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Private Club Membership--Where Does Privacy End and Discrimination Begin?

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NOTE

PRIVATE CLUB MEMBERSHIP—WHERE DOES PRIVACY END AND DISCRIMINATION BEGIN?

To associate freely with others is a fundamental constitutional right.[1] Although this freedom is generally asserted affirmatively,[2] courts have recognized that the freedom to associate implies the right not to associate.[3] Moreover, the right to associate freely has

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[1] *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (association as a "freedom . . . central to our constitutional scheme"); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (freedom of association included in "liberty" guaranteed by fourteenth amendment). In the *Civil Rights Cases*, Justice Harlan said in dissent, "I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes." The Civil Rights Cases, 109 U.S. 3, 59 (1883) (Harlan, J., dissenting). "The right of association is closely related to the right to believe as one chooses and to the right of privacy in those beliefs." Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361, 1361 (1963). Justice Douglas' remarks, however, were reflective of the NAACP's assertions that state government requirements at issue in *NAACP v. Alabama ex rel. Patterson* threatened the NAACP's very existence. *See id.* at 1379. Note, however, that Justice Douglas did not postulate an absolute right to associate, saying, "[g]overnment can intervene . . . when belief, thought, or expression moves into the realm of action that is inimical to society." *Id. See generally* G. ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION (1961); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW (3d ed. 1986) [hereinafter NOWAK, ROTUNDA & YOUNG]. Abernathy identifies several important functions performed by associations in a democratic society. Among the functions discussed is the association's role in accustoming the individual to the necessity of acquiescence in majority decisions in order to reduce the need for government controls, and its role in checking the inherent dangers of tyranny by the majority. *See* G. ABERNATHY, *supra*, at 240-44.

[2] *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (associational rights of members inhibited by requested submission of membership lists). *Cf.* Tashjian v. Republican Party of Conn., 107 S. Ct. 544, 548 (1986) (right to associate for the advancement of political beliefs); Schware v. Board of Bar Examiners, 353 U.S. 232, 244 (1957) (lawyer could not be barred from practice based on prior Communist Party membership); Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945) (blacks have a right to join labor union).

[3] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) (deprivation of right to refuse to associate violative of first amendment); NOWAK, ROTUNDA & YOUNG, *supra* note 1,

been bifurcated into two apparently distinct categories: freedom of intimate or private association and freedom of expressive association.[4] Freedom of private association encompasses fundamental freedoms within the penumbra of the concept of privacy,[5] while freedom of expressive association is derived from the nexus between the express rights guaranteed by the first amendment and the self-evident necessity for free association to effectuate these rights.[6]

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at 206-07; Comment, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 PAC. L.J. 1047, 1067 (1985). *See also* Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981) (right not to associate with those holding adverse views); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 637 (1980) (freedom of intimate association "implies the choice *not* to associate oneself in intimate ways with the world at large" (emphasis in original)). *But see* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (requirment to consider an individual for partnership on merits does not infringe on right of association); Norwood v. Harrison, 413 U.S. 455, 470 (1973). The *Norwood* Court observed significantly that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood*, 413 U.S. at 470. Thus the *Norwood* Court refused to cloak "private bias" with the salubrious values inherent in the first amendment. *See id.* at 469-70.

In Plessy v. Ferguson, 163 U.S. 537 (1896), the Court suggested that laws could not overcome social prejudices between blacks and whites. *See id.* at 551. However, the Court, in Brown v. Board of Education, 347 U.S. 483 (1954), disavowed the *Plessy* approach and held segregation in public schools an inherent violation of equal educational opportunities. *See id.* at 493. Thus the Court asserted the right of minority students to associate with whites and rejected the argument that public schools could legally be segregated. *See id.* at 495.

[4] *See* Board of Directors of Rotary Int'l v. Rotary Club, 107 S. Ct. 1940, 1945 (1987); *Roberts*, 468 U.S. at 617-18. *See generally* 3 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.41, at 199-208 (1986) [hereinafter ROTUNDA, NOWAK & YOUNG, TREATISE].

[5] *See Roberts*, 468 U.S. at 618-19. Courts have found privacy rights based on general principles inherent in the Constitution, rather than on specific constitutional language. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965) (receipt of contraceptive information necessary to exercise fundamental right to make procreational choices). *See also* Zablocki v. Redhail, 434 U.S. 374, 382-86 (1978) (state could not prohibit resident's marriage despite prior child support failures); Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977) (state statute restricting distribution of contraceptives to pharmacists invalid); Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977) (invalidating state statute limiting occupants of single family dwelling to members of nuclear family); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (state abortion legislation violative of individual's privacy rights); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (voiding state statute prohibiting children from attending private schools); Karst, *supra* note 3, at 635 (intimate associations "have a great deal to do with the formation and shaping of an individual's sense of his own identity"). *See generally* 2 ROTUNDA, NOWAK & YOUNG, TREATISE, *supra* note 4, § 15.7, at 79-86.

[6] *See, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556 (1974). The *Gilmore* Court noted that the "very exercise of the freedom to associate by some may serve to infringe that freedom for others." *Id.* at 575. *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886,

Historically, the right to associate freely with others for social as well as political and business purposes has been a hallmark of equality.[7] In the past two decades courts have been summoned to balance the interests of groups aspiring toward equality against the interests of individuals and groups seeking to maintain the status quo through discriminatory institutions.[8] Perhaps one of the most controversial issues involved in this struggle concerns the extent to which the government may constitutionally intrude into the criteria for membership in "private" clubs.[9]

This Note will address the need for courts to develop a workable and comprehensive definition of the concept of the "private club." Furthermore, it will examine the implications of discrimina-

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907-09 (1982) (organized boycott of white merchants is protected expression); Larson v. Valente, 456 U.S. 228, 244-46 (1982) (state statute requiring registration of religious organizations that obtain over half their funds from nonmembers violative of religious expression); *In re* Primus, 436 U.S. 412, 426 (1978) (associational rights extend to lawyers seeking to organize class action); NAACP v. Button, 371 U.S. 415, 431 (1963) (NAACP's efforts to solicit civil rights litigation essential to free expression); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (group membership list need not be disclosed if result would chill associational freedom); Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1, 1 (1977) (freedom of association is "little more than a shorthand phrase used by the Court to protect traditional first amendment rights of speech and petition as exercised by individuals in groups"). *See generally* 2 ROTUNDA, NOWAK & YOUNG, TREATISE, *supra* note 4, § 18.28, at 562-68.

[7] *Cf.* Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (negative effects of exclusion of minorities on their self-image and achievement); Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 SW. U.L. REV. 237, 271 (1982) (persons deprived of right to participate fully in certain social institutions will have diminished self-image).

[8] *See, e.g.*, Daniel v. Paul, 395 U.S. 298, 308 (1969) (striking down membership policy designed to keep recreational facility all white); Nesmith v. YMCA, 397 F.2d 96, 100 (4th Cir. 1968) (YMCA could not restrict membership to whites). *See also* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1430-33 (1974) (discussing need to balance public goods against privacy interests); Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878, 1882-83 (1984) (viewing this balance as a clash between "egalitarian and communitarian values"). Courts, therefore, have differed when evaluating the relative importance of integration as compared to privacy rights. *Compare* Wright v. Cork Club, 315 F. Supp. 1143, 1157 (S.D. Tex. 1970) (integration necessary in non-private organizations to balance goal of racial integration against associational rights of members) *with* Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182, 1195 (D. Conn. 1974) (privacy rights of members dominant over goal of integration).

[9] *See, e.g.*, Board of Directors of Rotary Int'l v. Rotary Club, 107 S. Ct. 1940, 1943-45 (Rotary International required to accept woman member in local club); Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 477 (3d Cir. 1986) (Kiwanis International's refusal of woman's membership upheld in local club), *rev'g* 627 F. Supp. 1381 (D.N.J.); New York State Club Ass'n, Inc. v. City of New York, 69 N.Y.2d 211, 215, 505 N.E.2d 915, 916, 513 N.Y.S.2d 349, 350 (1987) (upholding local law which prohibits discrimination by private clubs which provide benefits to non-members).

tion by private clubs upon the associational rights of the members of such clubs, as well as those excluded from membership. Initially, this Note will review federal legislative restrictions in the area of private club discrimination and then shift its focus to attempts by states to limit discrimination through public accommodations statutes. These governmental efforts will then be analyzed against the paradigm of constitutional protections of the right to associate freely. Ultimately, this Note will suggest a legislative approach that equitably protects the rights of the conflicting parties through permissible restrictions on discrimination by private clubs.

FEDERAL CIVIL RIGHTS LEGISLATION

Post Civil War Legislation

At the time the Constitution was written, most Americans viewed their individual state governments as buffers against the potential tyranny of an omnipotent federal government.[10] However, in the aftermath of the Civil War, it became the federal government that adopted the role of protector of individual rights and guarantor of equal protection.[11] Through the thirteenth amendment[12] and the Civil Rights Act of 1866,[13] the federal government

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[10] *See* THE FEDERALIST No. 46, at 294, 297 (J. Madison) (C. Rossiter ed. 1961).

