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Chipping Away at Discrimination at the Country Club

Jennifer Jolly-Ryan*

I. INTRODUCTION

There are many private clubs in America today where members are free both to recommend for membership those people with whom they would like to associate, and to blackball those with whom they would prefer not to associate.¹ As a consequence, private clubs often choose new members based upon the desire to socialize with people of like background, education, and stature within a community. Historically, the American country club has been one of the least diverse American institutions by design.² For the most part, the country club was created by wealthy, white, Anglo-Saxon Protestants (WASPs) "between 1880 and 1930, when economic, racial, cultural and ethnic lines divided the United States . . . into 'us' and 'them.'"³ This division was never more

* Professor of Legal Writing, Salmon P. Chase College of Law, Northern Kentucky University, and member, Kentucky Commission on Human Rights. Any opinions expressed herein are those of the author and not those of the Kentucky Commission on Human Rights. Thank you to Jennifer Edwards, my research assistant, for all of her hard work, to the late William Martin, Jr., and to my colleagues on the Commission who inspired this article through their dedication to the cause of civil rights.

1. See Tracy Everbach & Mark Wrolstad, *Most-Elite Country Clubs Haven't Admitted Blacks*, DALLAS MORNING NEWS, May 22, 1997, at 1A. "The vote on new members [at many exclusive clubs] must be virtually unanimous because . . . [a] handful of members" have veto power which can prevent membership. *Id.* Furthermore, a dissenter is not required to provide any reason for excluding an individual from a club. *See id.*

2. See Frank Whelan, *Few Minorities at Country Clubs*, ALLENTOWN MORNING CALL, June 5, 1997, at D1.

3. *See id.* Reportedly, President Kennedy was once challenged by his Secretary of Labor, future Supreme Court Justice Arthur Goldberg, for his membership in the Links Country Club because it excluded Jews, whereupon President Kennedy supposedly replied with a chuckle, "Hell, Arthur, they don't even allow Catholics." *See id.*

prevalent than on the country club golf course.⁴ By 1900, more than 1000 golf courses operated in the United States, and whatever status the game of golf had attained, derived from its association with the wealthy who loved the game and were in a position to hire the best golf course designers and develop the most exclusive clubs.⁵ In many cases, as a result of the prevailing policy of exclusion, those excluded from the upper-tier of country clubs opted to establish their own country clubs to exclude people with whom they did not want to associate.⁶ For example, when the wealthy Irish and German Jewish Americans were denied membership to a "WASP-only country club," they formed their own country club and excluded Italians and African Americans.⁷

Although the historic division at country clubs has been made primarily on the bases of race and national origin, gender has served as an additional basis for division.⁸ Even when admitted to country club membership, clubs have traditionally denied women the same benefits of membership that have been and continue to be extended to male members.⁹ Although some clubs have restructured their policies to accommodate female members, "[t]hat doesn't mean . . . that she gets to play on Saturday morning."¹⁰ While clubs typically reserve Tuesdays for women, with men and women sharing tee times during the remainder of the week, clubs typically reserve Saturdays for men, who presumably maintain work schedules that do not permit them to play during the week, unlike their wives.¹¹ For many years, generally accepted practices included providing fewer benefits and less access for women because wives were aware that their husbands worked during the week.¹²

However, times have changed. "A new generation of golfers now is making its way onto the country club scene, career women who during the week work just as hard as their male counterparts. And those women expect to receive the same benefits and privileges that dues-paying

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *See* Tim Stephens, *Women Golfers Slowly But Surely Chip at Barriers*, ROCKY MOUNTAIN NEWS, Feb. 18, 1996, at 10B (discussing the recent trend of prestigious country clubs allowing female membership).

9. *See id.* (noting that women have been disadvantaged in such areas as voting privileges, survivorship rights, and priority tee times).

10. *See id.* (quoting Marcia Chambers, a contributing editor for *Golf Digest* and author of *THE UNPLAYABLE LIE: THE UNTOLD STORY OF WOMEN AND DISCRIMINATION IN AMERICAN GOLF* (1995)).

