U.S. at 541-45.

Title VII also exempts from the category of employees the personal staff of certain public officials. 42 U.S.C. § 2000e(f) (1982). In *Ramirez v. San Mateo County Dist. Attorney's Office*, 639 F.2d 509 (9th Cir. 1981), the court treated Title VII and § 1981 as separate remedies without discussion. The district court found that the position of deputy district attorney fit the category of personal staff, thus Ramirez could not bring his Title VII claims for discrimination based on national origin. The district court, however, did allow Ramirez to bring his § 1981 suit. *Id.* at 515. It is possible that had Ramirez won his § 1981 suit, discussion of the propriety of allowing § 1981 claims would have followed. For a discussion of the personal staff exemption, see *United States v. Gregory*, 818 F.2d 1114, 1116 (4th Cir. 1987), cert. denied, 108 S. Ct. 143 (1988).

124. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976)).

125. "Irreconcilable conflict" denotes a "positive repugnancy" between two statutes. *Radzanower*, 426 U.S. at 155.

126. The legislative intent may establish a repeal by implication because it shows the true purposes of the statute. Thus, it is always of great importance. 1A SUTHERLAND, *supra* note 110, § 23.09, at 332.

127. See *Radzanower*, 426 U.S. at 154-56.

128. See *supra* note 12.

129. See *Kemerer v. Davis*, 520 F. Supp. 256, 258 (E.D. Mich. 1981) (quoting *Wright v. Salisbury Club*, 479 F. Supp. 378, 386 (E.D. Va. 1979), *rev'd on other grounds*, 632 F.2d 309 (4th Cir. 1980)).

the irreconcilable conflict between two acts that is required to meet the first part of the test.¹³⁰

As to the second half of the test, the legislative history of Title VII does not show an intent to limit or amend section 1981.¹³¹ The second half of the test cannot be met. Two courts have held, however, that Title VII does impliedly limit section 1981.¹³² These courts reason that prior to *Jones v. Alfred H. Mayer Co.*, section 1981 applied only to cases involving state action.¹³³ Because the Civil Rights Act of 1964 became law four years prior to *Jones*, Congress, it is argued, believed it was writing on a "clean slate."¹³⁴ In other words, Congress—unaware of *Jones*—believed that there were no other federal statutes governing racial discrimination in private employment.

The courts which have held that Title VII impliedly limited section 1981 reason that it is irrelevant that the legislative history of the 1964 Act does not indicate congressional intent to amend or limit section 1981. That is, Congress could not possibly have indicated such an intent.¹³⁵ Thus, these courts found that the test was met.¹³⁶

B. Arguments Against the Implied Amendment Theory

In *Johnson v. Railway Express Agency*,¹³⁷ the Supreme Court held that the proper and timely filing of a Title VII complaint with the Equal Employment Opportunity Commission did not toll the running of the statute of limitations for a section 1981 action.¹³⁸ The opinion stressed the differences between Title VII and section 1981,¹³⁹ observing that "[s]ection 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers."¹⁴⁰

130. *Id.*

131. See Note, *Is Section 1981 Modified By Title VII of the Civil Rights Act of 1964?*, 1970 DUKE L.J. 1223, 1228 n.36 ("Civil Rights Act of 1866 was never mentioned in either the debates or committee hearings concerning Title VII") [hereinafter *Modified By Title VII*].

132. See *Hudson v. Charlotte Country Club*, 535 F. Supp. 313, 317 (W.D.N.C. 1982); *Kemerer v. Davis*, 520 F. Supp. 256, 260 (E.D. Mich. 1981). Though these cases quote language discussing repeal-by-implication, see, e.g., *Kemerer*, 520 F. Supp. at 258, it is clear from their results that they are not claiming that Title VII repealed § 1981, but rather amended or limited § 1981, see, e.g., *Kemerer*, 520 F. Supp. at 260.

133. See *supra* note 45 and accompanying text.

134. See *Hudson*, 535 F. Supp. at 317; *Kemerer*, 520 F. Supp. at 259.

135. See *supra* note 134.

136. *Id.*

137. 421 U.S. 454 (1975).