[11] *See* U.S. CONST. amend. XIV, § 1. The fourteenth amendment prohibits states from abridging the rights of their citizens or denying equal protection of the laws to all people. *See id.*

[12] U.S. CONST. amend. XIII, § 1. The thirteenth amendment provides in pertinent part that, "Neither slavery nor involuntary servitude . . . shall exist within the United States." *Id. See also* Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) (private persons liable for abrogating thirteenth amendment rights); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968) (thirteenth amendment protections applicable to individual and state action). *See generally* 2 ROTUNDA, NOWAK & YOUNG, TREATISE, *supra* note 4, §§ 19.6-19.10, at 739-53 (discussing protections provided by thirteenth amendment).

[13] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981, 1982 (1982)). Section one of the Civil Rights Act of 1866 reads in pertinent part:

> That all persons born in the United States and not subject to any foreign power . . . 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 . . . shall have the same right, in every State and Territory 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 . . . .

Id. The Civil Rights Act of 1866 was based on the theory that to deny the enumerated rights and privileges contained in the Constitution was to subject an individual to involuntary servitude. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 91-92 (1873) (Field, J., dissenting).

articulated a policy of protecting individuals' contractual and property rights.[14] Although this protection remained largely dormant for a century following its enactment, it was revitalized in *Jones v. Alfred H. Mayer Co.*[15] when the Supreme Court held that section 1982, enacted under the Civil Rights Act of 1866, extended to private discrimination.[16] Section 1981, created by the same act, also has been held applicable to private discrimination.[17]

Civil Rights Act of 1964

The modern era of civil rights legislation is marked by the Civil Rights Act of 1964.[18] While this Act clearly prohibits racial discrimination in the area of public accommodations,[19] Title II, which provides an exemption for "private clubs,"[20] has generated considerable controversy as to the "private" nature of the wide variety of groups that have claimed exemptions due to their "pri-

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[14] *See* Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 440 (1973). *See also* McCrary v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975) (restricting private school admission to white students denies a contractual right to qualified black students), *aff'd*, 427 U.S. 160 (1976); Taylor v. Jones, 495 F. Supp. 1285, 1290 (E.D. Ark. 1980) (racially motivated termination of employment violates 42 U.S.C. § 1981), *aff'd in part and rev'd in part*, 653 F.2d 1193 (8th Cir. 1981).

[15] 392 U.S. 409 (1968).

[16] *See id.* at 412. The *Jones* Court held that section 1982 applies to the purely private sale of property. Relying on section two of the thirteenth amendment, the Court reasoned that Congress had the authority to determine what constitutes "badges and incidents of slavery" and to pass the appropriate legislation to eliminate them. *See id.* at 437-44. Moreover, the Court upheld the congressional determination that discrimination in real estate sales was such an incident of slavery. *See id.* at 413. Thus, Congress could prevent a private person from refusing to sell his house to another person solely on the basis of race. *See id.*

[17] *See* Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182, 1199 (D. Conn. 1974). *See also supra* note 14 (cases analogize § 1982 and § 1981 as jointly emanating from thirteenth amendment and extending to acts of private discrimination).

[18] Pub. L. No. 88-352, § 201, 78 Stat. 243 (1964) (codified as amended in scattered sections of 42 U.S.C. § 2000a (1982)).

[19] Section 2000a(b) of the Civil Rights Act of 1964 describes a public accommodation by citing a series of examples that would be illustrative of the type of entity that would be covered. *See* 42 U.S.C. § 2000a(b) (1982). This section refers, however, solely to discrimination or segregation "on the ground of race, color, religion, or national origin," and not to equivalent acts on the basis of gender. *See id.* § 2000a(a).

[20] 42 U.S.C. § 2000a(e) (1982). This subsection exempts from the provisions of the Act, "a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons" of a place of public accommodation. *Id. See generally* Note, *The Private Club Exemption To The Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U. L. REV. 1112 (1969) (detailed look at developing standards used to determine status of assertedly private clubs within context of racial discrimination actions under § 2000a(e)).

vate" character.[21] Courts generally have had little difficulty in rejecting claims for exemption brought by sham organizations created solely to avoid the consequences of the Civil Rights Act of 1964.[22] In dealing with alleged "private clubs," courts have outlined a series of factors to help determine whether a club that attempted to exclude blacks from membership was indeed "truly private."[23]

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[21] *See, e.g.*, Nesmith v. YMCA of Raleigh, 397 F.2d 96 (4th Cir. 1968). The Raleigh, North Carolina YMCA claimed that its health and recreation facilities were private and therefore exempt from the anti-discrimination provisions of the Act. *See id.* at 101. The court, however, found that the YMCA, which had no limits on membership and no standards for admission, was not a private club within the meaning of the Act and thus was not exempt. *See id.* at 102. *See also* Bell, *Private Clubs and Public Judges: A Nonsubstantive Debate About Symbols*, 59 TEX. L. REV. 733, 739 (1981) (private club exemption "has tempted a legion of public facilities to cloak discriminatory policies in private club garb").

[22] *See* United States v. Richberg, 398 F.2d 523, 530 (5th Cir. 1968). Richberg's Cafe, which existed prior to the enactment of the Civil Rights Act of 1964, segregated its customers by race. *Id.* at 525. At some time after the initiation of the instant suit, the Dixie Diner Club was established on the premises of Richberg's Cafe. *See id.* The court determined that this club was not within the exemption provided in section 2000a(e), because there was no selectivity in membership, no club meetings were held, and there were no changes in food, prices, or personnel from the former cafe. *See id. See also* United States v. Johnson Lake, Inc., 312 F. Supp. 1376, 1380 (S.D. Ala. 1970) (association reincorporated as "private club" subsequent to passage of Civil Rights Act of 1964 primarily to discriminate against blacks); United States v. Jordan, 302 F. Supp. 370, 379 (E.D. La. 1969) (public restaurant converted to "private dining club" held not exempt); United States v. Beach Assocs., Inc., 286 F. Supp. 801, 807-09 (D. Md. 1968) (allegedly private beach club which admitted all white persons enjoined from discriminating against black applicants); Note, *supra* note 20, at 1113-14 (criticizing criteria used by Supreme Court in evaluating Lake Nixon Club in Daniel v. Paul, 395 U.S. 298 (1969), as indistinct).

[23] *See Jordan*, 302 F. Supp. at 371. In *Jordan*, the court was confronted with a formerly public restaurant which had incorporated as a private club and subsequently sought to claim exemption from the anti-discrimination provisions of the Civil Rights Act of 1964. *See id.* at 371. The court adopted the government's brief which set forth in detail criteria which may be utilized to determine the true status of an assertedly private club. *See id.* at 375-77. One broad category involves the degree of selectivity of the club, including the control of the existing members over the admission of applicants and the revocation of existing membership. *See id.* at 375. Limits on club membership and any genuine qualifications for membership are also scrutinized. *See id.* A second category a court will investigate involves control of the operations of the "club." *See id.* at 375-76. Additionally, the ways in which club membership is developed, with an emphasis on the degree of advertising aimed at the public, will be a third criterion. *See id.* at 376. The court also cited the purpose of the club and the formalities of membership as factors in the determination of private status. *See id.* Senator Hubert Humphrey emphasized that the exemption was to protect only "the genuine privacy of private clubs or other establishments whose membership is *selective on some reasonable basis.*" *See* 110 CONG. REC. 13,697 (1964) (emphasis added); *see also* Note, *supra* note 20, at 1117-18 (factors courts will consider in determining whether, in context of federal legislation, a club is private).

STATE PUBLIC ACCOMMODATIONS STATUTES

Although federal statutes remain an effective weapon against racial discrimination in businesses affecting commerce,[24] they provide no protection against sexually discriminatory membership policies.[25] During the past fifteen years the preferred alternative, in attempting to scale back the all-male social bastions of America, has been the state statute prohibiting discrimination in public accommodations.[26] However, since most state statutes are modelled after Title II of the Civil Rights Act of 1964, they too include exemptions for private clubs.[27] Thus, state courts have had to define

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[24] *See* 42 U.S.C. § 2000a(b) (1982). Public accommodations must either affect commerce as defined in section 2000a(c), or be supported by state action as defined in section 2000a(d) in order to come within the reach of federal regulation. *Id.* The state action requirement has been a substantial hurdle preventing application of section 2000a to membership clubs. *See, e.g.*, New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 858-59 (2d Cir. 1975) (despite receipt of considerable governmental funds, state action not present).

[25] *See* 42 U.S.C. § 2000a(b) (1982). Subsection (b) limits the scope of the statute to discrimination or segregation based on race, color, religion or national origin. *See id. See also* Seidenberg v. McSorleys' Old Ale House, Inc., 308 F. Supp. 1253, 1255-56 (S.D.N.Y. 1969) (civil rights protections of § 2000a(a) inapplicable to women); DeCrow v. Hotel Syracuse Corp., 288 F. Supp. 530, 532 (N.D.N.Y. 1968) (same).

Title VII of the Civil Rights Act provides protections against sexual discrimination in addition to the other forms of discrimination covered by Title II. For an interesting discussion of the interrelation of Title VII provisions and state regulations and the effect of this interrelation on the exemption of private clubs in the arena of employment discrimination, see Garcia, *Title VII Does Not Preempt State Regulation of Private Club Employment Practices*, 34 HASTINGS L.J. 1107 (1983). *See also* Bohemian Club v. Fair Employment & Hous. Comm'n, 187 Cal. App. 3d 1, 231 Cal. Rptr. 769 (Ct. App. 1986) (preservation of comraderie in all-male club does not justify sexually discriminatory hiring practices); Guesby v. Kennedy, 580 F. Supp. 1280, 1284 (D. Kan. 1984) (right of association more limited in employment context than club membership context).

