The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs

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THE KEY TO UNLOCKING THE CLUBHOUSE DOOR:  
THE APPLICATION OF ANTIDISCRIMINATION  
LAWS TO QUASI-PRIVATE CLUBS

*Sally Frank*

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The people of the United States have traditionally organized into political, social, professional, religious, and other groups to find community, to do business, to practice religion, and to effectuate change. Many of these groups have long-standing practices which limit membership on the basis of race, sex, religion, national origin, or age.

In recent years such discrimination has been attacked in many forums. Disputes have arisen over groups ranging from the Boy Scouts to Princeton University's eating clubs and Harvard University's final clubs; from the Jaycees and Rotary Clubs to the Bohemian, Cosmos, and Century Clubs. Meanwhile, entities ranging from the federal government to the Professional Golf Association (PGA) have struggled with the question of whether or not they should interact with clubs that discriminate.

Groucho Marx once wrote, "I don't want to belong to any club that will accept me as a member." By the same token, others often

1. Alexis de Tocqueville, Democracy in America 191 (1945).
13. Groucho Marx, in a letter of resignation to the Friars Club of Beverly Hills. The
question why a person would want to join a club that does not want her to be a member. The answer is that many organizations have important benefits to offer.

The Boy Scouts, for instance, attracts many people by teaching self-sufficiency and providing activities such as camping and exploring. One family, however, was barred from membership because it did not believe in God. Others who wanted to become scout masters were prevented from doing so because they were women or homosexuals.

Quasi-private clubs are an important category of organizations that offer valuable benefits to their members, such as business, social, career, or recreational opportunities. These benefits have prompted individuals, legislatures, and courts to challenge discrimination in quasi-private clubs. This trend has, in turn, caused authoritative entities to become increasingly wary of their involvement with discriminatory quasi-private clubs. In recent years, the Senate Judiciary Committee has announced that it will no longer confirm judicial nominees who have belonged to a discriminatory club but did not work to change that club's practice of discrimination. The American Bar Association has suggested that it is a violation of judicial ethics for judges to belong to discriminatory

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18. Of course, those who belong to discriminating clubs defend their practices against such arguments. Aside from arguing that they have a constitutional right to discriminate as will be described later, they argue that the discrimination is necessary to maintain the camaraderie that they seek. They believe that ending the discrimination will change the nature of the club and ruin what they enjoy in the organization. Other less substantial arguments, especially regarding sex discrimination, include that members would have to dress (in the Bohemian Club) or dress up (in college social organizations) and would have to watch their language if women were members. See also Daniel L. Schwartz, Note, Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations, 75 Cal. L. Rev. 2117, 2122-23 (1987).

clubs. The federal government barred government officials from participating in their official capacities in meetings or conferences at facilities which discriminate on the basis of race, sex, national origin, or religion. After the PGA scheduled a major tournament at a discriminatory country club, it announced that it would no longer hold any tournaments at clubs that discriminate.

Individuals are being challenged to take personal stands as well. Tom Watson, a well-known professional golfer, resigned from his prestigious golf club after it denied membership to Herbert Bloch because he is Jewish. Former Vice President Dan Quayle agreed not to play golf at one country club because it had no African-American members. The former Vice President, however, refused to take a similar stand against the Burning Tree Club in Maryland, which bars women from membership.

This article focuses on discrimination in quasi-private clubs and the impact of laws and the United States Constitution on that discrimination. For the purposes of this article, a quasi-private club is any organization that claims to be private but which might in fact be viewed as public. The term “quasi-private” is used because litigation concerning discrimination in such organizations often rests on whether the entity is private, and therefore cannot be regulated.

Section I of this article explores why people join organizations, and why they may want those organizations to discriminate. It then examines why others seek to challenge this discrimination.

Section II addresses judicial and statutory efforts to reconcile the various competing interests in challenges to quasi-private club discrimination. First, it explores whether there is a constitutional right to free-

22. Jaime Diaz, PGA Tour to Require Proof of Nonbias at Sites, N.Y. Times, Aug. 4, 1990, at A43. This decision was made after the PGA was widely criticized for holding its tournaments at clubs which discriminated.
25. Quayle to Keep Golfing at Men-Only Club, supra note 24.
26. The ways in which the terms “public” and “private” can be defined is one of the primary topics of the rest of this article.
27. Rarely, if ever, do the organization’s claims to be a club fall into question.
28. See infra part I.
29. See infra part I.B.
dom of association and/or a bar to discrimination when the discriminating party is not a state actor. Second, it looks at the impact and judicial interpretations of state statutes. As challenges and lawsuits involving discrimination in quasi-private clubs continue, different state and federal laws barring discrimination in public accommodations—and private club exemptions contained in those laws—have come under increased scrutiny. The phrasing and interpretation of such statutes greatly affects legal challenges to discrimination in quasi-private clubs. Third, it addresses various constitutional limits to states' authority to regulate discrimination in quasi-private clubs. Section II also focuses on the right to freedom of association in the contexts of expressive and intimate association and freedom of religion.

Section III discusses how to reconcile the different rights through statutes and court opinions. It argues that courts should narrowly construe these rights in the context of quasi-private clubs to limit the invidious effects of discrimination, but should also not simply ignore the right of freedom of association.

I. THE IMPORTANCE OF ASSOCIATION AND THE HARM OF DISCRIMINATION

A. Why People Join Organizations

Humans have a fundamental need for a feeling of community. Organizations fill this need by giving people a place where they can feel important, needed, and accepted.

It was once common to call the United States a melting pot, as many Americans subscribed to the belief that people from different countries and cultures found a home in the United States and lived together peacefully. Many of these people, however, have maintained their cultural heritage or national identity. Thus, the melting pot has become, in Jesse Jackson's formulation, a "Rainbow Coalition," or, in the words of former New York City Mayor David Dinkins, "a beautiful
mosaic.” The metaphors are important because they recognize the value of individual people's differences.

At the same time that we have begun to recognize the diverse nature of our culture, people have also been moving away from their extended families and into more ethnically mixed neighborhoods. At the same time that we have begun to recognize the diverse nature of our culture, people have also been moving away from their extended families and into more ethnically mixed neighborhoods. People move far more frequently in this generation than they did in previous generations. As people move to new places, they want to reestablish a sense of community by associating with people who share common interests and backgrounds. This feeds people's desire to join exclusionary clubs.

The preference for exclusionary clubs has also increased as housing patterns have changed. At one time, people lived in relatively homogeneous communities. This pattern was reinforced by housing discrimination which prevents selling or renting to certain groups of people. After the Fair Housing Act of 1968, the geographic division between different ethnic and religious groups began to break down. Thus, people may now find that they live in neighborhoods populated with people very different from themselves.

As a result, people may turn to organizations such as exclusionary clubs to find individuals with whom they have more in common, such as religion, ethnic heritage, or gender. Outside such associations, people often feel highly vulnerable because of their different backgrounds. Within the group, people are more able to discuss problems or issues common to the group with less fear of being misunderstood or rejected, as they might be by the wider community.

38. People who have been longstanding members of communities also join discriminatory clubs. Some join because their families have been members for generations. When the clubs were founded and started their discriminatory practices, they often barred members of religious or ethnic minority groups because of bigotry. Newer members continue the practice, justifying it on the basis of tradition. (These statements were made to the author in conversations with members of various discriminatory clubs.)
39. See Vobejda, supra note 37.
The self-segregating habits of some students dramatically illustrate this pattern. African-American students are often criticized for sticking together on campuses and forming organizations which bar white students from membership. People notice that there is often an “African-American table” in dining rooms and that African-American students often want to live together, eat together, and socialize together. While some argue that this is a form of segregation that runs counter to the integration efforts of the 1960s, and may feel threatened, the pattern may be due to the fact that African-American students on primarily white campuses often feel very isolated. Associating with other African-American students can decrease their anxiety about facing racist remarks and attitudes, due to a certain level of assumed understanding of their struggles and culture. In the overwhelmingly white environment of higher education, these students seek a sense of community and sharing. What others perceive as self-segregation is primarily an expression of the need to belong.

This pattern is also seen in single-sex groups. There is often sexual tension between heterosexual men and women, and people may feel they cannot be themselves in front of the opposite sex. The easiest way to find a retreat from this tension is to have a time and place where people of the opposite sex are not present. Some men and women also feel a special camaraderie when they are with members of their own sex. Sports teams promote this kind of

44. Masters, supra note 43.
45. There are negative aspects to this self-segregation. White students who would be allies in the struggles of the African-American students are sometimes afraid to approach them and lend support because they fear that they will be rejected. Sometimes, the African-American students lose some of the benefits of being on the campus if they segregate themselves too much from the other students. All students learn from interaction with those who are different. Those who close themselves off from others lose some of the most important lessons colleges have to offer their students.
46. For example, people may worry about their appearance when faced with the opposite sex.
bond, but other associations can have the same effect. This camaraderie can come from the feeling of community or the commonality of shared ethnic, religious, racial, or cultural backgrounds. In the same way that members of cultural and ethnic groups need to share parts of their lives with people of the same or similar background, men and women need to share aspects of their lives with people of the same sex, who may be better able to understand their needs.

For high school or college students, the sexual tensions may be especially difficult because people at that age are becoming independent and still learning about their sexuality. Thus, a need to retreat from an environment fostering great sexual tension into a single-sex environment may be even more important.

In the business world, there is immense stress and competition. Many people, whether married or single, may feel a need to escape from the competition and tension of the work world. For some, a single-sex environment is the only place where this can be done.

All of these factors contribute to people’s desire to associate with similar individuals, often to the exclusion of those who are different. These genuine feelings must be recognized and respected as the basis for acknowledging a right to some form of freedom of association. At the same time, other issues—the major problems caused by discrimination and society’s interest in remedying these problems—are involved when exploring discrimination at quasi-private clubs.

B. Problems Caused by Discrimination in Quasi-Private Clubs

There is a long history of virulent discrimination in the United States. This discrimination causes society to lose the potential contributions of many of its members. When certain groups of people are barred from contributing all they can to society’s improvement, everyone suffers. If people have no hope of achievement, they have no reason to participate

50. Clare, supra note 47, at 16.
51. See Schwartz, supra note 18, at 2123.
52. Clare, supra note 47, at 16.
in society, and may then become outsiders, a phenomenon visible in our urban ghettos.\textsuperscript{54}

Many antidiscrimination laws were passed because people in the United States became convinced that simple justice required barring discrimination. Today, the federal government and most states bar some forms of discrimination in employment, housing, and public accommodations. Federal and state laws vary in which forms and in which environments discrimination is deemed unlawful. The purpose of all of the statutes, however, is to stop discrimination and its harmful effects.

The specific injuries caused by discrimination vary at different stages of an individual's life. The need to be included and accepted is especially important for young people. Children internalize others' negative stereotypes of them. In noted experiments to determine the effects of school segregation on children, psychologist Kenneth Clark asked African-American children in segregated schools to describe characteristics of both black and white dolls.\textsuperscript{55} The children used positive adjectives to describe the white dolls, and used negative adjectives to describe the black dolls. From this he concluded that African-American children subjected to segregation form negative self images.\textsuperscript{56} The Supreme Court cited this study when it outlawed segregation in public schools, finding that "[s]eparate educational facilities are inherently unequal."\textsuperscript{57}

Discrimination against children due to race, sex, religion, or other categories also impinges upon opportunities to learn and grow. One

\textsuperscript{54} Many youths are responding to this sense of hopelessness by joining gangs so that they can enjoy life now by earning large sums of money even if they risk a violent young death.

\textsuperscript{55} K.B. Clark, \textit{The Effect of Prejudice and Discrimination on Personality Development} (1950).

\textsuperscript{56} One author summarizes Clark's study as follows:

\begin{quote}
Forty years ago, the study found, black girls wanted white dolls; but by the mid-1970s, at the height of the black-pride movement, the choice had turned to black dolls.