138. See *id.* at 462-66.

139. See *id.* at 457-61.

140. *Id.* at 460.

In support, the Court cited section 2000e(b) of Title VII. Private membership clubs are among those employers listed in section 2000e(b).

Two courts have subsequently interpreted the Supreme Court's language in *Johnson* as logically implying that section 1981 then applies to all employers, including those "certain employers" to which Title VII does not apply—namely, private clubs.¹⁴¹

Because *Johnson* did not decide or even interpret the private club exemption, the language quoted above is dictum.¹⁴² Courts have inferred, however, from the opinion as a whole that Title VII and section 1981 should be viewed as separate and distinct remedies.¹⁴³ As such, courts note that section 1981 has not been impliedly amended by such Title VII provisions as Title VII's strict time limitation,¹⁴⁴ its limited remedies¹⁴⁵ or its requirement that the administrative remedies be exhausted prior to the filing of a civil action.¹⁴⁶ Further, a complainant need not proceed under Title VII before suing under section 1981.¹⁴⁷ In short, it is argued that "the scope of protection of Title VII and [s]ection 1981 differ both in terms of relief and the ability to bring the claim."¹⁴⁸ Courts which have held that Title VII does not impliedly amend section 1981 reason that if these varied Title VII provisions do not amend section 1981, the private club exemption does not amend it either.¹⁴⁹

141. *Baptiste v. Cavendish Club*, 670 F. Supp. 108, 110 (S.D.N.Y. 1987); *Guesby v. Kennedy*, 580 F. Supp. 1280, 1285 (D. Kan. 1984).

142. "Dictum" is defined as a "remark made by a judge . . . not necessarily involved in the case or essential to its determination . . . [which] lack[s] the force of an adjudication." BLACK'S LAW DICTIONARY 409 (5th ed. 1979).

143. *See Johnson v. Railway Express Agency*, 421 U.S. 454, 457-61 (1975); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974) ("legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes"); *Lowe v. City of Monrovia*, 775 F.2d 998, 1010 (9th Cir. 1985) ("Title VII and [§] 1981 are overlapping but independent remedies for racial discrimination in employment"), *modified on other grounds*, 784 F.2d 1407 (9th Cir. 1986). *But see New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 n.24 (1979) ("[a]lthough the exact applicability of [§] 1981 to a claim that a statute had an adverse impact on blacks and Hispanics] has not been decided by this Court, it seems clear that [§] 1981 affords no greater substantive protection than Title VII").

144. *See supra* notes 28-31 and accompanying text.

145. *See supra* notes 38-39 and accompanying text.

146. *See supra* note 34 and accompanying text.

147. *See Torre v. Barry*, 661 F.2d 1371, 1374-75 (D.C. Cir. 1981); *Long v. Ford Motor Co.*, 496 F.2d 500, 503 (6th Cir. 1974). The situation for federal employees is different. Title VII is their exclusive remedy for claims of discrimination. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976).

148. *Baptiste v. Cavendish Club*, 670 F. Supp. 108, 110 (S.D.N.Y. 1987).

149. *See Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). *But see*

Implicit in the argument that Congress believed it was writing on a clean slate when it wrote Title VII is the assumption that had Congress known of the conflict between section 1981 and Title VII, they would have amended or otherwise limited section 1981.¹⁵⁰ One commentator has suggested that the proper inquiry is not whether Congress would have repealed or limited section 1981 but rather whether and in what form Congress would have enacted Title VII.¹⁵¹ This commentator has concluded that Title VII might have been passed as a supplement to section 1981, but that given the political climate of the early 1960's,¹⁵² sufficient votes to repeal or otherwise limit section 1981 could not have been gathered.¹⁵³

When amending Title VII in 1972 and 1978,¹⁵⁴ Congress did know of the Supreme Court's interpretation of section 1981 in *Jones*.¹⁵⁵ Congress could have added language limiting section 1981 or amending it directly, but chose not to do so. In fact, Congress specifically rejected an amendment that would have made Title VII and the Equal Pay Act the only federal laws on employment discrimination.¹⁵⁶

Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1201 (D. Conn. 1974) (differentiating between administrative procedures that have not been incorporated into § 1981 and more substantive provisions, such as the private club exemption, similarly not incorporated).