[26] *See, e.g.*, United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981) (Jaycees considered place of public accommodation within meaning of state statute); United States Power Squadrons v. State Human Rights Appeal Bd., 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983) (boating clubs held to be places of public accommodation). *See also* Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984) (affirming determination by Minnesota Supreme Court that state public accommodation statute applied to Jaycees); Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. REV. 443, 445 (1983) (states adopted public accommodations laws in response to Supreme Court's invalidation of federal public accommodation law); Note, Roberts v. United States Jaycees, 53 U. CIN. L. REV. 1173, 1178 (1984) (prior to federal civil rights acts state public accommodation laws were primary means of protecting disadvantaged groups); *see generally* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 1037-70 (1975); Project, *Discrimination In Access To Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978) [hereinafter Project].

[27] *See, e.g.*, N.J. STAT. ANN. § 10:5-5(*l*) (West Supp. 1987) (enumerated list of public

their statutory terms to determine which organizations, because of their private nature, fall within this exemption.[28]

Definition of "Place"

Most state civil rights statutes prohibit discrimination in *places* of "public accommodation."[29] In *National Organization for Women v. Little League Baseball, Inc.*,[30] which involved a challenge to all-male baseball programs, Little League asserted that it should not be considered a "place of public accommodation" because it did "not operate from any fixed parcel of real estate."[31] While pointing to some location-specific connections,[32] the court held the Little League to be a place of "*public* accommodation" essentially because it was "open to children in the community at large, with no restriction (other than sex) whatever."[33] The court emphasized that the term "place" was a "term of convenience, not of limitation."[34]

Some membership clubs have successfully avoided anti-discrimination provisions by claiming they did not operate from any statutorily-required fixed location.[35] Refusing to follow the *Little*

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accommodations and "distinctly private" exempted clubs).

[28] *See infra* notes 29-46 and accompanying text.

[29] *See, e.g.* N.J. STAT. ANN. § 10:5-5(*l*) (West Supp. 1987). In an effort to exemplify the concept of equality, state public accommodations laws have created a tension between the goal of equal opportunity and the freedom of association. *See* Comment, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 PAC. L.J. 1047, 1047 (1985); Project, *supra* note 26, at 290-91; *cf.* Unruh Civil Rights Act, CAL. CIV. CODE § 51 (Deering Supp. 1987) (referring to business establishments of any kind rather than places of public accommodation).

[30] 127 N.J. Super. 522, 318 A.2d 33, *aff'd*, 67 N.J. 320, 338 A.2d 198 (1974).

[31] *Id.* at 530, 318 A.2d at 37.

[32] *See id.* at 531, 318 A.2d at 37. The court pointed to the ball field at which the league held its tryouts, gave instruction to the youngsters, and held practice and league games. *See id.*

[33] *Id.* at 531, 318 A.2d at 37-38 (emphasis in original). The court agreed with the hearing officer of the Division of Civil Rights, that a place is a public accommodation if the public is invited to attend. *See id.*

[34] *Id.* at 531, 318 A.2d at 37. The *Little League* decision reflects the view that the term "place" is used because it is the most convenient way to describe most public accommodations, which are "commonly provided at fixed 'places'." *Id.* at 530, 318 A.2d at 37. The court cautioned, however, that the language of the statute should not be read restrictively so as to defeat its remedial purpose. *See id.*

[35] *See, e.g.*, United States Jaycees v. Bloomfield, 434 A.2d 1379, 1381 (D.C. 1981). Approaching the notion of "place" differently from the *Little League* court, the *Bloomfield* court refused to apply the public accommodations statute of the District of Columbia to the Jaycees because the club did "not operate from any particular place within the District of Columbia." *See id.* The District of Columbia statute at issue contained a laundry list of

League approach when interpreting statutes which define public accommodations by example,[36] some courts have found a fixed situs to be essential.[37] Several state legislatures, perhaps in anticipation of such possible limitations, have attempted to broaden their statutory language to deemphasize the role of the fixed situs.[38]

Definition of "Private"

Many courts that have gone beyond the definition of "place" have been confronted with a statutory exemption for clubs that are "private."[39] Due to close structural parallels between the provisions of section 2000a of the Civil Rights Act of 1964[40] and some state public accommodations laws,[41] particularly in the area of the private club exemption,[42] the federal criteria used to determine whether clubs are "private" are often helpful in state cases as

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locations specifically denoted as places of public accommodations. *See* D.C. CODE ANN. § 6-2202(x) (Supp. 1978). Other cases involving the Jaycees have followed the *Bloomfiled* court's interpretation of "place." *See, e.g.*, United States Jaycees v. Richardet, 666 P.2d 1008, 1011 (Alaska 1983) (public accommodation status requires fixed physical location); United States Jaycees v. Massachusetts Comm'n Against Discrimination, 391 Mass. 594, 603, 463 N.E.2d 1151, 1156 (1984) (Jaycees not considered place of public accommodation because do not maintain "place of operations" within state).

[36] *See, e.g.*, ALASKA STAT. § 18.80.300(12) (1986). The Alaska statute defines a public accommodation as:

> a place that caters or offers its services, goods or facilities to the general public and includes a public inn, restaurant, eating house, hotel, motel, soda fountain, soft drink parlor, tavern, night club, roadhouse, place where food or spiritous or malt liquors are sold for consumption, trailer park, resort, campground, barber shop, beauty parlor, bathroom, resthouse, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company and all other public amusement and business establishments, subject only to the conditions and limitations established by law and applicable alike to all persons.

Id.

[37] *See supra* note 35.

[38] *See* MINN. STAT. ANN. § 363.01(18) (West Supp. 1987). A place of public accommodation is "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." *Id. See also* CAL. CIV. CODE § 51 (Deering Supp. 1987). This section provides in pertinent part that "[a]ll persons . . . no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in *all business establishments of every kind whatsoever*." *Id.* (emphasis added).

[39] *See, e.g.*, N.Y. EXEC. LAW § 292(9) (McKinney 1982) (exempting from coverage "any institution, club or place of accommodation which is in its nature distinctly private").

[40] 42 U.S.C. § 2000a(e) (1982). *See supra* note 19 (discussion of § 2000a).

[41] *See supra* note 36.

[42] *See supra* notes 27 and 39 and accompanying text.

well.[43]

While courts have enumerated a great many factors in evaluating claims to private club status, the criterion central to this determination is selectivity.[44] Courts applying either the federal statute or its various state analogues repeatedly have analyzed the standards by which a club selected its members.[45] Clubs that routinely admitted men of a certain age and social group while excluding similarly situated women have been held not to be "private."[46]

Only recently have these attempts to delineate those clubs that might or might not be permitted to discriminate in their membership policies raised issues as to the extent of constitutional protection afforded the freedom of association.

FREEDOM OF ASSOCIATION GENERALLY

As society has become increasingly technological and impersonal, the individual has increasingly needed to join with others who have similar objectives and interests.[47] The importance of

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[43] *See supra* note 22 and accompanying text.

[44] *See* Rogers v. International Ass'n of Lions Clubs, 636 F. Supp. 1476, 1479-80 (E.D. Mich. 1986); Wright v. Cork Club, 315 F. Supp. 1143, 1150-53 (S.D. Tex. 1970); United States v. Jordan, 302 F. Supp. 370, 375-77 (E.D. La. 1969). Generally, courts have held that the selection of new members must be based on some enumerated criteria and must include screening by current members of applications for new membership. *See Wright*, 315 F. Supp. at 1151. Without the actual operation of such screening, a finding that a club is "private" is extremely unlikely. *See id.*

The anomalous results which can occur when clubs do not meet the selectivity criteria, yet nevertheless claim to be "private," are exemplified by situations wherein entire groups, such as women who are professionals in their respective fields, are excluded from clubs solely because of their sex. *Cf.* Comment, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460, 468-69 (1970) (discussion of harmful effects of racial discrimination practiced by various clubs).

[45] *See Wright*, 315 F. Supp. at 1154. *See also Rogers*, 636 F. Supp. at 1479-80 (cursory formal procedure for admission is not indicative of selectivity); United States v. Slidell Youth Football Ass'n, 387 F. Supp. 474, 485-86 (E.D. La. 1974) (2000 white applicants accepted by association without interviews, recommendations, or evaluations); United States Power Squadrons v. State Human Rights Appeal Bd., 59 N.Y.2d 401, 412-13, 452 N.E.2d 1199, 1204-05, 465 N.Y.S.2d 871, 876-77 (1983) ("no plan or purpose of exclusivity other than sexual discrimination").

[46] *See Rogers*, 636 F. Supp. at 1480; *Power Squadrons*, 59 N.Y.2d at 413-14, 452 N.E.2d at 1205, 465 N.Y.S.2d at 877.