By the mid-1980s, the situation had reversed itself, with black girls preferring white dolls at rates surpassing the level of the 1950s.
\end{quote}


young girl who brought a lawsuit to obtain permission to attend a Boy Scout summer camp explained that she wanted to participate in activities offered by the Boy Scouts, which differed substantially from those offered by the Girl Scouts.58

Similarly, for a number of years, girls were barred from participating in many athletic programs available to boys, such as Little League Baseball. While other sports, such as softball, were available to girls, those sports did not offer the same opportunities for development. Since 1974, when a New Jersey appellate court declared Little League Baseball’s exclusion of girls to be illegal,59 many girls have participated in organized baseball and grown from their ability to do so, gaining a sense of equality and self-esteem.

Discrimination at any age also reinforces negative stereotypes about people. For instance, in the above example, barring girls from Little League Baseball reinforced the view of girls as unathletic and too fragile to be involved in sports with boys. Similarly, by maintaining different programs Boy Scouts and Girl Scouts could foster stereotypes about the interests of boys and girls, thereby limiting the range of activities available to them. American children are also victimized by the ban against homosexuals in the Boy Scouts because it reinforces the false notion that it is unsafe to have homosexuals around young boys.60 The ban also deprives children of willing scout masters, and prohibits young people who realize they are homosexual from joining the group.61

As people grow older, stereotypes are reinforced in different ways. Discrimination in student organizations is often a problem because it fosters an acceptance of discrimination. If the most prestigious organizations on a college campus discriminate, students may learn that discrimination is acceptable or even desirable, because inherent in the message


60. The myths that are perpetuated accuse homosexuals of seeking to recruit others to be homosexuals, or of molesting children. These accusations are false, but they are perpetuated and given credence when a respected group like the Boy Scouts bars homosexuals. See Old-Line Youth Groups Back in Style, supra note 14, at 75.

of discrimination is the message that the excluded person is not good enough to be part of the group. If the person is not good enough for the group, it also may be appropriate to exclude the person from parts of the social and business world. Thus, the message sent by discrimination on college campuses—especially discrimination by elite organizations—is a dangerous one.

Sex discrimination in organizations like fraternities can cause other problems as well. When the single-sex atmosphere is combined with alcohol and youth, dangerous incidents can occur. Stories of sexual harassment, gang rape, and date rape abound at fraternities.\(^2\) If both men and women were part of such organizations, the tenor of discussion might change to a point where sexual incidents would be far less likely.

There are more fundamental reasons, however, for concern about discrimination in institutions affiliated with universities. Because universities shape students’ outlooks in addition to educating them, discrimination at universities can have lasting negative effects.\(^3\) If students do not learn how to interact comfortably with a diverse group of people while at school, they may be unable to do so in the workplace, which is especially harmful if they are in a position to hire others. Final job determinations are often based on relatively subjective criteria. Employers often hire those with whom they feel most comfortable as equals.\(^4\) Consequently, when students are allowed to discriminate in their college social organizations because they feel uncomfortable relating to


\(^3\) One New Jersey Court explained:

Princeton as a public accommodation for higher education performs a significant social function by promoting “the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large.” . . . Hence it is important to eradicate sex discrimination at Princeton and private establishments associated with Princeton which have altered their distinctly private character through close association with the University.


those whom they feel are different, they are likely to continue this pattern when they graduate and hire others.

For people in the business world, discrimination can cause other problems. It is often the most prestigious clubs that discriminate. These clubs can be crucial to developing business connections. Government policy is also often shaped behind the closed doors of such clubs. When people are barred from these organizations, they are also barred from cultivating business opportunities, and from influencing policy through informal contact with policymakers. Being in the “right” club can be crucial to one’s career.

Whether a person lives in a small city, a large city, or a suburb, the key to power within a community is often the same: membership in the community’s elite organizations. Thus, denial of access to such organizations because of discrimination due to race, color, religion, national origin, sex, sexual orientation, or other criteria not based on individual merit deprives people of their ability to participate fully in society.

People need to find groups of similarly minded or similarly situated individuals with whom to form ties. At the same time, problems arise when such organizations discriminate against other groups. The question then becomes whether there is any way to reconcile the apparent conflict between the need to associate selectively and the need to be free from discrimination.

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66. One trenchant observer noted the harm done by discriminatory clubs and wrote:

> Few people appreciate the integral relationship between club membership and professional achievement, although the correlation has been well documented. These clubs provide an environment within which “friendships and associations are formed which express themselves in business opportunities, positive evaluations, and predispositions toward promotion.” In our society, membership in the “right” clubs may well be a necessity for developing the right connections to attain positions of leadership in the community.

Burns, supra note 65, at 327–28.
Sometimes no conflict arises because the people who are excluded will not challenge their exclusion. In other words, they do not want to be where they are not wanted. If an organization does not provide any major benefits other than companionship, it is unlikely an outsider would insist on membership. When, however, there are other benefits to membership, such as business opportunities, access to government policymakers, participation in the “old boy’s” network, or access to facilities not otherwise available in the community, excluded individuals may be more interested in joining. Some of those who are barred will likely resort to political pressure or legal measures to force open the doors to membership in these beneficial organizations.67

The remainder of this article explores the legal issues that arise in opposing discrimination in quasi-private clubs.

II. THE IMPACT OF LAW AND JUDICIAL OPINIONS ON QUASI-PRIVATE CLUBS

A. The Constitution

On its face, the Constitution has little to say about discrimination in quasi-private clubs. Nowhere in the Constitution are the words “freedom of association.” Most scholars, however, believe that the concept is implicit in the document and can be found with minimal interpretation.

The First Amendment guarantees the rights to assemble peaceably, to petition the government for a redress of grievances, to speak with freedom, and to exercise one's religion freely.68 These activities often require association with other people.69 If the right to associate freely did not exist, the government could easily infringe upon other First Amendment rights.

To find a right to associate freely when not for the purpose of exercising First Amendment rights, it is necessary to look elsewhere in the Constitution. The Supreme Court, as will be discussed more fully below, has found freedom of association to lie within the penumbras of

68. U.S. Const. amend. I.
69. For instance, ten adult Jews (or ten adult Jewish men, depending on the branch) are required for certain kinds of communal prayer in Judaism.
the First, Fourth, Ninth, and Fourteenth Amendments, and therefore within the right to privacy.\textsuperscript{70}

That we infer a right to association from the right to privacy acknowledges that people come together to fulfill personal, social, and community needs. In doing so, they are not trying to affect or change government policy, but are merely trying to obtain a sense of community by being with people who are like them. Such an association can be deeply personal and intimate. When the group that has formed is small, it can be like an extended family for its members.

Thus, finding a constitutional basis for a right to freedom of association requires a definition of the type of association desired. The basis for this can be found either by looking towards the First Amendment or by looking towards the right to privacy. Either way, freedom of association is embedded in constitutional principles.

Many would also argue that there is no constitutional right to be free of discrimination perpetrated by non-governmental entities. While the Constitution bars some forms of discrimination by the federal government,\textsuperscript{71} and the Fourteenth Amendment bars discrimination under certain circumstances by states or their sub-entities,\textsuperscript{72} the Constitution does not govern conduct by private parties.\textsuperscript{73} To find a basis on which to challenge discrimination in quasi-private clubs, therefore, one must look to state or federal statutes.

\textbf{B. State and Federal Laws That Address Discrimination in Quasi-Private Clubs\textsuperscript{74}}

The federal government and the governments of many states have adopted laws which bar certain types of discrimination in public accommodations. These laws are intended to permit people to use, without

\textsuperscript{73} Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978). (The Thirteenth Amendment is an exception. Its bar on slavery directly affects the conduct of private parties. U.S. Const. amend. XIII.)
\textsuperscript{74} I will not attempt to survey every state's public accommodations laws to determine their scope and their definitions in this article. Instead of an exhaustive survey, I will examine different statutes to show the variations that have been used in the definitions and how they have been interpreted by courts. In each sample, I will explore whether or not arguments could be made successfully that quasi-private clubs may not discriminate under a particular law.
discrimination, privately owned facilities which are open to the public.\footnote{75} Following the \textit{Civil Rights Cases}, in which the Supreme Court overturned federal legislation passed at the end of the Civil War aimed at such entities,\footnote{76} states began developing similar antidiscrimination legislation. The federal government passed a new law barring discrimination in public accommodations as part of the Civil Rights Act of 1964.\footnote{77}

The federal government, state, and city public accommodations laws differ greatly in their treatment of which types of organizations and what types of discrimination\footnote{78} should be barred. Some states define "public accommodations" in terms of the business aspects of an organization,\footnote{79} while others define it in terms of public use.\footnote{80} In some states, whether an organization is deemed a public accommodation depends on whether it meets at one particular place.\footnote{81} Finally, a few states have laws that seem to include all organizations not protected by freedom of association.\footnote{82}

In this section of the article, I will describe some of the definitions of "public accommodations" used by states, cities, and the federal government in their statutes and/or in court rulings, exploring the benefits and drawbacks of each definition.

1. The Effect of Using "Place" as a Distinguishing Feature in Public Accommodations Statutes

Most public accommodations laws bar discrimination in "places of public accommodation." While some people view the word "place" as

\footnote{75}{This may include stores, restaurants, hotels, swimming pools, and other businesses. \textit{See, e.g.}, N.J. STAT. ANN. § 10:1.5 (West 1993).}
\footnote{76}{Robinson v. Memphis and Charleston R.R. Co., 109 U.S. 3 (1883).}
\footnote{77}{42 U.S.C. § 2000(a) (1988).}
\footnote{78}{For instance, only six states, the District of Columbia, and several cities bar discrimination based on sexual orientation. The federal government does not. Most jurisdictions with public accommodations laws bar discrimination based on race, color, religion, and national origin; several, including the federal government, do not bar sex discrimination in public accommodations. There are other variations as well.}
\footnote{79}{\textit{See} CAL. CIV. CODE § 51 (West 1982); MINN. STAT. ANN. § 363.01 (West 1991).}
\footnote{80}{\textit{See} 43 PA. CONS. STAT. ANN. § 954 (1991).}
\footnote{81}{\textit{See} ALASKA STAT. § 18.80.300(14) (1992); D.C. CODE ANN. § 2502 (1981); IOWA CODE ANN. § 601A.2 (West 1990); MASS. ANN. LAWS ch. 272 § 92A (LAW. CO-op. 1992).}
\footnote{82}{\textit{See} N.J. STAT. ANN. § 10:5-5 (West 1993).}
merely an introductory phrase, many courts interpret "place" as a factor limiting which entities are public accommodations. These courts have ruled that in order to be considered a public accommodation, the entity must exist at a particular place. This interpretation places obstacles in the way of defining quasi-private clubs as public accommodations. Many quasi-private clubs which have a history of discrimination, such as the Jaycees and Rotary Clubs, as well as the Boy Scouts, meet in different places throughout the community. Thus, attacks on discrimination in such quasi-private clubs have met with varying results depending on states' interpretations of the importance of the word "place" in their statutes.

83. There have been several challenges to the discrimination against women that was practiced by the Jaycees until 1984. At least three of those challenges were rejected in part because the Jaycees "does not operate from any particular place." United States Jaycees v. Richardet, 666 P.2d 1008, 1011–12 (Alaska 1983); United States Jaycees v. Bloomfield, 434 A.2d 1379, 1381 (D.C. 1981); United States Jaycees v. Massachusetts Comm'n Against Discrimination, 463 N.E.2d 1151 (Mass. 1983).

The Alaska Supreme Court explained,

In our view, the Jaycees, which does not operate from a fixed geographic situs, should not be considered a "place" for purposes of the definition of "Public Accommodation" under A.S. 18.80.300(7). Thus, we hold that the Jaycees' organization does not fall within the prohibition of A.S. 18.80.230 which applies exclusively to places of public accommodation.