11. *See id.*

12. *See id.*

men enjoy."¹³ Despite this change in our modern culture, division and exclusion are still the norm at many country clubs throughout the nation.¹⁴ Because private clubs are exempt from the public accommodations provisions of the Civil Rights Laws,¹⁵ that division is allowed to continue and flourish in America today.¹⁶

At a time when the President of the United States is calling for a meaningful conversation on the country's race relations,¹⁷ affirmative action is under attack,¹⁸ and minorities and women are attempting to reach the upper echelon of the business world, the denial of access to private clubs has become increasingly detrimental to affected individuals.¹⁹ Moreover, the blatant and free exclusion of these otherwise protected groups of persons "is detrimental to the goal of removing racial discrimination from society."²⁰ Private club membership "can be an important source of business opportunity" because it potentially provides for "developing new contacts, expanding networks, and gaining new clients."²¹ In a number of small communities, private clubs may monopolize certain types of recreational facilities, from which otherwise protected classes of persons are excluded.²² Furthermore, discriminatory membership policies have had the effect of relegating wom-

13. *Id.*

14. *See* Everbach & Wrolstad, *supra* note 1, at 1A. Partly because of the efforts of the Professional Golf Association (PGA), African Americans have made progress in the fight against discriminatory membership policies. *See id.* In 1990, a country club founder in Shoal Creek, Alabama, precluded the admission of African Americans as members. *See id.* In response, the PGA required clubs hosting PGA-sanctioned events to "demonstrably open their membership practices by 1995." *See id.* Furthermore, the United States Golf Association (USGA), which hosts the U.S. Open tournaments for both men and women, has adopted a similar antidiscrimination policy. *See id.*

15. *See* 42 U.S.C. § 2000a(e) (1994).

16. *See* Everbach & Wrolstad, *supra* note 1, at 1A.

17. *See* Clinton Urges Nation to Mend Race Relations, BUFFALO NEWS, June 15, 1997, at A1 (stating that '[w]e have torn down the barriers in our laws' . . . 'Now we must breakdown the barriers in our lives, our minds and our hearts').

18. *See* Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275, 277-78 (1997) (discussing the means by which affirmative action is being opposed).

19. *See infra* note 253 (discussing the underrepresentation of women and minorities in executive-level positions).

20. *See* Cynthia A. Leiferman, Comment, *Private Clubs: A Sanctuary For Discrimination?*, 40 BAYLOR L. REV. 71, 95 (1988).

21. *See* Thomas H. Sawyer, *Private Golf Clubs: Freedom of Expression and the Right to Privacy*, 3 MARQ. SPORTS L.J. 187, 203 (1993).

22. *See id.*

en and minorities to a social status that "bears no relation to their actual abilities."²³

The costs of preserving and protecting the practice of discrimination in private clubs are significant.²⁴ First, discrimination perpetuates the "all white male private club," thus "signal[ing] to other members of the white male 'good ol' boy' network that deliberate discrimination has not yet become discredited enough to express proudly and openly."²⁵ Second, discrimination implies that both our government and judicial system approve of inequality among WASPs and such groups as African Americans, Jews, and women.²⁶ Finally, perhaps the most devastating effects are the stigma of inferiority and psychological harm that private acts of discrimination cause.²⁷

Although the issue of private club membership has been raised over the years, the issue may be gaining new vitality with the professional success and celebrity of a young multiracial golfer named Tiger Woods, who continues to win tournaments held at some clubs which, years earlier, would allow him to do no more than caddie for another golfer.²⁸ Although Woods reportedly declined the position of champion for the cause of eliminating discriminatory practices at private clubs,²⁹ his success has already begun to serve as a catalyst for change.³⁰

23. See Beth H. Parker, *Membership Has Its Privileges: Defiant Private Clubs Are Testing The Boundaries of Associational Rights*, CAL. LAW., June 1988, at 46, 115.

24. See Sawyer, *supra* note 21, at 202-04. See generally Edith M. Hofmeister, Comment, *Women Need Not Apply: Discrimination and the Supreme Court's Intimate Association Test*, 28 U.S.F. L. REV. 1009 (1994) (discussing the United States Supreme Court's application of an "intimate association" standard to gender discrimination in private clubs and its detrimental impact on women).

25. Sawyer, *supra* note 21, at 202-03.

26. See *id.* at 203.

27. See *Runyon v. McCrary*, 427 U.S. 160, 173-75 (1976) (holding that federal civil rights statute 42 U.S.C. § 1981 prohibits a private school from denying admission to an African American solely on the basis of race); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 446-47 (1968) (Douglas, J., concurring) (discussing the effects of racial discrimination on African Americans).