[47] *See* G. ABERNATHY, *supra* note 1, at 171-73. However the need to join with others is not a new phenomenon. Almost 150 years ago Alexis de Tocqueville observed:

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

group association in the development of one's own identity has been acknowledged both by the Supreme Court and legal commentators.[48]

Although the Constitution does not explicitly provide for a freedom of association, courts have acknowledged that this right is derived from the first amendment rights of freedom of speech and assembly.[49] Concurrently, courts have recognized associational rights, derived from the penumbra of the Bill of Rights, that create a zone of privacy protected from governmental interference.[50]

In *NAACP v. Alabama ex rel. Patterson*,[51] the Supreme Court acknowledged initially the existence of a right to associate for the purpose of advancing common goals or interests.[52] This right was identified in the context of a court order that the NAACP provide the State of Alabama with a complete list of names and addresses

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impairing the foundations of society.

1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 196 (Bradley ed. 1954). De Tocqueville, however, discussed this right in an inclusive rather than exclusive context. *See id.*

[48] *See* Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984). Justice Brennan characterized certain aspects of association as playing "a critical role in the culture" and acting as "critical buffers between the individual and the power of the State." *See id.* at 618-19. *See also* Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 308-09 (importance of group membership in development of one's own identity). *Cf.* Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294 (1981) (collective effort sometimes necessary to make individual voice heard).

[49] *See Roberts*, 468 U.S. at 622; NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-09 (1982); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958). Justice Douglas noted that the act of joining an organization could itself be a form of expression:

> The right of "association". . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group . . . . Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (dicta).

[50] *See supra* note 5 and accompanying text. "Right of Privacy is a zone of prima facie autonomy, of presumptive immunity from regulation, in addition to that established by the first amendment." Henkin, *supra* note 8, at 1425. Although Professor Henkin indicates that some rights are so fundamental that they are "implicit in the concept of ordered liberty," he emphasizes that most aspects of an individual's life are not "fundamental" and thus are subject to presumptively valid statutory controls. *See id.* at 1425-26. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 7-10 (1974) (upholding zoning ordinance restricting use to single family dwellings). Furthermore, even "fundamental rights" will have to yield to a "compelling public good clearly established." *See* Henkin, *supra* note 8, at 1426.

[51] 357 U.S. 449 (1958).

[52] *Id.* at 460-61. The Court stated that "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association. . ." *Id.* at 460. Furthermore, the Court stressed that associational freedom is a basic component of due process under the fourteenth amendment and "it is immaterial whether the beliefs . . . pertain to political, economic, religious or cultural matters. . . ." *Id.*

of all NAACP members in that state.[53] Fearing the chilling effect enforcement of such an order might have upon the first amendment rights of the members, the Court found the disclosure order to be an abridgment of the constitutional right to associate.[54] Subsequent cases have seen the freedom of association successfully employed by political parties asserting their rights against various governmental restrictions.[55]

Freedom From Coerced Association

Paradoxically, the right to associate implies a right not to associate with groups or individuals.[56] Generally, this right has been advanced by individuals seeking to avoid coerced associations.[57] In *Abood v. Detroit Board of Education*,[58] a group of teachers challenged agency shop requirements either to join the local union or pay a fee equivalent to union dues.[59] The teachers alleged, among other things, a violation of their freedom of association because they were being forced to contribute to an organization with which they had ideological disagreements.[60] The Court sustained the claim that the use of compulsory union dues to fund extraneous political causes violated the associational rights of teachers who opposed such causes, but upheld the fee requirement to the extent the fee reflected union expenditures made on behalf of all employees.[61]

Two important cases involving the right to exclude, as an aspect of the freedom of association, left unsettled the basic issue of whether private clubs have a right to discriminate, but have often

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[53] *Id.* at 451.

[54] *See id.* at 462-63, 466.

[55] *See* Tashjian v. Republican Party of Conn., 107 S. Ct. 544, 548 (1986); Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 120-26 (1981); Cousins v. Wigoda, 419 U.S. 477, 487-91 (1975). In *Tashjian*, the plaintiffs challenged a state requirement that voters in party primaries be members of that party. *See Tashjian*, 107 S. Ct. at 546-47. The Republican Party prevailed in its assertion that such a rule, conflicting with Republican desires to allow independent voters to vote in state primaries, was a violation of associational freedom. *See id.* at 548-54.

[56] *See supra* note 3 and accompanying text.

[57] *See infra* notes 58-61 and 65-67 and accompanying text.

[58] 431 U.S. 209 (1977).

[59] *See id.* at 211-13.

[60] *See id.* at 233-35. The employees alleged that the union was using a portion of the collected fees to fund political causes "unrelated to its duties as exclusive bargaining representative" of the teachers. *Id.* at 234.

[61] *See id.* at 235-36.

been cited by parties seeking to exclude certain groups from membership in their association. In *Moose Lodge No. 107 v. Irvis*, a black guest of a member challenged the lodge's refusal to serve him.[62] The plaintiff conceded the right of a private club to discriminate but argued that the state's issuance of a license to sell alcoholic beverages at the lodge was "state action" implicating the protection of the fourteenth amendment.[63] Consequently, the Court did not have to decide the right of a private club to discriminate, and dicta as to the private nature of the club and the club's concomitant right to discriminate[64] cannot be considered conclusive with reference to state public accommodation statutes. In *Runyon v. McCrary*,[65] the Court refused to recognize the associational right claim of a private school that denied admission of black children to its all-white student body.[66] The Court, however, specifically noted that its decision did not address the issue of whether private social clubs were similarly restricted in their right not to associate.[67] These cases, however, did not directly question the right of a private club to exclude certain categories of people as an element of a constitutional right to associate. That question was addressed directly for the first time in *Roberts v. United States Jaycees*.[68]

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[62] 407 U.S. 163 (1972). *See also* Goodwin, *supra* note 7, at 247-48, 251-52 (evaluating significance of *Moose Lodge*).

[63] 407 U.S. at 171, 179 n.1 (Douglas, J., dissenting).

[64] *See id.* at 171. The Court found Moose Lodge to be a private club, in the ordinary meaning of that term, but it did not attempt a detailed analysis of that issue since it focused on the question of state action. *See id.* at 172-77. In his dissent, Justice Douglas appeared to support the right of private clubs to discriminate against minorities of all types, but he argued that there was sufficient state action to bar further discrimination against blacks. *See id.* 179-83 (Douglas, J., dissenting).

Additional support for the freedom to associate is found in Griswold v. Connecticut, 381 U.S. 479 (1965), which involved governmental intrusion into procreational matters. Although the case did not involve social clubs, remarks by Justice Douglas have oft been cited to support discriminatory practices within the borders of freedom of association. *See id.* at 483. Justice Douglas suggested that the right of association is "more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it . . ." *Id. See also* Karst, *supra* note 3, at 624-26 (pointing to *Griswold* as seminal case in expansion of concept of freedom of association).

[65] 427 U.S. 160 (1976).

[66] *See id.* at 175-76. The Court acknowledged the right of parents to send their children to "educational institutions that promote the belief that racial segregation is desirable," but the Court refused to protect "the *practice* of excluding racial minorities from such institutions. . . ." *See id.* at 176 (emphasis in original).

[67] *Id.* at 167.

[68] 468 U.S. 609 (1984). Subsequent to the decision in *Roberts*, the Jaycees voted to admit women to all its chapters. *See* N.Y. Times, Aug. 17, 1984, at A8, col. 1.

IMPACT OF *Roberts v. United States Jaycees*

In *Roberts v. United States Jaycees*, the Minneapolis and St. Paul chapters of the Jaycees began admitting women in 1974 and 1975, respectively.[69] In response, the United States Jaycees imposed on the local chapters a series of sanctions and threatened to revoke their local charters.[70] Members of the chapters responded by filing charges with the state department of human rights alleging discrimination in violation of the Minnesota Human Rights Act.[71] The Minnesota Supreme Court found the Act applicable to any "public business facility" and found the Jaycees to fit within that classification.[72] In its analysis, the court stressed that membership in the Jaycees was solicited on a nonselective basis.[73]

The Jaycees sought declaratory and injunctive relief in federal court to prevent enforcement of the law by Minnesota state officials. Although the federal district court ruled against the Jaycees,

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[69] *See Roberts*, 468 U.S. at 614. Under the national organization's by-laws, women previously had been allowed to participate as associate members who paid somewhat lower dues, but women could not vote, hold office, or participate in certain activities. *See id.* at 613.

[70] *See id.* at 614. In 1978, the chapters were advised that the national board of directors would shortly consider a motion to revoke the charters of both offending chapters. *See id.*

[71] *See id.*; MINN. STAT. ANN. § 363.03(3) (West Supp. 1987). Section 363.03(3) proscribes denial of the "full and equal enjoyment . . . of a place of public accommodation because of . . . sex." *Id.* For a history of the procedural background, see *Roberts*, 468 U.S. at 615-17.

[72] *See Roberts*, 468 U.S. at 616; United States Jaycees v. McClure, 305 N.W.2d 764, 774 (Minn. 1981).

[73] *See United States Jaycees*, 305 N.W.2d at 771. The methods by which the Jaycees recruited members indicated that membership was considered a product to be sold to the general male public. *See id.* at 769. But the Minnesota Supreme Court created some confusion by stating:

> Private associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. § 363.01(18) (1980) [definition of "public accommodations"]. Any suggestion that our decision today will affect such groups is unfounded.
>
> We, therefore, reject the national organization's suggestion that it be viewed analogously to private organizations such as the Kiwanis International Organization.