Richardet, 666 P.2d at 1012.

A federal district court has taken a similar approach to the question of the definition of the word "place" in the federal public accommodations statute, 42 U.S.C. § 2000(a),(e). Welsh v. Boy Scouts of Am., 787 F. Supp. 1511 (N.D. Ill, 1992), aff'd, 993 F.2d 1267 (7th Cir. 1993), cert. denied, 114 S. Ct. 602 (1993). The case before that court involved religious discrimination by the Boy Scouts. The Boy Scouts would not admit as a member anyone who refused to subscribe to a belief in God. The court found that "Title II has never been applied so broadly as to encompass organizations which lack a tie to a facility of the kinds enumerated in the statute." Welsh, 787 F. Supp. at 1523.

The Iowa Supreme Court agreed with that literal interpretation of place when it had to decide if the Jaycees violated Iowa's public accommodations law, IOWA CODE ANN. § 601A.2 (West 1988).

We are persuaded by the literal and ordinary definition of the statutory term that the United States Jaycees is not a "place" within our definition of "public accommodation." Similarly, we do not think the organization is either an "establishment"... or a "facility"... The ordinary usage of these terms connotes a spatial dimension which the Jaycees' membership, as such, does not possess.

Even if a Court views "place" as a meaningful term in the public accommodations statute, this definition need not be quite so limiting as it might seem at first. All entities exist at a place, even if this place changes on occasion. In 1974, the New Jersey Superior Court, Appellate Division, used this understanding of "place" to find that the Little League was a place of public accommodation.\textsuperscript{84}

In many ways, this definition of "place" serves to recognize the word and, at the same time, render it meaningless. If the court views the purpose of the statute as being the eradication of discrimination wherever possible, an expansive definition of "place" is appropriate. If, however, the purpose of the statute is to eliminate discrimination in a limited number of settings, "place" should be defined so as to limit the


The New Jersey courts are not unique in their interpretation of place. The Minnesota Supreme Court used similar reasoning to find that the Jaycees is a public business "facility" within the meaning of its law, \textsc{Minn. Stat. Ann.} \textsection 363.01 (West 1991):

We need not decide whether "facilities" should be construed to include persons. What we decide here is that an organization engaged in the business of seeking to advance its members and to add to their ranks by assiduously selling memberships in this state is a "public business facility." In more familiar terms, such an organization has more than the "minimum contacts" to qualify as doing business in this state, and its facilities are anywhere it promotes, solicits, and engages in the sale of memberships on an unselective basis.

United States Jaycees v. McClure, 305 N.W.2d 764, 774 (Minn. 1981).

application of the statute. It is this difference in philosophy which may have led different courts to their varying definitions of “place.”

Courts should be sure, however, to examine the rest of the statutory definition as written by the legislature to determine what is a place of public accommodation rather than base their decision on the mere use of the word “place.” Courts should only use the word “place” to limit statutes if the legislature clearly expressed such an intention in the statute’s definition.85

2. Is the Club Open to the General Public?

Many states define “public accommodations” in terms of the entity’s relationship to the general public. These states bar discrimination in entities that serve the public. In some cases, they exempt private clubs from their antidiscrimination laws, but include a clause stating that the clubs may not discriminate in areas or at functions where nonmembers are present.86

Like statutes that include the word “place,” statutes that define public accommodations in terms of their public use are subject to a wide variety of interpretations. Some states categorize all businesses as public accommodations, as would be the usual understanding of the phrase “open to the public.”87 Others, however, have chosen to interpret the statute more narrowly.88 These states give an extremely con-

85. At least one court found that the crucial difference between states in which "place" was determinative and ones in which it was not was whether the word "place" was repeated in the definition of the term "place of public accommodation." Welsh v. Boy Scouts of Am., 787 F. Supp. 1511, 1530 (N.D. Ill. 1992), aff'd, 993 F.2d 1267 (7th Cir. 1993), cert. denied, 114 S. Ct. 602 (1993).


87. See, e.g., CAL. CIV. CODE § 51 (West 1982); MINN. STAT. ANN. § 363.01(33) (West 1991).

88. In South Dakota, for instance, the public accommodations law bars discrimination at "any place, establishment, or facility of whatever kind, ... that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuitously." S.D. CODIFIED LAWS ANN. § 20-13-1(12) (Supp. 1994).

A South Dakota court found that Prudential Insurance Company was not covered by that state's public accommodations law. It reasoned, "Prudential does not solicit the patronage of the general public and is not a place of general trade; it
stricted reading to the statute, which seems to interfere with the remedial policy embodied in antidiscrimination laws. An example of an unreasonable reading of "open to the public" has occurred in states that interpret the phrase to exclude wholesale businesses because they do not do business with the general public.89

89. See Graham, 607 P.2d 759; South Dakota Div. of Human Rights ex rel. Ewing v. Prudential Ins. Co. of Am., 273 N.W.2d 111, 113 (S.D. 1978). The courts' reasoning in these situations is faulty, since they are ignoring members of the general public who have retail businesses.
The application of such public accommodations laws to quasi-private clubs is especially complex. Typically, membership in a quasi-private club is not available to the general public, and is therefore not subject to statutory provisions barring discrimination. Only courts that broadly interpret "open to the public" to include any club with few membership criteria would scrutinize discriminatory practices in membership selection.90

When, however, the statutes prohibit discrimination in private club activities which are open to the public, they can have a profound effect on discrimination in quasi-private clubs. Such a law barring private club discrimination in a club's public functions91 was used in two Pennsylvania cases involving the Loyal Order of Moose.92 In these cases, the court found that certain activities of each lodge were open to the public. In Commonwealth, Human Relations Commission v. Loyal Order of Moose, Lodge No. 107 (1972), appeal dismissed, 409 U.S. 1052 (1972) [hereinafter Lodge No. 107]; and Commonwealth, Human Relations Commission v. Loyal Order of Moose Lodge No. 145 v. Commonwealth, Human Relations Commission, 328 A.2d 180 (Pa. Commw. Ct. 1974) [hereinafter Lodge No. 145].

90. A federal district court interpreted Iowa's statute, IOWA CODE ANN. § 601A (west 1981), broadly and found that the Jaycees "provides services to the general public and therefore, is a public accommodation." United States Jaycees v. Cedar Rapids Jaycees, 614 F. Supp., 515, 517 (D.C. Iowa 1985), aff'd on other grounds, 794 F.2d 379 (8th Cir. 1986). The Iowa Supreme Court, however, found that Rotary International (Good v. Iowa Civil Rights Comm'n, 368 N.W.2d 151 (Iowa 1985)) and the Jaycees (United States Jaycees v. Iowa Civil Rights Comm'n, 427 N.W.2d 450 (Iowa 1988)) are not public accommodations. In Good, an exchange program was advertised, and there were eligibility requirements. Because of those requirements, the court found that the program was not offered to the general public. Good, 368 N.W.2d at 156.

91. The statute states:

It shall be an unlawful discriminatory practice . . . in the case of a fraternal corporation or association, unless based upon membership in such association or corporation . . . (h)(10)(i) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee [sic] of any public accommodation, resort or amusement to: (1) Refuse, withhold from, or deny to any person because of his race, color, sex, religious creed, ancestry, national origin or handicap or disability, or to any person due to use of a guide or support animal because of the blindness, deafness or physical handicap of the user . . . either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such place of public accommodation, resort, or amusement.


Moose, Lodge No. 107 [hereinafter Lodge No. 107],93 African Americans were refused service in the lodge’s dining room, which was open to the general white public.94 Similarly, in Loyal Order of Moose Lodge No. 145 v. Commonwealth, Human Relations Commission [hereinafter Lodge No. 145],95 a bowling league that was open to white people denied membership to African Americans.96

The Pennsylvania courts in both cases ruled that the discrimination was illegal. In Lodge No. 107, the court drew a careful distinction between discrimination in membership and discrimination in activities open to the public. The antidiscrimination statute exempts membership decisions of fraternal organizations.97 Those organizations’ activities which are open to the public are not, however, exempt.98 The court in Lodge No. 145 reached the same conclusion.99

Other clubs may find themselves subject to antidiscrimination laws in some of their activities “when such distinctly private place, establishment or facility caters or offers services, facilities, or goods to the non-members for fee or charge or gratuitously….”100 The statutes do not bar discrimination in club membership but may be used to challenge discrimination in access to the clubs. For instance, many country clubs have different golfing hours for men and women.101 In such instances,
men are usually allowed to golf early in the morning while women are relegated to less preferable times. Women are inconvenienced by the inability to golf around a business schedule and by the inability to use the activity as a setting in which to conduct business with clients or associates. If women can show that nonmembers are permitted to golf during the men's golfing time, they could mount a legal attack against such discrimination. Courts may rule that since the club had opened its facilities to nonmembers, it was therefore barred from discriminating in the facilities' availability.

It is, therefore, clear that legal challenges to discrimination in the membership policies of quasi-private clubs are unlikely to succeed in states that define "public accommodation" in terms of "use by the general public." To succeed, a challenger must show that most of the organization's activities are open to the public and that there are few membership restrictions beyond the discriminatory ones. Therefore, challengers will have more success if they object to discriminatory practices in which the quasi-private clubs engage when nonmembers are present.

3. Statutes That Bar Discrimination in "Businesses"

Many states bar discrimination in businesses by defining a business as a public accommodation. As with "place," state court definitions of "business" have varied to a large degree. Some states have been inclined to interpret the term narrowly and to find that only profit-making operations qualify as businesses. In those states, quasi-private clubs are excluded from coverage under the state public accommodations law.

102. Holloway, supra note 101, at B5. (The Ladies Professional Golf Association (LPGA) this year organized clinics to teach women how to use golf as a business tool. According to Cindy Davis, director of the LPGA Teaching and Professional Club Division in Daytona Beach, Florida: "[w]omen are finding it's an excellent business tool for them . . . It's a relationship-building sport.")


105. See, e.g., CAL. CIV. CODE § 51 (West 1982); COLO. REV. STAT. § 24-34-601 (Supp. 1994); MINN. STAT. ANN. § 363.01 (West 1991).

106. Alaska, for example, found that a membership organization cannot be a public accommodation under its law. United States Jaycees v. Richardet, 666 P.2d 1008, 1012 (Alaska 1983). At least two other states have attacked the business aspect of discriminatory clubs not by barring them from discriminating, but rather by preventing people from using business expenses as tax deductions when the expenses
Other states have defined “business” to encompass any organization that has any business operations within the state. If, for instance, an organization sells anything or pays anyone in the state, it is viewed as a business.\textsuperscript{107} Courts have also included quasi-private clubs in their definition of “business” when they have found that the clubs exist primarily for business purposes.\textsuperscript{108}

One reason for the difference in interpretations of the word “business” may be in the wording of the statutes. For instance, California’s Civil Rights Act states that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color,
religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, or services in all business establishments of every kind whatsoever.”\textsuperscript{109} By specifying “of every kind whatsoever,” the California legislature expanded the old definition of “public accommodations” to include many more entities,\textsuperscript{110} and invited courts to define business as broadly as possible.\textsuperscript{111} California courts, therefore, do not limit the term to profit-making organizations, and may also view non-profit entities as businesses.\textsuperscript{112}

California’s approach, however, stretches the definition of “business” to an extreme with which most courts or legislatures would probably be uncomfortable. While some states have been willing to examine quasi-private clubs to determine whether they are actually businesses,\textsuperscript{113} most states are unlikely to adopt California’s expansive definition. States that bar discrimination in business might not, therefore, bar quasi-private clubs from discriminating. An exception may occur in clubs that have many business attributes. If an employer pays its employees’ membership dues, or if dues are deducted as business expenses, the club may be considered a business. A club may also be deemed a business if it serves as the location for business deals, contacts, or meetings.