28. See Whelan, *supra* note 2, at D1. The young Masters champion reportedly informed television talk show host Oprah Winfrey of his belief that some country clubs continue to practice discrimination and stated, "I've had to deal with that growing up I got kicked off of golf courses numerous times; been called some pretty tough words to my face." *Id.*

29. See Lynn Zinser, *Sexist Club a Knock on Woods*, SEATTLE TIMES, Aug. 6, 1997, at C1. Woods reportedly responded to criticism regarding his coach's affiliation with an all-male club by saying, 'I can't be a champion to all causes.' See *id.*; but see *Sportscene*, PORTLAND OREGONIAN, Aug. 10, 1997, at D2 (explaining that Woods has a "stated goal to help eliminate discrimination in golf" but suggesting that perhaps Woods's goal extends only to racial discrimination).

30. See Everbach & Wrolstad, *supra* note 1, at 1A. Dallas Mayor Ron Kirk recently discussed Woods's success and focused attention on the issue of private clubs' dis-

This Article will attempt to capitalize upon the renewed attention paid to the issue of the membership practices of some private clubs today and will argue that the time has come to abolish such forms of blatant discrimination through the following: (1) broad judicial interpretation of the Civil Rights Laws and a narrow interpretation of any exemptions contained therein;³¹ (2) state legislation affording all protected classifications of persons access to opportunities without any exemption for private clubs;³² (3) the denial of any government benefits or privileges to private clubs that discriminate;³³ and (4) political and social pressures against discrimination.³⁴ This Article will provide an overview of the federal law most frequently invoked in civil rights cases involving private club membership practices,³⁵ the Public Accommodations provisions of Title II of the Civil Rights Act of 1964,³⁶ and some state laws which provide recourse to women and minorities excluded from private club membership.³⁷ It will discuss the balance courts have attempted to strike between clubs' and members' First Amendment right of association and the goal of eliminating discrimination through a judicially-created definition of "private club."³⁸ Finally, this Article will conclude that even if a particular club fits the definition of a distinctly

crimination by refusing to visit clubs that adhered to race-based exclusionary policies. *See id.* Mayor Kirk refused to attend events held at several Dallas country clubs "because of their exclusionary policies, which he called offensive, stupid and embarrassing." *See id.* Woods was again "drawn into the tricky confluence where golf meets discrimination" when Houston's all-male Lochinvar Golf Club denied a female CNN producer access to the club to discuss with Woods the mechanics of his golf swing. *See David Barron, Club's Discriminatory Policy Puts Tiger in Middle Again, HOUSTON CHRON.*, May 26, 1997, at 12.

31. *See infra* notes 182-91 and accompanying text (discussing judicial intervention and interpretation as a means to curtail private discrimination).

32. *See infra* notes 192-203 and accompanying text (discussing state legislation as a means to address private discrimination).

33. *See infra* notes 204-31 and accompanying text (advocating denial of liquor licenses and tax exemptions from private clubs found to enforce discriminatory policies).

34. *See infra* notes 232-51 and accompanying text (discussing the application of social and political pressures as a means to alleviate private discrimination).

35. *See infra* notes 68-89 and accompanying text (discussing federal civil rights laws).

36. *See* 42 U.S.C. § 2000a (1994).

37. *See infra* notes 192-203 and accompanying text (discussing state and local legislation).

38. *See infra* notes 122-78 and accompanying text (discussing the judicially-created definition of "private club").

private club, and is therefore exempt from the Civil Rights Act of 1964, the government should require such a club to surrender its tax-exempt status and certain public benefits and privileges.³⁹ Otherwise, individuals who are excluded from private clubs, along with fellow taxpayers in general, would be asked to support clubs which discriminate, including those from which they were originally excluded.

II. CONSTITUTIONAL PROTECTIONS FOR PRIVATE CLUBS WITHIN LIMITED BOUNDARIES

A close review of the United States Constitution reveals that it should afford few protections to private clubs today, particularly country clubs and organizations devoted to social or recreational pursuits such as playing golf. As previously discussed, it is often difficult to distinguish between a purely social function and an economic activity.⁴⁰ Many sports and social activities held at country clubs provide economic opportunities for concessionaires and the clubs themselves, at the very least, offer valuable networking activities by providing opportunities for members to mix business with pleasure.⁴¹ Courts have recognized an inherent conflict between legislative efforts to eliminate discrimination against citizens and the First Amendment "freedom of association" of the members of a private organization.⁴² Additionally, courts have addressed the constitutionally protected freedom of association in two distinct senses: intimate association and expressive association.⁴³

The United States Supreme Court defines intimate association as those "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."⁴⁴ The Supreme Court has traditionally limited these constitutionally-protected intimate associations to those arising from the core concept of family.⁴⁵ Likewise, intimate associations afforded

39. See *infra* notes 179-231 and accompanying text (discussing methods for chipping away at country club discrimination).

