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Discriminatory Membership Policies in Federally Chartered Nonprofit Corporations

I. INTRODUCTION

Since 1791 the United States has created federal corporations by specific acts of Congress. These corporations fall into three general types, including corporations organized in the District of Columbia, corporations that carry out a federal governmental or public function, and private nonprofit corporations that undertake educational, charitable, historical, cultural or similar purposes. About fifty groups comprise the third category, including the American National Red Cross, the Girl Scouts of America, the Boy Scouts of America, the United States Olympic Committee, the American Legion, the Veterans of Foreign Wars of the United States (VFW), and the Little League.

1. The first charter was to establish the Bank of the United States. Act of Feb. 25, 1791, ch. 10, § 3, 1 Stat. 192.
3. Corporations organized in the District of Columbia include the whole gamut of organizations typically chartered by a state, such as gas and water companies (e.g., Georgetown Gaslight Co., created by Act of July 20, 1854, ch. 98, §§ 1-12, 10 Stat. 785), cemeteries (e.g., Prospect Hill Cemetery, created by Act of June 13, 1860, ch. 122, §§ 1-12, 12 Stat. 52), educational institutions (e.g., Howard University, created by Act of March 2, 1867, ch. 162, §§ 1-10, 14 Stat. 449), hotels (e.g., Capitol Hotel Co., created by Act of March 3, 1865, ch. 123, §§ 1-5, 13 Stat. 539), and insurance companies (e.g., Mutual Investment Fire Insurance Co. of the District of Columbia, created by Act of Jan. 28, 1905, ch. 285, §§ 1-16, 33 Stat. 622). Congress acts as a local legislature when incorporating business organizations, now following the standard state procedure of allowing incorporation by the filing of appropriate papers. See D.C. Code Ann., § 29-201 (1973).
4. This category includes, for instance, banks (e.g., Bank of the United States, created by Act of April 10, 1816, ch. 44, § 7, 3 Stat. 259), railroads (e.g., National Railroad Passenger Corp., created by the Rail Passenger Service Act of 1970, Pub. L. No. 91-519, §§ 301-66, 84 Stat. 1327), the Federal Deposit Insurance Co. (created by the Banking Act of 1933, ch. 32, §§ 1-30, 48 Stat. 58), and the Tennessee Valley Authority (created by the Tennessee Valley Authority Act of 1933, ch. 32, §§ 1-30, 48 Stat. 58). There is no statutory procedure for incorporating organizations in this category. Charters are granted on a case-by-case basis.

Unlike states, which typically provide a simple statutory procedure for incorporation of nonprofit groups, the Federal government creates national nonprofit corporations only by specific acts of Congress. A bill is introduced in one of the houses and is
Recently, the discriminatory membership policies of some of these nonprofit organizations have aroused interest. The Boy Scouts, for example, maintain that “no boy can grow into the best kind of citizen without recognizing his obligation to God,” and therefore refused to initiate a ten-year-old boy as a member of a Cub Scout pack because he had stricken the word “God” from the Scout Promise on his application. The Little League and the VFW have also invited attention; recent suits have been brought against both organizations challenging their practice of limiting membership to men.

Although the issue has never been raised, there exists a theoretical problem of finding constitutional authority for congressional incorporation of certain nonprofit organizations. Because incorporation is not authorized by an express constitutional provision, its validity depends upon whether it is “necessary and proper” to the exercise of a delegated power. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Incorporation of a veterans’ organization may be justified as deriving from Congress’s power to regulate military affairs, but the delegated power supporting incorporation of groups such as the Little League and the Girl Scouts is unclear. Although Congress has the power “To . . . provide for the . . . general Welfare of the United States,” U.S. Const. art. 1, § 8, cl. 1, this clause is read as only a qualification of the taxing power. See, e.g., U.S. v. Butler, 297 U.S. 1 (1936). The commerce clause may provide authority in certain cases, but it is difficult to see how a group such as the Little League “affect[s] commerce.” Perez v. United States, 402 U.S. 146, 150 (1971).

Uncertainty concerning legislative authority also characterizes private bills, to which federal charters bear considerable resemblance. In addition, both lack the generality normally expected of legislation, both lack statutory definition and procedure, and both present intractable equal protection problems. See Note, Private Bills in Congress, 79 Harv. L. Rev. 1684, 1686 (1966):

“[U]nanswered problems related to the notion of “equal protection” are raised when an individual denied a bill is in all relevant respects in the same position as one for whom a bill has been passed . . . . Because there is no appeal from congressional rejection, and because Congress sheds so little light on its enactment of private legislation, it is impossible to determine whether there is truly like treatment in like cases. These problems, however, are beyond the scope of this Note.

13. Id.
14. The suits against the Little League have been brought on a number of theories. In King v. Little League Baseball, Inc., Civil Action No. 40394 (E.D. Mich. July 6, 1973), appeal docketed, No. 73-1940, 6th Cir., Sept. 14, 1973, the plaintiff brought an action under 42 U.S.C. §§ 1981, 1983 (1970), alleging that her rights to equal protection under the fifth and fourteenth amendments had been infringed. Her claim of “governmental action” was based on the Little League’s extensive use of public facilities and the existence of a federal charter. The plaintiff also sought a declaration that the charter did not prohibit girls from competing. See Complaint at
While it is not clear that any federally chartered groups presently practice racial discrimination, several organizations have done so in the past.\footnote{15}

These controversial practices raise the question of whether judicial remedies exist for persons discriminatorily denied membership in federally chartered organizations. Traditional judicial response has been a reluctance to interfere with the policies of private associations, particularly where membership benefits are primarily social rather than economic. Therefore, if constraints on membership policies of federally chartered groups are to be found, they must flow from the charter itself. This Note will propose two theories by which such constraints may be derived, both of which rely heavily on the unique nature of a federal charter as an expression of official acclaim for an exemplary group. The first theory requires that the incorporating statute be read in light of federal public policy and construed not to require, and in fact to prohibit, discrimination inconsistent with federal policy. The second approach invokes the constitutional doctrine of governmental action. There is clearly sufficient governmental involvement to impose constitutional prohibitions if the statute chartering the group mandates the challenged membership policy. Even


\footnote{15. See, e.g., Chapman v. American Legion, 244 Ala. 553, 14 S.2d 225 (1943); \textit{Hearings on Corporation Charter Bills Before a Subcomm. of the Senate Comm. on the Judiciary, 79th Cong., 2d Sess. 54-56 (1946), referring to racially discriminatory policies of the American Legion and the VFW. Also, the American National Red Cross segregated its blood bank until 1950. N.Y. Times, Nov. 20, 1950, at 7, col. 1 (late city ed.). The abandonment of the practice was probably influenced by public criticism. See, e.g., \textit{Editorial}, N.Y. Times, Nov. 23, 1950, at 24, col. 3 (late city ed.); \textit{Id.}, April 2, 1943, at 15, col. 3 (late city ed.) (reporting criticism by the Quakers); \textit{Id.}, March 25, 1943, at 20, col. 3 (late city ed.) (reporting criticism by the Interracial Committee of the Women's Division of the Greater New York Federation of Churches).}
if the charter does not require the discrimination, the grant of a federal charter alone may be sufficient to characterize the group’s practices as governmental action and therefore subject to constitutional constraints.

II. TRADITIONAL JUDICIAL RESPONSE

Courts generally have been reluctant to interfere with the membership policies of private nonprofit associations. However, they are more willing to intervene when expulsion of a member is challenged than when exclusion of an applicant is involved. Membership status in expulsion cases has been protected under a variety of legal theories, including property, contract, and tort. Whatever the nature of the right, three tests are applied to judge the propriety of the expulsion: “(1) the rules and proceedings of the association must not be contrary to natural justice; (2) the expulsion must have been in accordance with the rules; (3) the proceedings must have been free from malice (bad faith).” The “natural justice” principle, which Chafee terms an “unwritten ‘due process’ clause,” is used to examine the procedural and substantive adequacy of the association’s rules. Thus, the expulsion process must afford at least notice and an opportunity to defend. Furthermore, a member must not be expelled for violating a rule that is contrary to law or public policy; that is, the rule may neither itself violate the law nor require a member to do so, nor “[prohibit] or [inhibit] the performance by the individual of a duty or function for the performance of which the state normally

16. Chafee, The Internal Affairs of Associations Not for Profit, 43 HARV. L. REV. 995, 996 (1930). Chafee uses the word “associations” to include nonprofit groups generally, whether incorporated or not. A similar practice will be followed here.

