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REFLECTIONS ON AUGUSTA: JUDICIAL, LEGISLATIVE AND ECONOMIC APPROACHES TO PRIVATE RACE AND GENDER CONSCIOUSNESS

Scott R. Rosner*

In light of the recent controversy surrounding Augusta National Golf Club's exclusionary membership policy, this Article highlights the myriad incentives and disincentives that Augusta and similar clubs have for reforming such policies. The author acknowledges the economic importance of club membership in many business communities and addresses the extent to which club members' claims of rights of privacy and free association are valid. The Article also considers the potential of judicial action in promoting the adoption of more inclusive membership policy; the state action doctrine and the First Amendment right to freedom of association are discussed as frameworks under which litigants may potentially bring claims against clubs and the author assesses the likelihood of success under each.

This Article next addresses the possibility of using existing legislation to prohibit or discourage exclusionary membership policies. Though he finds that the federal legislation on the books (Title II of the Civil Rights Act) falls short as a tool for combating discrimination, the author finds potential in some states' civil rights acts. The author also outlines the probable arguments plaintiffs and defendants would make were a claim brought against an exclusionary club.

Finally, this Article addresses the potential for new federal or state legislation to combat this type of discrimination, the efficacy of denying liquor licenses and property tax exemptions to exclusionary clubs, and the potential normative effect that could be realized were high-profile athletes, professional tours, concerned club members, and business communities to make their disapproval of exclusionary policies heard.

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I. INTRODUCTION

Though the 2002 U.S. ('People's') Open golf tournament was the first to be played on a truly public course, the Masters tournament continues to be played at Augusta National Golf Club, a prestigious club that has never had a female member and has fewer than ten African-Americans among its approximately 300 members.¹ Augusta National Chairman Hootie Johnson's defiant public response to a letter from the National Council of Women's Organizations urging the club to admit female members should not be surprising. Despite the fact that for the first time in history the best men's golfer and top two women's tennis players are minorities, discrimination remains prevalent in private country clubs throughout the United States. That people who look just like Tiger Woods, Serena and Venus Williams, and Annika Sorenstam would not be allowed to become members at the very places where their sports are most popular is ironic, yet reflects the current realities of the American legal, political, and economic systems.² However, this exclusion is hardly a recent development; there exists a long tradition of discrimination in American country clubs against women and ethnic, religious and racial minorities.³

While many overt forms of discrimination have ended in the years since the Civil Rights Movement, problems persist in other areas of society. Private country clubs like Augusta National remain a hotbed of gender and racial discrimination, even as these clubs retain their importance to business and industry leaders.⁴ The expansion of the corporate boardroom to the golf courses, tennis courts, locker rooms, dining areas, and bars found at private country clubs provides members of these clubs with substantial business advantages and can further career advancement by allowing access to influential members of the business community, providing members with the ability to network and cultivate business rela-

1. See *Tour, Players Lukewarm About Women at Augusta*, available at <http://sports.espn.go.com/golf/story?id=1427651>.

2. This was acknowledged in a 1996 Nike television commercial in which Tiger Woods stated, "There are still courses in the United States that I am not allowed to play because of the color of my skin." See DeWayne Wickham, *Tiger Finally Takes a Public Stand—the Wrong One*, USA Today (May 16, 2000) available at <http://www.usatoday.com/news/comment/columnists/wickham/wick095.htm> (on file with the University of Michigan Journal of Law Reform).

3. See generally JOHN H. KENNEDY, *A COURSE OF THEIR OWN: A HISTORY OF AFRICAN-AMERICAN GOLFERS* (2000). See also Jennifer Jolly-Ryan, *Chipping Away at Discrimination at the Country Club*, 25 PEPP. L. REV. 495, 496 (1997).

4. See Nancy Kamp, *Gender Discrimination at Private Golf Clubs*, 5 SPORTS LAW. J. 89 (1998).

tionships.⁵ Thus, access to country clubs is now more important than ever in the business world.

Over the years, many clubs have been criticized for their exclusionary membership policies.⁶ While numerous country clubs have withstood media criticism, some of these clubs have come under legal scrutiny, and have been forced either to justify their policies or prove that they have no legal obligation to change them.⁷ With respect to the latter assertion, there are several defenses available to clubs that allow them to operate free from government interference. A threshold argument is the absence of state action in their exclusive policies, which hinges on the distinction of whether an entity is public or private.⁸ A country club may also argue that its admission policy is a valid assertion of its membership's right to freedom of association;⁹ a court encountering this defense must determine if a group's existence provides it with either expressive or intimate association rights.¹⁰ Finally, a country club may argue that it is distinctly private, and thus not a place of public accommodation subject to either federal or state legislation addressing discrimination.

While there are many ways to avoid an unfavorable court ruling, every country club is further shielded from litigation by the daunting reality of initiating a lawsuit against a country club whose membership includes business and community leaders. An individual engaging in such defiant behavior risks becoming a social and economic pariah, ostracized by friends and business associates for 'shaking things up.' An individual challenging the system may well be shunned because of this act of defiance.¹¹

In Part II, the philosophical approaches to the issue of country club discrimination will be set forth. In addition, a discussion of the true value of the country club in today's business environment is undertaken. In Part III, the case law that is typically involved in a country club discrimination suit will be reviewed. These topics include state action, associational freedoms, and state interests. In Part IV, the federal and state legislation salient to the issue will be

5. *Id.*

6. *Id.* at 91.

7. Alternatively, members of the disaffected minority group have often responded by forming their own country clubs that exclude other types of minorities. See KENNEDY, *supra* note 3, at 11-12. See also Jolly-Ryan, *supra* note 3, at 496.

8. See Kamp, *supra* note 4, at 92-94.

9. *Id.* at 96.

10. *Id.*

11. The numerous negative implications of initiating change within one's own club are discussed *infra* Part V.F.

addressed, including the Civil Rights Act of 1964 and numerous state public accommodation laws. While the Civil Rights Act of 1964 has led to dramatic changes in the lives of many individuals,¹² it has not substantially changed the makeup of most country clubs. The benefits and shortcomings of this legislation as it applies to country clubs will be analyzed. State legislation impacting country clubs has been enacted in several states.¹³ The content of these disparate laws will be reviewed in terms of their potential effect of country club discrimination and judicial interpretations of these pieces of legislation thus far. In Part V, several alternative solutions to the problem of country club discrimination will be discussed. While the aforementioned litigation and legislation may ultimately lead to the eradication of discrimination in country clubs, it is also necessary to consider alternative methods of achieving this result. A variety of possible solutions to the problem and their likelihood of success will be proposed and analyzed. These remedies include internal challenges by country club members to discriminatory practices at their clubs, new federal and/or state legislation, liquor license regulation, removal of tax-exempt status and property tax exemptions, external challenges by non-club members, and sanction by professional golf and tennis organizations. Each of these singular measures may only effect change at a relatively small number of country clubs because the appropriate remedy will vary with the situation of each individual club. However, when considered collectively, these solutions have the potential to reach a large number of country clubs and have a profound effect on the landscape of a social institution. The article will conclude in Part VI.

II. ECONOMIC CONSIDERATIONS AND THE NOTIONS OF LIBERTY AND EQUALITY

A. Economic Advantages of Club Membership

Membership in a private country club provides a substantial business advantage.¹⁴ Members often argue that the country club is

12. See Kamp, *supra* note 4, at 94-95.

13. *Id.* at 95.

14. The PGA of America has recognized the advantage gained by private club membership by its establishment of the 'Golf: For Business & Life' program in 1999. The PGA of America recently donated \$200,000 to the program, which teaches college juniors and seniors about the business opportunities that golf provides. See *PGA's Golf: For Business & Life Program Expands to Atlanta Colleges* (on file with the University of Michigan Journal of Law Reform).

merely an extension of their homes, and thus the rights that they enjoy at home extend to the club.¹⁵ Yet this argument ignores the reality of the business world. The PGA of America has recognized the advantage of private club membership by establishing the 'Golf: For Business & Life' program to teach college juniors and seniors about the business opportunities that golf provides.¹⁶ Employers and the Internal Revenue Service also acknowledge this reality. Employers frequently reimburse employees' club dues and related expenses as a perquisite of employment,¹⁷ while the IRS allows federal income tax deductions to be taken by members of private clubs.¹⁸ There can be no doubt that the country club is an extension of the marketplace.¹⁹ Networking is of great importance in achieving success in business, so much so that it has become a new business school mantra. Country club membership provides access to influential members of the business community and the ability to cultivate business relationships and in a relaxed setting.²⁰ Opportunities for career advancement into executive positions are often dependent upon these informal relationships as well,²¹ with the result that access to private country clubs can be indispensable to career success.²² The excluded group suffers a tremendous economic loss from the denial of private club membership.²³ The inability to gain access to important business networks ultimately manifests itself in the exclusion of minorities and women from significant parts of the marketplace. The 'glass ceiling' and 'old boy network' thus remain very much a part of the business community. The continued toleration of this disadvantage perpetuates the socioeconomic differences between the excluded and non-excluded groups.

15. See RICHARD J. MOSS, *GOLF AND THE AMERICAN COUNTRY CLUB* 162 (2001).

16. See Beth Parker, *Membership Has Its Privileges: Defiant Private Clubs Are Testing the Boundaries of Associational Rights*, CAL. LAW., June 1988, at 46, 51 (June 1988).

17. *Id.*

18. *Id.*

19. See Editorial, *Private Clubs and Private Choices*, N.Y. TIMES, June 3, 1980, at A18.

20. See Kamp, *supra* note 4, at 89, 91.

21. *Id.* at 91.

22. See Brief of Amici Curiae Conference of Private Organizations, *New York State Club Ass'n*, 487 U.S. 1 (1988) (No. 86-1836).

23. See Kenneth L. Shropshire, *Private Race Consciousness*, 1996 DET. C.L. REV. 629, 631.

B. Equality and Liberty in the Context of Private Country Clubs

Underlying the debate surrounding the eradication of discrimination in private country clubs is a conflict between fundamental notions of equality and liberty.²⁴ In the present context, equality refers to the right of the excluded individuals to be free from unlawful discrimination, while liberty involves the individual country club member's right to privacy and freedom of association. These two concepts require further discussion so that a reasonable conclusion may be reached as to their relative value in this context.

Private clubs provide a sense of belonging and fellowship and a pleasurable, relaxing, and comfortable social environment.²⁵ Such are the benefits of voluntary associations. These benefits are largely absent when a person is forced to associate with those he would rather avoid.²⁶ Alexis de Tocqueville recognized the importance of private associations in a democratic society and believed that they should not be limited.²⁷ He commented,

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.²⁸

The Supreme Court echoed de Tocqueville's beliefs in explaining that liberty is protected by the right of association, stating,

[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability

24. See Moss, *supra* note 15, at 191.

25. See Brief of Amici Curiae California State Club Association and National Club Association at 5, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

26. *Id.* at 7.

27. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 203 (Bradley ed. 1945).

28. *Id.*

to define one's identity that is central to any concept of liberty.²⁹

The freedom of association is not limited to choosing the individuals with whom one chooses to form relationships; it also encompasses the right to refuse to form relationships with individuals. The Supreme Court has recognized this principle, writing, "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire . . . Freedom of association therefore plainly presupposes a freedom not to associate."³⁰ Favoring liberty over equality by protecting the private country club's right to discriminate constitutes judicial validation of discrimination and the denial of equal opportunities to all citizens, and contributes to a lack of social integration.³¹ Yet as a former Supreme Court justice explained:

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally permitted liberties.³²

Such support for the discriminatory practices of country clubs was later found in another Justice's dissenting opinion: "The First Amendment and the related guarantees of the Bill of Rights . . . create a zone of privacy which precludes government from interfering with private clubs . . . Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."³³

The benefits of choosing equality over liberty are numerous. The psychological effects of discrimination are daunting: feelings of worthlessness and hopelessness, depression, and lowered self-esteem are common amongst individuals suffering from the stigma

29. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984) (citation omitted).

30. *Id.* at 623.

31. Thomas H. Sawyer, *Private Golf Clubs: Freedom of Expression and the Right to Privacy*, 3 MARQ. SPORTS L.J. 187, 202–04 (1993).

32. *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

33. *Moose Lodge 107 v. Irvis*, 407 U.S. 163, 179–80 (1972) (Douglas, J., dissenting).

of discrimination.³⁴ The social effects of discrimination are similarly troubling. The stereotyping of minority groups and lack of diversity lead to societal discord and a general lack of understanding between individuals.³⁵ Finally, the financial effects of discrimination are significant when segments of the population are essentially excluded from achieving economic prosperity due to the discrimination that forces them to exist away from the upper-end of the socioeconomic strata. Ending discrimination at private country clubs can thus have enormous psychological, social, and economic consequences. Preventing stigmatization, leveling the financial playing field, ending the perpetuation of stereotypes, and promoting diversity are among these benefits. The costs of favoring equality over liberty by eradicating discrimination at private country clubs are the impairment of the freedom to associate and right of privacy.³⁶

The underlying assumption of this analysis is that in the area of discrimination at private country clubs, the interest in equality outweighs the interest in liberty. The goal of ending discrimination in this realm of society supersedes the individual country club member's right to privacy and freedom of association. The Supreme Court has stated that associations at private country clubs are "clearly outside of the category of relationships worthy of this kind of constitutional protection,"³⁷ but this is hardly an uncontroversial notion.

III. CASE LAW

A. State Action

No discussion of country club discrimination can be undertaken without an analysis of the state action doctrine. This threshold issue is frequently debated in litigation involving country clubs.³⁸ Absent legislation deeming a club a place of public accommodation, a lack of state involvement in a club's actions will prevent a court from evaluating a party's underlying discrimination claim against a club.³⁹ There are three theories by which state action can

34. See Jolly-Ryan, *supra* note 3, at 497-98.

35. *Id.*

36. See Sawyer, *supra* note 31, at 204-05.

37. *Roberts*, 468 U.S. at 620.