40. See *supra* notes 17-23 and accompanying text.

41. See *supra* notes 17-27 and accompanying text.

42. See *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984).

43. See *id.* at 617-18.

44. See *id.* at 620.

45. See *id.* at 618-19; see also *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (protecting personal affiliations that attend the creation and sustenance of a family and marriage); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 855-56 (1977) (protecting decisions regarding raising of children); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 689-90 (1977) (protecting woman's right to abortion); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-06 (1977) (protecting right to cohabitation with one's relatives).

First Amendment protections are generally characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."⁴⁶ On the other hand, a relationship lacking the foregoing qualities appears to be too remote from the privacy concerns which the Court has accorded constitutional protection under the First Amendment right of association.⁴⁷

In *Roberts v. United States Jaycees*,⁴⁸ the Supreme Court recognized that there is a diverse range of human relationships that may claim constitutional freedom of association rights.⁴⁹ To address such diversity, a court must make a "careful assessment" on a case-by-case basis as to where a particular "relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."⁵⁰ Relevant factors in conducting the foregoing assessment include the size, purpose, policies, selectivity, and congeniality of the relationship.⁵¹ Applying these factors in *Roberts*, the Supreme Court upheld the Minnesota Human Rights Act, which forbids gender discrimination in "places of public accommodation," against a freedom of association challenge by determining that the Jaycees was not a private club.⁵² In particular, the Court noted that the local Jaycees had never denied membership to an applicant on any basis other than sex or age, and, therefore, had "no plan or purpose of exclusiveness."⁵³

46. See *Roberts*, 468 U.S. at 620.

47. See *id.*

48. 468 U.S. 609 (1984).

49. See *id.*

50. *Id.* at 618 (citing *Runyon v. McCrary*, 427 U.S. 160, 187-89 (1976) (Powell, J., concurring)).

51. See *id.*

52. See *id.* at 625, 630-31. The Minnesota Department of Human Rights used the Act to find a violation of the state's public accommodations law and ordered that women be admitted. See *id.* at 615. The Minnesota Human Rights Act provides, in relevant part: "It is an unfair discriminatory practice: to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, . . . or sex." MINN. STAT. § 363.03 subd. 3(a)(1) (1991).

53. See *Roberts*, 468 U.S. at 621; see also *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969) (discussing housing discrimination); *Daniel v. Paul*, 395 U.S. 298, 302 (1969) (discussing discrimination at an amusement park); cf. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 438 (1973) (holding that an organization whose only selection criterion is race has "no plan or purpose of exclusiveness" that might make it a private club exempt from the federal civil rights statute).

Moreover, women were permitted to attend certain meetings and participate in particular projects and social functions.⁵⁴ The Court determined that the local chapters of the Jaycees were “neither small nor selective” and noted that “much of the activity central to the formation and maintenance of the association involve[d] the participation of strangers.”⁵⁵

The second type of associational right protected under the Constitution is the right of expressive association.⁵⁶ The Supreme Court defines expressive association “as the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”⁵⁷ In *Roberts*, for example, the Court stated that “[a]n individual’s freedom to speak, to worship, and to petition the government for the 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.”⁵⁸ The Court recognized that “[t]here 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.”⁵⁹ Although that was precisely the effect of the Minnesota Human Rights Act as discussed in *Roberts*,⁶⁰ the Court noted that the constitutional right of association is not absolute.⁶¹ Rather, it is balanced against compelling state interests in eradicating discrimination.⁶²

If the state’s interest “cannot be achieved through means significantly less restrictive of associational freedoms,” the balance tips in favor of

54. See *Roberts*, 468 U.S. at 621.

55. *Id.*; see also *Board of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 546-47 (1987) (holding that California’s Unruh Civil Rights Act, requiring all “business establishments” to admit women, did not violate the First Amendment right to intimate association because of the business-like attributes of Rotary, including the fact that each chapter had 20 to 900 members, and because many activities of the local clubs were carried on in the presence of strangers).

56. See *Roberts*, 468 U.S. at 622.

57. *Id.*; see also *Parker*, *supra* note 23, at 50.

58. *Roberts*, 468 U.S. at 622.

59. *Id.* at 623. Other examples of government action which may infringe upon the freedom of expressive association include “impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group” and requiring disclosure of membership rosters. See *Brown v. Socialist Workers’ 74 Campaign Comm.*, 459 U.S. 87, 98 (1982) (holding compelled disclosure of campaign contributions to the Socialist Party unconstitutional); *Healy v. James*, 408 U.S. 169, 181 (1972) (holding that college could not deny official recognition of student political group based on disagreement with group’s philosophy).