4. Exemptions for Private or Distinctly Private Clubs

Many states, in defining “public accommodations,” specifically exempt “private” or “distinctly private” clubs from their laws.\textsuperscript{114} Courts in these states must define “private” or “distinctly private” when faced with discrimination claims against quasi-private clubs. In many courts, the trend has been to narrow the definition of “private” so that more quasi-private clubs are barred from discriminating.

\begin{thebibliography}{9}
\item \textsuperscript{109} Cal. Civ. Code \S 51 (West 1982).
\item \textsuperscript{110} O’Connor v. Village Green Owners’ Ass’n, 191 Cal. Rptr. 320, 323 (Cal. 1983).
\item \textsuperscript{111} “[T]he term ‘business establishments’ was used in the broadest sense reasonably possible.” Burks v. Poppy Constr. Co., 20 Cal. Rptr. 609, 612 (Cal. 1962).
\item \textsuperscript{112} Burks, 20 Cal. Rptr. at 612.
\item \textsuperscript{113} See United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981).
\end{thebibliography}
The discussion concerning what is a “private” club generally began with the Civil Rights Act of 1964, which exempts “private clubs” from its reach. Many restaurants began to call themselves private in an attempt to evade the statute. It was clear that such claims were merely pretexts in order to permit discrimination. Eventually, the facts became less obvious and courts were forced to create a test to define a “private” club. The test included the following factors:

(1) An organization which has permanent machinery established to carefully screen applicants for membership and who selects or rejects such applicants on any basis or no basis at all; (2) which limits the use of the facilities and the services of the organization strictly to members and bona fide guests of members in good standing; (3) which organization is controlled by the membership either in the form of general meetings or in some organizational form that would and does permit the members to select and elect those member officers who control and direct the organization; (4) which organization is non-profit and operated solely for the benefit and pleasure of the members; and (5) whose publicity, if any, is directed solely and only to members for their information and guidance.

While this test became the accepted definition of “private,” it did not answer the question of what is a “distinctly private” club. Several states exempt only those clubs that are “distinctly private,” rather than merely “private,” from their antidiscrimination laws. When courts in these states analyze a club to determine if it is “distinctly private,” they

116. In one such case a court noted that a restaurant was changed into a so-called private club on the day the Civil Rights Act went into effect. Katzenbach v. Jack Sabin’s Private Club, 265 F. Supp. 90, 91–92 (E.D. La. 1967). Membership in the “club” was not required for whites to eat in the restaurant nor was there a membership fee. *Katzenbach*, 265 F. Supp. at 93. Also, membership cards were sent to regular customers without having been requested. *Katzenbach*, 265 F. Supp. at 93. In that case, the court had no difficulty determining that it was not in fact a private club. *Katzenbach*, 265 F. Supp. at 94.
generally begin with the *Cork Club* definition of a “private” club.¹¹⁹ They then determine what additional indicia are required by the use of the word “distinctly.”¹²⁰

When the statutes do not define “distinctly,” courts have a wide range of options in deciding which, if any, types of quasi-private clubs to include in the scope of their state’s antidiscrimination laws. Judges could choose to read “distinctly” as a modifier of “private,” thereby according it little meaning. In such a case, any bona fide club would be exempt from the public accommodations law.¹²¹ Over the years, some state courts which had originally interpreted “distinctly private” to exempt many quasi-private clubs later adopted a different definition, which now bars discrimination in a greater number of organizations.¹²²


¹²¹. An example of such a reading of “distinctly” private can be found in Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (3d Cir. 1986). The Kiwanis Club of Ridgewood, New Jersey decided to admit women, and the national organization sought to revoke its trademark license. *Ridgewood Kiwanis Club*, 806 F.2d 468. The Kiwanis Club of Ridgewood claimed that it would violate the New Jersey Law Against Discrimination if it barred women, and the federal district court concurred. *Ridgewood Kiwanis Club*, 806 F.2d at 471. The Third Circuit, however, reversed, finding that Kiwanis is not a public accommodation under New Jersey law. *Ridgewood Kiwanis Club*, 806 F.2d at 477.

The agency charged with enforcing New Jersey’s Law Against Discrimination was not persuaded by the ruling. It made a motion to reconsider and for *en banc* review asserting that the court misinterpreted New Jersey law and a divided court (by a 5-4 vote) denied the petition. *Ridgewood Kiwanis Club*, 811 F.2d at 248. Shortly after the petition was denied, the State of New Jersey Department of Law and Public Safety, Division on Civil Rights made a ruling in a case involving Princeton University’s all male eating clubs ordering the clubs to admit women and showing that it would not interpret the law as did the circuit court. See Frank v. Trustees of Princeton Univ., et al. Docket Nos. PL-05-1678, 1679, 1680, OAL Dkt. No. Crt. 5042-85, May 16, 1987, *aff'd*, Frank v. Ivy Club, 576 A.2d 241 (N.J. 1990), *cert. denied*, 498 U.S. 1073 (1991).

¹²². New York is one such state that has changed its interpretation of the “distinctly private” club exemption to its public accommodations law. N.Y. Exec. Law § 292(9) (McKinney 1993). While a case in the 1970s found that the Kiwanis Club was distinctly private, Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l, 363 N.E.2d 1378 (N.Y. 1977), *cert. denied*, 434 U.S. 859 (1977), six years later the New York courts took a much more expansive view of New York's public accommodations law and found that an organization which trained people in boating skills and was nonselective except that it refused membership to women was not distinctly private. United States Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1206 (N.Y. 1983), *reargument dismissed*, 455 N.E.2d
In the end, a broader reading seems more appropriate. Because of the remedial purpose of the statutes, most states interpret their antidiscrimination laws liberally, so as to include as many instances of discrimination as would be reasonable. These courts have found that because discrimination injures the entire community, not just the person discriminated against, a wide-ranging remedy is required.

If state courts liberally construe their antidiscrimination statutes as described above, many more seemingly private clubs would not be permitted to discriminate. While such clubs may appear private on the surface, a deeper examination of how they operate would reveal that they are not "distinctly private." Thus, an organization may be non-profit and still be barred from discriminating, especially if the general public is invited to join. A selective organization could also be covered by the act, particularly if not all of the members participate in the selection process. In addition, advertising to the general public for members or about activities can hurt a quasi-private club's claim that it should be exempt from antidiscrimination laws. If part of an organization is private but other parts are open to the public, it may be found to be a public accommodation, as could an organization that ex-

1267 (N.Y. 1983).

The New York State Legislature recently passed a bill to codify a definition of "distinctly private." See Pact Reached on Bias Law for Some Clubs, N.Y. TIMES, June 22, 1994, at B5.


124. In a 1965 case, the New Jersey Supreme Court wrote, "[The] prevention of unlawful discrimination vindicates not only the rights of individuals but also the vital interests of the State. In short, such discrimination is regarded as a public wrong not merely a private grievance." David v. Vesta Co., 212 A.2d 345, 359 (N.J. 1965).


127. "An establishment which caters to the public or by advertising or other forms of invitation induces patronage generally is a place of public accommodation." Sellers v. Philip's Barber Shop, 217 A.2d 121, 123 (N.J. 1966). Thus, a swim club that advertised for members but was then selective is a public accommodation. Clover Hill Swimming Club, 219 A.2d at 165. See also Evans v. Ross, 154 A.2d 441 (N.J. Super. Ct. App. Div. 1959), cert. denied, 157 A.2d 362 (N.J. 1959).

128. Evans, 154 A.2d 441.
cludes the public from only some of its activities. Finally, a club’s relationship to another entity that is a public accommodation can cause it to come under the reach of a state’s antidiscrimination law.

Several local governments, recognizing the difficulties courts have with defining “distinctly private,” have defined the term in their public accommodations laws. Most of these statutes attempt to define clubs that are formed primarily to enhance business opportunities as not being distinctly private. Factors to consider in determining whether an


130. As the New Jersey Supreme Court ruled in Frank v. Ivy Club:

Where a place of public accommodation and an organization that deems itself private share a symbiotic relationship, particularly where the allegedly "private" entity supplies an essential service which is not provided by the public accommodation, the servicing entity loses its private character and becomes subject to laws against discrimination.


131. New York City passed such an ordinance to require some of its highly prestigious but quasi-private clubs to admit women. The statute states:

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

New York, N.Y., Local Law 63 § 2 (1983). New York passed the law in part because:

One barrier to the advancement of women and minorities in the business and professional life of the city is the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed.


organization is distinctly private include: the size of the organization, whether nonmembers pay for membership or other expenses, whether club expenses are deducted from members' tax returns as business expenses, whether meals are regularly served at the club, and whether, and the extent to which, nonmembers use the club's facilities.\textsuperscript{132} While these legislative actions are controversial, they have been upheld as constitutional by the courts.\textsuperscript{133} The ordinances—or the threat of such laws—have caused some quasi-private clubs to stop discriminating against women.\textsuperscript{134}

5. How Public Accommodations Statutes Should Be Worded

It becomes clear from the above that the wording of a public accommodations law can greatly influence its interpretation by state courts. While some courts are inclined to stretch the ordinary meaning of the words used in an antidiscrimination statute in order to give it either a wide or narrow application, most courts look to the actual wording of the statute and its legislative intent to determine the reach of the statute. Whether and which quasi-private clubs will be barred from discriminating will, therefore, depend in large part upon the wording of the specific law.

In determining what language to use in antidiscrimination laws, legislators have enacted their own views of how best to balance the right to associate freely with the right to be free from discrimination.

\textsuperscript{132} See \textit{New York, N.Y., Local Law} 63 § 2 (1983).

\textsuperscript{133} See \textit{New York State Club Ass'n v. City of New York}, 505 N.E.2d 915 (N.Y. 1987), \textit{aff'd}, 487 U.S. 1 (1988). The New York State Club Association vigorously opposed the New York City ordinance, citing state and federal statutory and constitutional problems with it. The New York State Club Association lost in the United States Supreme Court as it had earlier lost in the New York Court of Appeals. New York State Club Ass'n v. City of New York, 487 U.S. 1, 2, 7 (1988). The New York Court of Appeals found that the state's and city's use of "distinctly private" intentionally gave a narrower exemption than that contained in the federal law. \textit{New York State Club Ass'n}, 505 N.E.2d at 919. The Court found that the law spelled out in concrete terms circumstances under which a club would not be considered distinctly private and that it was permissible. \textit{New York State Club Ass'n}, 505 N.E.2d at 919–20.

\textsuperscript{134} For instance, because of the New York law, the University Club of New York voted to admit women after the Court of Appeals ruling. E.R. Shipp, \textit{The University Club Votes to Take Women as Members}, \textit{N.Y. Times}, June 6, 1987, at A32. The Union League Club in Philadelphia voted to admit women because of a threat by the Philadelphia City Council to pass a similar law. \textit{Philadelphia Club Drops All-Male Restriction}, \textit{N.Y. Times}, May 22, 1986, at A20.
This being the case, while the question is a close one, discrimination at prestigious and influential organizations causes too much damage to allow it to continue unfettered by antidiscrimination laws.

More specifically, discrimination in quasi-private clubs places major obstacles in the paths of women and minorities who are trying to break through the “glass ceiling.” If women and minorities are to accomplish this, they must be able to eat, golf, socialize, and do business in the same places where white Anglo-Christian men do. Laws, therefore, should be structured in such a way as to bar most quasi-private clubs from discriminating. The most effective phrasing that has been used bars discrimination in all but “distinctly private” clubs. Legislatures should go one step further by defining “distinctly private” in order to alert courts to those features of a club that bring it within the public sphere.