38. See Kamp, *supra* note 4, at 92-94.

39. *Id.*

be established. First, state action can be found when the group in question is serving a public function.⁴⁰ More specifically, state action is present “where a private concern provides goods or services traditionally performed as a government function.”⁴¹ The second theory of state action, the state compulsion theory, asserts that state action will be found “where a government becomes so involved in a private entity that it encourages or requires conduct.”⁴² The third theory of state action is the nexus theory,⁴³ also called the joint action theory. Its reasoning provides that state action is found “where government judicially enforces a private party’s right to discriminate in a racially restrictive covenant.”⁴⁴

Courts have swayed between narrow and broad readings of state action in the context of private clubs. Two cases that demonstrate this inconsistency are *Daniel v. Paul*,⁴⁵ and *Moose Lodge No. 7 v. Ivis*.⁴⁶

1. *Daniel v. Paul*—In 1969, two African-American residents of Little Rock, Arkansas, brought suit against the Lake Nixon Club, an amusement park facility owned by Paul.⁴⁷ The plaintiffs claimed that the club’s exclusion of African-American members was in violation of Title II of the Civil Rights Act, which prohibits racial, ethnic, and religious discrimination at places of public accommodation that affected commerce.⁴⁸ The distinction between private and public accommodations became the focus of the case for the U.S. Supreme Court,⁴⁹ which evaluated this issue according to the standards set forth in Sections 201 (b) and 201 (c) of Title II.⁵⁰

40. *Id.* at 92–93.

41. *Id.* at 92; see *Marsh v. Alabama*, 326 U.S. 501 (1946). See also *Kamp*, *supra* note 4.

42. *Id.* at 92–93; see *Reitman v. Mulkey*, 387 U.S. 369 (1967).

43. See *Kamp*, *supra* note 4, at 93–94.

44. 334 U.S. 1 (1948).

45. 395 U.S. 298 (1969).

46. 407 U.S. 163 (1972).

47. 395 U.S. at 300.

48. 395 U.S. at 301.

49. The district court found that the club was not private, since it was “open to all members of the white race who were members.” *Id.* In other words, entrance into the park was not based on paid membership, or status in any organization. Entrance was granted simply on the basis of race. *Id.* Thus, the District Court found that the park was clearly not a private club. 263 F. Supp. at 418. The Supreme Court affirmed this finding of fact, 395 U.S. 298, 302, and the defendants did not dispute this fact. *Id.* The defendants did, however, dispute the notion that the park was a place of public accommodation. *Id.* at 305.

50. 395 U.S. at 302–03.

The Court examined the four categories of establishments that are defined as places of public accommodation under 201 (b).⁵¹ The following three were deemed relevant:

- (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
- (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
- (4) any establishment (A) . . . (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.⁵²

The plaintiffs argued that the park fell within the ambit of section 201 (b) (2), since the country club in question was engaged in selling food for consumption on the premises.

The Court also evaluated Title II as it applies to the term “affecting commerce.” Section 201 (c) establishes standards for determining whether the operations of an establishment affect commerce within the meaning of Title II:

The operations of an establishment affect commerce within the meaning of this title if . . . (2) in the case of an establishment described in paragraph (2) . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) . . . it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) . . . there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, ‘commerce’

51. *Id.*

52. *Id.* (citing 42 U.S.C. § 2000a (b) (2001)).

means travel, trade, traffic, commerce, transportation, or communication among the several States.⁵³

The plaintiffs asserted that the park fell under 201(c)(4).⁵⁴ In response to both claims by the petitioners, the Court found that “the snack bar is ‘principally engaged in selling food for consumption on the premises.’”⁵⁵ Relying on the fact that many of the park’s patrons were from out of the state, and that as a result, much of the food sold was involved in interstate commerce, the Court found that the park was a place of public accommodation.⁵⁶

In addition, the Court found that the club solicited interstate travelers, as evidenced by its advertising outside of the state.⁵⁷ Finally, the Court determined that the operations of the club “‘affect[ed] commerce,’” as its customary sources of entertainment, including the club’s juke box and boats, were bought from out of state sources.⁵⁸ The legislative history of Title II indicated that Congress intended mechanical sources of entertainment such as these to be within the meaning of Section 201(c)(3).⁵⁹

The decision in *Daniel* established that there are a substantial number of factors that could establish a club as a place of public accommodation and hence a state actor within the purview of the antidiscrimination laws. The Supreme Court’s holding in *Daniel* is instructive as to the application of Title II of the Civil Rights Act of 1964, and the opinion has served as a model for state legislation that deems private clubs a place of public accommodation subject to state antidiscrimination laws. The broad application of Title II in *Daniel* contrasts with the Supreme Court’s narrower interpretation of the scope of the Act in *Moose Lodge No. 107 v. Irvis*.⁶⁰

2. *Moose Lodge v. Irvis*—Mr. Irvis, an African American guest of a white member, was refused service at the bar and dining area of a Moose Lodge solely because of his race.⁶¹ This policy was set by the Supreme Lodge, the governing body of the Moose Lodge that limited membership to white males.⁶² Irvis claimed that state action was present because the state of Pennsylvania had issued the Lodge

53. *Id.* at 303 (citing 42 U.S.C. § 2000a (c) (2001)).

54. *Id.* at 303–04.

55. *Id.* at 304.

56. *Id.* at 305–07.

57. *Id.* at 304.

58. *Id.* at 308.

59. *Id.* at 307.

60. 407 U.S. 163 (1972).

61. *Id.* at 165.

62. *Id.* at 165–66.

a liquor license, and thus the Lodge's discrimination involved state action and was in violation of the Equal Protection Clause of the Fourteenth Amendment.⁶³ Irvis sought injunctive relief to revoke this license until the Lodge ended its discriminatory policies.⁶⁴ The trial court found the Lodge's membership and guest policies to be discriminatory and constituted state action, and granted the injunction.⁶⁵ The Moose Lodge subsequently appealed to the United States Supreme Court.

The Supreme Court spent significant effort considering the issue of state action.⁶⁶ The Lodge was a local chapter of a national organization, housed in a privately owned building, to which only members and their invited guests were admitted.⁶⁷ The Court found that there was no Fourteenth Amendment violation, as there was no state action.⁶⁸ The Court disregarded the idea that the issuance of a liquor license constituted state action, stating,

[T]he court has never held . . . that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the state . . . Since state-furnished services include such necessities of life such as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct.⁶⁹

The decision in *Moose Lodge* demonstrates that mere government licensing of a club does not constitute state action. Absent a finding of state action, a club will be exempted from constitutional scrutiny unless it can be established that the club is a public accommodation.

B. Freedom of Association

All individuals rely on certain freedoms that are essential to establishing our identity. One of these freedoms, safeguarded by the

63. *Id.* at 165.

64. *Id.*

65. 318 F. Supp. 1246 (M.D. Pa. 1972).

66. 407 U.S. 163, 171-79.

67. *Id.* at 171.

68. *Id.* at 171-72.

69. *Id.* at 173.

Constitution, is that of association.⁷⁰ The Supreme Court has concluded that “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the state because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”⁷¹

This freedom is further defined by distinguishing two separate types of association—intimate and expressive. Intimate association involves personal affiliations that are distinguished by characteristics such as relative smallness, a high degree of selectivity in decisions to begin and maintain affiliations, and seclusion from others in critical aspects of the relationship.⁷² Thus, the freedom of intimate association encompasses the whole of personal relationships that people have with one another and all of the aspects of these relationships.

Expressive association was incorporated into the First Amendment based on the principle that “[a]n individual’s freedom to speak, to worship, and to petition the government for redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”⁷³ Expressive association is based on a group’s size, purpose, policies, selectivity, congeniality, and other characteristics.⁷⁴

While both types of association are of great importance, intimate association has been protected by courts more than its counterpart. The Supreme Court has interpreted the Constitution’s definition of intimate relationships to reflect the realization that individuals gain a great deal from their relationships with others, and that the Bill of Rights affords for the preservation of these highly personal relationships from unjustified interference by the State.⁷⁵

The Supreme Court has taken a different view of expressive association. There are several ways in which the expressive association right could potentially be unconstitutionally infringed upon, including, but not limited to: the imposition of penalties or withholding of benefits from individual members because of their membership in a disfavored group; an attempt to require

70. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

71. *Id.*

72. *Id.* at 620.

73. *Id.* at 622.

74. *Id.* at 620.

75. *Id.* at 618.

disclosure of facts of membership in a group seeking anonymity; and the attempt to interfere with the internal organization or affairs of the group.⁷⁶ Thus, it would appear that clubs or organizations have a large umbrella under which to conduct activities free from governmental involvement. However, the Court has concluded that the right to associate for expressive purposes is not absolute.⁷⁷ There are certain social objectives that are sufficiently compelling to warrant state involvement in seemingly private affairs, including the eradication of discrimination.⁷⁸ The Court considered the abridgement of the right to engage in expressive association in favor of compelling social objectives in *Roberts v. U.S. Jaycees*, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, and *Boy Scouts of America v. Dale*.

1. *Roberts v. United States Jaycees*—In 1984, the Minnesota Department of Human Rights filed a lawsuit against the Jaycees alleging that the organization's policy of excluding women from membership violated the Minnesota Civil Rights Act.⁷⁹ The petitioners acted when the national Board of Directors notified two local chapters of the Jaycees in Minneapolis and St. Paul that they were in danger of losing their charters because they admitted women as members.⁸⁰

In response to the lawsuit, the Minnesota Human Rights Department scheduled a hearing to assess the merits of the case.⁸¹ Prior to the hearing, the Jaycees had sought injunctive relief against several state officials to prevent the enforcement of the Act.⁸² The Jaycees claimed that forcing the organization to accept women members would violate its male members' constitutional rights to free speech and association and that the Act was unconstitutionally vague and overbroad.⁸³

After the trial court ruled in favor of the plaintiffs, the Court of Appeals for the Eighth Circuit reversed, and held that the Minnesota Human Rights Act that forced the Jaycees to admit women as full members violated the First and Fourteenth Amendments.⁸⁴

76. *Id.* at 622–23.

77. *Id.* at 623.

78. *Id.* at 623.

79. See MINN. STAT. ANN. § 363.03, subd. 3 (West 1982). The Act states, "It is an unfair discriminatory practice to: (1) deny any person of the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, or sex."

80. 468 U.S. at 614.

81. *Id.* at 615.

82. *Id.*

83. *Id.* at 615–16.

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

Thus, the Court had several issues to review. At the outset, the Court set out to determine whether the Act violated the male members' freedom of association, either intimate or expressive.⁸⁵ The Supreme Court began this inquiry by determining what type of association was at issue.⁸⁶ Initially the Court looked to accepted standards for establishing intimate association: relative smallness, a high degree of selectivity in decision making, and seclusion from others in critical aspects of the relationship.⁸⁷ When these standards were applied, the Court found that the Jaycees did not represent an intimate association for several reasons. First, local chapters of the national organization were large and basically unselective, with 430 members in Minneapolis and 400 in St. Paul.⁸⁸ Second, there were no standards or qualifications necessary to become a member of the Jaycees.⁸⁹ Third, in evaluating whether there was seclusion from others, the Court noted that women members, although non-voting, were involved in all other aspects of the organization, and thus there seemed no reasonable justification for the Jaycees' claim that admitting women as members would be a hindrance to the male members.⁹⁰

The Court then evaluated whether the Jaycees had established an expressive association by analyzing whether the organization engaged in behavior such as speech, religious worship, and petitioning of the government, all of which are protected by the Constitution.⁹¹ The Supreme Court found that the group met with the purpose of expressing certain views or ideas, and thus there was an expressive association present. Next, the Court looked to determine whether the Minnesota Human Rights Act unconstitutionally violated this right to expressive association. In general, the state must demonstrate that there exists a compelling state interest sufficient to justify government regulation in order for the legislation to withstand constitutional scrutiny.⁹² The Court was persuaded that "Minnesota's compelling interest in eradicating discrimination against its female citizens justifie[d] the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."⁹³ The Court also found that

85. 468 U.S. at 617-29.

86. *Id.*

87. *Id.* at 620.

88. *Id.* at 621.

89. *Id.*

90. *Id.* at 621.

91. *Id.* at 622-23.

92. *Id.* at 623.

93. *Id.*

there was no reason to conclude that the “admission of women as full voting members [would] impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.”⁹⁴

The Court further analyzed this issue by reviewing previous decisions addressing the Equal Protection Clause and its relation to racial and gender discrimination.⁹⁵ The Court noted that its prior decisions repeatedly hinged on the fact that stereotype-based discrimination forces those being oppressed to labor under often completely unfounded assumptions.⁹⁶ Thus, such discrimination “deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”⁹⁷ Accordingly, the Court asserted that preventing such discrimination should be a significant issue in the court and the legislature.

The decision in *Roberts* was an important step toward preventing discrimination by country clubs. However, there is a fundamental difference between large national organizations, such as the Jaycees, and small, local country clubs: the private country club may be more likely to establish an intimate association, which would make the standard of protection afforded to it substantially higher. The Supreme Court next considered the issue in *Board of Directors of Rotary International v. Rotary Club of Duarte*.⁹⁸

2. *Rotary International v. Rotary Club of Duarte*—Rotary International is a nonprofit corporation of business and professional men with the purpose to provide “humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world.”⁹⁹ Individual members belong to a local Rotary Club, and each club is a member of Rotary International.¹⁰⁰ Membership in Rotary Clubs was open only to men.¹⁰¹ The organization claimed that its exclusion of women resulted in a sense of fellowship among the male members and allowed it to operate in foreign countries that held different attitudes toward women and frowned upon mixed-gender clubs.¹⁰² In 1977, the Rotary Club of Duarte went against these accepted practices and admitted three women

94. *Id.* at 627.

95. *Id.* at 625.

96. *Id.*

97. *Id.*

98. 481 U.S. 537 (1987).

99. *Id.* at 539.

100. *Id.*

101. *Id.* at 541.

102. *Id.*

as active members.¹⁰³ Rotary International, its parent organization, then revoked the Duarte Club's charter.¹⁰⁴ The Duarte Club and two of the women asserted that Rotary International's actions were in violation of California's Unruh Civil Rights Act.¹⁰⁵ The Duarte Club lost in a bench trial in California Superior Court but was successful in the California Court of Appeal.¹⁰⁶ In both, the focus was on determining if Rotary Clubs were "business establishments" under the Unruh Act.¹⁰⁷ The U.S. Supreme Court extended this focus to include the issue of associational freedoms.

With respect to the issue of intimate association, the Court stated that "the evidence in this case indicates that the relationship among Rotary Club members is not the kind of intimate or private association that warrants constitutional protection."¹⁰⁸ The Court found that guests or members of the public were often present at Rotary activities, that Rotary members were encouraged to invite their business associates to meetings, and that there was no limit on the number of members in any local Rotary Club.¹⁰⁹

The Court cited *Roberts* on the issue of expressive association, stating that ". . . the right to engage in activities protected by the First Amendment implies 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'"¹¹⁰ The Court found that Rotary International failed to demonstrate that the admission of women would affect its members' ability to carry out the clubs' purposes in any significant way.¹¹¹ The Unruh Act did not require that the Rotary Club abandon its basic goals, classification system, or admit members "who do not reflect a cross section of the community."¹¹² Further, the Court found that even if the Unruh Act did infringe slightly on the Rotary members' freedom of expressive association, this infringement would be justified by the state's compelling interest in eliminating apparent gender discrimination.¹¹³ As with its decision in *Roberts*, the Supreme Court determined that the organization's associational rights were outweighed by the importance of

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 542.