150. See *Kemerer v. Davis*, 520 F. Supp. 256, 258-59 (E.D. Mich. 1981).

151. See *Modified By Title VII*, *supra* note 131, at 1234-35.

152. The seriousness of the racial discrimination problem had caught the attention of the American public by the early 1960's. Throughout this time, there were numerous boycotts, sit-ins and demonstrations. On May 2, 1963, Martin Luther King staged a protest involving over 1,000 Alabama school children. The nation watched their televisions in horror as the Birmingham police attacked the children with billy clubs, police dogs and fire hoses. On August 28, 1963, approximately 200,000 people marched on Washington, D.C., to demand action from President Kennedy and Congress. See, e.g., C. WHALEN & B. WHALEN, *THE LONGEST DEBATE* xvi-xix, 24-25 (1985).

153. See *Modified By Title VII*, *supra* note 131, at 1235.

154. See *supra* note 4.

155. *Jones v. Alfred H. Mayer Co.* was decided in 1968 and the amendments were made in 1972 and 1978.

156. 118 CONG. REC. 3371-73 (1972). Senator Williams stated his opposition to amendment of § 1981:

The rights of individuals to bring suits in [f]ederal courts to redress individual acts of discrimination, including employment discrimination, [were] first provided by the Civil Rights Acts of 1866 and 1871, 42 U.S.C. [§§] 1981, 1983. . . . [T]he courts have specifically held that Title VII and [t]he Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances. Mr. President, the amendment of the Senator from Nebraska will repeal the first major piece of civil rights legislation

V. Title VII Does Not Amend Section 1981

Arguments other than those based on statutory construction may determine whether Title VII amends section 1981 so as to bar a private club employee from bringing an employment discrimination suit. Other considerations include the effect of the constitutional right to freedom of association, the existence of pertinent legislative history and basic principles of equal opportunity.

A. The Title II Cases Apply to Membership—Not Employment

Courts holding that Title VII impliedly amends section 1981¹⁵⁷ primarily rely on a line of Title II cases holding that a section 1981 plaintiff does not have a cause of action against a private club that denies him membership.¹⁵⁸ That line of cases can be distinguished from the Title VII cases in two ways: (1) the constitutional right to freedom of association does not extend to the employer/employee relationship,¹⁵⁹ and (2) the legislative history focuses only on the Title II exemption.¹⁶⁰

in this nation's history.

118 CONG. REC. 3371. The proposed amendment making Title VII and the Equal Pay Act the only federal laws on employment discrimination failed. *Id.* at 3373.

Congress again contemplated the relationship between Title VII and § 1981 when passing the Attorney's Fees Award Act in 1976. Congress chose to give to § 1981 plaintiffs what Title VII plaintiffs already had—the remedy of attorney's fees. *See* 42 U.S.C. § 1988 (1982); *White v. Beal*, 447 F. Supp. 788, 792-93 (D.C. Pa. 1978) (prevailing litigant may recover fees under both Title VII and § 1981).

157. *See Hudson v. Charlotte Country Club*, 535 F. Supp. 313, 317 (W.D.N.C. 1982); *Kemerer v. Davis*, 520 F. Supp. 256, 260 (E.D. Mich. 1981).