17. Fussell v. Hall, 233 Ill. 73, 84 N.E. 42 (1908); Heaton v. Hall, 51 App. Div. 126, 64 N.Y.S. 279 (1900).


21. Id. at 1015.


23. An opportunity to defend generally means a hearing, but the requirement varies according to the nature of the association, the issues involved, and the potential harm to the individual. See, e.g., Nametra, Inc. v. American Soc. of Travel Agents, Inc., 36 Misc. 2d 291, 211 N.Y.S.2d 655 (Sup. Ct. 1961); Harmon v. Mathews, 27 N.Y.S.2d 656 (Sup. Ct. 1941). See also Private Associations, supra note 22, at 1029.
relies on individual initiative.” The former requirement means that an organization, for example, cannot require that a member disobey a court order or buy illegally adulterated coffee. The latter requirement ensures that “[t]he role of the member as a responsible citizen—voter, witness, petitioner to the legislature—is protected.”

The early New York case of In re Gallaher v. American Legion illustrates the above principles in the federal charter context. An American Legion post and its members sought a writ of mandamus to compel restoration of its charter, which had been revoked for a violation of a Legion regulation prohibiting a post from publicly opposing any position taken by the national organization. The court granted the writ, holding that there were both procedural and substantive defects in the expulsion. First, the court found the failure to apprise post officers of the charges against them to be contrary to “settled principles of law.” Whether or not the Legion’s rules or bylaws so provided, “notice of the charges and a reasonable opportunity to be heard is always required . . . .” Furthermore, the expelled post had not been granted the right of appeal afforded under the Legion’s bylaws. Substantively, the court held that the regulation unreasonably inhibited the “fundamental right” to “publish [one’s] sentiments on all subjects,” and therefore was “opposed to the spirit if not the very letter of our State Constitution and our Federal Constitution.” Concluding that the regulation was “contrary to law, unsound in principle, and out of harmony with the noble ideals for which this fine organization was founded,” the court expressly relied on the doctrine that “[b]ylaws and regulations of associations must be reasonable and not contrary to law or to public policy.” By forbidding the Legion to expel members for publicly opposing the payment of a soldiers’ bonus, the holding may illustrate the traditional protection of a citizen’s right to advocate a position on legislation, in accordance with Chafee’s “unwritten ‘due process’ clause” for expulsion cases. However, the case may be read more broadly.

24. Private Associations, supra note 22, at 1029.
27. Private Associations, supra note 22, at 1029.
29. 154 Misc. at 283, 277 N.Y.S. at 83.
30. 154 Misc. at 283, 277 N.Y.S. at 83.
31. 154 Misc. at 285, 277 N.Y.S. at 85.
32. 154 Misc. at 284, 277 N.Y.S. at 85.
33. 154 Misc. at 285, 277 N.Y.S. at 85.
34. 154 Misc. at 285, 277 N.Y.S. at 85.
35. See text accompanying note 21 supra.
The facts do not clearly involve the right to petition the government in support of legislation. Moreover, the court's reference to the first amendment and its statement that the expulsion "transcend[ed] the powers granted to the Legion by the act of Congress incorporating it"^3^ suggest that the case was decided not upon traditionally narrow public policy grounds, but by the use of federal public policy, in part defined by the federal constitution, as an indicator of congressional intent in granting a federal charter. This theory of adjudication will be fully explored below.\(^{37}\)

Courts have been more reluctant to interfere with the exclusion of applicants from membership,\(^{38}\) particularly in cases involving social groups. In \textit{Trautwein v. Harbourt}\(^{39}\) plaintiffs sought damages for malicious exclusion from the Order of the Eastern Star, a fraternal organization. The New Jersey court, distinguishing expulsion cases, cases in which membership is an economic necessity, and cases in which the organizations are "repositories of civic, civil or political rights,"\(^{40}\) concluded that

there is no "abstract right to be admitted" to membership in a voluntary association . . . The general rule is that there is no legal remedy for exclusion . . . no matter how arbitrary or unjust . . .

\dots \dots [V]oluntary associations generally have the unquestionable right to exclude from membership on any basis whatever.\(^{41}\)

Courts have been more willing to intervene where the organization is one in which denial of membership has important adverse economic effects. Though they have occasionally relied on a state action theory,\(^{42}\) the more common ground is a concern for the association's exercise of "quasi-governmental power."\(^{43}\) In \textit{Falcone v. Middlesex County Medical Society},\(^{44}\) for example, the New Jersey supreme court found that the defendant had a monopoly of power

\begin{footnotesize}
\begin{enumerate}
\item[36.] 154 Misc. at 284, 277 N.Y.S. at 85.
\item[37.] See Part III infra.
\item[38.] See, e.g., \textit{Chapman v. American Legion}, 244 Ala. 553, 556-57, 14 S.2d 225, 227-28 (1943); \textit{Mayer v. Journeymen Stonecutters' Assn.}, 47 N.J. Eq. 519, 524, 20 A. 492, 494 (Ch. 1890).
\item[40.] 40 N.J. Super. at 254-65, 123 A.2d at 39.
\item[41.] 40 N.J. Super. at 250, 257, 123 A.2d at 37, 41, \textit{quoting Mayer v. Journeymen Stonecutters' Assn.}, 47 N.J. Eq. 519, 524, 20 A. 492, 494 (Ch. 1890).
\item[43.] Other theories argued occasionally, but less successfully, are antitrust violation (state and federal) and tortious economic injury. \textit{See Note, Judicially Compelled Admission to Medical Societies: The Falcone Case, 75 HARV. L. REV. 1188 (1962).}
\item[44.] 34 N.J. 582, 170 A.2d 791 (1961).
\end{enumerate}
\end{footnotesize}
over local hospital facilities, and stated that “[p]ublic policy strongly dictates that this power should not be unbridled but should be viewed judicially as a fiduciary power to be exercised in reasonable and lawful manner for the advancement of the interests of the medical profession and the public generally.” Since Falcone, courts have begun to insist that, in cases where membership in an association is a practical necessity (cases involving professional societies and unions, for example), an applicant is entitled to a hearing embodying the elements of due process and can be rejected only for good cause.

Though Falcone illustrates a judicial willingness to confront arbitrary exclusion from membership, its applicability in federal charter cases is questionable. Most federally chartered groups do not wield the economic power over an individual necessary for judicial intervention. Furthermore, although In re Gallaher indicates that courts will protect an established membership right that is threatened by expulsion, such protection may be of little practical significance because any groups determined to bar certain persons can discriminate ab initio, thus avoiding the need for expulsion. Traditional judicial response, then, is inadequate to deal with most discriminatory membership policies of federally chartered groups. If one is to find constraints on such policies, one must look to the federal charter itself, finding constraints either as a matter of statutory interpretation or as a result of the constitutional theory of governmental action.

III. STATUTORY CONSTRUCTION

The doctrine that voluntary associations have an absolute right to deny membership to applicants is applied whether or not the association is incorporated, unless the incorporating charter “imposes a clear obligation on the corporation to admit certain persons to membership.” Determining the circumstances in which a federal charter imposes such an obligation is thus of central importance.