107. *Id.* at 542-43.

108. *Id.* at 546.

109. *Id.*

110. *Id.* at 548 (citing *Roberts*, 468 U.S. at 622).

111. *Id.*

112. *Id.*

113. *Id.* at 549.

seeing that the purpose of the Unruh Act—the eradication of discrimination—was carried out.¹¹⁴

3. *New York State Club Association v. City of New York*¹¹⁵—New York City's Human Rights Law was enacted in 1965.¹¹⁶ The original piece of legislation forbade "discrimination based on race, creed, sex and other grounds by any 'place of public accommodation, resort or amusement,' but specifically exempted 'any institution, club or place of accommodation which in its nature is distinctly private.'"¹¹⁷ Local Law 63 was passed as an amendment to the city's Human Rights Law in 1984.¹¹⁸

With this amendment, the New York legislators sought to broaden the traditional goals and purposes of civil rights legislation. Specifically, the legislation sought to stretch the Human Rights Law to reach any "institution, club or place of accommodation [that] 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."¹¹⁹ The legislative history of the statute made clear that it was intended to include country clubs and demonstrated that New York's City Council had recognized the importance of such clubs in the business arena.¹²⁰ While the original scope of civil rights legislation was limited to actual businesses or public places, this new legislation targeted the *purpose* of such places. The City Council determined that "'the public interest in

114. *Id.*

115. 487 U.S. 1 (1988).

116. *Id.* at 4.

117. *Id.* at 1.

118. *Id.* at 5–6 ("[T]he city of New York has a compelling interest in providing its citizens an environment where all persons, regardless of race, creed, color, national origin or sex, have a fair and equal opportunity to participate in the business and professional life of the city, and may be unfettered in availing themselves of employment opportunities. Although city, state and federal laws have been enacted to eliminate discrimination in employment, women and minority group members have not attained equal opportunity in business and the professions. 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. While such organizations may avowedly be organized for social, cultural, civic or educational purposes, and while many perform valuable services to the community, the commercial nature of some of the activities occurring therein and the prejudicial impact of these activities on business, professional and employment opportunities of minorities and women cannot be ignored.").

119. *Id.* at 6 (citing N.Y.C. Admin. Code § 8-102 (9) (1986)).

120. *Id.* at 16.

equal opportunity' outweighs 'the interest in private association asserted by club members.'¹²¹

As soon as the amendment became effective, the New York State Club Association filed a suit against the City of New York. The Association asserted that the amendment was both invalid and unconstitutional on its face under the First and the Fourteenth Amendments.¹²² The Association lost at the trial court level and subsequently lost on appeal at the intermediate state appellate level. The New York Court of Appeals also ruled for the city, finding that "any infringement on associational rights is amply justified by the city's compelling interest in eliminating discrimination against women and minorities."¹²³

The New York State Club Association first challenged the facial constitutionality of the 1984 law. In order to prevail on this argument, the appellant needed to show that "the challenged law either 'could never be applied in a valid manner,' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.'"¹²⁴ When addressing these challenges, the Supreme Court noted that "the first kind of facial challenge will not succeed unless the court finds that 'every application of the statute created an impermissible risk of suppression of ideas,'¹²⁵ and the second kind of facial challenge will not succeed unless the statute is 'substantially' overbroad."¹²⁶ This would require the Court to find "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court."¹²⁷

The New York State Club Association conceded that, at least in part, the law could be constitutionally applied to some of its members;¹²⁸ namely, those with more than 400 members that provide regular meal service. The Supreme Court stated that "these characteristics . . . significant in defining the nonprivate nature of these associations, because of the kind of role that strangers play in their ordinary existence, as is the regular participation of strangers at

121. N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 6 (1988).

122. *Id.* at 7.

123. *Id.*

124. *Id.* at 11 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984)).

125. *Id.* (citing *Taxpayers for Vincent*, 466 U.S. at 798 n.15).

126. *Id.*

127. *Id.* (citing *Taxpayers for Vincent*, 466 U.S. at 801).

128. *Id.* at 11-12.

meetings, which we emphasized in *Roberts* and *Rotary*.”¹²⁹ In other words, the Court believed that social clubs, including country clubs, had characteristics that made them unmistakably business oriented. The Court found that although some of the interaction between club members may be private or intimate in nature, that alone did not afford the clubs protection from government interaction against discriminatory practices.¹³⁰ Thus, the Court determined that the statute was not unconstitutional on its face because it did not infringe on the rights of every member of the Association.¹³¹

The Court found similar problems with the appellant’s argument that the statute imposed upon its freedom of expressive association.¹³² The Court looked to the intention of the statute, and found that the law did not impose on any club in a way that would inhibit the freedom to form associations of either a private or public nature.¹³³ The statute merely forbade the practice of discriminating based on race, sex, and other specific characteristics, but allowed clubs to maintain the practice of turning away those people with whom they did not share common viewpoints.¹³⁴

The appellant next argued that the statute was overbroad in that it covered clubs that were “distinctly private.”¹³⁵ Here, the appellant erred by neglecting to provide any description of what features such clubs possessed that would make them any different than those for which the statute had already been deemed constitutional. Without any criteria to evaluate, the Court decided that the statute could not be found to be overbroad and that any overbreadth could be addressed on a case-by-case basis.¹³⁶

The Supreme Court’s decision in *New York State Club Association* demonstrated that New York City was allowed to broaden the original boundaries established by the Civil Rights Act of 1964. The legislation in question went to the very heart of the problem involving country clubs: that while they may be formed for a social purpose, the resulting relationships are a vital part of the business world, and, consequently, discrimination in determining membership puts those in excluded groups at a severe disadvantage in the business world. *New York State Club Association* is the only Supreme

129. *Id.* at 12.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 13.

134. *Id.*

135. *Id.* at 14.

136. *Id.*

Court decision that involved specific guidelines regarding the number of members required to include a private club within the ambit of the law. Other cities and states have been encouraged by the court's decision in *New York State Club Association* to develop new and creative methods to force private country clubs to open their membership policies through the regulation of government benefits and privileges such as liquor licenses and tax exemptions.¹³⁷

An analysis of *Roberts, Rotary*, and *New York City* yields the inescapable conclusion that the Court favored equality over the liberty interests of the club members. Yet the Supreme Court's revisiting of the issue in *Boy Scouts of America v. Dale*¹³⁸ raised some important questions about the future of cases involving discrimination in private organizations of all types.

4. *Boy Scouts of America v. Dale*—James Dale, a homosexual member of the Boy Scouts of America since 1978, filed a complaint against the organization in 1992 after he was informed that his status as an adult member was being revoked due to his sexual orientation.¹³⁹ Dale sued under New Jersey's public accommodations statute, which prohibited discrimination on the basis of sexual orientation in places of public accommodation.¹⁴⁰ The New Jersey Superior Court ruled that the Boy Scouts were a private organization, and thus exempt from the statute.¹⁴¹ The state's Court of Appeals reversed, and its ruling that the organization was covered under the state's public accommodations statute was affirmed by the New Jersey Supreme Court.¹⁴² The United States Supreme Court granted the Boy Scouts' petition for certiorari to determine if the application of the state's public accommodations law was in violation of the First Amendment.¹⁴³

The New Jersey Supreme Court's decision concentrated on the issues of intimate and expressive association.¹⁴⁴ The court found that the Boy Scouts' "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the

137. See Moss, *supra* note 15, at 162. These regulations will be discussed at length in section V *infra*.

138. 530 U.S. 640 (2000).

139. *Id.* at 645. Dale was told that his suspension from the organization was due to the fact that the Boy Scouts "specifically forbid membership to homosexuals." *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 646.

143. *Id.* at 647.

144. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1219–28.

freedom of intimate association.’”¹⁴⁵ Similarly, the New Jersey Supreme Court held that the Boy Scouts’ expressive association rights were not violated by the inclusion of Dale in its membership; the Boy Scouts ability to express its message was not infringed because the members of the group did not associate for the purpose of disseminating their views on homosexuality.¹⁴⁶ The United States Supreme Court did not address the issue of intimate association. Instead, it focused on the issue of expressive association.

In order to establish the existence of an expressive association, a group must demonstrate that they engage in some sort of expression, either public or private.¹⁴⁷ The Supreme Court reviewed the Boy Scouts’ Oath and Laws, after which they determined that the general mission of the Boy Scouts was “to instill values in young people” by promoting “morally straight” behavior.¹⁴⁸ The Supreme Court found that it was “indisputable that an association that seeks to transmit such a system of values engages in expressive activity.”¹⁴⁹

After it established the existence of an expressive association, the Court turned to the issue of whether or not the inclusion of a homosexual as an adult member would severely affect its members’ freedom of association. The Court found that the Boy Scouts’ assertion that homosexuality is contrary to the organization’s view of “morally straight” behavior could be found in other cases in the past, and thus the Court did not doubt that this view was sincere.¹⁵⁰ The Court then looked to determine whether admitting Dale would significantly affect the organization’s ability to succeed in its goal not to “promote homosexual conduct as a legitimate form of behavior.”¹⁵¹ The Court found that Dale’s open and honest stance in the community as a homosexual would “at the very least . . . send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”¹⁵²

The United States Supreme Court disagreed with the New Jersey Supreme Court’s conclusion that the Boy Scouts did not engage in expressive association for several reasons. First, the Court noted that the Boy Scouts did not have to meet for the purpose of ex-

145. *Boy Scouts of America*, 540 U.S. at 646.

146. *Id.* at 654–55.

147. *Id.* at 648.

148. *Id.* at 649–50.

149. *Id.* at 650.

150. *Id.* at 651–52.

151. *Id.* at 653.

152. *Id.*

pressing the belief that homosexuality is wrong; they merely had to engage in expressive activity.¹⁵³ The New Jersey Supreme Court pointed out that the Boy Scouts discourage their leaders from discussing sexual issues with scouts and determined that sexual preference would not be a major issue, a point with which the Boy Scouts disagreed.¹⁵⁴ However, the United States Supreme Court held that forbidding the discussion of sexual matters did not necessarily imply that the organization's beliefs on specific sexual matters were not sincere.¹⁵⁵ Although the Scouts did not openly denounce homosexuality, in the Court's view the failure to do so did not necessarily demonstrate that the Scouts did not wholeheartedly believe that the lifestyle is morally wrong.¹⁵⁶

The Court further found that although the Boy Scouts allowed heterosexual members to disagree publicly with the organization's view on homosexuality, this was entirely different from allowing a homosexual to become an adult member.¹⁵⁷ The organization's expressive association rights are not limited simply because all members do not agree with the belief or action in question, as "the Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes."¹⁵⁸ For all of these reasons the United States Supreme Court determined that the New Jersey Supreme Court had erred in finding for Dale, and held that the application of New Jersey's public accommodations law to the Boy Scouts violated its members' rights to expressive association.¹⁵⁹

This decision could have important implications in future cases involving country club discrimination. The facts in the *Dale* case are significantly different than those in a case involving a country club, simply because the Court determined that the Boy Scouts were too large and inclusive to exhibit an intimate association. The Court instead relied on the fact that the general mission of the organization was to promote certain values in finding that the Boy Scouts engaged in a constitutionally protected expressive association. This ruling—decided with only an expressive association at issue—raises two interesting questions: 1) could a country club claim that it, too, was organized to promote certain values; and

153. *Id.* at 655.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 655–56.

158. *Id.* at 655.

159. *Id.* at 656.

2) if so, what values could it be attempting to instill? The ruling in *Dale* could allow private country clubs to make subtle changes in their bylaws or codes that could allow them to claim a similar purpose and provide protection from invasion by the state.¹⁶⁰

IV. LEGISLATION

A. Federal Legislation

The passage of the Civil Rights Act of 1964 represented a great victory for the Civil Rights Movement. Congress enacted this pivotal legislation to combat discrimination in many aspects of society, including housing (Title VI) employment (Title VII) and education (Title IX). Title II of the Act addresses racial, religious, and ethnic discrimination in places of public accommodation.¹⁶¹ The Act has been quite successful in eliminating many forms of overt discrimination in most aspects of society.¹⁶² However, the Act also provides an exemption from its provisions for bona fide private clubs, enabling these clubs to continue their discriminatory practices.¹⁶³ It has been suggested by one prominent commentator that “[t]he sponsors of Title II were led to believe that without a private club exemption, the whole of Title II might go down to defeat.”¹⁶⁴ Yet the meaning of the term ‘private club’ in Title II is left undefined, and the Supreme Court has failed to remedy the situation by leaving this task to the various lower federal courts, state courts and legislatures that have considered the issue.¹⁶⁵ Thus, discrimination within this setting has remained as a result of the interpretation of the exemption provided by the courts and legislatures faced with this issue. The determination of whether a club is distinctly private is a fact-sensitive inquiry;¹⁶⁶ factors such as the club’s size, selectivity

160. For example, a club could include bylaws that a particular religion is against its beliefs. This would limit the possibility for membership by followers of that religion, many of whom could be members of minority groups in the United States.

161. See 42 U.S.C. § 2000a (2001).

162. See Shropshire, *supra* note 23, at 631–32.

163. 42 U.S.C. § 2000a (e) provides that “[t]he provisions of [42 USCS §§ 2000a–2000a-6] shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).” In addition, the Act does not prohibit gender discrimination.

164. See DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* § 3.7 at 138 (3d ed. 1992).

165. See Shropshire, *supra* note 23, at 643–44.

166. See Jolly-Ryan, *supra* note 3, at 500.

in membership, the procedural formalities followed by the club, the membership's control over the governance of the club, the club's history, the use of the club's facilities by nonmembers, and the club's purpose are emphasized by courts and legislatures.¹⁶⁷ The private club exemption and corresponding uncertainty in the interpretation of this standard make Title II of the Civil Rights Act of 1964 an unlikely weapon for those combating discrimination within private country clubs.