Id. at 771. The Supreme Court's subsequent adoption of the loose language of the Minnesota court has led to speculation that there are still ways around public accommodations statutes. *Cf.* Comment, Roberts v. United States Jaycees: *How Much Help For Women?*, 8 HARV. WOMEN'S L.J. 215, 224-26 (1985).

Recently, to clarify its statement in *Roberts* with respect to the private nature of Kiwanis clubs, the Supreme Court stated that it had not evaluated whether Kiwanis clubs were sufficiently private to merit constitutional protection exempting these clubs from state public accommodations statutes. *See* Board of Directors of Rotary Int'l v. Rotary Club, 107 S. Ct. 1940, 1947 n.6 (1987). The Court failed, however, to provide any further guidance in making such determinations. *See id.*

thereby affirming a state agency's order requiring the Jaycees to allow its local Minnesota chapters to admit women,[74] that ruling was later reversed by the Eighth Circuit Court of Appeals.[75] Focusing on the tension between the anti-discrimination provisions of the Minnesota public accommodations statute and the general freedom of association,[76] the circuit court distinguished a membership club from a club which in reality merely provides commercial goods or services.[77] The court determined that the Jaycees fell into the former category,[78] and suggested that only a compelling state interest could justify a "direct and substantial" intrusion into Jaycee affairs by proscribing male-only membership.[79] Differentiating tangible goods and services from those involved in membership qualifications,[80] the court found the state interest not sufficiently compelling to override the associational rights of the Jaycees.[81]

The Supreme Court, however, supported Minnesota's highest court, upholding the Minnesota statute and its application to the Jaycees.[82] In so doing, the Court, more importantly, identified a framework for the analysis of associational freedom.[83]

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[74] *See Roberts*, 468 U.S. at 615-16. The United States District Court entered judgment in favor of state officials seeking to enforce the Minnesota Human Rights Act. *See id.* This judgment was based, in part, on the ruling of the Minnesota Supreme Court that the Jaycees was a "place of public accommodation" within the meaning of the statute. *See id.* at 616.

[75] *See* United States Jaycees v. McClure, 534 F. Supp. 766, 770-74 (D. Minn. 1982), *rev'd*, 709 F.2d 1560 (8th Cir. 1983), *rev'd sub nom.* Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[76] *See United States Jaycees*, 709 F.2d at 1566-68.

[77] *See id.* at 1571. The court characterized the Jaycees as "a genuine membership organization, whose members govern its affairs and decide its policies," rather than merely a way to deliver commercial goods and services. *See id.*

[78] *See id.*

[79] *See id.* at 1572.

[80] *See id.* at 1573.

[81] *See id.* at 1576.

[82] *See* Roberts v. United States Jaycees, 468 U.S. 609, 630-31 (1984). Unfortunately, the Court did not sufficiently explore the parameters of a "private" club in such cases. "[T]he Court must be criticized for adopting Minnesota's functional definition of 'goods and services' " rather than delineating clear guidelines to assist lower courts. *See* Note, Roberts v. United States Jaycees: *What Price Freedom of Association?*, 1985 DET. C.L. REV. 149, 160 [hereinafter Note, *What Price Freedom*]; Note, *supra* note 26, at 1187 (constitutional protection afforded various categories of organizations unclear from *Roberts* decision).

[83] *See Roberts*, 468 U.S. at 617-18. This framework involved the division of freedom of association into two distinct freedoms—freedom of intimate association and freedom of expressive association. *See id.*

Freedom of Intimate Association

The *Roberts* Court stressed its concern that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State."[84] Characterizing intimate associations as "an intrinsic element of personal liberty,"[85] the Court specifically identified family relationships as examples of such intimate associations. However, the Court did not limit this category to that narrow grouping but rather delineated certain attributes of groups that would implicate the freedom of intimate association.[86] It suggested that this freedom might best be viewed as a continuum which decreases in magnitude as the size of the group increases and its selectivity decreases.[87] Finding the Jaycees large and unselective in its membership policies, the Court did not find it necessary to delineate the outer parameters of this central concept.[88]

Freedom of intimate association remains a significant, although relatively uncharted area of interest. The Court has not clarified the relationship between size and selectivity,[89] and has not

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[84] *See id.*

[85] *See id.* at 620.

[86] *See id.* at 619-20. The Court identified certain characteristics such as relative smallness, high degree of selectivity in admissions and retention, and need for privacy in certain key aspects of the relationship. *See id.* at 620; *see also* Karst, *supra* note 3, at 629-30 (nature and value of intimate association).

[87] *See Roberts*, 468 U.S. at 620. Between the polar extremes of the large business and the nuclear family there is a broad range of relationships which would invoke a range of constitutional protections against state interference. *See id.*

[88] *See id.* at 620-21. While the local chapters of the Jaycees were characterized as basically unselective, it is unclear whether selectivity by the local club would have altered the Court's analysis. *See id.* at 621. Both Minnesota chapters had approximately 400 members. Furthermore, there were no criteria for membership, and apparently age and sex were the only reasons why applicants were ever rejected. *See id.* Because women had already been active participants in many of the organization's social events, privacy concerns were considered to be of minimal importance. *See id.*

[89] *See id.* at 619-20. Courts have not yet confronted the difficult problems of defining how far beyond the family unit the freedom of intimate association extends nor the extent to which such freedom is immune from compelling state interests. In *Roberts*, there was a very large national organization with virtually no selectivity apart from gender. *See id.* at 613, 621. In *Rotary Club*, the Court once again was faced with a large and impersonal organization. *See* Board of Directors of Rotary Int'l v. Rotary Club, 107 S. Ct. 1940, 1946 (1987). To date, the Court has not had to address the issue as applied to a much smaller group with clearly selective membership practices, but with an avowedly racist or sexist bias. The Court indicates that "certain kinds of highly personal relationships" are to be granted a wide area in which to operate. *See Roberts*, 468 U.S. at 618. But even here, the Court has implied that certain policy objectives would justify state intervention. *See id.*

identified the extent to which the freedom of intimate association may exist beyond the scope of the family unit.[90] The Court appears to be suggesting that as the interests of intimate association increase, the interests of the state must, of necessity, diminish. It is submitted that a small club, which comprises several dozen friends who value the congenial atmosphere of their group and is unrelated to commercial activity, should be included within the parameters of intimate association.[91]

Finding the freedom of intimate association inapplicable to the Jaycees,[92] the *Roberts* Court elaborated on the other branch of associational freedom—freedom of expressive association.[93]

Freedom of Expressive Association

It is clearly recognized that people have the right to associate in pursuit of activities protected by the first amendment.[94] However, this right may be subject to restriction when the state employs the least restrictive means to achieve compelling state interests, unrelated to the suppression of ideas expressed through such association.[95] Denoting Minnesota's "strong historical commitment to eliminating discrimination," the *Roberts* Court summarily found the existence of a compelling state interest.[96] More accurately, the Court's opinion indicated that it did not believe the admission of women to the Jaycees would prevent the organization from engag-

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[90] *See Roberts*, 468 U.S. at 618-20. Association with others is significant in developing one's cultural identity. *See* Karst, *supra* note 48, at 339. We learn to trust the members of our own cultural group as we learn what to expect from them; "[c]onversely, distrust of the members of a different cultural group flows from fear . . . that outsiders threaten our own acculturated views of the natural order of society." *Id.* at 309.

[91] The implication is that in such an intimate group associational rights would be particularly strong while state interests would be quite minimal with respect to such a group. *See Roberts*, 468 U.S. at 620.

[92] *See id.* at 621.

[93] *See id.* at 622.

[94] *See id.*

[95] *See id.* at 623.

[96] *See id.* at 623-24. Discrimination based on sexual stereotyping "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic and cultural life." *Id.* at 625. Furthermore, a state has broad authority to create equal access rights for its citizens. *See id.* at 625-26; *see also* United States Jaycees v. McClure, 305 N.W.2d 764, 766-68 (Minn. 1981) (citing legislative history and broad language of Minnesota statute and longstanding state interest in full equality). *But see* Linder, *supra* note 8, at 1891-92 (suggesting that Justice Brennan may not have been fully persuaded by his own "compelling interest" argument).

ing in its various activities or expressing its views.[97] The Court failed to discuss the outcome of a situation in which such expressive rights would directly be curtailed by modifications in membership policies.

Unfortunately, the *Roberts* Court failed to evaluate carefully the underlying characterization of the Jaycees as a "public accommodation." By merely accepting the determination of the Minnesota court, the Supreme Court has left this important issue unilluminated. Apparently, the Court prefers to allow each state to determine for itself what is a "private club."[98] Although this allows for diversity and flexibility, it obfuscates the constitutional arguments resulting from the Court's failure to relate the state's statutory definition in the Minnesota Act to any possible protections under the freedom of intimate association.[99]

CLUB DISCRIMINATION SINCE *Roberts*

The *Roberts* decision appeared to promise clarification of the limitations on the rights of private clubs to discriminate in the context of membership policies.[100] Recent cases, however, have illustrated that *Roberts* has not prevented litigation in this area nor has it resolved some basic areas of uncertainty.[101]

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[97] *See Roberts*, 468 U.S. at 627. The Court did not believe that the Jaycees' expressive activities would be hampered by the admission of women. *See id.* However, the Court, finding no support in the record, chose not to address potential changes in the basic philosophy of the organization which might necessarily result if women become full voting members. *See id.* If such a basic interest is not really endangered, it is unclear why the Court finds it necessary to invoke a "compelling interest" test. One possible explanation relates to a dichotomy between belief and action, which the Court mentions but does not pursue fully, saying, "like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection." *See id.* at 628.