60. See *Roberts*, 468 U.S. at 622.

61. See *id.* at 623.

62. See *id.*

enforcing the antidiscrimination law.⁶³ In holding that Minnesota's compelling state interest justified the infringement upon the associational rights held by the Jaycees, the Court stated:

[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.⁶⁴

Noting the state's "broad authority to create rights of public access on behalf of its citizens," the Court upheld the Minnesota public accommodation law.⁶⁵ In reaching its conclusion, the Court noted that the Jaycees afforded its members "public accommodations" in the form of leadership skills, business contacts, and employment opportunities.⁶⁶

It is clear that First Amendment rights will give way when a purportedly private club conducts a significant amount of commerce. Such clubs are "commercial" in nature "where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed."⁶⁷

63. *See id.*

64. *Id.* at 625 (citing *Heckler v. Mathes*, 465 U.S. 728, 744-45 (1984); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-26 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684-87 (1973) (plurality opinion)).

65. *Id.*

66. *See id.* at 625-26 (citing *United States Jaycees v. McClure*, 305 N.W.2d 764, 772 (Minn. 1981)).

67. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 12 (1988) (citation omitted). In *New York State Club Ass'n*, the Court upheld a city ordinance that prohibits discrimination in

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."

Id. at 6 (quoting N.Y. ADMIN. CODE § 8-102(9) (1986)) (alteration in original); see Diane S. Worth & Nancy M. Landis, *Does Membership Have Its Privileges? The Limits on Permissible Discrimination in Private Clubs*, 60 J. KAN. B. ASS'N 27, 31 (1991) (discussing the implication of discriminatory club practices on the right to make contracts).

III. OVERVIEW OF FEDERAL CIVIL RIGHTS LAWS AFFECTING PRIVATE CLUBS

A. 42 U.S.C. §§ 1981 and 1982:⁶⁸ *Equality in Contractual and Property Rights*

The Civil Rights Act of 1866,⁶⁹ which abolished slavery and attempted to abolish all remaining badges of slavery, was codified in §§ 1981⁷⁰-1982⁷¹ of the United States Code and proscribes private acts of racial discrimination.⁷² Section 1981 ensures non-white citizens the same right to "make and enforce contracts" as white citizens,⁷³ and § 1982 prohibits racial discrimination in the sale or rental of property.⁷⁴ Both sections have limited utility in eradicating discrimination in the membership of private clubs because membership in a private club ordinarily does not involve property or contract rights. However, in limited circumstances, the Supreme Court has held that private club memberships can be so closely associated with the sale or lease of property as to become "part of that property."⁷⁵

B. 42 U.S.C. § 1983:⁷⁶ *Equal Protection Under Color of State Law*

Section 1983 prohibits anyone acting under color of state law from denying equal protection to any individual.⁷⁷ Section 1983's utility in eradicating discriminatory membership practices of private clubs is also limited because the practices of the club must involve some state action in order to be actionable.⁷⁸ Thus far, courts have taken a narrow view

68. 42 U.S.C. §§ 1981-1982 (1994).

69. Ch. 31, § 1, 14 Stat. 27 (1866), *reenacted as* Act of May 31, 1870, Ch. 114, § 16, 16 Stat. 144 (1870) (codified as amended at 42 U.S.C. §§ 1981-1982).

70. 42 U.S.C. § 1981 (1994).

71. *Id.* § 1982.

72. *See generally id.* §§ 1981-1982.

73. *See id.* § 1981.

74. *See id.* § 1982.

75. *See Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 437 (1973) (finding that a recreational association's discriminatory membership policy violated § 1982 because membership created a valuable property right); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969) (holding that a "leasehold of realty coupled with membership share in a nonprofit company organized to offer recreational facilities to owners and lessees of real property constituted property under § 1982"); *see also Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 315-16 (4th Cir. 1980) (citing *Tillman* in finding that membership in club tied to home ownership establishes "property rights"); *Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 961 (W.D. Tex. 1987) (applying *Sullivan* in holding that use of a specific plot of land owned by club constituted "property").

76. 42 U.S.C. § 1983 (1994).