B. State Legislation

Currently, the laws in each state fall short of establishing a clear precedent to be followed in cases involving country club discrimination. These result-oriented laws are well-intentioned but offer little guidance to judges considering this issue. One solution to this problem entails states following the model established by Congress in the Civil Rights Act of 1964 and adopting their own forms of civil rights legislation. The vast majority of states have done so,¹⁶⁸ and have subsequently further expanded existing state civil rights laws by enacting public accommodations laws that typically define 'public accommodations' quite broadly,¹⁶⁹ thus bringing many private country clubs within the ambit of these laws.¹⁷⁰ Generally, this reduces the burden placed on the courts to determine if a club is a state actor or a place of public accommodation. While the laws in these states do not specifically address discrimination in private country clubs, courts have interpreted them as doing so when the clubs do not meet certain criteria.¹⁷¹ Other states have adopted laws that specifically address country club discrimination.¹⁷² This section will describe state legislation affecting country clubs and challenges brought under existing state legislation in California and Massachusetts, beginning with California's Unruh Act, which has proven noteworthy in the state's legal framework.

1. *Unruh Civil Rights Act (California)*—While the Civil Rights Act of 1964 was one of the most important pieces of federal legislation ever enacted, it failed to clearly enunciate a bright-line standard as

167. See Shropshire, *supra* note 23, at 644. See also Jolly-Ryan, *supra* note 3, at 510–15.

168. See Kamp, *supra* note 4, at 95.

169. *Id.*

170. *Id.*

171. *Id.* at 101–02.

172. See Stephen Goodwin, *Ladies in Waiting*, THE MET GOLFER, Sept./Oct. 1998.

to the definition of a private organization.¹⁷³ This places a burden on the judiciary, as they are forced to make a threshold decision on this matter before determining the merits of the underlying claim. Where the federal statute is lacking, the Unruh Act is unmistakably clear. The Act states that, "All persons . . . are free and equal, no matter what their sex, race, color, religion, ancestry, national origin, or disability, are entitled to full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever."¹⁷⁴ This statement is quite broad, and thus needs judicial clarification in order to be effective in cases involving private clubs. Such clarification was given in *Warfield v. Peninsula Golf and Country Club*.¹⁷⁵

Mary Ann Warfield brought suit against the Peninsula Golf and Country Club in 1981, claiming that the club's membership policies were illegal under the Unruh Act in that they excluded women from holding full regular family memberships.¹⁷⁶ The plaintiff and her husband had been members of the club since 1970 when her husband obtained a regular family membership in his name.¹⁷⁷ Throughout the marriage, the couple frequented the club and established both social and business relationships with many members.¹⁷⁸ The plaintiff and her husband divorced in 1981, and the plaintiff requested that the club's board of directors transfer the Regular Family Membership previously held by her husband into her name.¹⁷⁹ When the board cited the club's bylaws in refusing this request, Ms. Warfield initiated the suit.¹⁸⁰

Warfield set out to establish that the Peninsula Golf and Country Club fell within the definition of a 'business establishment' under the Unruh Act.¹⁸¹ While the Act's definition of such an establishment is extremely broad,¹⁸² the California Supreme Court set out to determine whether a private country club was a business estab-

173. See Shropshire, *supra* note 23, at 639-40 (citing DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW § 3.7 (3d ed. 1992)).

174. CAL. CIV. CODE § 51 (West 2001).

175. 896 P.2d 776 (Cal. 1995).

176. *Id.* at 782.

177. *Id.* at 781.

178. *Id.* at 781-82.

179. *Id.* at 782.

180. *Id.*

181. *Id.* at 782-83.

182. Section 51 of the Unruh Civil Rights Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." 913 CAL. STATS. § 3 (1992). See also 896 P.2d at 777.

lishment.¹⁸³ The court found that “traditionally, statutes prohibiting discrimination in places of public accommodation have not been applied to the membership policies of private social clubs.”¹⁸⁴ In addition, the legislative history of California’s first public accommodation statute in 1897 showed no indication of intending to apply to private social clubs, “and the decisions applying the statute do not suggest that the legislation had any such effect.”¹⁸⁵

Considering these facts, the court stated, “[a]lthough we conclude that the provisions of [the statute] do not apply to the membership decisions of a truly private social club, we hasten to add that an entity is not automatically exempt from the strictures of [the statute] simply because it characterizes itself as a ‘private social club.’”¹⁸⁶ This is an important distinction since, theoretically, virtually any establishment, no matter what its true purpose, could *claim* to be a private club in order to escape the legal burden of equal rights. Thus, the court’s negation of this possibility was noteworthy.

According to the California Supreme Court’s decision in *Warfield*, there were several factors that should be considered in determining whether a club has private or public status.¹⁸⁷ These factors were:

- (1) the selectivity of the group in the admission of members,
- (2) the size of the group, (3) the degree of membership control over the governance of the organization (and particularly the selection of new members), (4) the degree to which club facilities are available for use by nonmembers, and (5) whether the primary purpose served by the club is social or business.¹⁸⁸

The plaintiff argued that applying these factors to the facts in the case resulted in several favorable conclusions. First, the plaintiff argued that “the size of the total membership of the club (700 members plus their spouses and children)” was too substantial to meet the standard of selectivity established by the court.¹⁸⁹ Next, “the circumstances that only one-half of the members were proprietary members with the authority to govern the club and select

183. Both the trial court and Court of Appeal held that the club was not a business establishment within the Unruh Act. 896 P.2d at 783.

184. *Id.* at 789.

185. *Id.*

186. *Id.* at 791.

187. *Id.* at 791–92.

188. *Id.*

189. *Id.* at 792.

new members” demonstrated that the plaintiff’s entrance into the club would not have a significant effect on the governance of the club itself.¹⁹⁰ Third, “the access enjoyed by nonmembers to the club’s pro golf and tennis shops and to ‘sponsored events’” was an obvious indicator that the club was not exclusive to members.¹⁹¹ Finally, “the opportunity for obtaining advantageous business contacts provided by club membership” was such an important aspect of the plaintiff’s relationship with the club that she argued that the primary purpose could be deemed business rather than social.¹⁹²

Interestingly, the court found that only one of these conclusions was necessary to deem the club a business establishment. The court ruled that:

[T]here is no need to determine whether defendant constitutes a “private club” rather than a place of public accommodation under the multi-pronged standard developed in the out-of-state cases, because we conclude that *the business transactions that are conducted regularly in the club’s premises with persons who are not members of the club* are sufficient in themselves to bring the club within the reach of section 51’s broad reference to “all business establishments of every kind whatsoever.”¹⁹³

Thus, the court ruled for the plaintiff, recognizing the underlying purpose of California’s Unruh Act.¹⁹⁴

2. *Borne v. Haverhill Golf and Country Club*—The most recent court decision addressing country club discrimination is *Borne v. Haverhill Golf and Country Club*.¹⁹⁵ In October, 1999 a unanimous jury in Massachusetts Superior Court awarded \$1.97 million to nine women whom it determined had suffered gender discrimination at their private country club in violation of state law.¹⁹⁶ The club was

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 798.

195. No. 96-6511-C, 1999 Mass. Super. LEXIS 523 (Nov. 19, 1999).

196. See Margaret Graham Tebo, *Teed Off: Massachusetts Court Takes Shot at Private Country Club for Gender Discrimination*, A.B.A. J., Feb. 2000, at 26. \$1.5 million of the award was in the form of punitive damages. The plaintiffs’ claims of sex discrimination were brought under Mass. Gen. Laws ch. 272, § 92A (2001) and Mass. Gen. Laws ch. 151B. The plaintiffs also successfully claimed that the club breached its implied covenant of good faith and fair dealing. *Borne*, 1999 Mass. Super. LEXIS 523 at *1. Section 92 A states, in relevant part, that:

No owner, lessee, proprietor, manager, superintendent, agent or employee of any place of *public accommodation*, resort or amusement shall . . . discriminate against . . .

transformed into a place of public accommodation subject to state law because it rented out three function rooms to the public for banquets and meetings.¹⁹⁷ These golfers successfully argued that the suburban Boston club engaged in discrimination by offering them only limited memberships;¹⁹⁸ limited members were denied tee times on weekend mornings and during selected weekday blocks, while primary members had no tee time restrictions.¹⁹⁹ Only four of the club's 320 primary members were women,²⁰⁰ as they were routinely steered into limited memberships and sometimes passed over on the waiting list for available primary memberships by men because of 'special circumstances.'²⁰¹

In addition, the plaintiffs established that the club discriminated against them in its membership transfer policy.²⁰² Men and women were subjected to different criteria when they sought to change the

persons of any religious sect, creed, class, race, color, denomination, sex, sexual orientation . . . or because of deafness or blindness, or any physical or mental disability, in the full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public by such places of *public accommodation*, resort or amusement.

A place of *public accommodation*, resort or amusement within the meaning hereof shall be defined as and shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be (1) an inn, tavern, hotel, shelter, roadhouse, motel, trailer camp or resort for transient or permanent guests or patrons seeking housing or lodging, food, drink, entertainment, health, recreation or rest; . . . (3) a gas station, garage, retail store or establishment, including those dispensing personal services; (4) a restaurant, bar or eating place, where food, beverages, confections or their derivatives are sold for consumption on or off the premises; (5) a rest room, barber shop, beauty parlor, bathhouse, seashore facilities or swimming pool, except such rest room, bathhouse or seashore facility as may be segregated on the basis of sex; . . . (7) an auditorium, theatre, music hall, meeting place or hall, including the common halls of buildings; (8) a place of public amusement, recreation, sport, exercise or entertainment.

(emphasis added).

197. *Borne*, 1999 Mass. Super. LEXIS 523 at 8.

198. See Tebo, *supra* note 196.

199. *Borne*, 1999 Mass. Super. LEXIS at 4. Primary members pay for this privilege, as they are subjected to higher initiation fees, annual dues, and required monthly dining room charges. *Id.* While the tee time restrictions based on club membership category were not per se illegal, the club's golf pro allowed exceptions to the restrictions based exclusively on gender. The golf pro frequently allowed limited and junior male members to tee off during the restricted times but not limited and junior female members. *Id.*

200. *Id.* at 2.

201. Jimmy Golen, *Judge May Appoint Monitor for Golf Course Discrimination*, ASSOCIATE PRESS SPORTS NEWS, Nov. 30, 1999 (on file with the University of Michigan Journal of Law Reform).

202. *Borne*, 1999 Mass Super LEXIS at 3-4.

category of their memberships.²⁰³ Men did not have to pay an initiation fee when they upgraded from a junior, family, or limited membership to a primary membership; women seeking to make a similar change in status were subjected to such a fee.²⁰⁴ Another area in which the club discriminated against its female members was in its facility usage policy.²⁰⁵ While women were granted access to the club's '19th Hole' bar in 1990 per a court order stemming from a complaint that they filed with the Massachusetts Commission Against Discrimination,²⁰⁶ they were discouraged from entering and, thus, largely still denied access to the club's Card Room by club officials.²⁰⁷ Finally, the jury determined that the club engaged in gender discrimination in its member tournaments²⁰⁸ by excluding women holding primary memberships from its "Primary tournaments" without any legitimate reasons.²⁰⁹

Pursuant to several post-trial motions, Judge John Cratsley of Massachusetts Superior Court issued a permanent injunction barring Haverhill Golf and Country Club from "making any distinction, restriction, or discrimination on the basis of sex in relation to any rights, benefits, services, and/or privileges at the club."²¹⁰ The judge also ordered the club to provide gender discrimination avoidance training to its board members and management, keep records of its membership and waiting lists, inform current and prospective members of their privileges, benefits and rights, and provide him with reports of the application process.²¹¹ While the judge refused the Massachusetts attorney general's request to appoint a monitor with authority over club operations, he agreed to hold "periodic compliance review hearings" to ensure that the club adhered to the injunction.²¹² In addition to this stringent judicial oversight, the court ordered the club to pay the plaintiffs' attorney's fees in the amount of

203. *Id.*

204. *Id.* The initiation fee rose from \$1000 to \$4000 when women became eligible for primary memberships in the early 1990's. See J.M. Lawrence, *A Year After Court Win, Female Golfers Battle Discrimination On and Off Course in Haverhill*, BOSTON HERALD, NOV. 28, 2000, at 47.

205. *Borne*, 1999 Mass. Super. LEXIS at 4.

206. Lynn Rosellini, *'Those Women' vs. the 'Neanderthals,' Gender Politics at a Massachusetts Golf Club*, U.S. NEWS & WORLD REP., June 12, 2000, at 56.

207. *Borne*, 1999 Mass. Super. LEXIS at 4-5.

208. *Id.* at 4.

209. *Id.*

210. Golen, *supra* note 201.

211. *Id.*

212. *Id.*

\$486,000.²¹³ The Appeals Court of Massachusetts affirmed the judgment of the trial court.²¹⁴

3. *Other State Legislation*—Several states have enacted legislation that specifically addresses discrimination in private country clubs. Connecticut's comprehensive equal access law requires that any private country club with at least twenty members and a nine-hole golf course that either receives revenues from nonmembers or holds a liquor license refrain from discrimination in its membership or access policies.²¹⁵ The law also mandates that private

213. *Id.*

214. *Borne v. Haverhill Golf & Country Club, Inc.*, 58 Mass. App. Ct. 306 (2003). The Supreme Court of Massachusetts refused to review the case. *Borne v. Haverhill Golf & Country Club, Inc.*, 440 Mass. 1101 (2003).

215. CONN. GEN. STAT. § 52-571d (2001) provides in relevant part:

a) For the purposes of this section, "golf country club" means an association of persons consisting of not less than twenty members who pay membership fees or dues and which maintains a golf course of not less than nine holes and (1) receives payment for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly, from or on behalf of nonmembers or (2) holds a permit to sell alcoholic liquor . . .

(b) No golf country club may deny membership in such club to any person on account of race, religion, color, national origin, ancestry, sex, marital status or sexual orientation.

(c) All classes of membership in a golf country club shall be available without regard to race, religion, color, national origin, ancestry, sex, marital status or sexual orientation.

(d) A golf country club that allows the use of its facilities or services by two or more adults per membership, including the use of such facilities or services during restricted times, shall make such use equally available to all adults entitled to use such facilities or services under that membership. The requirements of this subsection concerning equal access to facilities or services of such club shall not apply to adult children included in the membership. Nothing in this subsection shall be construed to affect the assessment by a golf country club of any fees, dues or charges it deems appropriate, including the ability to charge additional fees, dues or charges for access by both adult members during restricted times.

(e) A golf country club that has food or beverage facilities or services shall allow equal access to such facilities and services for all adults in all membership categories at all times. Nothing in this subsection shall be construed to require access to such facilities or services by any person if such access by such person would violate any provision of the general statutes or a municipal ordinance concerning the sale, consumption or regulation of alcoholic beverages.