C. The Constitutional Defenses Available to Quasi-Private Clubs

Quasi-private clubs facing challenges to their discriminatory practices may have some constitutional defenses available to them. Many members of these clubs believe that they possess the constitutional right to discriminate. At times they base their argument on Justice Douglas’

135. The “glass ceiling” refers to the unseen barrier that has tended to prevent women and members of minority groups from obtaining jobs at the highest echelons of society such as chief executive officers of corporations, senior partners in law firms, top officials in government, presidents of major universities, and the like. See generally Carol Hymowitz & Timothy D. Schellhardt, The Glass Ceiling: Why Women Can’t Seem to Break the Invisible Barrier that Blocks Them from the Top Jobs, WALL ST. J., Mar. 24, 1986, at 4A.


137. The dangers of failing to define “distinctly private” include the possibility that courts will have a different view than legislators as to the meaning of the term and the possibility that litigation will be prolonged while the parties dispute the meaning of the phrase. In Frank v. Ivy Club, 548 A.2d 1142 (N.J. Super. Ct. App. Div. 1988), rev’d on other grounds, 576 A.2d 241 (N.J. 1990), cert. denied, 498 U.S. 1073 (1991), the author of this article, a Princeton undergraduate at the time, brought sex discrimination cases against the university and its three all-male eating clubs. The courts took 13 years to resolve the case. The primary area of dispute was whether the clubs were “distinctly private” and therefore exempt from the New Jersey Law Against Discrimination.

dissent in *Moose Lodge No. 107 v. Irvis.* The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be."

The constitutional rights at issue for the clubs’ defense are based on freedom of association. The Supreme Court has divided freedom of association into the following concepts: freedom of expressive association and freedom of intimate association. A third concept of freedom of association should be added. This concept would stem from the right to the free exercise of religion, an argument some have used to claim a constitutional right to discriminate. The following section explores each aspect of freedom of association and its impact on discrimination in quasi-private clubs. It analyzes the merits and problems with the Supreme Court’s opinions in this area and discusses other ways of approaching freedom of association.

1. Freedom of Expressive Association

Freedom of expressive association is grounded in the First Amendment’s right to petition the government for a redress of grievances, right to free speech, and right to freedom of assembly. People cannot exercise these rights effectively if they are not also protected in their associations with similarly minded individuals. To safeguard political expression, therefore, the courts have protected expressive association.

140. *Id.* at 179–80 (J. Douglas, dissenting). It is useful to note that this was the dissent to a case in which the Supreme Court found no state action in the discrimination practiced by Moose Lodge and thus allowed the lodge to continue its racial discrimination. The context of the quote is not as supportive of discrimination as its users would have us believe. Justice Douglas specifically noted, “It has been stipulated that Moose Lodge No. 107 ‘is, in all respects, private in nature and does not appear to have any public characteristics.’” *Moose Lodge,* 407 U.S. at 179 n.1 (quoting App. 23). Justice Douglas dissented because he would have found state action in Moose Lodge’s discrimination. *Moose Lodge,* 407 U.S. at 181–83.
142. U.S. CONST. amend. I.
144. U.S. CONST. amend. I.
Groups formed for expressive purposes encounter opposition most frequently when they advocate minority points of view. The Supreme Court has occasionally protected such advocacy by recognizing a right to freedom of association. Early freedom of association cases involved civil rights organizations. More recently, politically unpopular groups have invoked freedom of association to protect themselves from election laws requiring financial disclosures. The cases establishing a right to freedom of association did not address discrimination, but involved state and federal government attempts to identify people involved with such groups or to curtail groups' activities. The Supreme Court has

145. See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 453 (1958); NAACP v. Button, 371 U.S. 415, 419 (1963). At other times, the Court has allowed the suppression of unpopular views. See United States v. Dennis, 341 U.S. 494 (1951) (upholding the Smith Act, which made it a crime to be an active member of the Communist Party).

146. The concept of freedom of association for expressive purposes derives from the freedom of speech and freedom of assembly clauses of the First Amendment of the Constitution. The first case specifically recognizing freedom of association in the political sphere arose from attempts by Alabama officials to obtain membership lists of the National Association for the Advancement of Colored People (NAACP). Patterson, 357 U.S. at 453. It was clear that if the officials were able to obtain those lists, the members of the NAACP would be harassed. Patterson, 357 U.S. at 462. Therefore, the NAACP resisted giving up those lists. Patterson, 357 U.S. at 464. The Supreme Court held that freedom of association gave the NAACP the right to resist such government requests. Patterson, 357 U.S. at 466.

In another early case concerning freedom of expressive association, the Supreme Court rejected a Virginia ban on lawyer solicitation possibly aimed at the NAACP and the NAACP Defense Fund. The ban made it a criminal offense for a person to tell others that their rights were being violated and at the same time to recommend a lawyer to redress those violations. Button, 371 U.S. at 419. The Court ruled that the First and Fourteenth Amendments protected this type of solicitation. Button, 371 U.S. at 428. In doing so the Court recognized that, for the NAACP, litigation "is a means for achieving the lawful objectives of equality of treatment by all government . . . for the members of the Negro community in this country. It is thus a form of political expression." Button, 371 U.S. at 429.

147. Brown v. Socialist Workers' '74 Campaign Comm., 459 U.S. 87 (1982); Buckley v. Valeo, 424 U.S. 1 (1976). In both cases, federal or state governments sought to require candidates to report the names and addresses of those who contributed to the candidates' campaigns for elected office. Brown, 459 U.S. at 89; Buckley, 424 U.S. at 74. The authorities also wanted access to a list of expenditures for candidates which would reveal with whom they did business. In Buckley, the Court upheld the federal financial disclosure laws generally but noted that it might be unconstitutional to require the same of minor parties. Buckley, 424 U.S. at 70. In Brown, the Socialist Workers' Party (SWP) was able to show a long history of governmental and private harassment against its members and supporters. Brown, 459 U.S. at 99–100. As a result, the Supreme Court ruled that the SWP had a right to withhold the lists. Brown, 459 U.S. at 102.
been less willing to invoke freedom of expressive association to protect quasi-private clubs from state attempts to bar their discrimination.\textsuperscript{148}

While quasi-private clubs might argue that they are now politically unpopular, and thereby require protection, disputes involving these clubs raise different issues than did earlier freedom of association cases. Where the Court has recognized freedom of expressive association, attempts to regulate the organizations have been largely based on state opposition to the groups' political positions.\textsuperscript{149} The regulations involved in major quasi-private club discrimination cases have been aimed not at the clubs' political objectives but at their discriminatory membership. Since the Supreme Court rejected clubs' claims that membership discrimination was related to their expressive activities, the Court found that the clubs enjoyed no right to discriminate based on freedom of expressive association.\textsuperscript{150}

The Supreme Court has not yet decided a case in which a quasi-private club was sued for discrimination and was able to establish a genuine connection between its discrimination and its expressive activities. When such a case arises, the organization's freedom of expressive association claims will be much harder to reject.

Overtly political organizations are the ones most likely to demonstrate successfully a genuine relationship between their discriminatory

\textsuperscript{148} See Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) ("The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

\textsuperscript{149} In the election cases, while the government was not seeking disclosure because of opposition to particular candidates since all candidates were required to make disclosures, the groups seeking protection had suffered years of governmental harassment because of their espoused goals. See, e.g., Socialist Workers' Party v. Attorney Gen. of the United States, 642 F. Supp. 1357 (S.D.N.Y. 1986).

\textsuperscript{150} Justice Brennan, for the majority, noted in Roberts, 468 U.S. at 627:

> There is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members.

\textit{See also} New York State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987).
practices and their objectives. Often, were a representative of the excluded group permitted to participate, the ability of the other members of the organization to explore their problems and develop solutions would be negatively affected, even if the outsider supported the goals and purpose of the organization. Members may not feel free to speak about their problems, goals, and proposed solutions when others of different backgrounds are present. This is most evident for people who are part of groups that have traditionally been exploited. Moreover, if outsiders are members of a more powerful group, they may tend to dominate the organization's leadership.

Organizations formed to advance gender- or race-based interests might successfully withstand legal challenge by linking membership discrimination to their political goals. While courts might bar a women's breakfast club from discriminating, a women's consciousness-raising group could likely show that the inclusion of men would contravene its purpose.\textsuperscript{151} A men's rights organization which bars women because it was formed to give men an opportunity to discuss ways in which men are disadvantaged as males, and then to work to overcome those disadvantages would be equally successful in passing this constitutional test. Another organization which could pass this constitutional test might be a campus African-American group seeking to advance the interests of African-American students while excluding white students.

As this argument would also be successful for a Ku Klux Klan chapter seeking to exclude African Americans or for the Nazi Party trying to exclude Jews, advocates of equality may oppose it. The Ku Klux Klan would argue that its very purpose is to support white supremacy and to subjugate African Americans, and that the admission of African Americans would hinder that purpose. Similarly, the Nazi Party might argue that a basic tenet of Nazism is the "inferiority of the Jewish race," and that allowing Jews membership would hinder the Party's aims. As repulsive as these arguments are, it is difficult to recognize a constitutional right and not apply it uniformly.\textsuperscript{152} In a sense,

\textsuperscript{151} Moreover, having men present could in fact interfere with a free discussion of issues and needs. For instance, if men could attend such meetings, a woman's boyfriend/husband might come with her to such a meeting. It is unlikely that in such circumstances she would be able to talk about problems she may be having at home, especially issues concerning sex, conflicts over money, and conflicts over domestic responsibilities.

\textsuperscript{152} Some might argue that groups which serve the disempowered should be able to discriminate while those that serve the empowered should have their right to discriminate limited. However, "a law that explicitly differentiates between men's and
those who advocate an expansion of freedom must respond with the famous defense of liberty, "I disapprove of what you say, but I will defend to the death your right to say it." 153

At the same time, recognizing a right to discriminate in membership does not require allowing discriminatory groups to act on their beliefs in ways that threaten others. For instance, burning crosses to intimidate African Americans or painting swastikas to intimidate Jews may lead to civil suits against these groups for civil rights violations. 154 Such activities may also lead to criminal charges of arson, criminal mischief, trespass, or other possible offenses, as well as to penalty enhancements for the hate aspects of the crime. 155 Such penalty enhancements have been passed because of the impact that hate crimes have on the broader community. That impact can lead to wide-scale riots, as in the Rodney King case, or to other forms of trauma. 156

women's associations, while theoretically defensible, may prove politically unpalatable." Deborah L. Rhode, Association and Assimilation, 81 Nw. U. L. Rev. 106, 127 (1986).


154. See Saint Francis College v. Al Khazrjhi, 481 U.S. 604 (1987); Shaare Tifela Congregation v. Cobb, 481 U.S. 615 (1987). Among the civil rights that these groups may be violating is the right to travel across state lines. This right may even be violated if the cross or swastika were placed on public grounds and if it could be shown that the purpose of this action was to scare African Americans or Jews away from a community or from a university by invoking the violence those symbols represent. In doing so, the actors would make African Americans or Jews afraid that they would become victims of violence should they come. An excellent example of a situation in which this argument might be useful would be the recent cross burnings in Dubuque, Iowa. They began after the city council decided that there were too few people of color in the community. The council therefore passed a plan to try to encourage people of color to move to Dubuque. After the plan was announced, a small group started burning crosses in the city and white supremacists began to march. Clearly, an argument could be based on these facts that those who were burning the crosses were doing so to discourage people of color from moving to Dubuque, a violation of the right to interstate travel. Deborah Wiley, Breaking the Barriers of Hate: Dubuque Grapples with Racism, Des Moines Reg., Nov. 17, 1991, at 1B.