77. *See id.*

78. *See id.*

of what constitutes state action in connection with private clubs. For example, in *Moose Lodge No. 107 v. Irvis*,⁷⁹ the Supreme Court determined that merely issuing a state liquor license and regulations of the state liquor control board does not "sufficiently implicate the state" in the discriminatory policies of a private club to constitute state action.⁸⁰ While conceding that private clubs have a right to choose their members by adhering to discriminatory policies, the litigant in *Irvis* argued that the state's issuance of a liquor license constituted state action for purposes of the Equal Protection Clause of the Fourteenth Amendment.⁸¹ The Court held that it is not enough that a private club receives some benefit or service from the state for purposes of § 1983 liability.⁸² Nor is state regulation sufficient.⁸³ Therefore, § 1983 is of very limited utility in eliminating deliberate discrimination by private clubs.

C. Title IX:⁸⁴ *Equal Opportunity in Education*

As discussed below, Title II of the Civil Rights Act of 1964 prohibits certain forms of discrimination in private associations or organizations.⁸⁵ However, the public accommodations provisions provide no remedy for gender discrimination; thus, women excluded from certain clubs must turn to other avenues to access networking opportunities.⁸⁶ In 1972, Congress enacted Title IX of the Education Amendments which is designed to assure equal opportunity to women in education, including sports activities.⁸⁷ Noting the absence of protections afforded to women by other civil rights laws, one commentator has stated that "Title IX

79. 407 U.S. 163 (1972).

80. *See id.* at 175-77. *But see* Citizen's Council on Human Relations v. Buffalo Yacht Club, 438 F. Supp. 316, 323-24 (W.D.N.Y. 1977) (finding state action where yacht club was located on land leased from the City of Buffalo adjacent to a public park); Frank v. Ivy Club, 576 A.2d 241, 257 (N.J. 1990) (holding that when a state university "and an organization that deems itself private share a symbiotic relationship, particularly where the allegedly 'private' entity supplies an essential service which is not provided by the [university], the servicing entity loses its private character and becomes subject to the laws against discrimination").

81. *See Irvis*, 407 U.S. at 171.

82. *See id.* at 173.

83. *See id.*

84. Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1994).

85. *See infra* notes 90-178 and accompanying text (discussing the prohibition of discrimination in places of public accommodation).

86. *See* 42 U.S.C. § 2000(a) (1994).

87. *See id.*

stands alone at the Federal level to fight against gender discrimination."⁸⁸ Because many private clubs permit local schools to use their courses for sports activities and competition, the practice of private clubs excluding women from their membership, admitting them as non-voting members only, or denying them equal benefits is questionable.⁸⁹

D. 42 U.S.C. § 2000a (Title II): Balancing First Amendment Rights and Antidiscrimination Laws in Public Accommodations.

Because the issue of discrimination in private clubs rarely involves protected property or contract rights or any state action,⁹⁰ the public accommodations law of Title II of the Civil Rights Act of 1964 provides a remedy to victims of discrimination by prohibiting discrimination or segregation on the basis of race, religion, color, or national origin at places of "public accommodation" that affect commerce.⁹¹ On its face, Title II is limited in scope because it prohibits only discrimination by private individuals providing public accommodations that affect commerce.⁹²

Most forms of racial and gender discrimination have been unlawful since the enactment of a series of civil rights laws designed to eliminate the badges of slavery that remained long after the Civil War.⁹³ Nevertheless, racial prejudice⁹⁴ and the physical bondage still imposed upon persons through denial of equal access to public accommodations remain

88. See Sawyer, *supra* note 21, at 199.

89. See *id.* at 198.

90. See *supra* notes 69-83 and accompanying text (discussing the idea that discrimination in private clubs rarely involves property or contract rights or state action).

91. See 42 U.S.C. § 2000a(a) (1994) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, . . . without discrimination or segregation on the ground of race, . . .").

92. See *id.*; see also Daniel v. Paul, 395 U.S. 298, 302 (1969).

93. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866), *reenacted as Act of May 31, 1870*, ch. 114, § 16, 16 Stat. 144 (1870) (codified as amended at 42 U.S.C. §§ 1981-1982). The Civil Rights Act of 1866 enforced the abolition of slavery, declaring:

[A]ll persons born in the United States and not subject to any foreign power . . . and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens

Id.