158. *Kemerer* cites six cases: (1) *Wright v. Salisbury Club*, 479 F. Supp. 378, 385-87 (E.D. Va. 1979) (private clubs exempt under Title II necessarily exempt under § 1981), *rev'd on other grounds*, 632 F.2d 309 (4th Cir. 1980); (2) *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661, 665-66 (E.D. La. 1976) (without discussing Title II, court held that § 1981 does not reach intimate associational relationships and does not compel defendant club to admit plaintiff as member); (3) *Cornelius v. Benevolent Protection Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974) ("[§] 1981 does not apply to the membership 'contracts' of truly private clubs"); (4) *Solomon v. Miami Woman's Club*, 359 F. Supp. 41, 45 (S.D. Fla. 1973) (when club is private, plaintiffs must show state action for standing to sue); (5) *Sims v. Order of United Commercial Travelers of Am.*, 343 F. Supp. 112, 113-14 (D. Mass. 1972) (court notes lack of authority for § 1981 grounds to obtain membership in private club); and (6) *Tillman v. Wheaton-Haven Recreational Ass'n*, 451 F.2d 1211, 1214-15 (4th Cir. 1971) (private clubs exempt under Title II necessarily exempt under § 1981), *rev'd on other grounds*, 410 U.S. 431 (1973). *See Kemerer*, 520 F. Supp. at 258. *Hudson* cites three cases: *Tillman*, *Wright* and *Cornelius*. *See Hudson*, 535 F. Supp. at 316-17.

159. *See infra* notes 161-74 and accompanying text.

160. *See infra* notes 175-81 and accompanying text.

1. Freedom of Association and Private Club Employees

The constitutional right to freedom of association does not protect clubs that discriminate in the selection of employees.¹⁶¹ The Supreme Court has recently decided not to review *Bohemian Club v. Fair Employment & Housing Commission*.¹⁶² In that case, the California Court of Appeal held that club members' first amendment right to freedom of association did not protect them from governmental intrusion into their selection of club employees.¹⁶³ The club excluded women from most of approximately 100 permanent positions and all of approximately 250 temporary positions.¹⁶⁴ The court of appeal ordered that the state Fair Employment and Housing Commission's findings be reinstated.¹⁶⁵ These findings required the club to institute an affirmative action program to employ women.¹⁶⁶

Bohemian Club outlines two types of associational rights protected by the Constitution: "intimate" and "expressive."¹⁶⁷ An individual's intimate associational rights prevent intrusion into their ability to "enter into and maintain certain intimate human relationships," while their expressive associational rights involve "the right to associate for the purpose of engaging in those activities protected by the [f]irst [a]mendment," for example, freedom of speech or assembly.¹⁶⁸ *Bohemian Club* holds that while relationships between club members may be intimate, and thus constitutionally protected, re-

161. See *infra* notes 162-74 and accompanying text.

162. 187 Cal. App. 3d 1, 231 Cal. Rptr. 769, cert. denied, 108 S. Ct. 51 (1987).

163. *Id.* at 13-14, 231 Cal. Rptr. at 776.

164. *Id.* at 7-8, 231 Cal. Rptr. at 772.

165. *Id.* at 24, 231 Cal. Rptr. at 783.

166. *Id.* at 6, 231 Cal. Rptr. at 771.

167. *Id.* at 12, 231 Cal. Rptr. at 775 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984)). Although *Bohemian Club* involves a state antidiscrimination statute rather than a federal provision and sex discrimination rather than race discrimination, its holding on associational rights rests on Supreme Court precedent.

The constitutional source of expressive associational rights is the first amendment. Justice Brennan wrote that "implicit in the right to engage in activities protected by the [f]irst [a]mendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

Justice Brennan found the source of intimate associational rights in the general constitutional protection of "highly personal relationships [which merit] a substantial measure of sanctuary from unjustified interference by the [s]tate." *Id.* at 618.

"Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619.

168. *Bohemian Club v. Fair Employment & Housing Comm'n*, 187 Cal. App. 3d 1, 12, 231 Cal. Rptr. 769, 775, cert. denied, 108 S. Ct. 51 (1987).

relationships between members and employees are not.¹⁶⁹ In so holding, the court noted that the club's hiring procedure was not selective and that employees were not allowed to fraternize with club members.¹⁷⁰ The club apparently did not claim that their expressive associational rights were threatened.¹⁷¹

A club member's right to freedom of association prevents that member from being forced to associate intimately with those with whom he would rather not associate.¹⁷² Such reasoning can be jus-

169. *Id.* at 13-14, 231 Cal. Rptr. at 776.

170. *Id.* at 13, 231 Cal. Rptr. at 776.