In Chapman v. American Legion the plaintiff argued that the Legion was obligated to admit him if he met the membership re-

45. 34 N.J. at 597, 170 A.2d at 799.
46. See Blende v. Maricopa County Medical Soc., 96 Ariz. 240, 245, 393 P.2d 926, 930 (1964) (In assessing good cause courts should consider “the social value of the goal of the Society's action; the appropriateness of the Society as a means for achieving the goal; and the reasonableness of this particular action of the Society in relation to the goal.”); Pinsky v. Pacific Coast Soc. of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969). The doctrine that an organization's quasi-public position imposes certain restrictions against arbitrary exclusion has also been used in union cases in which membership was denied on the basis of race. See Thorman v. International Alliance of Theatrical Stage Employees, 49 Cal. 2d 629, 320 P.2d 494 (1958); James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944).
47. Chapman v. American Legion, 244 Ala. 553, 557, 14 S.2d 225, 228 (1943).
48. 244 Ala. 553, 14 S.2d 225 (1943).
quirements set forth in the Legion's charter. The court rejected the claim, holding that, though the charter prescribed membership qualifications in terms of military record only, it could not be implied that all who met the qualifications could become members. To the same effect is Reiter v. American Legion, where the court held that the provision of the Legion charter limiting membership, in effect, to veterans of the first or second world wars was "manifestly merely a restriction upon eligibility, . . . in no wise limit[ing] the inherent power of the organization to adopt additional criteria of eligibility having a reasonable relation to its statutory purpose and not contrary to public policy." Though Chapman and Reiter dealt only with the American Legion charter, that charter is typical of others. The cases thus suggest that a federal charter, on its face, generally does not restrict an association's traditional power to limit membership as it pleases.

However, there is good cause to look beyond the face of the charter to find a duty to refrain from invidious discrimination in selecting members. A federal charter is a federal statute, and as such must be read in light of Congress's avowed acclamatory purpose in granting a charter and its strong declarations against discrimination in other contexts. Given the close scrutiny that characterizes the chartering process, and the supposed exemplary nature of the chartered bodies, an implied prohibition against discrimination that violates federal public policy, and is thus presumably contrary to the national interest, may be the only interpretation of the charter that fully expresses congressional intent.

49. 244 Ala. at 556, 14 S.2d at 227-28:
[T]hough certain service men may be eligible to membership under the Act of Congress creating the organization, the corporation itself has the right to determine . . . whether or not any person may be elected to membership in the respects indicated in its Constitution and By-laws.


51. 189 Misc. at 1055, 72 N.Y.S.2d at 347. The suggestion in Reiter that membership policies are subject to a public policy limitation must be considered in light of the fact that Reiter was an expulsion case. That the public policy caveat would grant a right to membership in exclusion cases is problematic. See text accompanying notes 38-41 supra. Perhaps Falcone v. Middlesex County Medical Soc., 34 N.J. 582, 170 A.2d 791 (1961) offers support for such a proposition. See text accompanying notes 44-46 supra. Even if public policy does afford a right to membership in certain instances, however, the right would not be as broadly applicable as the statutory right discussed in this section of the Note.


The need to interpret a charter may arise not only where a party contends that
The extent of congressional scrutiny is evident in the high standards a group must meet before it will receive a federal charter. Prior to 1969, Congress had no express requirements for incorporation. Nevertheless, the congressional debates and committee reports relating to the grant of charters give some indication of the selectivity with which charters were granted and the factors that impressed Congress. Particularly favored were groups with "patriotic, fraternal, historical, and educational [purposes]—all in keeping with the highest traditions of the American heritage,"63 "character building organization[s]"64 emphasizing "democratic methods and procedures,"65 groups with "national stature,"66 and groups that were "nonpolitical, nonsectarian,... [and open to all] regardless of economic status, race, or creed."67 The ad hoc nature of federal incorporation, however, led to discontent and increased pressure to adopt more selective and clearly defined criteria. This dissatisfaction resulted in occasional mass rejections of charter requests,68 attempts at adopting more
formal requirements, a law requiring annual audits of private corporations with federal charters, and ultimately President Johnson's veto of a proposed charter. Finally, in 1969, responding to President Johnson's suggestion that charters be granted only on a "selective basis" to groups that meet a "national interest standard," subcommittees of the House and Senate agreed to formal standards for granting federal charters. The standards require that the group be nonpartisan, nonprofit, and operated "solely for charitable, literary,


61. Message from the President of the United States, H.R. Doc. No. 292, 89th Cong., 1st Sess. (1965) (vetoing a bill to incorporate the Youth Council on Civic Affairs). President Johnson stated:

For some time I have been concerned with the question of whether we were granting Federal charters to private organizations on a case-by-case basis without the benefit of clearly established standards and criteria as to eligibility. Worthy civic, patriotic, and philanthropic organizations can and do incorporate their activities under State law. It seems obvious that Federal charters should be granted, if at all, only on a selective basis and that they should meet some national interest standard.

Other questions indicate the desirability of further study of this matter. For example, does the granting of Federal charters to a limited number of organizations discriminate against similar and worthy organizations and possibly stifle their growth? Should federally chartered corporations be more carefully supervised by an agency of the Federal Government? Does Federal rather than State chartering result in differences in the legal or tax status of the corporation, and are any differences appropriate ones?

Id. at 1-2.

62. See note 61 supra.


STANDARDS FOR THE GRANTING OF FEDERAL CHARTERS
(Agreed to jointly by Subcommittee No. 4 of the Committee on the Judiciary of the House of Representatives, and the Subcommittee on Federal Charters, Holidays, and Celebrations of the Committee of the Judiciary of the U.S. Senate).

In considering proposals for the granting of Federal charters, the following minimum standards will be applied:

Any private organization petitioning Congress for the purpose of obtaining the status of a Federal corporation shall be required to demonstrate to the satisfaction of the Congress that it is an organization which is—

(1) operating under a charter granted by a State or the District of Columbia and that it has so operated for a sufficient length of time to demonstrate its activities are clearly in the public interest;

(2) of such unique character that chartering by the Congress as a Federal corporation is the only appropriate form of incorporation;

(3) organized and operated solely for charitable, literary, educational, scientific, patriotic, or civic improvement purposes;

(4) organized and operated as a nonpartisan and nonprofit organization; and

(5) organized and operated for the primary purpose of conducting activities which are of national scope and responsive to a national need, which need cannot be met except upon the issuance of a Federal charter.

The meeting of the minimum standards as set forth by any private corporation shall not

(1) be considered as justification in itself for the granting of a Federal charter; or

(2) preclude or limit the Congress from imposing additional criteria or standards with respect to the granting of a charter to any organization.
educational, scientific, patriotic, or civic improvement purposes," and that its primary purpose be to conduct activities that are "clearly in the public interest," of "national scope," and "responsive to a national need, which need cannot be met except upon the issuance of a Federal charter."

Although the close congressional scrutiny evident in the new standards does not, in itself, imply a legislative intent to prohibit discrimination, the reason for the scrutiny—to ensure that charters are granted only to groups worthy of official acclaim—does imply such an intent. Senator Hruska summarized the reason for granting charters: "Very simply put, if the Congress enacts legislation granting a Federal charter to a nonprofit organization it confers on that organization mainly one benefit; that is, the prestige of setting out on their [sic] letterhead that it has been granted a Federal charter by act of Congress." Hruska's perception of legislative intent in granting a charter is well documented in reports recommending incorporation of particular groups. Thus, the Senate report introducing the Girl Scout bill states: "Because Congressional Charters are granted as marks of distinction to organizations whose public service is unique in scope and value, the friends of Girl Scouting believe that the deserved prestige of such a charter should be conferred on the Girl Scouts of the U.S.A." Other reports contain such statements as "the granting of a Federal charter would be an appropriate recognition of the national stature which Little League has attained and will encourage its further development..." and "[t]he organization will also acquire the respect and stature which accrue only to organizations with congressional recognition." In short, a federal charter is a declaration that a group serves the public interest, is of national scope, and is worthy of setting out on its letterhead. Invidious discrimination by such a group is surely contrary to congressional intent, and argues for the recognition of an implied prohibition against discrimination that is repugnant to federal public policy.

An implied prohibition also finds support in the legislative history of several charter grants. In discussing the proposed incorporation of the Girl Scouts in 1950, Congress noted that the organization was "nonsectarian and...open to all...regardless of economic..."