94. See Bell v. Maryland, 378 U.S. 226, 260 (1964) (Douglas, J., concurring).

the most prevalent remnants of slavery.⁹⁵ Congress enacted Title II of the Civil Rights Act of 1964 to eradicate racial prejudice and discrimination by private individuals in places of public accommodation.⁹⁶ Although the Act has been pivotal in providing a remedy for many egregious forms of discrimination, it completely exempts bona fide private clubs from its coverage.⁹⁷ In addition to exempting private clubs, women excluded from private clubs or public accommodations will find no remedy under Title II.⁹⁸ Although the Act prohibits discrimination on the basis of race, religion, or national origin by a place providing public accommodations that affect commerce, it makes no mention of gender.⁹⁹

By its statutory definition, a private club is discriminatory if its membership is inherently selective.¹⁰⁰ Race discrimination in a club's membership practices is not unlawful, however, regardless of how blatant or egregious it is, if a club is proven to be distinctly private under the Act.¹⁰¹ In essence, the Act gives truly private clubs a license to engage in discrimination based upon race and gender. However, Title II does provide an important remedy to many victims of discrimination as a result of a club's exclusionary practices by broadly defining public accommodation.¹⁰²

1. What is a Public Accommodation?

Under the Act, a place of "public accommodation" includes any place or organization which falls under any one of the following categories:

- (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests . . . ;
- (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other fa-

95. See Lieferman, *supra* note 20, at 71 n.15 (explaining that the purpose of "Title II of the 1964 Civil Rights Act is to eliminate distinctions 'between those who have and those who have not been slaves'").

96. See 42 U.S.C. § 2000a (1994).

97. See *id.* § 2000a(e).

98. See *id.* § 2000a.

99. See *id.*

100. See Lieferman, *supra* note 20, at 95.

101. See 42 U.S.C. § 2000a (1994). The burden of proof is on the defendant to show that it is a private club and not covered by the provisions of the civil rights laws. See *United States v. Richberg*, 398 F.2d 523, 529 (5th Cir. 1968) (holding that defendant's cafe was not a private club under the Act); *Wright v. Cork Club*, 315 F. Supp. 1143, 1150 (S.D. Tex. 1970) (holding that defendant's club was not a private club under the Act).

102. See 42 U.S.C. § 2000a(b).

cility principally engaged in selling food for consumption on the premises . . . ;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment which . . . is physically located within the premises of any establishment otherwise covered by this subsection, or . . . within the premises of which is physically located any such covered establishment, and . . . which holds itself out as serving patrons of such covered establishment.¹⁰³

In addressing discrimination in private clubs, the category of the public accommodation law of the Civil Rights Act of 1964 most frequently applied is that which relates to "places of exhibition or entertainment."¹⁰⁴ Because many private clubs provide sports activities, this provision has been extremely helpful in reducing discrimination at some clubs which initially appear to be private. The Supreme Court has held that "entertainment" includes "direct participation in a sport as well as the viewing of sports activities as a spectator."¹⁰⁵ Moreover, an emphasis on the recreational activities of an organization or association may result in a finding that it is a "place of entertainment" for purposes of the public accommodation laws.

For example, in *Welsh v. Boy Scouts of America*,¹⁰⁶ the Boy Scouts of America (Boy Scouts) excluded a seven-year-old boy when he refused to profess his belief in God as required by the Boy Scouts' "Declaration of Religious Principle."¹⁰⁷ The Boy Scouts argued that its organization was not a place of "public accommodation" because its function was education, not entertainment.¹⁰⁸ However, the court rejected the argument and determined that the Boy Scouts was indeed a place of "entertainment" because of its emphasis on "fun" as outlined in its own literature. Therefore, the Boy Scouts was deemed a place of public accommodation subject to the Civil Rights Act of 1964.¹⁰⁹

Once it is determined that an organization, association, or physical facility fits into one of the enumerated categories of § 2000a(b), it is easy to satisfy the second prong of the test for finding a place of public accommodation covered by the Act, which requires that the accommodation affect interstate commerce.¹¹⁰ For example, one court determined that a swim club affected interstate commerce when, among other factors, the club's sliding board was manufactured out-of-state and its out-

103. *Id.*

104. *See id.* § 2000a(b)(3).

105. *See Brown v. Loudoun Golf & Country Club, Inc.*, 573 F. Supp. 399, 402 (E.D. Va. 1983) (citing *Daniel v. Paul*, 395 U.S. 298, 306 (1969)).

106. 742 F. Supp. 1413 (N.D. Ill. 1990).

107. *See id.* at 1422.

108. *See id.* at 1417-18.