[98] *See id.* at 629-30. *See also* Note, *What Price Freedom*, *supra* note 82, at 160 (criticizing *Roberts* Court's unclear and result-oriented analysis).

[99] *See Roberts*, 468 U.S. at 621. The statutes, in those states that consider membership organizations to be *places* of public accommodation, illustrate a concern that discriminatory membership policies be proscribed, but allow an exemption for private clubs. *See, e.g.*, N.Y. EXEC. LAW § 292(9) (McKinney 1982) (explicitly exempting private clubs); *see also* United States Jaycees v. McClure, 305 N.W.2d 764, 771 (Minn. 1981) (private organizations unaffected by Minnesota Human Rights Act).

[100] *See Roberts*, 468 U.S. at 618-20. In light of the factual findings upon which *Roberts* is based, the decision may hold merely that a very large and unselective national organization whose expressive interests would be only incidentally affected, if at all, by the admission of women, cannot refuse to admit women. *See id.*

[101] *See infra* notes 103-44 and the accompanying text. *See also* Feldblum, Krent & Watkin, *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171, 173

In *Kiwanis International v. Ridgewood Kiwanis Club*[102] a federal district court faced a situation factually analogous to *Roberts*.[103] The Ridgewood club admitted, for club membership, a woman, a local art consultant who fulfilled all the club's criteria, except gender.[104] When her application was forwarded, Kiwanis International refused to accept her and revoked the Ridgewood Club's license to use any Kiwanis marks.[105]

Focusing primarily on assertions that the Kiwanis International was so "distinctly private" as to be exempt from the provisions of the New Jersey anti-discrimination statute,[106] the district court attempted to apply well settled criteria, including the *Roberts* framework.[107] Identifying the general parameters of the continuum of associational freedom,[108] the court examined the goals of

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(1986) (single-sex organizations advocated for women to compensate for societal disadvantages). "When males are excluded from all-female organizations in today's society, this exclusion does not create the same stigma or economic disadvatages as does the exclusion of females from all-male organizations." *Id.* at 216.

[102] 627 F. Supp. 1381 (D.N.J.), *rev'd*, 806 F.2d 468 (3d Cir. 1986).

[103] *See id.* at 1383-85. This case is similar to *Roberts* in that both involve large national organizations attempting to enforce sexually restrictive membership policies against local chapters that voluntarily admit women.

[104] *See id.* at 1384. While Kiwanis International limited its membership to men, it imposed other restrictions on prospective members, such as employment in a profession or recognized trade that, in and of themselves, would not have operated to bar women. *See id.* at 1383-84. Ms. Fletcher's occupation as an art consultant would have fulfilled Kiwanis International's qualifications. *Id.* Moreover, she was willing to comply with the additional requirements of the Ridgewood chapter, which demanded regular attendance plus a willingness to pray and recite the pledge of allegiance at meetings. *Id.*

[105] *See id.* at 1385. Judge Sarokin noted the novel twist of revoking the offending club's license to use Kiwanis' marks and symbols rather than revoking that club's charter, but he properly dismissed this distinction as immaterial to the outcome of the case. *See id.* at 1385-86. Kiwanis International argued, in effect, that the federal Lanham Act preempted the field of trademark law, thereby denying to the state the authority to enforce its anti-discrimination statute. *See id.* at 1390. In response to Kiwanis International's argument that enforcement would mean women would be admitted in some states and not in others, thus creating trademark confusion, the judge replied, "[N]onsense." *See id.* at 1390-91.

[106] *See* N.J. STAT. ANN. § 10:5-5(*l*) (West Supp. 1987). Section 10:5-5(*l*) provides in pertinent part:

> "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, . . . restaurant, eating house, or place where food is sold for consumption on the premises . . . . Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private . . . .

Id.

[107] *See Kiwanis Int'l*, 627 F. Supp. at 1387-90.

[108] *See id.* at 1383. The court succinctly paraphrased the *Roberts* Court, recognizing that as one goes beyond the scope of the family unit towards a clearly public organization, there is a point at which the court, balancing the associational rights of the exclusionary

the organization, its size, its process for membership selection, and the benefits accruing from membership.[109] Consequently, as in *Roberts*, the court found no abrogation of the freedom of intimate association.[110] As to the freedom of expressive association, the court followed *Roberts* in finding that the admission of women would have a negligible impact on the stated goals of Kiwanis International.[111] In balancing the slight impingement of expressive association against the state's compelling interest in eliminating discrimination,[112] the court rejected the claims that Kiwanis International should be exempt from the New Jersey statute or that its constitutional rights of free association were impermissibly infringed upon.[113]

Subsequently, the district court was reversed by the Court of Appeals for the Third Circuit.[114] Examining the selectivity of the *local* Ridgewood Kiwanis club and the special admission requirements imposed on local club members, the circuit court found, without reaching the constitutional issues directly,[115] the local chapter to be "distinctly private" within the meaning of the New Jersey statute, and thus exempt from its prohibition against discrimination.[116] It is submitted that the Third Circuit misapplied

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group against the individual's right to be free from discriminatory treatment, must rule in favor of the individual. *See id.*

[109] *See id.* at 1383. Kiwanis consists of some 8,200 local clubs with over 300,000 members worldwide. Its purpose is the performance of charitable service to the community rather than merely the promotion of comraderie. Kiwanis' objectives include giving "primacy to the human and spiritual . . . values of life," and a series of equally virtuous values that seem inapposite to the practice of discrimination. *See id.* at 1383. This latter point is important in evaluating the impact of admitting women on the organization's expressive freedom. *See id.* at 1389-90.

[110] *See id.* at 1389. The court found the organization to have none of the attributes of intimate association. *See id.*

[111] *See id.* The exclusion of women from full membership in the organization is contrary to the mission of an organization which "purports to—and indeed does—embody and encourage the most communitarian and charitable of social activities. . . ." *See id.*

[112] *See id.* New Jersey, historically, has had a firm commitment to the eradication of discrimination. *See id.*

[113] *See id.* at 1389-90.

[114] Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (3d Cir. 1986). It is argued that the decision of the circuit court demonstrates the continuing confusion in the application of state anti-discrimination statutes and evaluation of freedom of association concerns subsequent to the *Roberts* decision.

[115] *See id.* at 476, 477. The court did not have to balance the compelling interest behind the statute against any associational rights since it found the statute inapplicable to the Ridgewood Kiwanis. *See id.* at 477.

[116] *See id.* The court focused on whether or not Kiwanis was a place of public accommodation or a bona fide club exempted from the statute's coverage due to its distinctly

the criteria for determining "distinctly private" status as it should have focused its inquiry on the international organization rather than on the local chapter. Thus, the *Kiwanis* court has allowed sex based discrimination in membership by a basically unselective organization of over 300,000 members and, in the process, has further confused the issue of precisely what constitutes "distinctly private" in state statutes which provide for similar private club exemptions.[117]

To avoid potential confusion, California has broadly defined public accommodations to encompass "all business establishments of every kind whatsoever."[118] California's Unruh Act exemplifies a strong legislative commitment towards equal treatment for both men and women.[119] In that context, a California court, in *Rotary*

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private nature. *See id.* at 476. The court recognized that the key question was selectivity in membership admissions. *See id.* at 473.

Unfortunately, the court put excessive emphasis on the district court's mention that Kiwanis Ridgewood meetings were held in public restaurants. *See id.* at 474. Correctly noting that merely meeting in a public restaurant did not result in the club becoming a public accommodation, the court failed to recognize that this fact was not the basis of the district court's decision. *See id.* at 474-75.

[117] *See id.* at 475. The court erroneously focused on the membership practices of the Ridgewood Kiwanis chapter and found sufficient selectivity to qualify as a distinctly private club since the chapter had only twenty-eight members, ten of whom had been members for over twenty years. *See id. But cf.* United States v. Trustees of Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wis. 1979) (club requiring new members be recommended by two members not private within 42 U.S.C. § 2000a(e)).

The circuit court failed to inquire as to the numbers of applicants rejected or the criteria by which members were or were not rejected. *See Kiwanis Int'l*, 806 F.2d at 475-76. Moreover, the court refused to recognize the broad scope of membership solicitations used by Kiwanis International and minimized the effect of the local chapter's mailings to dozens of corporations in the Ridgewood area, which sought new members for the club. *See id.*

Courts generally will look beyond the formalities, such as sponsorship, to evaluate the true selectivity of the process. *See, e.g., Fraternal Order of Eagles*, 472 F. Supp. at 1176 (analyzed selectivity process according to actual, not asserted, practices). Rather, the Third Circuit suggests that so long as there is any pretense of selectivity, the club is not "open and unrestricted" in membership policy and is therefore a private club. *See Kiwanis Int'l*, 806 F.2d at 475-76. More problematic is the court's decision to focus on the characteristics of the local chapter rather than that of the international organization. This seems particularly significant since Kiwanis Ridgewood did vote to admit a woman to membership and it was Kiwanis International that refused to accept her application. *See id.* at 470-71. The circuit court refused a request for a rehearing en banc. Kiwanis Int'l v. Ridgewood Kiwanis Club, 811 F.2d 247 (3d Cir. 1987). However, Judge Sloviter, in a persuasive dissent, suggested the court's decision had misapplied New Jersey's statutes and legal precedent. *See id.* at 248-53 (Sloviter, J., dissenting).