(f) Nothing in this section shall be construed to prohibit a golf country club from sponsoring or permitting events that are limited to members of one sex if such club sponsors or permits events that are comparable for members of each sex.

country clubs allow all members equal access to all facilities.²¹⁶ A similar law exists in the state of Michigan, where a private club cannot discriminate against its members by refusing to grant them access to any of the club's facilities.²¹⁷ In addition, the state's Civil Rights Act specifically includes private country clubs within the definition of a place of public accommodation.²¹⁸ In New Jersey, an amendment to New Jersey's 'Law Against Discrimination' prohibits a private club from discriminating against any of its members.²¹⁹ Since a club cannot deprive any member of any privilege, restrictions on tee-times and access to club facilities are not allowed. The law's limited scope has been effective in ending gender discrimination against existing country club members.²²⁰ However, the law does not address discrimination against nonmembers; private country clubs are otherwise exempt from the state's antidiscrimination law.²²¹

While not enacting laws that specifically address discrimination in private country clubs, other states have taken steps to ensure that these clubs are included in the definition of 'public accommodation' in their respective antidiscrimination laws. In Kansas, private clubs that have over 100 members, provide regular meal service, and receive payments from nonmembers are included within the definition of public accommodations.²²² Clubs in Florida are subject to that state's antidiscrimination laws if they have over 400 members.²²³

(g) Any person aggrieved by a violation of the provisions of this section may bring a civil action in the Superior Court to enjoin further violations and to recover the actual damages sustained by reason of such violation or two hundred fifty dollars, whichever is greater, together with costs and a reasonable attorney's fee.

(h) If, in an action brought under subsection (g) of this section, the court finds that a golf country club holding a permit to sell alcoholic liquor . . . has violated any of the provisions of this section, it may, in addition to any relief ordered under said subsection (g), order the suspension of such permit until such time as it determines that such club is no longer in violation of this section.

216. *Id.*

217. MICH. COMP. LAWS ANN. § 37.2302(a) (2001).

218. MICH. COMP. LAWS ANN. § 37.2301(a)(i) (2001).

219. N.J. STAT. ANN. § 10:5-12 (f)(2) (2001).

220. See Goodwin, *supra* note 172.

221. N.J. STAT. ANN. § 10:5-5 (1) (2001).

222. KAN. STAT. ANN. § 44-1002 (i) (2000).

223. FLA. STAT. § 760.60 (1) (2000).

C. Application of Case Law

Pursuant to a discussion of the relevant legal issues involved in country club discrimination, it is necessary to determine how the respective parties would present their arguments. This section will analyze the arguments likely to be proffered by each side.

1. Plaintiff's Arguments—In the absence of legislation that transforms an otherwise private country club into a public accommodation subject to antidiscrimination laws, a plaintiff must establish that state action exists before a court will intervene. The Supreme Court has been generally reluctant to adopt a broad view of state action that would infringe on the rights of private groups.²²⁴ Therefore, once a club is deemed private, it becomes very difficult for a country club discrimination case to make it past the threshold issue of state action.

A plaintiff's first goal should therefore be to prove that the club is a place of public accommodation. While a plaintiff may assert that a private club is a public accommodation under Title II of the Civil Rights Act of 1964,²²⁵ this goal could be better achieved in several ways. First, a plaintiff may emphasize that a club allows its facilities to be used by nonmembers. The occurrence of commercial activity such as open tournaments, weddings, bar mitzvahs, and business meetings at a private club may be a key factor in transforming it into a public accommodation.²²⁶ Second, a plaintiff may argue that a club is not genuinely selective in its admission policy. Factors such as the number of club members, the amount of the membership fee, the admissions criteria and standards, and the formality of admissions procedures may be dispositive in finding that a club is a public accommodation.²²⁷ Finally, a plaintiff may assert that a club that advertises for new members is not distinctly private.²²⁸

A plaintiff who is able to pass this threshold may then attempt to prove that discrimination is actually occurring.²²⁹ There are several

224. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171–79 (1972).

225. See *Daniel v. Paul*, 395 U.S. 298 (1969).

226. Such evidence was heavily relied upon by the courts in both *Haverhill* and *Warfield*. See *infra* section IV.B.2.

227. See Jolly-Ryan, *supra* note 3, at 510–11.

228. *Id.* at 514. For example, Haworth Country Club is a private country club in northern New Jersey that offered membership in a New York Times advertisement in March 2002. Therefore, it is not distinctly private despite the \$60,000 full membership fee. See Advertisement, N.Y. TIMES, Mar. 10, 2002, at Sec. 14-9.

229. See Shropshire, *supra* note 23, at 641–42.

policy areas of a country club that may be involved in discrimination cases. First, the membership policies of clubs may come under scrutiny if they either imply or openly state that a member of a protected class may not apply or be accepted for membership.²³⁰ The types of memberships granted may also be at issue, since limited or partial memberships may be attainable by a member of a protected class, while full memberships may not be. Litigation may also arise as a result of unequal facilities or considerations for protected classes who are already members of the country club.²³¹ For example, a group of women may seek judicial relief as a result of inadequate locker room facilities when compared to those of their male counterparts. The opportunity to partake in events on the grounds of a country club is another area where discrimination may occur. Prime tee-times or tennis court spaces may, for example, be reserved for men, making it impossible for women to enjoy the full range of benefits offered by a club. If the plaintiff was able to establish that discrimination was occurring at the club, the court would then turn to an analysis of the freedom of association.

The constitutional right to freedom of association would likely be raised as a defense by a country club. First, a club could attempt to establish that an intimate association exists. If it were able to do so, a plaintiff would be unlikely to be able to successfully argue that a state may interfere with the actions of a club.²³² However, a plaintiff could attempt to prove that the relationships established as a result of membership are based more on business than a personal level. If a plaintiff demonstrated that people joined the club with the express purpose of establishing business relationships, the court may be convinced that the discrimination can be ameliorated without infringing on any intimate association.²³³ A plaintiff would undoubtedly face great difficulty in successfully proffering this argument.

The issue of expressive association is equally important in the analysis.²³⁴ If a country club asserts an expressive association right, a plaintiff must rebut this argument and demonstrate that the club members do not have such an association. The basic premise of an expressive association argument is that the challenged group was formed with the purpose of unifying members who hold a common

230. For example, the country club might prohibit women or racial minorities from becoming members.

231. See Kamp, *supra* note 4, at 90–91.

232. See *id.* at 96–97.

233. See Jolly-Ryan, *supra* note 3, at 516–18.

234. See *id.*

belief.²³⁵ For example, members of a group that meets to discuss the issue of abortion exhibit an expressive association. It should be easier for a plaintiff in a country club case to disprove the existence of an expressive association since membership in a country club is not typically based on a belief or a set of beliefs. Country club membership is instead usually the result of a desire for recreational facilities, social interaction, or business opportunities. A plaintiff could argue that any of these are a primary reason that individuals join a club, and that ending the challenged discrimination would not infringe on any expressive rights.

2. *Defendant's Arguments*—A country club has numerous options available to it in defending itself against a discrimination lawsuit. As previously noted, a club might first address state action by arguing that a narrow interpretation of both state action and public accommodation is appropriate given the Supreme Court's decisions in *Moose Lodge* and *Dale*.²³⁶ The defendant club could assert that it does not allow significant use of the facilities by nonmembers of the club, has a genuinely selective admissions policy, and does not advertise for new members.

If a club loses on these points, its strategy would likely be to refute the allegations of discrimination. First, a club could point to its bylaws, which would typically not include any discriminatory policies, as proof that it does not discriminate.²³⁷ It could also assert that any exclusion of protected classes from membership results from a lack of interest and applications for membership, rather than a denial of membership applications. The club may also choose to demonstrate that financial status is the determining factor that limits membership. The club could assert that they would accept members of all races and genders if they could pay the membership fees. Again, the club could attempt to demonstrate that the lack of diversity in its membership was coincidental rather than based on any stated policy. As a matter of practice, many new members of country clubs are accepted after an existing member gives them a recommendation.²³⁸ This virtually assures that minorities or women cannot become members in many clubs unless they are personally acquainted with current members. This is unlikely

235. See *id.* at 517.

236. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175–76 (1972), *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000).

237. It is far more likely that these policies are unwritten. See *Kamp*, *supra* note 4, at 90–91.

238. See *Jolly-Ryan*, *supra* note 3, at 495.

to occur if the existing members of a country club routinely discriminate.

If a private club is unsuccessful in putting forth these arguments and must instead justify its discrimination, its first option would be to establish the existence of an intimate association. This issue hinges on the type of relationships that club members enjoy with each other as a result of their club membership.²³⁹ It is easy for a club to demonstrate that the primary stated purpose of the group is to engage in social activity.²⁴⁰ The fact that there are business or political goals associated with membership is implied. While these benefits may nonetheless exist, the fact that the primary purpose of club membership seems to be social—in that many long-term personal relationships are formed as a result of membership—would provide a country club with a strong argument that an intimate association exists.

The second option for a club would be to claim that it enjoys an expressive association right. A club opting for this claim would attempt to prove that its members hold a common belief (or set of beliefs) on which their membership is based.²⁴¹ For example, if all of the members of a country club were the same religion, it may be able to prove the existence of an expressive association. However, this would be more difficult for a club to prove than would an intimate association, and it would seem highly unlikely that a club could make this assertion.

V. POTENTIAL ALTERNATIVE SOLUTIONS

A. *New Federal or State Legislation*

Clearly, the ultimate solution to country club discrimination would be to enact legislation at the federal level that would specifically forbid country clubs from discriminating. Though the likelihood of this legislation being passed is slim, there seems to be an important difference between the Boy Scouts of America and the typical private country club that could be a key factor in determining if such legislation could withstand legal challenge. There appears to be a general sentiment in contemporary American society that while social organizations must be given the freedom to act according to their beliefs independent from state

239. See *Roberts*, 468 U.S. at 617–21.

240. See Jolly-Ryan, *supra* note 3, at 495.

241. See *Roberts*, 468 U.S. at 622–23.

intervention, when these beliefs manifest themselves in a business setting any discrimination that they cause is sufficiently offensive to warrant legislative action.

With this in mind, the business climate present at most country clubs makes these organizations vastly different from truly social organizations such as the Boy Scouts. Unfortunately, this fact could both help and hinder the process of eradicating country club discrimination. On one hand, the fact that the associational freedoms in country clubs are suspect, coupled with the fact that business transactions come under their own forms of constitutional scrutiny, could allow Congress to take bold initiatives aimed at equaling the playing field. Broad federal legislation modeled after one of the aforementioned state public accommodations laws could certainly have this effect. The removal of the private club exemption from the Civil Rights Act could have a similar effect. In lieu of federal legislation, states could adopt public accommodations laws patterned after California's Unruh Act or the New York City Human Rights Law that would provide them with an effective tool in eradicating country club discrimination. State courts that have evaluated the application of the public accommodations laws to private country clubs have consistently held that the clubs are subject to these laws. State courts champion equality at the expense of liberty.²⁴²

Practically, however, new federal or state legislation is highly unlikely for two reasons. First, many federal and state legislators are members of country clubs.²⁴³ As such, they enjoy the amenities and privileges of club membership and benefit immensely from this affiliation.²⁴⁴ Enacting measures that would abbreviate these benefits would be contrary to their self-interest. Second, many of the key financial contributors to the political campaigns of federal and state legislators are wealthy individuals who may also be members of country clubs who are unlikely to favor an individual who acts directly against their interests. Disturbing the traditional settings of country clubs could financially burden those legislators who champion the call for equality. The importance of country clubs in business and in politics may make it imperative that legislators ensure that these clubs be able to operate completely free

242. See Moss, *supra* note 15, at 255.

243. See Eric Yoder, *Golfing Large in the Beltway*, GOLFWEB, June 4, 1997, available at <http://services.golfweb.com/ga97/pga/0602/features/beltwaygolf.html> (on file with the University of Michigan Journal of Law Reform).

244. Interestingly, New York City mayor Michael Bloomberg resigned his membership in several prestigious clubs during his candidacy in order to avoid criticism during the mayoral race from the minority groups that are largely excluded from these clubs.

from the governmental interference that would arise out of any 'club-unfriendly' legislation. It would likely be political suicide for a legislator to support any such measures. This is a risk that few legislators are likely to take.

In general, it is unlikely that any legislation specific to country clubs that would be effective in curtailing discrimination in this setting will be enacted in the near future. While litigation and existing federal and state legislation may ultimately lead to the eradication of discrimination in private country clubs, it is also necessary to consider alternative methods of achieving this result since economic and political concerns suggest that any such legislation is improbable. In the absence of legislation, attention might shift to various 'back door' alternatives that involve the curtailment of the many government benefits and privileges afforded country clubs in order to have a direct financial impact on their operations. These economic solutions are discussed in the sections that follow.

B. Removal of Liquor Licenses

The primary reason that many individuals claim to be members of country clubs is to socialize with their friends. The country club often plays a very important role in the social life of its members, and this socializing typically involves the consumption of alcoholic beverages at the club's bar (frequently referred to as the '19th Hole') and dining facilities.²⁴⁵ One member of a prestigious country club in New Jersey recently commented that "[N]obody would come to the club if it didn't serve alcohol. Forget it."²⁴⁶ This is likely a common sentiment that could provide a useful method of eradicating country club discrimination.

The simple existence of a liquor license granted by the state is not enough to establish state action.²⁴⁷ However, under the powers granted to the states to regulate the use of liquor by the Twenty-First Amendment,²⁴⁸ a state may consider the existence of a dis-

245. See Goodwin, *supra* note 172.

246. Interview with anonymous individual (June 26, 2001) (at the individual's request, the identity of the individual and club shall remain anonymous).

247. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-76 (1972).