171. *Id.* at 14 n.7, 231 Cal. Rptr. at 776 n.7.

172. See EEOC Decision No. 85-2, 36 Fair Empl. Prac. Cas. (BNA) 1893, 1895 (1984) (clubs may exclude those "individuals with whom they would not want to associate on a *personal* basis") (emphasis added).

Whether the law should permit private clubs to discriminate in membership is a hotly debated topic. In 1982, the American Bar Association House of Delegates adopted a resolution to reclassify private clubs as public accommodations for Title II purposes if they derived a substantial (over 20%) portion of their income from business sources. In an unusual move, the body later reversed this recommendation. Proponents of the resolution reasoned that discrimination should not be supported by tax subsidies. Members of truly personal and social clubs should not receive a business tax deduction for their memberships. On the other hand, when members of a substantially business-oriented club are able to take advantage of the tax laws, the club ought to comply with nondiscrimination laws. Opponents of the amendment pointed primarily to the adverse effect on the rights to free speech, privacy and association. They also expressed concern about the public examination of the members' and club's tax returns—presumably to see if someone was taking their dues as a deduction. None of the three articles discussing the issue mentioned the Title VII exemption. Born, *The A.B.A. Should Continue to Oppose Discrimination by Business Clubs*, 68 A.B.A. J. 1024 (1982); Ruddy, *A Protest from Private Organizations*, 68 A.B.A. J. 884 (1982); Winter, *Club Bias Proposal Reversed by House*, 68 A.B.A. J. 1204 (1982).

On June 20, 1988, the Supreme Court affirmed *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988), *aff'g*, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987). The New York Court of Appeals had held that the city's interest in eliminating discrimination against women and minorities justified infringement on club members' first amendment rights to free speech and association. A New York City ordinance states that a club is not "private" for purposes of the public accommodation statute if the club: (1) has more than 400 members; (2) provides regular meal service; and (3) receives payment directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. *NEW YORK, N.Y., ADMIN. CODE* § 8-102[9] (1986). The National Club Association considers *New York State Club Ass'n* the most significant case that the Supreme Court has ever adjudicated concerning private clubs and the rights of their members. *Turning the Tide*, PERSPECTIVE, Feb. 1988, at 6. Several cities, including Buffalo, Washington, D.C., Los Angeles and San Francisco, have laws similar to New York City's. *Id.*; see also *All-Male Clubs Give Ground*, N.Y. Times, Jan. 31, 1988, at 42, col. 6 (discussing Boston's regulation denying liquor licenses to clubs that discriminate in their membership).

tified as the protection of associational rights.¹⁷³ When the relationship being examined is between club members and employees of their club, however, these rights must give way and members can not constitutionally justify excluding employees on discriminatory grounds.¹⁷⁴

2. *The Legislative History Does Not Focus on Title VII*

The legislative history of the Civil Rights Act of 1964 focuses only on the Title II exemption.¹⁷⁵ Thus, it is not clear what Congress intended by exempting private clubs under Title VII.¹⁷⁶ Those in Congress who were critical of the Title II private club exemption worried about the possible impact on membership practices.¹⁷⁷ Critics of the language of the exemption did not fear that club members would be forced to associate with employees they would otherwise choose not to associate with.¹⁷⁸

The Age Discrimination in Employment Act (ADEA),¹⁷⁹ enacted three years after the Civil Rights Act of 1964, was modeled after Title VII, yet does not exempt private clubs from its prohibitions against discrimination on the basis of age in employment.¹⁸⁰ One commentator has noted that it follows that "private club associational rights are not, in the mind of Congress, paramount, constitutionally, to Congress' . . . authority to regulate the privilege of employment through antidiscrimination statutes."¹⁸¹

173. See *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("[i]t is the constitutional right of every person to close his home or club to any person").

174. See *Hishon v. King & Spalding*, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring) (enforcement of antidiscrimination laws may, as side effect, infringe constitutional right of freedom of association); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) ("[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the [f]irst [a]mendment, but it has never been accorded affirmative constitutional protections").