64. See note 63 supra.
66. GIRL SCOUT REPORT, supra note 54, at 2.
status, race, or creed."\textsuperscript{69} On another occasion it was noted that the Veterans of World War I was open to "any American citizen . . . who has been honorably discharged."\textsuperscript{70} Concern over discrimination by chartered groups was clearly expressed in the debate over the incorporation of the Jewish War Veterans. Responding to objections that a charter should not be granted to a group open only to Jews, the Senate Judiciary Report and various congresspersons repeatedly observed that the proposed bill "does not call for a charter to a membership organization; the bill is in the nature of a charter to a memorial . . . . [T]here is a definite distinction between the two."\textsuperscript{71} The speakers apparently agreed that a membership organization would be granted a federal charter only if it were open to "all veterans, regardless of race, color, or creed."\textsuperscript{72}

Additional support for the recognition of an implied statutory prohibition against discriminatory membership policies may, in many cases, be found in the charter provisions setting forth the purposes of the incorporated group. The Marine Corps League charter, for instance, states a purpose of "fit[ting] its members for the duties of citizenship and encourag[ing] them to serve . . . ably as citizens."\textsuperscript{73} The charter of the United States Olympic Committee states purposes of "instill[ing] and develop[ing] . . . the qualities of . . . tolerance, and like virtues; and . . . promot[ing] and encourag[ing] the . . . moral . . . and cultural education of the youth of the United States to the end that their . . . patriotism, character, and good citizenship may be fully developed."\textsuperscript{74} Such noble purposes are incapable of precise definition, but they arguably foreclose membership practices that are at odds with federal public policy. The court in \textit{In re Gallaher v. American Legion}\textsuperscript{75} relied in part on such reasoning to strike down a Legion regulation that was found "out of harmony with the noble ideals for which [that] fine organization was founded."\textsuperscript{76}

\begin{footnote}
\textsuperscript{69} GIRL SCOUT REPORT, \textit{supra} note 54, at 2.
\textsuperscript{70} \textbf{104} CONG. REC. 12224 (1958) (remarks of Congressman Lane).
\textsuperscript{71} \textbf{104} CONG. REC. 18195 (1958) (remarks of Senator Dirksen). \textit{See also} S. REP. No. 2420, 85th Cong., 2d Sess. 5 (1958) ("It is to be noted that [the bill] does not grant a Federal charter to the membership organization . . . but rather is limited to the national memorial.").
\textsuperscript{72} \textbf{104} CONG. REC. 18195 (1958) (remarks of Senator Hickenlooper).
\textsuperscript{73} 36 U.S.C. \textsection 57a (1970).
\textsuperscript{74} 36 U.S.C. \textsection 373 (1970).
\textsuperscript{76} 154 Misc. at 285, 277 N.Y.S. at 85. \textit{See} text accompanying notes 36-37 \textit{supra}. \textit{See also} \textit{Reiter v. American Legion}, 189 Misc. 1065, 72 N.Y.S.2d 345 (Sup. Ct), \textit{affd. mem.}, 273 App. Div. 797, 75 N.Y.S.2d 530 (1947), \textit{appeal denied}, 278 App. Div. 877, 77 N.Y.S.2d 991 (1948), in which the court looked to several federal statutes to decide whether the Legion could exclude communists without violating the charter's mandate that the organization be "nonpolitical."

\textit{The ultra vires doctrine}, which establishes that acts transcending a corporation's
Finally, an implied prohibition against discrimination is suggested by the serious constitutional problems raised in its absence. 77

Recognition of an implied statutory prohibition is only a first step in deciding a given case; the nature of the prohibition remains to be determined, with the attendant difficulty of assessing federal public policy with respect to various private discriminations. Several recent tax cases illustrate the use of federal policy in construing statutes and the delicate balancing involved in reading statutes to forbid discrimination by private groups.

In Green v. Connally, 78 a three-judge district court held that private racially restrictive schools were not “charitable” under section 501(c) of the Internal Revenue Code, defining tax-exempt organizations, and section 170(c), allowing deductions for certain charitable contributions. After discussing whether an educational institution that practices racial discrimination could qualify as a charitable trust under the common law of trusts, the court concluded that the proper interpretative guide was federal public policy, not the common law:

Taking into account the sensitive and crucial nature of the issue of racially discriminatory schools and the existence . . . of a federal policy derived from Congressional enactment as well as the Constitution itself, it is our conclusion that the ultimate criterion for determination whether such schools are eligible under the “charitable” organization provisions of the Code rests not on a common law referent but on that Federal policy. 79

Assessing the federal policy against race discrimination, Judge Leventhal first pointed to the thirteenth amendment’s authorization of congressional legislation “abolishing all badges and incidents of slavery,” 80 noting that the amendment applies to privately, as well as publicly, imposed badges. He then cited Brown v. Board of Education 81 and its progeny as evidence of a broad policy against discriminated powers are without effect, is the technical underpinning of this line of argument. Though the movement to virtually unlimited corporate powers has diminished the importance of ultra vires as a business corporation theory, it “has a continuing vitality in the realm of the nonprofit corporations where purposes are central to the whole concept.” Moody, Nonprofit Corporations—A Survey of Recent Cases, 21 Clev. State L. Rev. 26, 39 (1972). See, e.g., Bajdek v. Board of Trustees of the Am. Legion Pulaski Post No. 357 Trust, 132 Ind. App. 116, 173 N.E.2d 61 (1961); Wing Memorial Hosp. Assn. v. Town of Randolph, 120 Vt. 277, 141 A.2d 645 (1957).

77. Cf. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944). See Part IV infra. It should be noted that these arguments do not apply to state incorporation. State charters are freely granted and are not “badges of acclaim”; they are intended only to allow the use of the corporate form. Furthermore, state incorporation of discriminatory groups raises no constitutional problems. See text accompanying notes 166-73 infra.


79. 330 F. Supp. at 1161.


nation in public schools and several congressional enactments as indicative of a policy against federal support for discriminatory private schools. However, he was careful to consider competing policies before concluding that the challenged provisions of the tax code did not apply to racially discriminatory schools:

This principle [of construing the Internal Revenue Code so as not to contravene federal public policy] cannot be applied without taking into account that as to private philanthropy, the promotion of a healthy pluralism is often viewed as a prime social benefit of general significance. . . . This decentralized choice-making is arguably more efficient and responsive to public needs than the cumbersome and less flexible allocation process of government administration.

. . .

The indulgence of individual whim or preference has values but like all principles it cannot be pushed beyond sound limits to extremes that cannot be approved. . . . We are persuaded that there is a declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation.82

The following year another three-judge court construed the charitable deduction and exemption provisions of the Internal Revenue Code as applied to racially discriminatory fraternal orders. The court in McGlotten v. Connally83 again looked to the thirteenth amendment and Jones v. Alfred H. Mayer Co.84 to find a constitutional policy against public and private race discrimination. It then turned to what it termed "an analogous area,"85 section 601 of the Civil Rights Act of 1964,86 prohibiting racial discrimination by those receiving federal financial assistance, and found a "clearly indicated Congressional policy that the beneficiaries of federal largesse should not discriminate."87 Thus, it concluded, "this overriding public policy . . . requires that the Code not be construed to allow the deduction of contributions to organizations which excluded nonwhites from membership."88

82. 330 F. Supp. at 1162-63.
84. 392 U.S. 409 (1968).
85. 338 F. Supp. at 460.
87. 338 F. Supp. at 460.
88. 338 F. Supp. at 460. The McGlotten court discussed two other theories leading to the same result: (1) The tax benefits constituted federal "subsidies" that if granted to a racially restrictive fraternal order would violate the due process clause of the fourteenth amendment (see text accompanying notes 152-59 infra); (2) the tax benefits resulted in violations of § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), prohibiting discrimination in "any program or activity receiving Federal financial assistance."
McGlotten, although providing support for the use of federal public policy as a tool of statutory interpretation, illustrates the difficulty in accurately assessing that policy. Professors Bittker and Kaufman criticize the decision for failing to consider associational rights of purely private clubs and for failing to mention section 201(e) of the Civil Rights Act of 1964 and section 807 of the Civil Rights Act of 1968, which expressly exempt private clubs from prohibitions against discrimination in public accommodations and federally financed housing. Apparently, Bittker and Kaufman do not dispute the existence of a policy against federal support of race discrimination; their criticism is directed to the court's failure adequately to consider competing concerns for freedom of association. By overlooking those instances in which Congress weighed its concern for civil rights against interests of private clubs and struck a balance in favor of the latter, the McGlotten court undervalued the express legislative interest in preserving private rights of association. The undervaluation is particularly serious when the result of the implied statutory prohibition has a significant impact on private rights. Clearly, then, the distress of Professors Bittker and Kaufman results from their belief that excluding discriminatory organizations from the special tax status provisions forces the organizations to pay too high a price for their right to associate as they please.