248. U.S. CONST. amend. XXI provides:

Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

criminatory policy when issuing and renewing liquor licenses.²⁴⁹ Numerous states, including Connecticut, Illinois, Maine, Michigan, New Hampshire, New Jersey, New Mexico, and Utah, require holders of liquor licenses to refrain from discriminating against women and minorities;²⁵⁰ these states will confiscate the liquor licenses of clubs engaging in such discrimination.²⁵¹

This is a stiff social and financial penalty and is potentially an extremely useful tactic in ending discrimination at country clubs. Members of a country club that discriminates would be forced either to end the discriminatory practices or refrain from consuming alcohol at the club. At a club that chooses the latter option, it is

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

249. See *BPOE Lodge No. 2043 v. Ingraham*, 297 A.2d 607, 608–16, 619–20 (Me. 1972) (holding that a state statute prohibiting private clubs from using race as a membership criteria allowed the Maine Liquor Commission to legally refuse to renew the liquor licenses of fifteen Elks Lodges); see also *Vaspourakan, Ltd. v. Mass. Alcoholic Beverages Control Comm'n*, 516 N.E.2d 1153, 1154–55 (Mass. 1987) (holding that the state's antidiscrimination statute permitted a night club's liquor license to be revoked after it denied African Americans entrance); *Beynon v. St. George-Dixie Lodge No. 1743*, BPOE, 854 P.2d 513, 514–19 (Utah 1993) (holding that the sale of alcoholic beverages by an Elks Lodge made it subject to the antidiscrimination provisions of the Utah Civil Rights Act, as it qualified it as an "enterprise regulated by the state"); *Coalition For Open Doors v. Annapolis Lodge No. 622*, BPOE, 635 A.2d 412, 413 (Md. 1994) (holding that city may condition the grant or renewal of a liquor license on proof that a private club does not discriminate in its membership policies on the basis of race, gender, religion, physical handicap, or national origin). See also *Jolly-Ryan*, *supra* note 3, at 519–20.

250. See *Elks Lodges Nos. 719 & 2021 v. Utah Department of Alcoholic Beverage Control*, 905 P.2d 1189, 1200 (Utah 1995); see also 235 ILL. COMP. STAT. ANN. 5/6–17 (West 1993); ME. REV. STAT. ANN. tit. 17, § 1301-A (West Supp. 2002); UTAH CODE ANN. §§ 32A-5-102(3)(a), -102(3)(b), -103(7), -105(2)(c) (2001); CONN. GEN. STAT. § 52-571d (West Supp. 2003).

251. The Connecticut statute allows courts to revoke the liquor licenses of country clubs that discriminate on the basis of gender, race, religion, national origin, marital status, or sexual orientation. The New Jersey statute allows the state to withhold liquor licenses from private clubs that hold public functions (such as weddings) and engage in gender discrimination. In New Hampshire, there are clear standards that must be met before an establishment can receive a liquor license. 13 N.H. REV. STAT. ANN. § 178:4 (2002). Liquor licenses must be renewed each year, and there is a provision which states, "the vendor's license shall expire annually on the last day of the month of the incorporation or other organization of the liquor company and shall be renewed annually by the commission, upon application, unless the commission finds, after notice and hearing, that the renewal of such license would be against the public interest." *Id.* This consideration could include an analysis of membership or other policies that are deemed discriminatory.

highly unlikely that the members would become teetotalers; they would likely seek out alternative places to imbibe. This would impose a severe financial burden on the club, as it would lose a significant amount of revenues from both the sale of alcoholic beverages and the corresponding decrease in the club's restaurant business, as many members would likely choose to patronize an establishment where they could drink alcohol with their meals. This loss of revenues would have to be recouped from another area of the club's operations and may lead to higher dues or initiation fees for the club's membership.

The increased prices could ultimately have a chilling effect on membership, as individuals may be resistant to such higher costs. In addition, the social costs associated with the loss of a liquor license are not insignificant. As previously mentioned, socializing with friends and associates is for many individuals the greatest benefit of club membership. As alcohol consumption is part of this social milieu, the loss of this privilege is significant; club members would likely spend less time at the country club as they sought to socialize in a more desirable, 'user-friendly' setting. As the club became less important in the social lives of its members, membership would lose its cachet—and its value.

C. Removal of Tax Exempt Status

As non-profit organizations, private country clubs are exempted from federal and state income tax liability.²⁵² This provides a tremendous financial benefit to country clubs at taxpayers' expense.²⁵³ Thus, the government implicitly subsidizes discrimination at many country clubs; the exemption from federal taxes applies even if a club discriminates, provided that the invidious policy is unwritten.²⁵⁴

252. Section 501(a) of the tax code states, "An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503." I.R.C. § 501(a) (1999). The country club exemption is found in 501 (c) (7) which states, "Clubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder." I.R.C. § 501(c)(7) (1999).

253. Every year in Texas, private recreational clubs save an estimated \$1.1 million by not paying state franchise taxes; several clubs in Dallas save approximately \$1.7 million each in federal income taxes every year because of the exemption. Tracy Everbach & Mark Wrolstad, *Most Elite Country Clubs Haven't Admitted Blacks*, DALLAS MORNING NEWS, May 22, 1997, at 1A.

254. See *McGlotten v. Connally*, 338 F. Supp. 448, 457–58 (D.D.C. 1972) (holding that the granting of a tax exemption to Elks Lodge with racially discriminatory admissions policy

While the tax code includes a provision that forces social clubs to adhere to a practice of nondiscrimination, the requirement has little practical effect. Internal Revenue Code section 501 (i) states:

Notwithstanding subsection (a), an organization which is described in subsection (c) (7) shall not be exempt from taxation under subsection (a) for any taxable year if, at any time during such taxable year, the charter, bylaws, or other governing instrument, of such organization . . . contains a provision which provides for discrimination against any person on the basis of race, color, or religion.²⁵⁵

The obvious problem with this statement is the fact that is highly unlikely that a country club that discriminates puts its policy in writing.²⁵⁶ One solution to this problem would be to amend the provision to account for obvious discrimination that is unwritten but occurs nonetheless. Though members of country clubs often claim that the disparity in membership amongst minorities and women is a result of socioeconomic considerations rather than any outward discrimination, country club discrimination potentially could be proven by a statistical analysis of membership figures similar to the method approved in an employment context by the Supreme Court in *Griggs v. Duke Power Co.*²⁵⁷ There, the Court determined that the plaintiff need not prove intent on the part of the defendant, but must only prove a disproportionate impact on a protected group.²⁵⁸

If a court were to apply a similar method of statistical analysis in a non-employment context and the analysis showed that discrimination was taking place, the tax-exempt status of the country club in question could be attacked on this basis. However, it is unlikely that a court would apply this standard in a non-employment context. Members of a country club that is forced to pay federal

is constitutional and is not equivalent to a government involvement in or approval of racial discrimination).

255. I.R.C. § 501(i) (1999).

256. While doing so would clearly establish the existence of the club's discriminatory policy and lead to a loss of its exemption from federal taxes, it would not necessarily make it easier for members of protected classes to ultimately prevail in court. In *Dale*, the Supreme Court stated that had the Boy Scouts put its policy of denouncing homosexuality in writing, the group may have been able to avoid having to prove that they were sincere in this belief and thus were justified in enforcing it under their freedom of expressive association. 120 S. Ct. 2446 (2000).

257. 401 U.S. 424 (1971).

258. *Id.* at 428-29.

income taxes on its revenues would face a dramatic increase in their assessments, dues and/or initiation fees in order for the club to be able pay for its tax liability. This is a significant financial burden that could be substantial enough to force the club to end its discriminatory practices. Attacking the substantial tax advantages that country clubs enjoy would make for sensible and fair tax policy. A country club should not enjoy the benefits of favorable tax rules if it discriminates against minorities, and taxpayers should not be forced to subsidize entities that engage in behavior that many find odious.

Another aspect of federal tax policy that is dubious with respect to country clubs involves allowable business entertainment deductions. While individuals are no longer allowed to deduct membership dues or initiation fees as business expenses,²⁵⁹ they are allowed to deduct 50 percent of expenses directly related to or associated with business.²⁶⁰ Allowable expenses include those involving entertainment and meals at any club whatsoever—including country clubs that discriminate.²⁶¹ Through the business entertainment deductions, taxpayers are again subsidizing business activity occurring at private clubs that discriminate. The deduction should be disallowed if the expenses are incurred at a country club that engages in discrimination.

The state of California's tax code provides a useful model for possible changes to the Internal Revenue Code. In California, no deduction is allowed for "expenditures made at, or payments made to, a club which restricts membership or the use of its services or facilities on the basis of age, sex, race, religion, color, ancestry, or national origin."²⁶² Though appealingly straightforward, California's policy is not practical to administer. Implementation of this restriction would be difficult for two reasons. First, it is unclear who would ultimately bear the responsibility of establishing that a particular country club engages in discrimination. Courts and agencies at both the federal and state levels could potentially make such a determination; it is foreseeable that difficulties could arise surrounding the overlapping jurisdiction of the various entities.

A second issue involves the administrative difficulty of disallowing the deductions by members of a country club pursuant to a determination that their club engages in discriminatory practices.

259. "No deduction shall be allowed under this chapter for amounts paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purpose." I.R.C. § 274(a)(3) (1999).

260. See I.R.C. § 274(n) (1999).

261. See *id.*

262. Cal. Rev. & Tax. Code § 24343.2(a) (West 2000).

Every member of the club, their guests, and any outside groups that used the club's facilities for business purposes would need to be audited in order to determine whether improper deductions were taken. This is an extremely overwhelming task that places unrealistic demands on government agencies.²⁶³

D. Removal of Property Tax Exemptions

Property taxes are another area where country clubs are vulnerable. Country clubs typically have expansive facilities, both indoors and outside on their property. Clubs may also have a substantial amount of land under their control, particularly if a golf course is part of the facility. If their land were properly assessed, country clubs would incur steep property taxes. However, many country clubs that operate golf courses have been afforded generous abatements under state 'open spaces' laws. These laws provide tax incentives to country clubs to maintain their land as open spaces by extending them favorable land appraisals and commensurately lower property taxes.²⁶⁴ The maintenance of land for recreational and environmental purposes may be a legitimate goal; however, in cases of country clubs that practice discrimination, these allowances should be revoked.

Some states require that country clubs refrain from discrimination in order to qualify for property tax exemptions.²⁶⁵ This

263. One commentator has estimated that an audit of a single taxpayer could take one year. See Jolly-Ryan, *supra* note 3, at 524.

264. Typical of these laws, the Minnesota Open Space Property Tax Law has the following purpose:

The present general system of ad valorem property taxation in the state of Minnesota does not provide an equitable basis for the taxation of certain private outdoor recreational, open space and park land property and has resulted in excessive taxes on some of these lands. Therefore, it is hereby declared that the public policy of this state would be best served by equalizing tax burdens upon private outdoor, recreational, open space and park land within this state through appropriate taxing measures to encourage private development of these lands which would otherwise not occur or have to be provided by governmental authority.

MINN. STAT. § 273.112.2 (2000).

265. In Minnesota, private country clubs with fifty or more members and more than five acres of property are denied property tax deferments if they discriminate in membership requirements or selection, or limit access to golf, beverage, or dining facilities on the basis of sex or marital status. See MINN. STAT. § 273.112.3 (2000). In order to qualify for the deferments every year, these clubs must make an affirmative showing that they do not discriminate in their bylaw, rules, and regulations. See MINN. STAT. § 273.112.6 (2000). A

requirement is valid under the U.S. constitution.²⁶⁶ Implementing a policy that grants preferential treatment to only those country clubs that do not discriminate could coerce those clubs that engage in bigotry, segregation, and intolerance to reconsider their practices in order to avoid the severe financial burden that would result were the club ineligible for a property tax abatement.

E. Sanctions by Professional Athletes, Tours and Governing Bodies

Like the country clubs at which their tournaments are held, the governing bodies of golf in the United States have a long history of discrimination. From 1943 to 1961, the Professional Golfers' Association of America (PGA) banned African-Americans from membership.²⁶⁷ The "Caucasians—only" clause was codified in the PGA's constitution and bylaws: "Professional golfers of the Caucasian race, over the age of eighteen years, residing in North or South America, and have served at least five years in the profession . . . shall be eligible for membership."²⁶⁸ In the early 1950's African-American professional golfers Teddy Rhodes and Bill Spiller sued the PGA Tour under the California public accommodations law when they were denied entry into the Richmond Open, a PGA Tour event in northern California.²⁶⁹ The lawsuit was dismissed after the PGA promised not to discriminate against anyone because of color.²⁷⁰

This promise has long been ignored.²⁷¹ After the PGA received negative publicity when professional boxer (and nascent golfer)

failure to do results in a club being assessed as if it were regular property. *See id.* § 273.112.4 (2000). *See also* Maryland Tax-Property Code Ann. § 8-214 (2001) (denying tax abatement to country clubs that discriminate on the basis of race, color, creed, sex, or national origin in membership or guest privileges). The Maryland Department of Assessment and Taxation's Real Estate Division recently began the process of assessing and reassessing the value of every golf course in the state. *See Maryland Golf and Country Clubs—Tax Alert*, available at <http://www.natclub.org/maryland.htm> (on file with the University of Michigan Journal of Law Reform).

266. *See* State of Md. v. Burning Tree Club, Inc., 315 Md. 254 (1989), *cert. denied*, 493 U.S. 816 (1989) (prohibition of gender discrimination at country clubs with open spaces contract does not infringe on members' First Amendment rights).

267. *See* KENNEDY, *supra* note 3, at 20–21.

268. *Id.* (summarizing former Section 1, Article III of PGA Const. & Bylaws). Though the United States Golf Association (USGA) never adopted a similar clause, it followed the unwritten segregative rules of its member clubs. *Id.* at 100.

269. *Id.* at 52–55.

270. *Id.* at 62.

271. *Id.* at 64.

Joe Louis was banned from playing in a Tour event in 1952,²⁷² it changed some of its policies and allowed African-Americans to play if the tournament's sponsors and host club acquiesced.²⁷³ However, they were still not allowed in the host club's locker rooms and clubhouses²⁷⁴ and did not play in tournaments held in the South, as the PGA's fear of a negative reaction from its Southern sponsors and fan base prevented it from changing its policy.²⁷⁵ This resulted in African-Americans playing in only 10–15 of the Tour's 40 events every year from 1952 to 1961.²⁷⁶ Though Charlie Sifford became the first African-American golfer to play in a PGA Tour event in the South in 1960,²⁷⁷ the PGA refused to remove its "Caucasians—only" clause in 1961 despite threats by the California Attorney General that he would disrupt the 1962 PGA Championship to be held in the state.²⁷⁸ Instead of changing its discriminatory rule, the PGA moved its 1962 championship to Aronimink Country Club in Pennsylvania.²⁷⁹ The PGA finally removed the Caucasians-only clause in November, 1961.²⁸⁰

Despite Lee Elder becoming the first African-American to compete in the Masters tournament in 1975²⁸¹ and Calvin Peete winning more tournaments from 1982–85 than any other PGA player,²⁸² the barriers to African-American golfers remained, but were largely ignored by the popular press until a much-publicized interview in 1990. Hall Thompson, the president and co-founder of the Shoal Creek Golf and Country Club in Birmingham, Alabama did not mince words when questioned about the club's racially discriminatory admissions policy weeks before the club hosted the 1990 PGA Championship. Thompson stated, "The country club is our home and we pick and choose who we want . . . I think we've said we don't discriminate in every other area except for the blacks."²⁸³ In response to a question about whether members brought African-Americans to the club as guests, Thompson

272. The PGA ultimately relented and allowed Louis to play in the tournament after he stated, "I want people to know what the PGA is . . . We've got another Hitler to get by." *Id.* at 72–73.