156. For instance, in March 1994, this author's synagogue was defaced with antisemitic and pro-Nazi graffiti, including statements such as "go home Jew" and "remember Holocaust," and numerous swastikas. Tom Alex, D.M. Synagogue Defaced; Police Seek Vandal, Des Moines Reg., Mar. 4, 1994, at 1A. There was a large scale response from the religious and political communities that helped the Jewish community to heal. Yet, this author and many of her friends still felt deep trauma
A conflict between rights to inclusion and free speech arose recently in New York City. The sponsors of the annual St. Patrick's Day parade, the New York County and State Boards of the Ancient Order of Hiberians (the Hiberians) refused to allow the Irish Lesbian and Gay Organization (ILGO) to participate in the parade. The ILGO challenged the Hiberians before the New York City Commission of Human Rights and in federal district court, claiming that the Hiberians were illegally discriminating against them on the basis of sexual orientation. The New York Civil Liberties Union defended the organizers, arguing that the Hiberians had an expressive association right to discriminate because the parade was organized to celebrate Irish and Roman Catholic pride, and because the ILGO had a view that was "contrary to the teachings of [the] Catholic faith." The ILGO argued that the parade was a government action and that under New York City law the Hiberians could not discriminate against them on the basis of their sexual orientation. The administrative judge for the New York City Human Rights Commission recommended that the Commission rule against the ILGO based on the freedom of expressive association claim. The district court then ruled against the ILGO, for several weeks. Some Holocaust survivors were unable to look at the synagogue; others dissolved in tears and trembled in fear upon seeing the graffiti and being reminded of the horrors through which they had lived.

157. A similar dispute arose in 1993 over the Salute to Israel Parade, although it was never taken to court. The sponsors of the parade in New York did not want to allow Congregation Beth Simchat Torah, the gay synagogue in New York, to participate in the parade because of objections by some Orthodox Jewish groups to homosexuality. In defending the Congregation, others noted that the Israeli Army does not even bar gays and lesbians from serving and that the parade is not a reflection of Jewish doctrine but of support to Israel. A compromise was brokered shortly before the parade to allow the Congregation to march. When the issue was reported in the New York Times, however, the parade organizers again barred the synagogue. Ultimately, they were barred from marching. See Alan Finder, Parade Furor: Salute to Israel Uninvites Gay Group, N.Y. Times, May 8, 1993, at A23.


refusing to grant them the preliminary injunction that would have allowed the group to participate in the 1992 parade.165

This use of the freedom of association argument presents a close case. The Hiberians, however, eventually persuaded the court that the message of their parade was “to honor the patron saint of Ireland and to proclaim their allegiance to the Roman Catholic Church . . . .”166 Because of this, the court found that by ignoring the parade’s political message, and by ordering them to include the ILGO, New York City had violated the Hiberians’ free speech rights.167

Before a court permits an organization to discriminate, it should continue to require that a discriminatory practice is necessary to the expressive message that an organization wishes to convey. Courts should uphold an organization’s right to discriminate only if that organization demonstrates a strong relationship between its expressive activities and its discrimination. If courts require a lesser showing of such a relationship, clubs may make expressive claims that are in fact pretextual.

2. Freedom of Intimate Association

Quasi-private clubs challenged for their discriminatory practices defend themselves more often on the basis of a right to freedom of intimate association, which can be a far stronger defense, than on expressive association rights. Such intimate association rights are based on both a right to privacy168 and on notions of intimacy contained in the First169 and Fourth Amendments.170 Initially, the Supreme Court recognized freedom of intimate association in issues concerning marriage,171 child-rearing,172 and child-bearing.173

169. U.S. CONST. amend. I.
170. U.S. CONST. amend. IV.
Because some small groups function as an extended family, the expansion of intimate association rights to such organizations was reasonable. The Supreme Court then recognized a right to intimate association in small organizations that function like extended families, but no such group has yet presented itself to the Court. The Court first applied the test of freedom of intimate association to quasi-private clubs in *Roberts v. United States Jaycees*. In that case, the Court developed a framework for analyzing quasi-private clubs' claims that their constitutional right to discriminate should override state public accommodations laws. The Court listed the following relevant factors: "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." The Jaycees, with approximately 295,000 members in 7400 local chapters involving 400 to 430 members each, and affiliated with fifty-one state organizations, were clearly not the type of intimate association that merited constitutional protection. In addition, while the organization admitted only males between the ages of eighteen and thirty-five, older people and women participated in many Jaycees' functions, thus making the organization non-seclusive. Moreover, Minnesota's courts had found that one of the Jaycees' purposes was to sell memberships, which qualified it as a business.

Seclusivity is one factor relevant to determining whether a club has the right to discriminate. If nonmembers participate in the club's activities and are simply refused membership, the club members are not expressing a desire to refrain from associating with them. Likewise, if an organization is so large that its members cannot all know each other, requiring admission of individuals from an excluded group is not a major imposition on members' associational rights.

174. Justice Brennan explained the reason for protecting intimate associations: "[I]ndividuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Roberts*, 468 U.S. at 619.
Selectivity is also a relevant issue, because if anyone can become a member, then granting membership is not indicative of a true desire to associate with a particular individual. If only a small subset of the membership chooses whom to admit, membership in the group does not indicate a close personal tie between members. Without that intimate relationship, associational rights are not imposed upon too severely by the requirement that additional people be granted membership.

Finally, the purpose of an organization is relevant in determining whether its discrimination can be regulated. As discussed above, if the organization has formed for expressive purposes, it is likely to succeed with its assertions of a right to discriminate. Organizations that have formed primarily for business purposes have much more limited rights to discriminate. The state’s interest in enabling all of its citizens to participate in commerce is compelling and overrides a club’s claim of a right to discriminate. An organization which purports to serve another public accommodation may also face strong arguments against any claim of a right to discriminate.181

Following the Roberts decision, there was uncertainty as to how the Supreme Court’s test would be applied. Women’s groups hoped that the test would be interpreted liberally to limit such organizations’ ability to discriminate. By using the Roberts criteria to define “private” and “distinctly private” clubs,182 some women helped initiate legislative efforts to bar quasi-private club discrimination. Others were more conservative in forecasting the effects of the decision. While some argued that Roberts could result in successful litigation against quasi-private clubs,183 others predicted that the case would be limited to its

182. See infra part III.

A successful challenge to the sex-discriminatory policies of a private club that offers its members business opportunities and contacts, a challenge based on a state or city’s public accommodations law, has a very good chance of being held constitutional. In other words, a club that is a “public business” in the context of a public accommodations law probably will not be entitled to a constitutionally protected right of expressive association or a constitutionally protected right of intimate association. If there is any hope for private clubs that want to retain their all-male memberships, it lies in the future development of the freedom of intimate association.
facts, believing that any club more selective than the Jaycees would receive constitutional protection for its discriminatory practices.\textsuperscript{184} Still others viewed the decision as allowing states and courts great leeway to determine whether quasi-private clubs were subject to antidiscrimination laws.\textsuperscript{185}

Many quasi-private organizations took the position that the opinion was limited to the facts of the \textit{Roberts} case. For example, Kiwanis International reaffirmed its all-male membership policy after the decision was rendered.\textsuperscript{186} At their next convention, however, the Jaycees voted to admit women.\textsuperscript{187}

In subsequent cases, the Supreme Court applied the \textit{Roberts} criteria so as to bar discrimination in two major quasi-private clubs.\textsuperscript{188} These

\textit{See also} Gerald L. Edgar, Note, \textit{Roberts v. United States Jaycees: Does the Right of Free Association Imply an Absolute Right of Private Discrimination?}, 1986 UT AL. REV. 373, 397:

Public accommodation legislation will probably be subject to liberal interpretation by the courts in order to render discriminatory private organizations subject to such legislation. Individuals suffering the adverse effects of such discrimination may also be more encouraged to bring actions against offending organizations with a greater hope of success.


The Court has kept its options open. Should it choose to do so, \textit{U.S. Jaycees} could be extended to uphold the application of antidiscrimination statutes to organizations as diverse as the Rotary International, the Girl Scouts, the Elks, or the Sons of Norway. More probably, language in the opinion will be used by courts to limit application of antidiscrimination statutes to a handful of organizations which employ the Jaycees' unusually aggressive recruitment policies.


\textsuperscript{187.} \textit{Jaycees Vote to Admit Women to Membership}, N.Y. TIMES, Aug. 17, 1984, at A8.

\textsuperscript{188.} Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) [hereinafter \textit{Rotary}]; New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988). In \textit{Rotary}, the Court found that a California decision, ruling that the organization was subject to the Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1982), was not unconstitutional. \textit{Rotary}, 481 U.S. at 547. While Rotary had over 900,000 members in about 20,000 clubs nationally, it differed from the
three cases, *Roberts*, *Rotary*, and *New York State Club Ass'n*, were each rendered without dissent, showing the Court's willingness to uphold local and state ordinances designed or interpreted to stop quasi-private club discrimination.

This trend could mean that large quasi-private clubs which serve as business facilitators could be required by state or local laws to stop discriminating. For example, in instances involving clubs that serve lunch and country clubs where business is conducted on the golf course, courts will likely rule against defenses based on a right to intimate association.189

Discriminatory organizations formed in response to discrimination by major clubs could also be barred from discriminating. There are

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189. A relatively easy way to determine if a club is actually a place that facilitates a business is to use discovery to learn the number of businesses that pay for employee dues or bills at the clubs and the number of members who deduct club expenses from their taxes as business expenses. The clubs should retain records showing who pays their bills. Members could be required through interrogatories to state under oath whether they take business tax deductions for their membership and/or expenses at the club. While a plaintiff would probably be barred from reviewing the tax returns of every member, such an interrogatory would not be unduly intrusive. The clubs should not be permitted to claim that they are purely social and also claim that members' activities at the clubs are business-oriented. The New York City ordinance was aimed at these kinds of characteristics and thus indicated how to gain the necessary proof. See *New York*, N.Y., *Local Law* 63 § 1 (1983).
many such women's clubs. Defenders of these organizations might argue that, because there is a strong "old boys' network" which will likely remain in place for a long time, women must form an "old girls' network."

There are at least two problems with this approach. One is that the "old girls' network" will never be a substitute for entry into the "old boys' network." Men have greater access to prestigious jobs; their networks are, therefore, more useful. Until women enjoy equality in the workplace, a women's group will not be able to provide the same access to business that a men's group can provide. At the same time, allowing an all-women's business club would also require that all-men's business clubs be permitted, thus perpetuating women's unequal status in the workplace. While it may be tempting to allow women, who have long suffered discrimination, to form their own business clubs, such action is ultimately counterproductive.\footnote{190}

The arguments for single-sex health clubs and sports leagues, which are based on privacy interests and real biological differences between men and women, are more compelling, though in most cases they should also fail. While separate locker rooms are necessary for privacy concerns, there is really no need for exclusively single-sex health clubs. Some activities may be separated if a real need can be shown.\footnote{191} Generally, however, joint participation should be encouraged. Most public accommodations laws require it because athletic facilities are defined as public accommodations in many state statutes.\footnote{192} The Constitution does not prohibit states from requiring health clubs to admit members without discrimination. It does, however, protect those members' privacy interests in having single-sex locker rooms and some single-sex activities, if those activities are equally available to women and men.\footnote{193}

\footnote{190. Similar arguments can and will be made about racial, ethnic, and religious clubs formed at least in part for business purposes.}

\footnote{191. For instance, some exercises are designed for either men or women to strengthen muscles that are particularly vulnerable for one sex but not for the other. Saunas are typically occupied by people who are not wearing clothes. Men and women have a privacy interest in sharing saunas with members of only one sex at a time. Other types of exercise classes should be open without discrimination although many people would say that some would be uncomfortable exercising in front of the other sex. While this discomfort cannot be ignored, it is based on social conditioning, and in the balance, the damage done by discrimination is too serious to allow arguments of discomfort to succeed in the face of antidiscrimination laws.}

\footnote{192. See, e.g., N.J. STAT. ANN. § 10:5-5(l) (West 1993).}

\footnote{193. The constitutional right should derive from the First, Fourth, Ninth, and Four-
In professional sports, the issue concerns employment opportunities rather than access to public accommodations. The bona fide occupational qualification exception to Title VII's bar of gender-based employment discrimination\(^{194}\) could allow a separate women's professional golf or tennis tour.\(^{195}\) In sports which do not offer separate and nearly equal professional opportunities for men and women, like baseball, hockey, or basketball, women should be permitted to try out for the men's teams.\(^{196}\) The controversy arises most often when men seek to compete on women's teams or in women's tournaments. Because men are generally stronger than women, women fear that men will take over the team or will dominate strength-related sports. There is a basis to argue that if a significant number of men are interested in a sport, they should be encouraged to form their own leagues. In any situation in which too few are interested, the sport should allow anyone to compete and determine teams on individual talent and skill, not sex.