175. See *supra* notes 81-82 and accompanying text.

176. *Id.*

177. *Id.*

178. See *supra* note 83.

179. 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986).

180. *Id.* § 630(b). The statute defines "employer" as any person engaged in an industry affecting commerce who employs 20 or more persons. *Id.*; see *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 346 n.1 (9th Cir. 1982) (same basic standards apply to claims under both Title VII and ADEA); *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403, 1405 (N.D. Ga. 1976) (ADEA and Title VII may "profitably be compared").

181. Garcia, *Title VII Does Not Preempt State Regulation of Private Club Employment Practices*, 34 HASTINGS L.J. 1107, 1116 (1983) [hereinafter Garcia].

B. The "Badges and Incidents" Argument

The Enabling Clause of the thirteenth amendment¹⁸² gave Congress the power "to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents."¹⁸³ In his concurring opinion in *Jones v. Alfred H. Mayer Co.*,¹⁸⁴ Justice Douglas listed badges of slavery that still remained.¹⁸⁵ He included among them, real estate agents using subterfuge to avoid selling to blacks, labor unions barring the entrance of blacks, and schools moving much too slowly to integrate.¹⁸⁶

Each of these badges listed by Justice Douglas has a competing interest—the right of a community to determine who their neighbors will be,¹⁸⁷ of workers to determine with whom they share the benefits of their association,¹⁸⁸ of parents to determine the type of schooling their children receive.¹⁸⁹ But each of these competing interests is inferior to the state's interest in creating equal opportunities for all its citizens.¹⁹⁰

182. U.S. CONST. amend. XIII, § 2. See *supra* note 49 for the text of the thirteenth amendment.

183. The Civil Rights Cases, 109 U.S. 3, 21 (1883). Justice Bradley reasoned, however, that "slavery" was the operative word and that the refusal to allow a black person to stay at an inn or enter a theater had nothing to do with involuntary servitude. *Id.* Justice Harlan, as indicated in his dissent, would have found such discrimination to be a badge of servitude. *Id.* at 40-42 (Harlan, J., dissenting).

184. 392 U.S. 409, 444 (1968).

185. *Id.* at 447-49.

186. *Id.*; see *Memphis v. Greene*, 451 U.S. 100, 149-50 (1981) (Marshall, J., dissenting) (erection of the physical barrier between historically all-white residential neighborhood and predominantly black neighborhood is "precisely the kind of injury that [§ 1982] was enacted to prevent"). But see *Runyon v. McCrary*, 427 U.S. 160, 211 (1976) (White, J., dissenting) (some racially motivated refusals to contract, such as the decision "to hire a Negro or a white babysitter or to admit a Negro or a white to a private association" cannot be considered badges or incidents of slavery).

187. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412-13 (1968) (plaintiff cannot be prevented from buying home in white community solely on basis of race).

188. See *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945) (association whose membership was limited to whites and Indians argued unsuccessfully that state civil rights law interfered with both its right to select its own membership and its property rights).

189. See *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) ("parents have a [f]irst [a]mendment right to send their children to educational institutions that promote the belief that racial discrimination is desirable" but such schools do not have right to exclude blacks).

190. See *Hishon v. King & Spalding*, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring) (female plaintiff denied partnership in law firm states cause of action for Title VII discrimination). Justice Powell noted the tradeoff, stating that "en-

The right of private clubs to discriminate between employees based on their race is also such a badge. This is because it "detracts from the basic principle that racial discrimination in employment is wrong."¹⁹¹ It implies that of the two competing interests, the right of club members to discriminate in their choice of employees is more important than the right of individuals to pursue employment with private clubs, confident that they are being judged only on their qualifications.