The assessment of federal public policy is less difficult in federal charter cases than in the context of construing the Internal Revenue Code. The constitutional and statutory referents relied upon by the McGlotten court are still relevant to show an antidiscriminatory policy, but a court may also be guided by explicit congressional expressions against discrimination in the federal charter context.

More significantly, reading federal charters to prohibit certain discrimination does not result in as heavy an impact on associational freedoms as results in the tax cases. While an organization must make the same choice—governmental benefit or discriminatory practices—the price for choosing to discriminate is less severe. Relinquishment of a charter is much less likely to endanger the group's survival than is forfeiture of "charitable" status under the income tax laws. Thus, though an implied statutory prohibition against discrimination must be separately considered for different

92. Bittker & Kaufman, supra note 91, at 86.
93. See text accompanying notes 69-72 supra.
94. See text accompanying notes 145-47 infra.
types of discrimination and different charters, it may be justified even by a relatively weak expression of federal policy.


Religious discrimination presents almost as compelling a case. The policy of separation of church and state is of course an integral part of the first amendment, and religious discrimination is prohibited under most of the provisions of the civil rights legislation cited above. However, competing concerns—respect for associational freedoms and the free exercise of religion—have also been recognized by Congress. In addition to the private club exemptions mentioned above, religious enterprises are exempted from equal employment provisions with respect to the employment of individuals of particular religions to perform work connected with the carrying on of their activities, Civil Rights Act of 1964 § 702, 42 U.S.C. § 2000e-1 (1970); the fair housing statute is not applicable to dwellings owned or operated by religious groups for noncommercial purposes (unless the religion restricts membership on the basis of race, color, or national origin), 42 U.S.C. § 3607 (1970); and the prohibition of sex discrimination in federally assisted educational programs is not applicable to institutions controlled by religious organizations if compliance would be inconsistent with religious tenets, 20 U.S.C.A. § 1681(a)(3) (Supp. 1974). Such exceptions, however, indicate at most a tolerance for religious discrimination insofar as it furthers the purposes of religious groups. If this is not the case—if, for example, the Boy Scouts require a belief in God as a precondition of membership (see text accompanying notes 12-13 supra)—an implied prohibition against religious discrimination falls clearly within federal public policy. Again, the minimal impact of the prohibition upon associational and free exercise rights is significant.

Sex discrimination presents the hardest case, because of a weaker expression of federal policy. Nevertheless, “Congress has . . . manifested an increasing sensitivity to sex-based classifications.” Frontiero v. Richardson, 411 U.S. 677, 687 (1973). Thus, sex discrimination is prohibited under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)(2)(a)-(d) (1970); under the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970); and most recently under 20 U.S.C.A. §§ 1681-86 (Supp. 1974), prohibiting sex discrimination in federally assisted educational programs. Furthermore, Congress has passed and submitted to the states for ratification the Equal Rights Amendment, H.R.J. Res. 208, 92d Cong., 2d Sess. (1972), which declares that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” The foregoing enactments have led four members of the Supreme Court to state that “Congress itself has concluded that classifications based upon sex are inherently invidious . . . .” Frontiero v. Richardson, 411 U.S. 677, 687 (1973). Despite the growth of this policy, some sex discrimination is carried on with congressional approval. Colleges that have “traditionally and continually” admitted students of one sex are exempted from antidiscriminatory requirements for federally assisted educational programs, 20 U.S.C.A. § 1681(a)(5) (Supp. 1974). Furthermore, Congress approved a “separate but equal” philosophy by granting a federal charter to the Girl Scouts with an expressed purpose of “giving] the same prestige to the girls of America as has been given to the boys.” 96 Cong. Rec.
Many discriminatory membership practices that raise substantial constitutional questions may be dealt with by an implied statutory prohibition. However, there are situations in which a prohibition cannot be read into a charter, making the constitutional issues unavoidable. One such situation involves charters that expressly mandate discrimination. The charter of the Sons of Union Veterans of the Civil War, for example, restricts membership eligibility to "male blood relatives" of union soldiers, and the charters of the Little League and the VFW arguably restrict membership to males. Similarly, a charter expressly reserving to an organization the power to select members on the basis of race or national origin, for example, would resist the statutory analysis suggested above, although it is improbable that such a charter would be granted. Finally, even a charter that is silent on membership restrictions may not be susceptible to the statutory analysis if granted to an organization with a clear history of discrimination. If constraints on membership policies are to be found in these situations they must derive from the Constitution.

The relevant constitutional provision—the fifth amendment's prohibition of unreasonable discrimination—applies only to govern-

98. However, it may still be possible to construe the charter to prohibit the discrimination. One may argue that clear congressional pronouncements against similar discrimination in other areas should be given decisive weight unless Congress specifically provides otherwise.
99. Although the fifth amendment contains no explicit equal protection guarantee against actions by the federal government, such a guarantee has been found implicit
ment actions. Thus, "private conduct abridging individual rights does no violence to the [right to equal protection] unless to some significant extent the State in any of its manifestations has been found to have become involved in it." When there is sufficient involvement, the activities of the private party are "tantamount to governmental action," so that either the actor is bound by constitutional prohibitions or the government must disengage itself.

in the concept of "due process." See, e.g., Schneider v. Rusk, 377 U.S. 163, 168 (1964) ("While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.") Accord, Frontiero v. Richardson, 411 U.S. 677, 680 n.5 (1973). Although the Court has never expressly declared that the fifth amendment equal protection guarantee exactly parallels the equal protection guarantee of the fourteenth amendment, fifth amendment cases freely use fourteenth amendment precedent. See, e.g., United States Dept. of Agriculture v. Moreno, 418 U.S. 528, 533 (1979).


102. This Note will discuss only the involvement that inheres in the grant of a federal charter per se. Other factors may be relevant and should be considered in particular cases. In the Little League cases, for example, a finding of state action is given added support by the group's use of public school fields and other municipal facilities. Also, many chartered groups enjoy favorable tax status under the income tax laws. See Stearns v. VFW, No. 73-1197, slip op. at 3-4 (D.C. Cir. June 19, 1974).

The Note will also discuss governmental action only with respect to equal protection rights against discriminatory membership policies. Although the issue is not settled, cases suggest that different degrees of governmental involvement are necessary to activate different constitutional restrictions. See, e.g., Grafton v. Brooklyn Law School, 478 F.2d 1137, 1142 (2d Cir. 1973) (involving due process rights in an expulsion from a private law school); "While a grant or other index of state involvement may be impermissible when it 'fosters or encourages' discrimination on the basis of race, the same limited involvement may not rise to the level of 'state action' when the action in question is alleged to 'affront other constitutional rights.' See also Jackson v. Statler Foundation, No. 73-1643, slip op. 2747-50 (2d Cir. April 5, 1974); Pitts v. Department of Revenue, 333 F. Supp. 662, 668-69 (E.D. Wis. 1971); Comment, Tax Incentives as State Action, 122 U. Pa. L. Rev. 414, 445-47 (1973). Due process rights in the charter context are in any case largely unnecessary; similar rights, which do not depend on governmental action, have evolved under the common law. See text accompanying notes 17-35 supra. Although the state action requirement is unclear in due process cases, it is clear that greater governmental involvement is required to invoke the establishment clause than the equal protection clause, as indicated in Norwood v. Harrison, 413 U.S. 455, 469-70 (1973): '[t]he transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors. In contrast, although the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. An establishment of religion claim, however, is unlikely to arise in the charter context,
If a federal charter mandates the challenged discrimination a finding of governmental action is almost axiomatic. The Supreme Court has explicitly held that "a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act."\(^{103}\) If the governmental action were then held to violate a substantive constitutional restraint the court would probably declare the charter invalid insofar as it mandated the discrimination and enjoin its future enforcement.\(^{104}\) In *Moose Lodge No. 107 v. Irvis*\(^{105}\) the Court even enjoined enforcement of a liquor license regulation that required the licensee to adhere to all the provisions of its own constitution and bylaws. Acknowledging that the regulation was neutral on its face, the Court held that applying it to a licensee whose bylaws required discrimination would result in invoking the sanctions of the state to enforce a discriminatory private rule.\(^{106}\) Such an injunction in a federal charter case would have little impact on an excluded applicant's chances for membership. After the invalid provision is stricken, the group would be free to retain its charter and continue discriminating on its own volition.\(^{107}\) If this future discrimination is to be restricted, it is necessary to ask whether the grant of a federal charter per se is sufficient to subject a chartered group to constitutional restraints.