In school sports programs, Title IX\(^{197}\) requires that unless separate teams are provided for men and women in the same sport, both sexes must be allowed to compete on the same team.\(^{198}\) Courts have also interpreted public accommodations laws to prohibit discrimination in children's sports programs.\(^{199}\) A freedom of association argument has tenth Amendments, as does the right to privacy and to intimate association.

194. 42 U.S.C. § 2000(e) (1988). Recognizing the biological difference in men's and women's upper body strengths could result in a finding that sex is a bona fide occupational qualification at least in those sports that have different, yet nearly equal, professional outlets for men and women.

195. This became controversial when Dr. Renee Richards, who had competed in the men's professional tennis tour before undergoing a sex-change operation, tried to compete in the women's tour. Eventually, she was permitted to compete with the women but lost to them. Neil Amdur, 'Renee Richards Ruled Eligible for U.S. Open,' N.Y. Times, Aug. 17, 1977, at B7; Neil Amdur, 'Dr. Richards Put in Main Draw of U.S. Open,' N.Y. Times, Aug. 18, 1977, at B17.

196. Differences in body build between men and women which justify different sports leagues cannot, of course, justify preventing women from being umpires in major league baseball or referees in professional football or basketball.


198. There have even been rulings to this effect involving a field hockey team. Williams v. School Dist., 988 F.2d 168 (E.D. Pa. 1993). Recently, the National Collegiate Athletic Association (NCAA) has mandated that colleges and universities provide scholarships to women athletes in nearly equal numbers to the number provided to male athletes, because of the requirements of Title IX. Alexander Wolff, 'Trickle Down Economics,' Sports Illustrated, Oct. 25, 1993, at 84.

not protected these programs from challenge, because the programs are often large and open to any male who wants to compete for a place on the team. Instead, these challenges succeed or fail based solely on state and federal employment discrimination or public accommodations laws.

Private all-women's colleges have argued strongly for the right to continue as single-sex institutions. While colleges' single-sex enrollment policies are exempt from Title IX and from most public accommodations laws, public all-male colleges have faced challenges in the courts. One federal district court judge ruled that Virginia Military Institute's (VMI) sex discrimination was lawful because it served to diversify educational options, and that admitting women to the school would "alter the adversative environment that VMI students must now endure." The appellate court reversed, finding that Virginia either had to permit women to enroll, or offer them similar opportunities.

The argument for all-women's schools is more persuasive, as studies have shown that females in coeducational schools are called on less frequently and are given less encouragement than males. But while it may seem that the government's interest in providing quality education to women and girls might be best served by including the option of single-sex schools, this practice may encourage different treatment, thereby increasing discrimination. The state and public interests in a quality education for women and girls would be better served by mak-

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202. United States v. Virginia, 976 E2d 890 (4th Cir. 1992). Thus, the court found that sex discrimination in public colleges was allowed under the Constitution so long as the state provided a separate but equal education for men and women. While this opinion is certainly better than the district court's opinion, it is still troubling because it perpetuates the notion of separate but equal, which was wholly rejected when applied to race discrimination in Brown v. Board of Educ., 347 U.S. 483 (1954). In a similar case against the Citadel, a public all-male military school in South Carolina, a federal judge recently ordered the admission of a woman to the corps of cadets. Mary Jordan, Citadel Ordered to Admit Woman, WASH. POST, July 23, 1994, at A1.
204. An all-women's school might meet the test for public sex discrimination; the discrimination is to achieve the important governmental objective of giving women a quality education and is substantially related to that objective. See Craig v. Boren, 429 U.S. 190, 197 (1976).
ing all public schools coeducational, while permitting single-sex private schools.

A college social organization (CSO) may also face challenges if it discriminates in membership decisions. Fraternities and sororities usually are open to only one sex, and they also have traditions of racial and religious discrimination. Because African Americans and Jews were not historically permitted to join the most prestigious fraternities and sororities, they formed their own groups. Now, while few if any fraternities and sororities openly maintain racial or religious bars, the tradition of separate CSOs is still reflected in the membership of the different groups.

College social organizations argue fiercely for exemption from discrimination laws on the basis of intimate association. These organizations usually have only a small, highly selective undergraduate membership and provide their members with close relationships similar to family. Also, to the extent that a fraternity or sorority functions as a dormitory, the members may have a privacy right to single-sex housing.

A more thorough examination of CSOs’ attributes, however, shows that the Constitution should not bar states from regulating discrimination in fraternities, sororities, or other CSOs. Fraternities and

205. Now, the African-American fraternity system differs from the white system in that the students in the African-American fraternities and sororities are often far more involved in community service activities than are students in the white system. The African-American fraternities and sororities also often help their members form a positive self-image and make them feel more comfortable, especially on predominantly white campuses. To the extent that an African-American fraternity or sorority does discriminate based on race in membership and can show that the discrimination is due to and necessary for its expressive associational activity, it might be able to withstand the challenge of a discrimination. See infra part III.

206. See Colloton, supra note 48.

207. See N.J. STAT. ANN. § 10:5-12(g) (West 1993). If a statute did not recognize that right and forced organizations to have both men and women live in their facility, the sorority or fraternity might have a constitutional challenge based on the right to privacy and intimate association in living quarters. While that right might protect living arrangements, it might not affect rulings on membership.


209. See Daniel L. Schwartz, Note, Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations, 75 CAL. L. REV. 2117 (1987). For example, in New Jersey, the Division on Civil Rights ruled that Princeton University’s eating clubs do not have a freedom of association right to discriminate because they are too large, nonselective, and nonexclusive to claim constitutional protection. See
sororities are usually large national organizations;\textsuperscript{210} the members of one chapter usually do not know and have no participation in choosing the members of another chapter. Similarly, alumni\textmacronae neither know nor participate in choosing the undergraduate members. Universities often rely on the fraternities and sororities to feed, house, and/or provide a social life for a portion of their students. This reliance could be seen as another equally important purpose of the organization, in addition to the social purpose described above. Another limit on the CSOs' associational claims is the function that these groups play in the "old boy's" network. Prestigious CSOs provide entry into business and government opportunities upon graduation.\textsuperscript{211} Finally, nonmembers usually participate in most, if not all, fraternity and sorority activities.

The above analysis suggests that only truly private clubs should succeed in gaining constitutional protection from state or federal laws against discrimination.\textsuperscript{212} This does not mean, however, that other clubs will lose all rights to association. They may still set their own criteria for membership, and choose the activities in which they want to engage. Also, any order to cease discrimination must use the least restrictive means to achieve the state's compelling interest in ending discrimination.\textsuperscript{213} Consequently, the infringement on freedom of association that would come with barring discrimination would be limited to preventing the harm that society has found to stem from discrimination. It is likely that the Supreme Court will be receptive to attempts to

\textsuperscript{210} For a complete description of the fraternity and sorority system, see Fraternities and Sororities on the Contemporary College Campus (Roger B. Wunstor et al. eds., 1987).

\textsuperscript{211} Rattling the Bonesmen, Time, Apr. 29, 1991, at 33.

\textsuperscript{212} Such a club might be an all-women's Monday Night Football club made up of ten women. All know each other and meet only with each other while they watch Monday Night Football. A new member is added only when all know her and want her included. No tax deductions are made for expenses related to the club, and its purpose is purely social. A similar all-men's cooking club would likewise be protected.

\textsuperscript{213} Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984). Similarly, it was important to the Court's ruling in New York State Club Ass'n v. City of New York that membership could still be restricted on other grounds. It was merely that being a member of a suspect class could not be used as a criterion for exclusion from membership. New York State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988).
bar discrimination in quasi-private clubs if the litigants show that the organization is especially large, lacks selectivity and seclusivity, has a business or other nonsocial purpose, and has members with no preexisting relationship to each other.

3. Freedom of Religion

Freedom of religion is another potential defense for quasi-private clubs which are challenged for discriminating. While this defense has not often been raised in the past, it will probably be used with some frequency in the future. When it is, it will likely be the most difficult of the defenses with which to deal because of the conflicting constitutional and policy considerations.

Several considerations need to be weighed when religion is raised as a defense to charges of discrimination. No such defense should be recognized unless the discrimination at issue is based on an identifiable doctrine or tenet of the religion whose practice is in question.214 One problem that comes from such a conclusion, however, is that courts may be put in the position of deciding what is a doctrine or tenet of the religion, which could be violative of the First Amendment's Establishment Clause. Yet, there really is no other way to determine which religious practices should be exempt from discrimination laws, unless one allows the mere raising of the defense to exempt particular discriminatory actions from the law. Such an exemption would be an invitation to pretextual defenses.

Religious defenses may not be available at all to quasi-private clubs if courts adopt the broadest reading possible of the recent Supreme Court case, Employment Division, Department of Human Resources v. Smith.215 In Smith, the Court found that a generally applicable criminal law could be applied to religious practices so long as the law was not intended or written solely to attack a particular religious practice.216

214. Once this defense is put forward, a question arises whether courts are an appropriate body to determine what are religious doctrines or tenets in any religion. Any attempt to determine the answer could have courts interpreting and determining religious questions and answering religious debates.


216. Smith, 494 U.S. at 877–78.
Because discrimination laws are generally applicable, and are not written or intended to reach religious organizations exclusively, a court might not exempt religious practice from the reaches of antidiscrimination laws. It is unlikely, however, that the Supreme Court would interpret Smith so broadly. Moreover, state high courts are unlikely to disregard the importance of the free exercise of religion and interpret Smith in this way.

While the interplay between freedom of religion and antidiscrimination laws will raise some close questions, it will answer others. Under the Free Exercise Clause, for example, the government may not interfere with rituals, even if they have discriminatory aspects. The state should not, therefore, be able to bar Orthodox Jews from requiring men and women to sit separately at services or from limiting the honor of aliyyot to men (calling on men to read the Torah). Similarly, certain forms of employment discrimination should be exempt from the reach of state antidiscrimination laws. The government should not, for instance, be permitted to require the Catholic Church to ordain women as priests nor to require an Orthodox Jewish Synagogue to employ a woman rabbi.

The appropriate reach of antidiscrimination laws is much more difficult to determine as one considers issues and activities which are not core religious activities. While a religious school can administer discriminatory tests for its religion teachers, it is questionable whether the school should be able to do the same for math teachers, secretaries, or janitors. Also, when religious organizations provide services, they should presumably be able to limit those services to members of the organization or adherents to the religion. If, however, a religious group


218. Similarly, women who celebrate Rosh Chosdesh could not be barred from engaging in discrimination. Rosh Chosdesh is traditionally a Jewish holiday especially for women, celebrating the new moon and new Jewish month. The men are usually excluded from the ceremonies. See Susan Weidman Schneider, Jewish and Female: A Guide and Sourcebook for Today's Jewish Woman 94–97 (1985) (discussing Rosh Chodesh).

219. At Catholic University, Father Curran was stripped of his tenure in the religious education department because he had views of sexuality that were opposed by the Pope. The issue arose whether he should have been transferred out of the seminary to the philosophy or religion department rather than having been dismissed. Eventually, he left Catholic University. Lawrence Feinberg, Vatican Bars CU Priest From Teaching Theology, WASH. POST, Aug. 19, 1986, at A1.
provides services to non-adherents, should it be able to discriminate in those services? For instance, could the group limit a soup kitchen, which had no government funding, to only whites or only men? If the problem of discrimination is viewed as compelling, the answers to the above questions should be no. A religious organization should be required to provide its services to all without discrimination, unless it limits its assistance to its own members or to adherents of its religious views.