[118] CAL. CIV. CODE § 51 (Deering Supp. 1987). Section 51 is also known as the Unruh Civil Rights Act. *Id.*

[119] *See* Rotary Club of Duarte v. Board of Directors of Rotary Int'l, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986), *aff'd*, 107 S. Ct. 1940 (1987) (Unruh Act prohibits direct

Club of Duarte v. Board of Directors of Rotary International,[120] ordered the reinstatement of a local Rotary club whose charter had been revoked for declining to enforce a male-only membership policy.[121]

Although the court looked at policies and activities of the local Duarte Rotary club, a central issue was whether the Rotary International was a "business establishment" within the meaning of the statute.[122] Upon careful evaluation, it was determined that the Rotary International "exhibit[ed] substantial businesslike attributes" and was within the parameters of the Unruh Act.[123]

The *Duarte* court effectively illustrated that "substantial business benefits" were available through membership in the Rotary or similar organizations.[124] Such clubs provide contacts with leaders of the business and industrial communities and are considered so important that many businesses pay their employees' club membership dues.[125] Furthermore, the Internal Revenue Service has approved business deductions for membership dues in such organizations, thereby recognizing a business rather than primarily social

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discrimination against women).

[120] *Id.*

[121] *See id.* at 1067-68, 224 Cal. Rptr. at 232-33.

[122] *See id.* at 1051, 224 Cal. Rptr. at 221. Compare the focus of this court on the policies and activities of the International Rotary, *see id.*, with the flawed approach taken in *Kiwanis Int'l*, which analyzed the policies of the local chapter. *See supra* note 117 and accompanying text.

[123] *See Rotary Club of Duarte*, 178 Cal. App. 3d at 1053, 1055, 224 Cal. Rptr. at 223, 224. In finding that the International Rotary was a "business establishment" within the Unruh Act, the court analyzed the association's internal organization along with its financial and administrative policies. *See id.* at 1051-52, 224 Cal. Rptr. at 222. The principal source of the International Rotary's income derived from per capita dues from local clubs, other fees, sale of publications, and other business-like activities. *See id.* The fact that its central office was divided into six divisions helped support the notion that this was a "businesslike" operation. *See id.* at 1052-53, 224 Cal. Rptr. at 222-23. Particularly suspect was the publication of an official magazine, the *Rotarian*, to which members were required to subscribe and which, consequently, was a major source of revenues. *See id.* at 1054, 224 Cal. Rptr. 223.

[124] *See id.* at 1055, 224 Cal. Rptr. at 224. "The primary purpose for the formation of the Rotary movement was commercial advantage" through the connection between social intercourse and business opportunities. *See id.* at 1055-56, 224 Cal. Rptr. 224-25 (citing the basic Rotary Library).

[125] *See id.* at 1056-57, 224 Cal. Rptr. at 225. Richard Key, president of Duarte's Rotary Club at the time its charter was revoked by the International, testified that significant commercial advantage was available through club membership and that he had successfully deducted his membership dues from his federal income taxes. *See id.* at 1055, 224 Cal. Rptr. at 225. Additional testimony cited by the court adds further support to the claim that commercial advantage is not only a by-product of Rotary membership, but also an important part of the commercially oriented agenda of those in the Rotary. *See id.*, 224 Cal. Rptr. at 225-26.

purpose in such membership.[126]

The United States Supreme Court recently affirmed the ruling of the California Court of Appeals.[127] In *Duarte*, the first chance for the Court to elaborate on its *Roberts* framework, the Court broke little new ground. While focusing on the business related elements of Rotary Clubs,[128] the Court recognized the absence of clear boundaries for activities within the protection of intimate or private association,[129] but found that the relationships among Rotary Club members were not so private as to warrant this form of associational protection.[130] With respect to the protections afforded to expressive association, the Court enumerated a variety of reasons why the admission of women would not inhibit the members' ability to effectuate the purposes of Rotary.[131]

The Court failed, however, to clarify the parameters of private association outside the limited examples enumerated in the *Rotary Club* and *Roberts* decisions. In a footnote, the *Rotary Club* Court did note that it had not concluded in the *Roberts* case that Kiwanis clubs did indeed involve relationships private or intimate enough to merit constitutional protection.[132] Rather, the Court opened the door for further ambiguity by proposing that each club would have to be judged based on the "objective characteristics of the particular relationships at issue."[133]

Legislative Definition

A legislative definition of a private club was upheld in *New*

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[126] *See id.* at 1056-57, 224 Cal. Rptr. at 225. Richard Key stated that an Internal Revenue audit of his returns found the deduction of his Rotary dues to be a proper business expense. *See id.*

[127] Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940 (1987).

[128] *Id.* at 1944.

[129] *Id.* at 1945. The Court cited marriage, begetting and bearing children, child rearing and education, and cohabitation with relatives as examples of protected intimate activities. *See id.* at 1945-46.

[130] *Id.* at 1946.

[131] *See id.* at 1947. The Court points to the apolitical nature of Rotary Clubs which are prohibited from taking positions on public questions. *See id.* In addition, no conflict existed between Rotary's goal of humanitarian service and the admission of women. *See id.* As in *Roberts*, the *Rotary* Court found that any slight infringement on expression was appropriate in light of the state's compelling interest in providing women with equal access to leadership skills and business contacts. *See id.* at 1948.

[132] *See id.* at 1947, n.6.

[133] *See id.*

York State Club Association, Inc. v. City of New York.[134] In 1984, the City Council of the City of New York ("City Council") passed Local Law 63[135] to deal with discrimination by clubs of over 400 members that are used primarily for business rather than social purposes.[136] Determining that these large clubs, which regularly provided meal service during which business was conducted, were pervaded by business activity,[137] the City Council decreed that such clubs could not be "distinctly private" so as to be exempt from the anti-discrimination provisions of the public accommodations law.[138]

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[134] 69 N.Y.2d 211, 215, 505 N.E.2d 915, 916, 513 N.Y.S.2d 349, 350 (1987).

[135] NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1987). This law broadly defines a place of public accommodations. *See id.* It excludes from coverage:

> any institution, club or place of accommodation which proves that it is in its nature distinctly private. An institution, club or place of public accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of his trade or business.

Id. See also supra notes 36 and 106 (comparison of similar statutes enacted in other states).

[136] *See New York State Club Ass'n*, 69 N.Y.2d at 216, 505 N.E.2d at 916, 513 N.Y.S.2d at 350. *See also* Note, *Discrimination in Private Social Clubs: Freedom of Association and Right To Privacy*, 1970 DUKE L.J. 1181, 1189 ("city clubs may be more important than country clubs for business and job promotion"); Note, *Sex Discrimination in Private Clubs*, 29 HASTINGS L.J. 417, 418 (1977) ("Those 'sacred' men's bars and lunchrooms are the embodiment of a strong idea: that discrimination on the ground of sex is reasonable, even natural—not as harmful, somehow, as racial or religious bias.") (quoting Harkins, *Sex and the City Council*, NEW YORK MAG., Apr. 27, 1970, at 10).

[137] *See* Legislative Declaration, New York, N.Y., [1984] N.Y. Local Law No. 63, § 1 [hereinafter Legislative Declaration]. The focus of the law affects city eating clubs, which are extremely important for the conduct of business and professional promotion. *See also* Note, *Sex Discrimination in Private Clubs*, *supra* note 136, at 419 n.8 ("Social clubs . . . are gathering places for the establishment") (*quoted in* B. BABCOCK, A FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 1057 (1975)).

[138] *See* Legislative Declaration, *supra* note 137. The City Council declared that it had a "compelling interest in providing its citizens . . . [with] . . . an equal opportunity to participate in the City's business and professional life." *See id.* Furthermore, the City Council found a barrier to the advancement of women and minorities could be traced to discriminatory membership practices of certain clubs where members could gain personal contacts and consummate business deals that would aid in their professional advancement. *See id.* Despite the fact that such clubs are ostensibly organized for other than business purposes and indeed often perform valuable community services, the City Council found that if clubs: (1) have more than 400 members; (2) provide regular meal service; and (3) receive fees and dues from or on behalf of nonmembers, they will be deemed to be organized for business purposes. *See id. See generally* Burns, *The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321 (1983) (detailed description of role of elite men's clubs in development of America's top corporate and political leadership).