If a charter does not directly compel discrimination (either because it is neutral on its face or because its command to discriminate will not be enforced) its constitutional significance is difficult to assess. Few cases deal with the issue. In *Reiter v. American Legion*,\(^{108}\) the plaintiff was expelled from the Legion because of his affiliation with the Communist Party. He argued that the expulsion infringed upon his freedom of speech, but the court noted that the

because Congress has been reticent to charter religious membership groups. See text accompanying notes 71-72 *supra*. Furthermore, religious discrimination by a nonsectarian group, such as the Boy Scouts, is probably better analyzed as an equal protection case than as an establishment clause case.


\(^{106}\) 407 U.S. at 178-79.


first amendment protects an individual only against governmental action and concluded that "the mere circumstance that The American Legion exists under a Federal charter, rather than as an unincorporated association, or as a State-incorporated membership corporation, would seem without significance in this respect." Reiter cannot be afforded great weight. Its analysis is conclusory and it was decided in 1947, before the expansive development of modern governmental action doctrine. The most recent case, Stearns v. VFW, is somewhat more helpful. The plaintiff, excluded from the VFW because of her sex, argued that the grant of a federal charter to the VFW "constitute[d] the kind of significant state involvement in private discriminations that is violative of the equal protection guarantee in the due process clause of the Fifth Amendment." The district court responded "... it does not. Cf. Moose Lodge No. 107 v. Irvis ...," but the court of appeals reversed this summary dismissal. Remanding the case for "further examination," the court urged consideration of the following factors, in addition to the grant of the federal charter: the requirement of presentations to Congress of annual reports of proceedings and audits of finances; the VFW's entitlement to loans or gifts of condemned or obsolete combat material; its special federal income tax status as a charitable organization; and the authorization of the Administrator of the Veterans Administration to recognize representatives of the VFW for the purpose of prosecuting claims under laws administered by the Veterans Administration, and the further authorization to furnish office space to VFW representatives. While the court stated that "we are inclined to agree that Congressional chartering alone does not constitute significant government involvement that triggers due process guarantees," all but two of the factors it suggested be considered on remand are natural concomitants of federal chartering.

Perhaps the best way to approach the problem is to examine the governmental action doctrine as it has been developed by the Supreme Court. Where the alleged governmental action does not mandate discrimination the Court has eschewed a rigid formula and adopted a "sifting of facts and weighing of circumstances" analysis.

109. 189 Misc. at 1057, 72 N.Y.S.2d at 349.
111. 323 F. Supp. at 475.
112. 323 F. Supp. at 476.
113. No. 73-1197 (D.C. Cir. June 19, 1974).
114. No. 73-1197, slip op. at 4.
115. No. 73-1197, slip op. at 5-4.
116. No. 73-1197, slip op. at 3 (emphasis original).
117. See note 142 infra and accompanying text.
The Court’s “sifting and weighing” gives recognition to two competing general principles. On the one hand, as Justice Brennan stated:

The state-action doctrine reflects the profound judgment that denials of equal treatment . . . are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in . . . discrimination.119

On the other hand, the doctrine reflects a respect for individual choice and a desire to protect genuinely private concerns. In the words of Judge Friendly, “courts should pay heed, in testing for government action, to the ‘value of preserving a private sector free from the constitutional requirements applicable to government institutions.’ ”120

Two landmark Supreme Court decisions illustrate the difficulty in reconciling these principles. In Burton v. Wilmington Parking Authority,121 the Court held that racial discrimination in a privately owned restaurant that leased space in a state agency’s parking building was not so purely private as to be outside the scope of the fourteenth amendment. The factors the Court found relevant included public ownership of the land and building and the use of public funds for its maintenance and upkeep, enjoyment of “mutual benefits” by the lessor and lessee (such as parking convenience for restaurant guests and increased demand for parking because of the restaurant), the fact that the discrimination created profits that were indispensable elements in the financial success of the governmental agency, and finally the fact that the state could have required its tenant to discharge its responsibilities under the fourteenth amendment.122 The Court concluded that “[t]he State [had] so far insinuated itself into a position of interdependence with [the lessee] that it must be recognized as a joint participant in the challenged activity,”123 thus subjecting the activity to the mandates of the fourteenth amendment. Responding to the fear of “nigh universal application”124 of its holding, the Court was careful to point out that its conclusions were not “universal truths on the basis of which

122. 365 U.S. at 723-25.
123. 365 U.S. at 725.
124. 365 U.S. at 726.
every state leasing agreement is to be tested," but rather were limited to the manner and purpose of the leasing in the case as presented.

Eleven years later, in Moose Lodge No. 107 v. Irvis, the Court assessed the significance of a state’s grant of a liquor license to a private club, and, in so doing, emphasized its concern with maintaining a line between private and governmental action:

The Court has never held, of course, 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, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases ... and adhered to in subsequent decisions.

Concluding that the grant of a liquor license and concomitant state regulation did not make the Lodge’s action governmental action, the Court distinguished Burton by noting that in Moose Lodge there was no “symbiotic relationship” or exchange of mutual benefits, the land upon which the Lodge was situated was privately owned, the Lodge had not proclaimed itself to be open to the public, and it did not perform a function that “would otherwise in all likelihood be performed by the State.”

Although Justice Douglas dissented, he too noted concern for a constitutionally protected “zone of privacy,” and recognized that the mere grant of a state permit would not make the recipient ipso facto a public enterprise or undertaking, “any more than the grant to a household of a permit to operate an incinerator puts the householder in the public domain.” He was able to distinguish Moose Lodge, however, by emphasizing an administrative requirement that every liquor licensee comply with all of its own rules, including in this case a discriminatory membership provision, and a state-enforced scarcity of licenses that gave the holder a monopolistic advantage both in selling liquor and ultimately in transferring the license. “Thus,” he concluded, “the State of Pennsylvania is putting the weight of its liquor license, concededly a valued and important

125. 365 U.S. at 725.
127. 407 U.S. at 173.
128. 407 U.S. at 175.
129. 407 U.S. at 179.
130. 407 U.S. at 180.
131. 407 U.S. at 181-83.
adjunct to a private club, behind racial discrimination." 132 Importantly, the majority and dissent disagreed primarily on their assessments of the facts—Justice Rehnquist had asserted that the quota system fell "far short of conferring . . . a monopoly." 133 Their conception of state action as a "sifting and weighing" of governmental involvement versus private associational interests was the same.

Burton and Moose Lodge support the holding that a grant of a federal charter is sufficient governmental involvement to impose equal protection limitations on a recipient's membership policies. 134 Such a holding is consistent with the principles behind the governmental action concept; the charter context presents clear indicia of governmental involvement and a governmental action holding would have few adverse effects on associational rights or private philanthropy. Moreover, a comparison of federal charters with other governmental benefits and regulation indicates that such a holding would not threaten the distinction between public and private action and, in fact, would go no further than present cases.