273. *Id.* at 83.

274. *Id.* at 85.

275. *Id.* at 87–88.

276. *Id.* at 89.

277. *Id.* at 130. The event was the Greater Greensboro Open. *Id.*

278. *Id.* at 133–37.

279. *Id.* at 136.

280. *Id.* at 139.

281. *Id.* at 221.

282. *Id.* at 245–46.

283. *Id.* at 249.

remarked, “[T]hat’s just not done in Birmingham.”²⁸⁴ The subsequent controversy included threats of economic boycott by civil rights leaders that resulted in several tournament sponsors withdrawing from the event, the free admission of Louis Willie, an African-American businessman from Birmingham, as an honorary member of Shoal Creek Golf and Country Club days before the tournament began, and Thompson’s resignation as club president.²⁸⁵

Following the Shoal Creek controversy, the USGA, PGA of America, PGA Tour and Ladies Professional Golf Association (LPGA) Tour revised their tournament site selection policies to require that country clubs hosting events demonstrate that they are demonstrably open to minorities.²⁸⁶ While prestigious country clubs such as Augusta National, Crooked Stick, and Baltusrol admitted their first minority members shortly thereafter,²⁸⁷ numerous others decided to forsake the opportunity to host future events rather than amend their admissions policies.²⁸⁸ In addition, the tours and governing bodies established The First Tee, a program developed to increase racial and ethnic youth participation rates among underserved

284. See John Davis, *Woods Still the Exception*, ARIZ. REPUBLIC, Aug. 24, 2000, at C9.

285. *Id.*

286. *Id.* Issued in 1991, the LPGA’s policy statement concerning discrimination reads: “The LPGA reiterates its opposition to discrimination in any form. The LPGA will require of all sponsors with whom it contracts to hold a tournament that such tournaments be held only at golf courses which do not and will not discriminate in their membership policies on the basis of race, religion, gender or national origin. To this end, the LPGA, when contracting with a sponsor, will require that the sponsor agree and confirm in writing that it will not contract to hold a tournament at any golf course or club unless such golf course or club agrees in writing that it does not and will not discriminate in its membership policies, either directly or indirectly, on the basis of race, religion, gender or national origin, and that the sponsor will extend its best efforts to determine and ensure that such statement, when given to it by a contracting golf course or club, reflects the actual policy and practices of said golf course or club.” Presentation by Libba Galloway, Senior Vice President and Chief Legal Officer, LPGA, to the Sport Lawyers Association Annual Conference (May 18, 2001) (on file with the University of Michigan Journal of Law Reform).

287. *Id.*

288. See Shropshire, *supra* note 23, at 635. The dissident clubs and tournaments included: Butler National (Western Open), Cypress Point Golf Club (AT&T Pebble Beach Pro-Am), Old Warson Country Club (Southwestern Bell Senior Classic), Skokie Country Club (Ameritech Senior Open), Amarillo Country Club (Ben Hogan Amarillo Open), The Golf Club of Louisiana (Ben Hogan Baton Rouge Open), St. Louis Country Club (1992 U.S. Women’s Amateur), Chicago Golf Club (1993 Walker Cup), Annandale Golf Club (1993 U.S. Women’s Amateur), Merion Golf Club (1994 U.S. Women’s Open), and Aronimink Golf Club (1993 PGA Championship). See Jaime Diaz, *In Golf, Integration is More Than 9-Iron Away*, N.Y. TIMES, Aug. 5, 1991, at C1.

populations.²⁸⁹ Finally, the USGA appointed its first African-American executive board member in 1992.²⁹⁰

Despite these measures, in many ways the tours and governing bodies remain as reticent today as they were forty years ago when they adhered to the “Caucasians-only” clause. One commentator has referred to the PGA and LPGA Tours’ nondiscrimination policy as “tokenism at its worst.”²⁹¹ The adoption of these policies may have eased public pressure on the professional golf tours, but it has had little effect on the membership policies of the country clubs that host their events.²⁹² Race and gender-based discrimination at these elite clubs is still a rule rather than an exception, and the professional tours and governing bodies seem to disregard their edict when making tournament site selections. Although the 2002 U.S. (‘People’s’) Open golf tournament was the first to be played on a truly public course, the Masters tournament is still played at Augusta National Golf Club, a prestigious club that has never had any female members and has five African-Americans among its approximately 300 members.²⁹³ Augusta National chairman Hootie Johnson defiantly responded to a letter from the National Council of Women’s Organizations urging the club to admit female members.²⁹⁴ Similarly, only two of the 1,300 members of The Country

289. See Davis, *supra* note 284. These bodies earmarked over \$10 million for this program from 1998–2000. *Id.*

290. See KENNEDY, *supra* note 3, at 249.

291. See Moss, *supra* note 15, at 163.

292. See Shropshire, *supra* note 23, at 634–35.

293. See Black Athlete Sports Network, *African American With A Problem*, available at <http://www.blackathlete.net/Blackbox/blackbox111402.html> (on file with the University of Michigan Journal of Law Reform).

294. Johnson’s response stated:

We have been contacted by Martha Burk, Chair of the National Council of Women’s Organizations (NCWO), and strongly urged to radically change our membership. Dr. Burk said this change should take place before the Masters Tournament next spring in order to avoid it becoming ‘an issue.’ She suggested that NCWO’s leadership ‘discuss this matter’ with us.

We want the American public to be aware of this action right from the beginning. We have advised Dr. Burk that we do not intend to participate in such backroom discussions.

We take our membership very seriously. It is the very fabric of our club. Our members are people who enjoy each other’s company and the game of golf. Our membership alone decides our membership—not any outside group with its own agenda.

We are not unmindful of the good work undertaken by Dr. Burk’s organization in global human rights, Social Security reform, reproductive health, education, spousal

abuse and workplace equality, among others. We are therefore puzzled as to why they have targeted our private golf club.

Dr. Burk's letter incorporates a deadline tied to the Masters and refers to sponsors of the tournament's telecast. These references make it abundantly clear that Augusta National Golf Club is being threatened with a public campaign designed to use economic pressure to achieve a goal of NCWO.

Augusta National and the Masters—while happily entwined—are quite different. One is a private club. The other is a world-class sports event of great public interest. It is insidious to attempt to use one to alter the essence of the other. The essence of a private club is privacy.

Nevertheless, the threatening tone of Dr. Burk's letter signals the probability of a full-scale effort to force Augusta National to yield to NCWO's will.

We expect such a campaign would attempt to depict the members of our club as insensitive bigots and coerce the sponsors of the Masters to disassociate themselves under threat—real or implied—of boycotts and other economic pressures.

We might see 'celebrity' interviews and talk show guests discussing the 'morality' of private clubs. We could also anticipate op-ed articles and editorials.

There could be attempts at direct contact with board members of sponsoring corporations and inflammatory mailings to stockholders and investment institutions. We might see everything from picketing and boycotts to t-shirts and bumper stickers. On the internet, there could be active chat rooms and email messaging. These are all elements of such campaigns.

We certainly hope none of that happens. However, the message delivered to us was clearly coercive.

We will not be bullied, threatened or intimidated.

Obviously, Dr. Burk and her colleagues view themselves as agents of change and feel any organization that has stood the test of time and has strong roots in tradition—and does not fit their profile—needs to be changed.

We do not intend to become a trophy in their display case.

There may well come a day when women will be invited to join our membership but that timetable will be ours and not at the point of a bayonet.

We do not intend to be further distracted by this matter. We will not make additional comments or respond to the taunts and gripes artificially generated by the corporate campaign.

We shall continue our traditions and prepare Augusta National Golf Club to host the Masters as we have since 1934.

With all due respect, we hope Dr. Burk and her colleagues recognize the sanctity of our privacy and continue their good work in a more appropriate arena.

Club in Brookline, Massachusetts are African-American,²⁹⁵ yet the club hosted the 1999 Ryder Cup and was awarded the 2005 PGA Championship, which the club subsequently relinquished because it could not accommodate the size of the event.²⁹⁶ The professional golf tours could potentially help eradicate discrimination at the country clubs that host their events by making their membership requirements more rigorous and then imposing harsh sanctions on clubs that refuse to comply. While the removal (or threat thereof) of a tournament from a club engaging in discrimination is certainly a drastic action, the risk of negative publicity and the potential for financial loss could force a club to truly change its policy rather than add one or two minorities as a symbolic gesture meant merely to placate its critics.

However, it is unlikely that the professional golf tours and governing bodies will adopt such measures. The PGA Tour refused the National Council of Women's Organizations' (NCWO) request to discontinue its recognition of the Masters as an official event and to no longer count players' Masters earnings on the Tour's money list.²⁹⁷ In a letter to NCWO chairwoman Martha Burk, PGA Tour commissioner Tim Finchem wrote, "It is recognized around the world as a major championship . . . and is a significant part of the structure of professional golf. We have concluded that we must continue to recognize the Masters Tournament as one of professional golf's major championships."²⁹⁸ Eradicating discrimination is not a priority for these entities;²⁹⁹ their efforts are focused on television contracts, marketing, and other business issues instead of social issues.³⁰⁰ In addition, the adoption of these measures would impact only a select few of the country's estimated 5,000 private

Reform). The letter from NCWO Chair Martha Burk to Mr. Johnson that lead to this response can be viewed at <http://www.womensorganizations.org/news/augustaletter.pdf> (on file with the University of Michigan Journal of Law Reform).

295. See Baltasar Garzon, "Integration Lacking at Course Which Is Indeed Exclusive," SCOTLAND ON SUNDAY, Sept. 26, 1999, at T2. The LPGA is likely to face a similar dilemma in the future, as the rotation of the British Open amongst clubs throughout Great Britain will eventually lead to a conflict when the event is held at The Royal and Ancient Golf Club of St. Andrews, Scotland, which specifically excludes women from many parts of its clubhouse. See Galloway, *supra* note 286.

296. See *PGA Calendar of Future Events*, available at <http://www.pga.com/tour/calendar/future.html> (on file with the University of Michigan Journal of Law Reform). See *Taniguchi Leads Nissan, Hoping to Join the Tour*, N.Y. TIMES, Feb. 16, 2002, at D8.

297. See *Tour, Players Lukewarm About Women at Augusta*, Sept. 10, 2002, available at <http://sports.espn.go.com/golf/story?id=1427651> (on file with the University of Michigan Journal of Law Reform).

298. *Id.*

299. Personal Interview with Libba Galloway, May 18, 2001.

300. *Id.*

clubs that host professional tournaments. The PGA Tour had 51 official events on its 2003 schedule,³⁰¹ while the LPGA had 34 on its 2003 schedule.³⁰² Thus, the vast majority of country clubs would be unaffected by any Tour regulations. Despite this limited reach, it is critical that the professional tours impose more rigorous membership requirements upon the private clubs that host its tournaments. This would send an important message to private clubs and their members—that the country's most visible golfing establishments do not tolerate discrimination. This proactive stance may set an example that other venerable institutions—principally, country clubs—seek to emulate.

Another potential solution associated with the professional tours requires the involvement of the professional athletes competing in tour events. While it is perhaps unfair to place the burden of curtailing discrimination on individuals who had nothing to do with establishing this long-held tradition, the power of these professional athletes to effect change not be underestimated. Social responsibility among professional athletes in the context of combating discrimination is not without precedent. Golf legend Tom Watson resigned his membership at the Kansas City Country Club when it rejected tax guru Henry Block because he was Jewish,³⁰³ and tennis star Serena Williams honored an NAACP-led boycott by refusing to play in the 2000 Family Circle Cup in South Carolina during the controversy surrounding the presence of the Confederate flag atop the state's capitol.

Yet, perhaps due to their relatively short career length or the fear of reprisal from their sponsors, most athletes on the professional tours are unwilling to engage in similar acts. PGA Tour players were largely unwilling to pledge their support to the NCWO in its controversy with the Masters, refusing to become involved in any boycotts of the tournament.³⁰⁴ John Daly, one of the

301. See 2003 PGA Tour Schedule, available at <http://www.pgatour.com/tournaments/pgatour.html> (on file with the University of Michigan Journal of Law Reform).

302. See *LPGA announces complete 2003 Tour schedule*, Feb. 5, 2003, at http://www.lpga.com/news/index.cfm?cont_id=162117 (on file with the University of Michigan Journal of Law Reform).

303. See Moss, *supra* note 15, at 161. Watson's wife and children are Jewish. *Id.*

304. See *Tour, Players Lukewarm About Women at Augusta*, *supra* note 297. Former Masters champion Mark O'Meara stated, "I'm all for a woman becoming president or equal pay for women but this is a First Amendment issue. This is a private club and they can choose who they want to include. If you don't like the policy, don't go to the tournament." *Id.* Former PGA Championship winner Bob Tway was even more forceful in his rebuke, saying, "I'd go to the Masters through hell or high water to show them they're full of a hill of beans. What does it matter to put a woman CEO making millions in the club? What does that prove?" *Id.* PGA Tour veteran Mike Weir was more diplomatic, opining, "I doubt many of the guys will say anything." *Id.*

PGA Tour's most popular players, stated, "I would not consider that. If I got into Augusta, I would play. It's a major. It's a tournament we dream as little kids of winning. Women protesting it shouldn't take it out on us for playing in it."³⁰⁵ However, Daly may have also echoed the beliefs of many players when he stated, "He's got so much power in the game right now. If Tiger was to say, 'I'm not going to play Augusta if they don't allow women,' then I'd side with Tiger. But it would have to be all the players. And that's not going to happen."