The New York Court of Appeals upheld the law against challenges that it impermissibly conflicted with the state's anti-discrimination law and that it violated the associational rights of the members of the affected clubs.[139] Finding the state's more general definition of a "place of public accommodation" not inconsistent with Local Law 63, the court held that the city's definition was not violative of any home rule provisions.[140] However, Local Law 63 does not prohibit consideration of the general factors which have been dispositive of distinctly private status in New York State.[141] In essence, the court noted that those clubs which meet the City Council's "three-prong test,"[142] as contained in the language of Local Law 63, will be deemed to have lost the "essential characteristic of selectivity" and instead have become "affected with a public interest" so as not to be "distinctly private."[143] Although satisfaction of the three-prong test was not conclusive evidence that a club was not "distinctly private," the court suggested that the burden shifted to the club to prove that it was distinctly private notwithstanding satisfaction of the three-prong test.[144]

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[139] *See New York State Club Ass'n*, 69 N.Y.2d at 216, 505 N.E.2d at 919, 513 N.Y.S.2d at 354.

[140] *See id.* at 220, 505 N.E.2d at 919, 513 N.Y.S.2d at 353. New York does not define a "distinctly private" club, *see* N.Y. EXEC. LAW § 292(9) (McKinney 1986), while the city regulation provides a detailed description of those facilities that will be deemed not to be distinctly private. *See* NEW YORK, N.Y., ADMIN. CODE § 8-102(a) (1987).

[141] *See New York State Club Ass'n*, 69 N.Y.2d at 220, 505 N.E.2d at 919, 513 N.Y.S.2d at 353. The *New York State Club Ass'n* court delineated five factors in determining the status of a place of accommodation as either public or distinctly private: (1) whether the club has a well-settled and standing procedure that is actually followed by which applicants may be screened; (2) whether the club limits the use of its facilities and services to members and their guests; (3) whether the club is, in fact, controlled by its members; (4) whether the club is operated for the benefit and pleasure of its members rather than for profit; and (5) whether the club solicits amongst the general public for membership in the club. *See id.* These five factors initially were adopted by the New York court in United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 412-13, 452 N.E.2d 1199, 1205, 465 N.Y.S.2d 871, 876 (1983), which ordered a boating club that denied admission to women to abandon its male-only membership policy because the club was not distinctly private. *Cf.* Wright v. Cork Club, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970) (delineated factors to determine whether club is place of public accommodation within 42 U.S.C. § 2000a or private and exempt within § 2000a(e)).

[142] *See supra* note 135. The three elements required to place a club within the coverage of Local Law 63 are termed the "three-prong test": the club must have at least 400 members; must provide regular meal service; and must receive payments from or on behalf of nonmembers to further the members' trade or business interests. *See* NEW YORK, N.Y., ADMIN. CODE § 8-102(9) (1987).

[143] *See id.*

[144] *See New York State Club Ass'n*, 69 N.Y.2d at 222, 505 N.E.2d at 920, 513 N.Y.S.2d

The court of appeals, reading the *Power Squadrons* test[145] into Local Law 63, found that Local Law 63 was no more restrictive of the freedom of intimate association than the factual context that existed in *Roberts*.[146] Moreover, finding "compelling governmental interests unrelated to the suppression of ideas," the court held that any incidental infringement on the freedom of expressive association was justified.[147]

It is submitted that the New York City approach has merit and should serve as a guideline for states and municipalities. The statute attempts to protect those clubs which are small and primarily non-business in nature, while preventing discrimination by large, powerful clubs that may hold the key to business contacts. Although questions arise as to whether smaller groups might not still be within the anti-discrimination provisions of the state public accommodations law and whether the city law improperly excludes fraternal organizations, it is a reasonable legislative framework which subsequently may be enhanced by judicial gloss as cases arise. Moreover, the court's interpretation in *New York Club Association* makes Local Law 63 specific enough to denote those organizations within its scope, while simultaneously retaining sufficient flexibility to assuage concerns as to the associational freedoms of groups that are distinctly private.[148]

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at 354.

[145] In *Power Squadrons*, the court identified a variety of factors to be considered in determining whether a club is private; among these were factors similar to those consider by other courts that have focused on selectivity as a key to private club status. *See* United States Power Squadrons v. State Human Rights Appeal Bd., 59 N.Y.2d 401, 412-13, 452 N.E.2d 1199, 1205, 465 N.Y.S.2d 871, 876 (1983).

[146] *See New York State Club Ass'n*, 69 N.Y.2d at 223, 505 N.E.2d at 921, 513 N.Y.S.2d at 355. The compelling interest—the elimination of discrimination against women and minorities—is sufficient to justify any incidental infringement unrelated to expressive association. *See id.* at 224, 505 N.E.2d at 921, 513 N.Y.S.2d at 355. *See also* Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984) (freedom of expressive association not absolute and subject to restrictions unrelated to expression).

[147] *New York State Club Ass'n*, 69 N.Y.2d at 223, 505 N.E.2d at 921, 513 N.Y.S.2d at 355. Prior to *New York State Club Ass'n* it might have been thought that no club with over four hundred members which satisfied the other prongs of Local Law 63 could ever be "distinctly private," and that this would violate the freedom of intimate association of such groups, which might otherwise have fit within the private category. *See* Brief for Appellants at 23-24, New York State Club Ass'n v. City of New York, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987); *see also New York State Club Ass'n*, 69 N.Y.2d at 222, 505 N.E.2d at 920, 513 N.Y.S.2d at 354 (criteria enumerated in *Power Squadrons* must be read into city law).

[148] *See New York State Club Ass'n*, 69 N.Y.2d at 222, 505 N.E.2d at 920, 513 N.Y.S.2d at 354.

CONCLUSION

The freedom of association presently exists in a troubling whirlpool of conflicting rights. Whereas freedom of association has been used historically by the oppressed and victimized to gain equality, it is increasingly being summoned to champion the cause of discrimination. This dilemma produces a direct confrontation between conflicting *good* values in our society.[149]

To fully understand the problem, we need briefly retrace the foundation of the concept of freedom of association. Professor Emerson has noted that "it is the individual who is the ultimate concern of the social order."[150] Although it is important to respect the associational rights of the social group member, discrimination against the less powerful which tends to keep them disadvantaged is *action* not *expression* and as such is subject to governmental regulation.[151]

Moreover, the Supreme Court has clearly indicated that freedom of expressive association is subject to restrictions when weighed against the compelling interest of the state. Groups seeking to discriminate against women or other minority groups will face an extremely strong state interest in eradicating inequality. The only area in which a private club may have a predominant right to discriminate involves "intimate association." Unfortunately, courts have not defined the parameters of this protection. Clearly, the family group would be beyond anti-discrimination provisions of public accommodations statutes, but where do we go

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[149] *Cf.* Goodwin, *supra* note 7, at 270 (need to balance countervailing interests).

[150] *See* Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 4 (1964). "[A]ny general right of association must be subordinate to the individual right." *Id.* at 5. However, this understanding still does not fully resolve the conflict between the right of the individual to be left alone to associate freely only with those whom he or she desires, and the occasionally conflicting right of another individual to be treated as an individual and not to be barred from significant areas of our society due solely to racial, ethnic, religious, or sexual discrimination.

[151] *See* Emerson, *supra* note 150, at 4. *See also* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959). Professor Wechsler has suggested that the forced integration of schools could properly be viewed as an infringement on the personal freedoms of those forced to associate, against their wishes, with others. *See id.* Recognizing that there was a clash between these conflicting values, Professor Wechsler has pointed out that he had no neutral answer to this dilemma. *See id.* It is important to distinguish the club that genuinely selects from among individual applicants on some reasonable basis from the club that excludes a substantial sector of the public based on stereotypical views. *See* Note, *supra* note 20, at 1123. If a club is broadly discriminatory, although not open to all, the club is open to a certain social class within society and does not merit protection as intimate association. *See id.*

from there? Can a small social group that meets weekly in a public restaurant be required to admit persons with whom they do not wish to associate?[152] Interestingly, most of the groups being challenged have not been local chapters refusing to admit women, but the large parent organizations sanctioning the local groups for attempting to exercise their own associational freedoms.

Any comprehensive scheme balancing the rights of the group against the rights of the individual in the area of private club discrimination must focus on the careful definition of a "private" club. To avoid statutory controls and fall within constitutional protections, the club should not contain any commercial elements. The elements of selectivity and congeniality must be prime considerations in reaching a determination as to the existence of a truly private club. Although the sliding scale implied by the *Roberts* and *Rotary Club* Courts needs further elaboration and clarification, courts should make it clear that groups will not be allowed to utilize the rubric of "privacy" to deny equal treatment to entire classes of citizens in organizations that have business-like qualities rather than the intimate qualities displayed in family and small group settings.[153] Thus, the legislative approach in New York City's Local Law 63 may provide a paradigm for other jurisdictions seeking to balance the right of equal access to public accommodations against the freedom of association.

Hyman Hacker

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[152] *See* Douglas, *supra* note 1, at 1379. Goodwin suggests that associational rights based on social needs deserve greater protection than similar economically oriented rights. *See* Goodwin, *supra* note 7, at 281. *See also* Emerson, *supra* note 150, at 21 ("expression" accorded broad protection against governmental intrusion; "action" subject to "reasonable and nondiscriminatory" regulations to effectuate legitimate social interests).

[153] *See* Karst, *supra* note 48, at 340. In response to arguments that minorities and women have their own associations, Professor Karst says this is merely a:

> consolation prize, a defensive identification in response to exclusion. Both the Nation's need for unity and the individual's need for connection will be best served when our constitutional law makes it possible for everyone, whatever his or her cultural identity, to participate as a full member of the larger American community, knowing that he or she belongs to America.

Id. at 340.