As in Burton and Moose Lodge, the government's action is straightforward. Congress passes laws granting charters as "marks of distinction," 135 so that the recipients may "acquire the respect and stature which accrue only to organizations with congressional recognition." 136 Furthermore, though prestige is the most significant benefit of a federal charter, other advantages may exist. President Johnson observed that the grant of a charter to one organization may discriminate against similar organizations and possibly stifle their growth. 137 Also, in most states federal corporations are deemed domestic as opposed to foreign for certain purposes, thus, for example, relieving them of the need to acquire authorizations to transact business. 138

Benefits also flow to the government. Because chartered groups are by definition organized "solely for charitable, literary, educational, scientific, or civic improvement purposes," 139 their activities

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132. 407 U.S. at 183.
133. 407 U.S. at 177.
134. See note 102 supra.
135. GIRL SCOUT REPORT, supra note 54, at 2.
137. See note 61 supra.
139. See note 63 supra.
often substitute for services that are otherwise performed by government. The American National Red Cross, for instance, provides disaster relief and wartime aid services that elsewhere are traditionally provided by the state. Congress expressly recognizes and indeed requires a quid pro quo for the grant of a charter by specifying that the chartered group be “responsive to a national need, which need cannot be met except upon the issuance of a Federal charter.” One may characterize this flow of “mutual benefits” as a “symbiotic relationship,” such as was found in Burton and lacking in Moose Lodge.

Finally, it should be noted that there is some continuous congressional regulation in the audit of federally chartered nonprofit corporations required to be submitted annually to Congress. The significance of this governmental involvement cannot, of course, be assessed in the abstract. Before concluding that the involvement is sufficient to invoke constitutional limitations, one must consider the competing interests—in this case, a respect for the

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141. See note 63 supra.

The argument may be made that the grant of a federal charter should not lead to a holding of governmental action because there is an insufficient “nexus” between the governmental involvement and the discrimination. Cases involving challenges to the membership policies of otherwise private organizations indicate some confusion regarding the exact nexus required. In Junior Chamber of Commerce v. United States Jaycees (10th Cir. April 16, 1974) (excerpted in 112 U.S.L.W. 2570) the court refused to find the Jaycees’ discriminatory policy subject to constitutional constraints by virtue of the organization’s administration of government funds. Although acknowledging that a constitutional violation might exist if the money were distributed in a discriminatory manner, the court held that there was not a sufficient nexus between the group’s membership policy and the alleged state action. The court in McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), however, rejected a similar contention: “We do not find it significant that plaintiff does not allege... that the charitable purposes to which the federal funds are put are in themselves discriminatory. Plaintiff alleges that he and others in his position are denied the opportunity to help determine the purposes to which the funds are devoted. Paternalism should not be confused with equality.” 338 F. Supp. at 456 n.38. Whatever the status of the nexus requirement, it is met in the federal charter situation. The government does not merely funnel money through private hands, in which case the only question may be the nature of the activities so financed. By granting a federal charter Congress selectively places its “stamp of approval” on a membership organization in its entirety. Frequently, the main function of the organization is to benefit its own members; thus, when a group such as the Little League or the Boy Scouts selects its members the beneficiaries of the government acclaim are defined. This would seem to provide a sufficient nexus between the discriminatory activity and the governmental involvement. For a more general discussion of the nexus question, see Comment, supra note 102, at 434-39.
right to associate freely and for the advantages of pluralistic philanthropy. Judge Friendly eloquently expressed this concern:

Philanthropy is a delicate plant whose fruits are often better than its roots; desire to benefit one’s own kind may not be the noblest of motives but it is not ignoble. It is the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones—without having to provide a justification that will be examined in a court of law, which stimulates much private giving and interest. If the private agency must be a replica of the public one, why should private citizens give it their money and their time? The case is not necessarily altered simply because government has decided to help private institutions carry a load they are no longer able to bear alone; rather, when the history of our time comes to be written, the development of techniques whereby privately managed universities, hospitals and social agencies have been assisted to work in tandem with state operated institutions will rank high for imagination and results.143

Two important points emerge upon consideration of the interaction of the factors discussed above. First, the degree of governmental involvement and the benefit conferred in the grant of a federal charter, though possibly of less weight than in Burton, still seriously impair the government’s stature as a model of justice and equality. Because federal charters are granted only in exceptional cases and for the primary purpose of bestowing acclaim, they imply that Congress has “elected to place its power . . . and prestige behind the admitted discrimination” and “by its inaction . . . has . . . made itself a party to the refusal”144 of membership. In other words, it is not the group’s private discrimination that offends fundamental societal and constitutional values as much as the legitimization and approval of the group that the federal charter represents.

Second, the considerations that argue against a governmental action holding are minimal. The Supreme Court has indicated generally that infringement on associational freedom is not to be considered decisive in governmental action cases: “[W]e must also be aware that the very exercise of the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action.”145 Moreover, regardless of the weight afforded the group’s associational interests, neither these interests nor society’s interest in preserving

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pluralistic philanthropy are significantly impaired by a governmental action holding. A group need only relinquish its charter in order to restore its "purely private" character. Though a disentanglement from governmental involvement may restore private status in many contexts, the significant point in the federal charter situation is that such disentanglement entails little cost. Groups seeking federal charters are already incorporated; thus, even after relinquishing its federal charter, a group can continue to have the legal and economic advantages incorporation provides. The only price exacted for the retention of discriminatory policies would be the loss of congressional acclaim, a loss that, unlike the loss of a tax exemption, for instance, does not impair a group's ability to pursue its philanthropic endeavors. In addition, no significant legitimate governmental objective in granting a charter is compromised by a conclusion of governmental action, even if the charter is relinquished. The primary purpose of bestowing acclaim is of course frustrated, but it is the very objective of acclaiming a discriminatory group that should be held impermissible. In contrast, much governmental involvement aims at promoting public health, safety, or welfare in a manner that might be seriously compromised if the private party were treated as an arm of the state. In Columbia Broadcasting System, Inc. v. Democratic National Committee, for example, plaintiffs argued that, in light of the substantial governmental involvement in the regulation of broadcast media, the CBS network should be considered an agent of the state for the purpose of affording responsible individuals and groups a constitutional right to purchase advertising time to comment on public issues. Although there was no majority decision on the governmental action claim, those who opposed it were concerned with the fact that the objective of the government regulation was "to maintain . . . essentially private broadcast journalism held only broadly accountable to public interest standards." A finding of governmental action would jeopardize that objective because "[j]ournalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government."

146. See note 107 supra.

147. Prior state incorporation is required of any group seeking a federal charter. See note 63 supra. Thus, "[f]avorable consideration by the Congress and approval by the President of a charter bill neither add to nor detract from the standing that that organization had under its State charter." 1971 Senate Hearings, supra note 65, at 69.


150. 412 U.S. at 120.

151. 412 U.S. at 121.
The conclusion that the grant of a federal charter subjects the recipient to constitutional restraints gains strong support from recent cases finding "state action" in the grant of favorable tax status to racially discriminatory groups. The tax cases rely primarily on two factors: official approval of the recipient groups and the mutual benefits resulting from the groups' performance of charitable activities.


The relief sought in most of these cases was a withdrawal of government benefits rather than an injunction of the discriminatory conduct. The McGlotten court found no analytical difference: "The determination of whether state involvement is sufficient either to bring otherwise private discrimination within the aegis of the Fifth or Fourteenth Amendment, or to evoke a duty on the part of the government to prevent that discrimination, has traditionally been styled one of 'state action.' Little clarity is gained at this stage by attaching a different label to the same inquiry depending on who is the defendant." 338 F. Supp. at 455 n.31. The court in Pitts, however, suggested that "[t]his difference in posture may bear upon the weight to be accorded to the prerogatives of private organizations in balancing them against the rights asserted." 338 F. Supp. at 459 n.31. The court in Pitts, however, suggested that "[t]his difference in posture may bear upon the weight to be accorded to the prerogatives of private organizations in balancing them against the rights asserted." 338 F. Supp. at 466. See also Jackson v. Statler Foundation, No. 73-1543, slip op. at 2766-67 (2d Cir. April 5, 1974) (Friendly, J., dissenting from the denial of reconsideration en banc): "A holding that an otherwise private institution has become an arm of the state is much broader and can have far more serious consequences than a determination that the state has impermissibly fostered private discrimination." If, however, the result of a conclusion of governmental action in either posture is to put the group to the choice of continuing to receive the governmental benefit or continuing to discriminate, it is difficult to see why the weighing should be different.