VI. Recommendation

In title VII of the Civil Rights Act of 1964 (Title VII), Congress formally recognized the right of individuals to take action to redress acts of employment discrimination.¹⁹² Moreover, the Supreme Court has held that individuals discriminated against in employment on the basis of race may sue under section 1981 as well as Title VII.¹⁹³ In various civil rights enactments, Congress has recognized that the more means of enforcing equal employment laws exist, the more likely it is that employment discrimination will be discouraged.¹⁹⁴

Nonetheless, within the context of private clubs, courts that have addressed the issue are divided as to whether Title VII and section 1981 are both available to the plaintiff alleging employment discrimination.¹⁹⁵ The dispute centers on whether Title VII impliedly amends

forcement of laws that ban discrimination [may be at a] cost to other values, including constitutional rights. Such laws may impede the exercise of personal judgment in choosing one's associates or colleagues." *Id.* (Powell, J., concurring); see also *Lombard v. Louisiana*, 373 U.S. 267, 280-81 (1963) ("there is hardly any private enterprise that does not feel the pinch of some public regulation from price control, to health and fire inspection, to zoning, to safety measures, to minimum wages and working conditions, to unemployment insurance").

191. M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 67 (1966).

192. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

193. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975) (plaintiff claiming employment discrimination may look to both Title VII and § 1981 for relief).

194. See *Alexander*, 415 U.S. at 48. "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Id.* (emphasis added); see also 118 CONG. REC. 3369-70 (1972) (Congress should not diminish "the variety of enforcement means available to deal with discrimination in employment").

195. See, e.g., *Lowe v. City of Monrovia*, 775 F.2d 998, 1010 (9th Cir. 1985) ("Title VII and [§] 1981 are overlapping but independent remedies"), modified on other grounds, 784 F.2d 1407 (9th Cir. 1986); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621, 623-24 (8th Cir. 1972) (same).

section 1981. Congress has had numerous opportunities to expressly amend or repeal section 1981 but has not done so.¹⁹⁶ The argument that Title VII's private club exemption impliedly amended section 1981 does not acknowledge congressional intent.¹⁹⁷ Further, the Supreme Court has made it clear that section 1981 is an independent remedy and has not been impliedly amended by Title VII's other requirements.¹⁹⁸ Thus, to find that the Title VII private club exemption amends section 1981 ignores the Supreme Court's reasoning.¹⁹⁹

This Note maintains that three arguments support the conclusion that Congress should repeal that part of Title VII which exempts private clubs. First, while the constitutional right to freedom of association may protect relationships between club members, it does not apply to the employer/employee relationship.²⁰⁰ Second, granting private clubs the right to discriminate between employees based on their race is a badge of slavery.²⁰¹ And finally, Congress' exclusion of private clubs from Title VII is not traceable to any legislative history. Nor has Congress included a private club exemption in other civil rights legislation.²⁰² In short, the exemption is an anomaly.

VII. Conclusion

Private clubs occupy a privileged position in society insofar as they may exclude from membership those with whom their members choose not to associate. This privilege should not extend to employment discrimination against those who are otherwise protected by discrimination laws. A club member may have a right to employ discriminatory grounds when determining with whom he shall drink. The same rights are not involved, however, when that club member uses discriminatory grounds to determine who may bring him his drinks. The repeal of the private club exemption of Title VII would clearly establish that any and all employment discrimination will be punished. In a society that has made it clear through law and policy

196. See *supra* notes 154-56 and accompanying text.

197. See *Baptiste v. Cavendish Club*, 670 F. Supp. 108, 110 (S.D.N.Y. 1987); *Guesby v. Kennedy*, 580 F. Supp. 1280, 1285 (D. Kan. 1984).

198. See *Johnson*, 421 U.S. at 459-60.

199. See *Guesby*, 580 F. Supp. at 1285; *Garcia*, *supra* note 181, at 1127.

200. See *supra* notes 161-74 and accompanying text.

201. See *supra* notes 182-91 and accompanying text. Title VII also proscribes gender and religious discrimination. Discrimination against these groups also constitutes a "badge." Such discrimination reflects the belief that members of a particular group are superior to other persons.

202. See *supra* notes 179-80 and accompanying text.

that discrimination in so many areas is illegal, the private club exemption is an archaic remnant of the past.

Until Congress repeals the Title VII private club exemption, however, section 1981 can protect those plaintiffs who allege a private club has discriminated against them in employment on the basis of race.

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