Yet Tiger Woods, the only African-American golfer on the PGA Tour, has refused to become involved in race-related protests and seems resigned to believing that, while he would like for country clubs to become more accessible, he is powerless in the face of a long-held tradition and larger societal issues. In response to questions about gender-based discrimination at Augusta National and race-based discrimination at other clubs, Woods answered,

[I]t's one of those things where everyone has—they're entitled to set up their own rules the way they want them. It would be nice to see everyone have an equal chance to participate if they wanted to, but there is nothing you can do about it. If you have a group, an organization, that's the way they want to set it up, it's their prerogative to set it up that way It's unfortunate that it is that way, but it's just the way it is. There are clubs that have segregated, whether it's sex or race, one of those two issues, and—or even age, those are issues and those are things that have happened and will continue to occur and they will continue to exist for a long period of time It would be nice to see every golf course open to everyone who wanted to participate, but that's just not where society is. If you just pigeonholed this single issue, I think you're not doing justice in the bigger scope, and I think there are a lot of other things that go into it. It's not just simple, he's too young or he's not the right race or he doesn't believe in the right religion, there's a lot more to it than just that.³⁰⁶

Woods declined to honor the aforementioned NAACP economic boycott when he played in the 2000 MCI Heritage

305. *Id.*

306. See Tiger Woods Press Conference: British Open, Jul. 16, 2002, Muirfield, East Lothian, Scotland, available at <http://www.tigerwoods.com/news/fulltext.sps?sid=825&lid=1&aid=16222&atpval=0> (on file with the University of Michigan Journal of Law Reform).

Classic, a PGA event held in South Carolina.³⁰⁷ When asked about the boycott, Woods responded, "I'm a golfer. That's their deal, you know?"³⁰⁸ In 1994, Woods rejected a request not to play in a college tournament at Shoal Creek Country Club.³⁰⁹ Woods is the most popular athlete in the world, and perhaps the most powerful person in the sports industry.³¹⁰ His words and actions yield tremendous influence, and despite his apparent beliefs, he has considerable ability to effect social change at numerous country clubs by threatening to boycott tournaments played at those clubs having a discriminatory membership policy.³¹¹ A club faced with a potential Woods boycott would be forced to make the difficult decision to either change its membership policies to make the club truly open or host a tournament missing the sport's biggest drawing card.³¹² Though some clubs would choose the latter option

307. See Wickham, *supra* note 2.

308. S.L. Price, *Tunnel Vision*, Sports Illustrated, April 3, 2000, at 89.

309. See *id.*

310. Sporting News recently named Woods the most powerful individual in sports. Michael Kinsley, *TSN 100 Most Powerful*, SPORTING NEWS (on file with the University of Michigan Journal of Law Reform).

311. When asked if his stature could allow him to force change, Woods has stated, "I've done my part so far trying to get more kids who haven't been able to have access to the game, that's what my foundation is all about, so . . . I'm trying to do my share in my sector where I'm really focused on [kids], and it's not easy . . . it's not easy." Tiger Woods Press Conference: British Open, *supra* note 306. At a later press conference, Woods gave a more elaborate response to the question:

You were in support of women at Augusta and with your popularity and success, do you think you have the power to change golf and change some of those clubs and some of those rules?" He answered, "I'd like to, yes. Certainly I'd like to. I'd like to see that happen. I'd like to think I have the influence to do that. But if you notice, look at the history of Augusta National and just look at the way they've conducted themselves over the history of the tournament and their policies and how they've run the tournament, you'll see they make change when they want to make change. At the players' dinners when we've had some informational conversations with the chairman of the tournament, and let me tell you, they run it the way they want to run it. It's their prerogative.

But I'd like to say I have made a little bit of difference in this game, as far as accessibility into our sport, kids, minorities, participating in the game, and I'd like to do more. I would love to do more. My foundation is trying to do that and we have got a lot of plans to do even more.

Tiger Woods Press Conference: Buick Open, Sunday, Aug. 11, 2002, Warwick Hills Golf & Country Club, Grand Blanc, Michigan, available at <http://www.tigerwoods.com/news/fulltext.sps?sid=825&lid=1&aid=17280> (last visited on Sept 6, 2002).

312. This would have a sizable financial impact on the event. Television ratings and attendance figures are significantly higher when Woods plays, making sponsorship opportunities at those events significantly more valuable.

on principle,³¹³ it is certain that others would bend to the economic forces and amend their membership policies. The threat of boycott would be even stronger if other popular Tour players joined Woods.³¹⁴ In response to a question about the possibility of boycotting the Masters because of Augusta National's membership policy, Woods responded, "Will other players do the same? If they don't, then what happens? Then the defending champion doesn't play."³¹⁵ It is possible that other leading PGA Tour players would follow a boycott led by Tiger Woods. This could place a significant strain on the club hosting the tournament.

F. Internal Solutions to Country Club Discrimination

The simplest way to combat discrimination at a country club is for members to recognize the need for a change in club policy and pressure the membership to end its perpetuation of discrimination. While pushing for change from within seems simple in theory, in reality it is quite difficult. There exists a long tradition of discrimination in country clubs that is deeply ingrained into its culture; most individuals have strong feelings about their club's membership policies and are quite resistant to changing them; these individuals may simply not believe that it is necessary to change the rules. A member seeking to change club policy risks a wide range of negative consequences—from social ostracism by fellow club members to a loss of business.

The nine women who successfully challenged the discriminatory practices at Haverhill Golf and Country Club have suffered from such treatment since initiating their lawsuit.³¹⁶ Their triumph has been Pyrrhic in many ways, with substantial emotional, social, and

313. See *supra* note 288 (discussing country clubs that refused to change their admissions policies to adhere to the PGA's requirements).

314. This is highly unlikely, as most players seem uninterested in wielding their power for social good. For example, Fred Couples, a high-profile player, is involved in the design of a men-only golf course in Arizona. See *Couples Helping to Design Men-Only Course*, available at <http://sports.espn.go.com/golf/story?id=1242938> (on file with the University of Michigan Journal of Law Reform). Other PGA Tour players such as David Toms and Charles Howell III support Augusta National's exclusion of women. See *Augusta Issue Likely to Dominate Golf's Offseason*, GOLFWEB WIRE SERVICES, Nov. 2, 2002, available at <http://www.golfweb.com/u/ce/multi/0,1977,5853689,00.html> (on file with the University of Michigan Journal of Law Reform).

315. *Tiger Woods Press Conference: Buick Open*, *supra* note 311.

316. See Marcia Chambers, *The High Price of Victory*, N.Y. Times, Apr. 4, 2001, at D1.

financial losses accompanying their legal victory.³¹⁷ While lost friendships are a normal consequence of litigation, it is an especially troublesome consequence in the country club context. The country club plays a large role in the social lives of many of its members, as numerous friendships exist in every club; a primary reason that people join clubs is to associate with their friends in a relaxed social setting. When a disaffected member challenges the country club's system, these social benefits end. The country club becomes a place where the member is despised rather than liked; ignored rather than acknowledged both on the golf course and the clubhouse; and treated with hostility instead of kindness.³¹⁸ Not surprisingly, several of the plaintiffs in *Haverhill* have resigned as members of the country club since the court's decision.³¹⁹

Financial costs are also a consequence of challenging country club discrimination. Club members frequently do business with each other; this is a primary reason why many individuals join country clubs. An individual challenging discrimination at her club will likely lose business; the other club members may seek financial revenge by taking their business away.³²⁰

Surprisingly, the efforts of those who challenge discriminatory practices at their club is often unappreciated by other similarly situated members of their club. At Haverhill Golf and Country Club, other female members of the club did not support the plaintiffs; instead, the plaintiffs were labeled as troublemakers.³²¹ One plaintiff expressed her frustration in commenting, "What we fought for was their rights, their tee times, their access to the course But these new women don't care."³²² In many ways, the negative backlash makes the effort to end discrimination at one's own club seem fruitless. This likely discourages many members from challenging unfair practices at their own club. It is too risky for most club members to get involved in fighting against discrimination. Change in the discriminatory climate that surrounds most country clubs is unlikely to happen from within.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* This financial loss may also extend to the family members of the individual challenging the discrimination. The husband of one of the plaintiffs in *Haverhill* lost several clients as a result of his wife's lawsuit. *Id.*

321. *Id.*

322. *Id.* at D4 (remarks of Lorna Kimball).

G. External Solutions to Country Club Discrimination

In order to lessen the financial burden placed on their membership, the majority of clubs seek to derive revenues by allowing outside groups to hold meetings, events, or conduct business at the clubs.³²³ These groups may exert economic pressure on country clubs that engage in discrimination by refusing to lease the club's facilities. While an individual group that acts on its own may behave ethically in refusing to subsidize discrimination, this is unlikely to lead to the end of a club's discriminatory policy.³²⁴ However, there is likely to be 'strength in numbers'—if a critical mass of groups joins the boycott, the country club may be forced to effectuate any desired changes in order to avoid significant financial consequences. This solution could be particularly effective in addressing discrimination at country clubs that play host to professional golf events. If the companies that sponsor and advertise on broadcasts of professional events refused to do so when they are held at private clubs that embrace discriminatory policies, the potential loss of revenue could force the clubs to make the desired changes.

To ease the pressure placed on its three primary sponsors and to prevent these companies from exerting any influence over the club during the pendency of its membership controversy, Augusta National suspended its contracts with IBM, Coca-Cola, and Citigroup for the 2003 Masters tournament.³²⁵ Since these companies were the only three advertisers on the Masters tournament television broadcasts on CBS, the tournament was commercial-free.³²⁶ This unprecedented action occurred even though these companies initially indicated that were unwilling to engage in such behavior, claiming that they sponsored the tournament held at the club, rather than the club itself.³²⁷ This reasoning is flawed. Though Augusta National has operated the Masters since 1934 and does so

323. See Jolly-Ryan, *supra* note 3, at 528.

324. The author was a senior member of a high school soccer team that was comprised of a large number of Jewish players. The team refused to use a local country club that was the traditional site of the annual team banquet when it was learned that the club discriminated against Jews in its membership policy. Despite its awareness of the reason for the boycott, the club's policy remains unchanged.

325. See *Move Comes from Conflict with Women's Group*, Sept. 1, 2002, available at <http://sports.espn.go.com/golf/story?id=1425166> (on file with the University of Michigan Journal of Law Reform).

326. *Id.*

327. See Richard Sandomir, *Sponsors Sidestep Debate*, N.Y. TIMES, Jul. 18, 2002, at D2.

independently of the PGA Tour, the club receives approximately \$3 million per year from CBS to broadcast the tournament³²⁸ and significant revenues from the sale of licensed products during the tournament.³²⁹ Augusta National and the Masters tournament are necessarily intertwined, as are all professional golf events and their host facilities. Presumably, the decision to drop its television sponsors will cost Augusta National a significant amount of money, which could force the club to pass this cost along to its members or raise ticket prices for the Masters tournament.³³⁰ In addition, it is expected that CBS will be pressured to drop its coverage of the Masters tournament altogether, with allegations that its coverage of the tournament supported and legitimized the club's exclusionary practices.³³¹

Another area in which external pressures could influence change involves corporate executives' compensation packages. As a perquisite of employment, corporations frequently pay for the country club memberships of their high ranking executives. These corporate entities could also be pressured to end this practice at clubs that have discriminatory membership policies if faced with company boycotts or public protests. Since private clubs do not have to disclose membership information, it likely will be difficult to ascertain which companies' executives are associated with clubs that have discriminatory policies in place. Though a leaked copy of the membership list of Augusta National was published in 2003,³³² knowledge of country club membership lists is largely anecdotal.³³³ However, shareholders of publicly traded companies are frequently underwriting these memberships. They could presumably learn the identity of the clubs that their executives belong to and demand an end to this practice through a vote of the shareholders or exerting substantial pressure on upper management. This would force executives to pay for their own memberships in country clubs

328. See *Broadcast Rights of Major Sports Properties*, SPORTSBUSINESS JOURNAL, available at <http://www.sportsbusinessjournal.com/article.cms?articleId=11022&s=1> (on file with the University of Michigan Journal of Law Reform).

329. See *Johnson Lashes Out at Call for Women in Club*, Jul. 9, 2002, available at <http://sports.espn.go.com/golf/story?id=1403695> (on file with the University of Michigan Journal of Law Reform).

330. See *Move Comes from Conflict with Women's Group*, *supra* note 325.

331. See *Women's Group Targets CBS in Fight with Augusta*, Aug. 31, 2002, available at <http://sports.espn.go.com/golf/story?id=1425570> (on file with the University of Michigan Journal of Law Reform).

332. See Augusta National Golf Club members list, April 9, 2003, available at <http://www.usatoday.com/sports/golf/masters/2002-09-27-augusta-list.htm> (on file with the University of Michigan Journal of Law Reform).

333. See *Tour, Players Lukewarm About Women at Augusta*, *supra* note 1.

that have discriminatory membership policies.³³⁴ Doing so could enhance the welfare of the corporation, as it could prevent public protests and boycotts of companies that underwrite memberships in country clubs with discriminatory membership policies.

VI. CONCLUSION

The eradication of discrimination at private country clubs may be sparked by the remarkable athletic achievements of several high-profile minorities, including the Williams sisters and Tiger Woods. They have served as pioneers in their sports, and their long-term impact on society may prove as important as any individual in the history of professional sports. While it is expected that minority participation in these historically exclusive sports will continue to grow at a rapid pace,³³⁵ this growth will likely yield additional minority professional athletes in golf and tennis when today's youths reach athletic maturity. The increased participation and professionalization of these minority athletes may change the mindset of many individuals—like those members of private country clubs who are adamantly opposed to allowing people who look like Woods and the Williamses to eat in their dining rooms, play on their courts, and shower in their locker rooms. Admiration of these athletes may lead these individuals to alter their beliefs as to minority membership in their clubs. Yet their success is not a panacea for the continuing problem of exclusion at a large number of country clubs throughout the country.³³⁶

While litigation and new federal or state legislation may result in a change in the policies of these country clubs, it is more likely that alternative economic measures—such as the suspension or termination of the clubs' liquor licenses, removal of clubs' exemptions from both income and property taxes, external boycotts by non-club members, and sanction by professional golf and tennis organizations and athletes—must be taken to effectuate the desired changes. Though the appropriate remedy is situation-dependent, when considered collectively these solutions have the potential to

334. This could result in some executives resigning from clubs, although it is believed that the membership initiation fee and annual dues at Augusta National are low enough and its members wealthy enough that this would not occur.

335. See James Sterba, *Playing the Lie: Golf is Booming—Except that It Isn't, Unless You Count TV*, WALL ST. J., Apr. 13, 2000, at A1, A10.

336. See KENNEDY, *supra* note 3, at 255.

affect change at a significant number of country clubs and alter the landscape of a social institution. It can be argued that the goal of eradicating discrimination in country clubs does not justify the infringement of the constitutional rights of country club members. However, the desire to attain equality for all members of society should take priority over the liberty interests of country club members. The issue of country club discrimination should be given the consideration it deserves and the legal, economic, and social support that is needed to make true change possible. The People's Open that was the 2002 U.S. Open golf tournament could then become a recurring theme in other segments of society and the discriminatory policies of many private country clubs a distant memory.