153. See, e.g., Falkenstein v. Department of Revenue, 350 F. Supp. 887, 889 (D. Ore. 1972), appeal dismissed sub nom. Oregon State Elks Assn. v. Falkenstein, 469 U.S. 1699 (1975): "Moreover, ORS 807.134(1)(c) requires the State, before granting an exemption, to find that the fraternal organization engages in benevolent and charitable activities 'with the purpose of doing good to others rather than for the convenience of its members.' With this finding, Oregon places its stamp of approval on the Elks Lodge as an organization that furthers the legislative policy of the State." See also McGlotten v. Connally, 338 F. Supp. 448, 456 (D.D.C. 1972) ("Thus the government has marked certain organizations as 'Government Approved'") (emphasis original).
functions. Both factors are present in the charter context, and, more importantly, the charter context is not complicated by the difficulties presented by the tax cases.

There are two significant distinctions. First, the tax cases deal with a governmental benefit—the grant of tax exempt "charitable" status under the Internal Revenue Code—that, unlike a federal charter, does not single out a specific group for acclaim and does not have acclaim as its primary purpose. As Professors Bittker and Kaufman have noted, the Internal Revenue Code "is a pudding with plums for everyone," making it a difficult task to decide which of the Code's many deduction and exemption provisions denote governmental approval of the activities of the recipient and which do not. Moreover, finding governmental action in the tax cases more seriously endangers "[t]he interest in preserving an area of untrammeled choice for private philanthropy" than would a similar conclusion in federal charter cases. As noted earlier, Professors Bittker and Kaufman believe that excluding discriminatory organizations from the "charitable" provisions of the Code forces the groups to pay too high a price for their rights of privacy and free association. Indeed, the denial of tax exempt status may mean the extinction of some charitable groups, an effect unlikely to result from the renunciation of a federal charter.

Finally, a conclusion of governmental action in federal charter cases will not "utterly emasculate the distinction between private as distinguished from State conduct." Seemingly analogous situations, such as those involving state incorporation and licensing, are distinguishable.

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154. See, e.g., Falkenstein v. Department of Revenue, 850 F. Supp. 887, 888 (D. Ore. 1992), appeal dismissed sub nom. Oregon State Elks Assn. v. Falkenstein, 499 U.S. 1099 (1995): "[T]ax exemptions for fraternal organizations benefit both the State and the organizations. Oregon relieves fraternal organizations from the burden of property and corporate excise taxes and, in return, the public benefits from the charitable and benevolent activities of these organizations. This is the kind of 'symbiotic relationship' that was lacking in Moose Lodge . . . ." See also Pitts v. Department of Revenue, 333 F. Supp. 662, 667 n.10 (E.D. Wis. 1971).

155. See text accompanying notes 135-36, 139-41.

156. Bittker & Kaufman, supra note 91, at 85.

157. Judge Bazelon recognized this problem in McGlotten:

Every deduction in the tax laws provides a benefit to the class who may take advantage of it. And the withdrawal of that benefit would often act as a substantial incentive to eliminate the behavior which caused the change in status. Yet the provision of an income tax deduction for mortgage interest paid has not been held sufficient to make the Federal Government a "joint participant" in the bigotry practiced by a homeowner.

158. F. Supp. at 456 (footnotes omitted).

159. Jackson v. Statler Foundation, No. 73-1548, slip op. at 2771 (2d Cir. April 5, 1974) (Friendly, J., dissenting from the denial of reconsideration en banc).

160. See text accompanying note 92 supra.

161. The grant of a franchise to public utilities may also parallel the federal
The Supreme Court and several commentators indicate that state licensing alone should not be held sufficient to place particular constitutional limitations on the licensee. Unlike federal charters, however, state licenses are not symbols of governmental acclaim but are widely used means of regulating public health and safety; a license will generally be granted to anyone willing to comply with the requirements, be they adequate refrigeration and dishwashing in a restaurant or satisfactory plumbing facilities in a home. Even liquor licensing regulations requiring that the applicant be "a person of good repute" and that the license not be "detrimental to the welfare, health, peace, and morals of the inhabitants of the neighborhood," are intended more to protect the public from abuse of the liquor laws than to see if an individual deserves the acclaim of the state. Furthermore, licenses are typically not exclusive franchises and do not confer monopolistic advantages. Finally, their pervasiveness in modern society, a fact that provokes the fear of "emasculating the distinction" between public and private conduct, stands in marked contrast to the limited number of federal charters.

State incorporation is also distinguishable. Nonprofit corporations face only the minimal requirements of being nonprofit and possibly of having a charitable, civic, or other social purpose. Although all states require that the purposes of the corporation not be contrary to law or to public policy, scrutiny of a requested charter situation, but the duty not to discriminate in providing services is mandated by the common law and does not depend on a governmental action theory. Recently, however, a governmental action theory has been advanced to impose a due process requirement on termination of services. See Note, Light a Candle and Call an Attorney—The Utility Shutoff Cases, 58 Iowa L. Rev. 1161 (1973).

164. Karst & Van Alstyne, supra note 163, at 774-75 ("There is no magic to a license from the government; it has none of the significance of governmental assistance . . . .")
166. A nonprofit corporation is typically defined as a "corporation no part of the income or profit of which is distributable to its members, directors, or officers." ABA-ALI Model Nonprofit Corp. Act § 2c (rev. 1964).
167. See, e.g., id. § 4 (rev. 1964): "Corporations may be organized under this Act for any lawful purpose or purposes, including, without being limited to, any one or more of the following purposes: charitable; benevolent; eleemosynary; educational; civic; patriotic; political; religious; social; fraternal; literary; cultural; athletic; scientific; agricultural; horticultural; animal husbandry; and professional, commercial, industrial or trade association . . . ." An alternative provision would authorize formation of a nonprofit corporation for "any lawful purpose." Id. alternative § 4 (rev. 1964).
168. This is true of both profit and nonprofit corporations. See W. Fletcher, Cyclopedia of the Law of Private Corporations § 93 (1903).
charter does not vest state officials with the power to grant or deny incorporation based on whether the purposes of the group merit an official "stamp of approval." In *In re Association for Preservation of Freedom of Choice, Inc.*, a New York trial court upheld the denial of a charter that stated the corporation's purpose to be: "[t]o promote the right to individual freedom of choice and freedom of association, constituting the right of the individual to associate with only those persons with whom he desires to associate." The court, finding that the group's purpose was to promote bigotry and thus "should not be sanctioned by receiving the imprimateur of this court," was reversed by the New York court of appeals. Without disagreeing with the lower court's characterization of the organization's activities, the court of appeals defined public policy narrowly and held that

the public policy of the State is not violated by purposes which are not unlawful.

[Agitation to repeal laws or to change the form of government] is not against public policy whether indulged in by an individual or a membership corporation, but of course approval of a corporate charter devoted to such a purpose does not imply approval of the views of its sponsors. It simply means that their expression is lawful, and their sponsors entitled to a vehicle for such expression under a statute which cannot constitutionally be made available only to those who are in harmony with the majority viewpoint. Dissenting organizations have equal rights, so far as freedom of expression is concerned, as any other groups, and are entitled to an equal and objective application of the statute.

In short, state incorporation, like state licensing, does not bestow acclaim. State charters are granted freely and governmental scrutiny is limited and nondiscretionary. Congress, on the other hand, grants few charters, strictly scrutinizes the social objectives of the group seeking incorporation, and retains ultimate discretion even after its standards are met. The conclusion that the grant of a federal charter is sufficient governmental involvement to subject a group to constitutional restraints is therefore easily kept within boundaries that do not "utterly emasculate" the distinction between public and private action.

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170. 17 Misc. 2d at 1012, 187 N.Y.S.2d at 706-07.

171. 17 Misc. 2d at 1013, 187 N.Y.S.2d at 707.

172. 9 N.Y.2d at 382-83, 174 N.E.2d at 489-90, 214 N.Y.S.2d at 391-92 (emphasis added). *See also In re Owles v. Lomenzo, 58 App. Div. 2d 981, 329 N.Y.S.2d 181 (1972).*

173. *See note 63 supra.*
In conclusion, it should be remembered that a finding of governmental action does not end the inquiry into the propriety of a group's membership policies. A court must further consider whether the challenged policies are proscribed by the equal protection guarantee of the fifth amendment. Equal protection analysis, however, requires detailed consideration of the nature and justification for the particular discrimination involved, and must therefore be left for determination in individual cases.