Many, however, disagree with these conclusions. This is particularly true if they view the religious issues as far more important than the problem of discrimination. The issue becomes more difficult when the religious group in question deeply opposes the practices of the people that they wish to exclude. While these views may perpetuate discrimination, negative stereotyping, and ignorance about people who are different, they are also a fundamental part of some religious beliefs.

Although few lawsuits have involved these issues in the context of public accommodations laws, courts have dealt with the problem in some recent housing discrimination cases. California and Minnesota courts have faced cases pitting housing discrimination laws against claims of religious principle. In both of these cases, couples were told that they could not rent apartments because they were not married. The couples each claimed marital status discrimination, while the landlords, viewing unmarried cohabitation as sinful, felt that renting to unmarried couples would violate their religious obligations. The California court found that the state had no compelling interest in the eradication of discrimination in housing against unmarried couples and upheld the religious claims of the landlord.

Some religious schools, for instance, believe that homosexuality is such a sin that a lesbian or gay man should not teach at those schools. Those who operate some Christian schools believe that their faith should infuse all subjects taught in the schools, not only theology classes. They may feel that Jews and people who adhere to pagan religions should not be allowed to teach Christian children at their schools.


Minnesota v. French, 460 N.W.2d 2 (Minn. 1990).

Donahue, 2 Cal. Rptr. 2d at 34; French, 460 N.W.2d at 4.

Donahue, 2 Cal. Rptr. 2d at 46. The court's reasoning was clearly affected by its disdain for cohabitation by an unmarried couple. It noted: "It is thus apparent that although the law recognizes cohabitation as a modern reality, it has not affirmatively promoted it as a matter of government policy." Donahue, 2 Cal. Rptr. 2d. at 45.
The Minnesota court used the state's constitution to analyze the freedom of religion claims. The court found that "[t]he state may interfere with the rights of conscience only if it can show that the religious practice in question is 'licentious' or 'inconsistent with the peace or safety of the state." The court held that the state could not meet this test and upheld the freedom of religion claim.

Both courts' rulings, however, were based more on an antipathy to cohabitation by unmarried couples than on freedom of religion. Housing discrimination laws should not be overcome by religious claims unless the housing is owned by a religious group for its adherents or officials. Private housing, which is a business activity subject to a full panoply of state and local regulations, should be subject to antidiscrimination laws without regard to the religious beliefs of the owners.

Courts have also been sympathetic to public accommodations defenses which are based on freedom of religion. In two such cases, the courts have balanced the state's interest in eradicating discrimination with the defendant's interest in religion and have tried to fashion remedies sensitive to both concerns.

In *Pines v. Tomson*, the defendant produced what he called the Christian Yellow Pages (CYP) and required anyone who placed an advertisement in the CYP to affirm that he or she was a "born-again" Christian. An introduction in the CYP encouraged people to patronize these advertisers. Originally, the remedial order required that the defendant accept advertisements from anyone and modify its introduction to avoid any implication of religious discrimination. The appellate court upheld only that part of the order which prohibited CYP from de-

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225. *French*, 460 N.W.2d at 8.
227. *French*, 460 N.W.2d at 9. This court was also influenced by its negative view of cohabitation which it called "licentious practices." *French*, 460 N.W.2d at 9.
228. *Donahue*, 2 Cal. Rptr. 2d 32; *French*, 460 N.W.2d 2.
229. Title VIII, the Fair Housing Act, has an exemption for owner-occupied family houses with four or fewer families. 42 U.S.C. § 3603(b)(2) (1988). This exemption protects religious owners from being required to rent to people to whom they object, where those people would live in the same building with the owners and three other families. This exemption should be preserved because of the close relationships and close contact among people who live in four-family houses.
manding that advertisers affirm their status as "born-again" Christians. Out of concern for the free exercise of religion and freedom of speech, it rejected the requirement that CYP modify its introduction. The court made clear that the editors of CYP did not have to endorse any advertisers and could print disclaimers telling purchasers that CYP was required to publish advertisements from people who may not be "born-again" Christians.

In *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, Georgetown University refused officially to recognize its undergraduate and law school gay and lesbian organizations. Georgetown claimed that to recognize a student group implied endorsement of that group. Because the Catholic Church condemns homosexual behavior as sinful, Georgetown, a Jesuit and Pontifical University, claimed that recognizing the groups would violate religious law.

The court of appeals found that the District of Columbia had a compelling interest in eradicating discrimination based on sexual orientation. The court then balanced the District's interest in eradicating discrimination and Georgetown's interest in the free exercise of religion. It noted that university recognition carried with it certain benefits and services including a university mailbox, computer label services, and the right to apply for funding from the university. The court, therefore, allowed Georgetown to refuse to recognize the groups, because it found that the law did not require an endorsement. It did, however, require Georgetown to extend to the groups all of the privileges of recognition. Although Georgetown did not choose to appeal

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238. *Gay Rights Coalition of Georgetown Univ. Law Ctr.*, 536 A.2d at 37–38. This was one of the first appellate court opinions to find that sexual orientation was a suspect class. *Gay Rights Coalition of Georgetown Univ. Law Ctr.*, 536 A.2d at 33–36.
to the Supreme Court, the order was eventually reversed by Congress.\textsuperscript{243}

Both courts were sensitive to the issues involved, drawing appropriate lines to protect victims of discrimination while preserving the free exercise of religion. While public accommodations laws may be applied to some organizations despite their religious objections, it is not clear how far these laws should extend. For instance, a quasi-private club which is affiliated with a house of worship such as a synagogue, church, or mosque, should be permitted to discriminate in membership\textsuperscript{244} since such an organization is so closely intertwined with the free exercise of religion. As a discriminatory practice moves further from the house of worship, however, it becomes less defensible. Quasi-private clubs connected with religiously affiliated hospitals should not be entitled to discriminate unless the clubs' membership is limited solely to members or adherents of that religion.\textsuperscript{245} Finally, Georgetown University, which has only a distant relationship with the Catholic Church, should not be permitted to discriminate against its lesbian and gay male students.

Additional close questions will undoubtedly arise as more quasi-private clubs are challenged for discrimination and raise free exercise of religion as a defense. Those who wish to end discrimination should show sensitivity to free exercise claims, especially for organizations that have a strong religious affiliation.\textsuperscript{246} At the same time, free exercise

\textsuperscript{243} First, Congress passed a statute requiring the D.C. City Council to amend the District's human rights law or lose all government funding. Nation's Capitol Religious Liberty and Academic Freedom Act, Pub. L. No. 100-462, § 145, 102 Stat. 2269-314 (1988). This statute was found to be an unconstitutional restriction on free speech by a federal district court in Clarke v. United States, which noted that Congress had a less restrictive way to enact its will. 705 F. Supp. 605 (D.D.C. 1988). Congress could simply enact the law itself because Congress can enact any law governing the District of Columbia regardless of the will of the people in the District who have no representative who can even vote on the matter. Clarke, 705 F. Supp. at 612. See D.C. Code Ann. § 1-206 (1992). Congress then passed the law overturning the decision itself Nation's Capitol Religious Liberty and Academic Freedom Act, Pub. L. No. 101-168, § 145(b), 103 Stat. 1284 (1989).

\textsuperscript{244} Such religious organizations could include groups like a sisterhood or brotherhood.

\textsuperscript{245} Often hospitals have groups attached to them which help raise funds and/or provide volunteers to assist the hospital. There should be no religious need to discriminate based on a suspect classification in such an organization, even if the hospital has a religious affiliation as do many nonprofit hospitals.

\textsuperscript{246} The question of the proper reach of employment discrimination laws when the free exercise of religion arises is even more difficult. While everyone probably would agree that discrimination in selection of clergy should be beyond the government's
claims should not succeed when they are being used pretextually to support discrimination not required for any religious purpose. In each case, the claims should be carefully analyzed and a balance should be sought between the competing interests in ending discrimination and in the free exercise of religion.

III. RECONCILING ASSOCIATIONAL INTERESTS WITH LIMITING DISCRIMINATION IN QUASI-PRIVATE CLUBS

This article has addressed two substantial and conflicting interests: the desire to associate with others who share common interests and the need to enter society freely and equally without discrimination. These are both important concerns and must be reconciled.

The Supreme Court's guidelines for intimate association, as enunciated in the Jaycees,247 Rotary,248 and New York State Club Association249 cases, strike a reasonable balance permitting discrimination in only small, selective, seclusive, and purely social entities. If an organization fails any of these tests, states should be allowed to prevent them from discriminating, despite defenses involving freedom of intimate association.

Organizations which have truly expressive purposes or political objectives should be free to discriminate if their discrimination is closely related to their political agenda. Courts should consider carefully the relationship between the goals and the discrimination in order to eliminate pretextual discrimination while at the same time ensuring that the courts are not unduly interfering with the organizations which appear before them.

Similarly, religious organizations should be permitted to discriminate in carrying out their rituals, selecting their members, and employing people who will carry out their rituals, lead their organizations, or teach religion. They should also be permitted to provide services to their members exclusively. When, however, religious organizations serve or employ nonadherents, they should not be permitted to discriminate. Moreover, religious individuals should not be allowed to use their

reach, the further one gets from worship and/or leadership of religious bodies, the harder the issue. For instance, may a religious school discriminate in the hiring of teachers who do not teach a religion course?

religious beliefs as a basis for discrimination in housing, except when they are renting an owner occupied building with four or fewer units.

In drafting statutes which bar discrimination, legislators should take into account the constitutional and associational interests at stake, as well as the states' interest in barring discrimination. Exemptions from antidiscrimination laws should be drawn narrowly to exclude only those groups which are constitutionally protected. The statute should exempt only "distinctly private clubs" from antidiscrimination laws and should provide a definition of "distinctly private" which is consistent with the right to intimate association. Exemptions for religious and expressive association should also be narrowly drawn.

If courts and legislatures follow the above recommendations, they will create a reasonable reconciliation between the interests at issue. This would allow and encourage association in two ways. First, intimate association will receive protection from state interference. Second, nonintimate associations will still be permitted to choose their members and activities. They will only be barred from discriminating against members of protected classes. Religious groups may continue to exercise their religion freely, although they may not impose discrimination where it is not needed. Similarly, political groups could discriminate when it would be necessary to carry out their political agenda. However, groups would have to admit people without discrimination when barring people would not be necessary to achieving political goals. People who have suffered from discrimination will be afforded opportunities to participate in activities closed to them in the past, allowing them entry into all levels of society.250

CONCLUSION

Reaching an appropriate compromise between associational interests and the need to end discrimination is an important legislative and judicial endeavor. Courts and government officials should continue efforts to end discrimination in quasi-private clubs, except in those instances where major constitutional barriers exist. In all other instances, the problems caused by discrimination are too vast to remain unaddressed. Those states which have not yet barred discrimination in public accom-

250. Of course, barring discrimination will not create a panacea. There are many other ways in which people's full participation in society is limited. Poverty, for example, creates a major barrier to children who might make great contributions but for lost educational and other opportunities.
modations should do so. States which have already barred discrimination should reexamine their laws to ensure that they have drawn appropriate distinctions.251

Courts should broadly and sympathetically interpret these laws in light of the harm they seek to eliminate. In doing so, courts should interpret liberally the definition of "public accommodations" and read narrowly any exceptions in the statutes.

Where legislators are slow to act or courts are unsympathetic to the statutes, political activity on the issue should continue. Hopefully, some clubs will stop discriminating as a result of political pressure or pressure from their members and the community, even if no laws bar their discrimination. §

251. Some states and the federal government still need to include sex as a protected class in public accommodations. Most states also need to expand their laws to include sexual orientation as a protected class.