109. *See id.*

110. *See* 42 U.S.C. § 2000a (1994).

of-state guests were sources of entertainment which "moved in commerce."¹¹¹ The commerce requirement was also easily satisfied in two other situations: (1) when an ostensibly private club hosted an annual golf tournament attended by out-of-state professionals and club members,¹¹² and (2) when a private club allowed an out-of-state golf team to play on its golf course once a year.¹¹³ The statute itself plainly provides that a place of entertainment affects commerce if "it customarily presents . . . athletic teams, . . . or other sources of entertainment which move in commerce"¹¹⁴

2. The Private Club Exemption

Although Congress went to great lengths to broadly define the term public accommodation, it provided a specific exemption from the Act's coverage, stating that distinctly private clubs are not places of public accommodation and are not covered under the Act.¹¹⁵ Section 2000a(e) of the Civil Rights Act of 1964 provides:

The provisions of this subchapter 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) of this section.¹¹⁶

Conspicuously absent from the wording of the exemption is any definition of the term "private club."¹¹⁷ While the term private club is not specifically defined, the legislative history of the private club exemption indicates that unlike the broadly enumerated categories of public accommodations,¹¹⁸ determining whether a club is private is a fact-sensitive inquiry.¹¹⁹ Ostensibly private clubs "must be examined in the light of the Act's clear purpose of protecting only 'the genuine privacy of private clubs . . . whose membership is genuinely selective'"¹²⁰ The "pur-

111. *See* *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 792 (E.D. Pa. 1989).

112. *See* *Brown v. Loudoun Golf & Country Club, Inc.* 573 F. Supp. 399, 402 (E.D. Va. 1983).

113. *See* *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474, 477 (E.D. Va. 1966).

114. 42 U.S.C. § 2000a(c) (1994).

115. *See id.* § 2000a(e).

116. *Id.*

117. *See id.*

118. *See id.* § 2000a(b).

119. *See* *Nesmith v. YMCA*, 397 F.2d 96, 98 (4th Cir. 1968) (finding that the YMCA was not a private club).

120. *Id.* at 101-02 (quoting 100 CONG. REC. 13,697 (1964) (remarks of Sen. Hubert

pose of Title II is 'to move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public,'"¹²¹

3. When is a Club Distinctly Private?

In narrowly construing the private club exemption, various courts have emphasized a number of nonexclusive factors to determine whether a particular organization, association, or physical facility is indeed a private club, thereby exempt under the Act.¹²² The following discusses some of the factors most frequently weighed by the courts.

a. The "genuine selectivity of the group in the admission of its members."¹²³

Rather than focusing on the physical facility of an organization or association, courts most frequently focus upon an organization's or association's membership practices.¹²⁴ Courts have determined that the key factor in determining whether an establishment is a private club is whether the club's membership is truly selective.¹²⁵ In analyzing whether a particular club is truly selective in its membership practices, courts have looked at the "substantiality of the membership fee;"¹²⁶ the "nu-

Humphrey)).

121. *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (quoting H.R. REP. NO. 88-914, at 18 (1964)).

122. See *infra* notes 123-78 and accompanying text (discussing factors for determining whether a club is private).

123. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 796 (E.D. Pa. 1989) (citing *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973); *Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 960 (W.D. Tex. 1987); *Brown v. Loudoun Golf & Country Club, Inc.*, 573 F. Supp. 399, 402-03 (E.D. Va. 1983); *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1175-76 (E.D. Wis. 1979); *Cornelius v. BPOE*, 382 F. Supp. 1182, 1203 (D. Conn. 1974); *United States v. Jordan*, 302 F. Supp. 370, 375 (E.D. La. 1969)).

124. See *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1420 (N.D. Ill. 1990) (explaining that "place" is a term of convenience, not limitation).

125. See *Tillman*, 410 U.S. at 438; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969); see also *Welsh*, 742 F. Supp. at 1425; *Lansdowne Swim Club*, 713 F. Supp. at 797-802; *Brown*, 573 F. Supp. at 403; *Wright v. Salisbury Club, Ltd.*, 479 F. Supp. 378, 382, *rev'd*, 632 F.2d 309 (4th Cir. 1980); *Wright v. Cork Club*, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970). During the floor debate regarding § 2000a(e), Senator Hubert Humphrey asserted, "[w]e intend only to protect the genuine privacy of private clubs or other establishment whose membership is genuinely selective on some reasonable basis." 110 CONG. REC. 13,697 (1964) (remarks of Sen. Hubert Humphrey).

126. See *Lansdowne Swim Club*, 713 F. Supp. at 797 (citing *Brown*, 573 F. Supp. at 403).

merical limit on club membership;¹²⁷ the "membership's control over the selection of new members;"¹²⁸ the "formality of the club's admission procedures;"¹²⁹ the "standards or criteria for admission;"¹³⁰ and "whether and how many white applicants have been denied membership relative to the total number of white applicants."¹³¹

No single factor in analyzing the issue of selectivity is dispositive. For example, in *United States v. Lansdowne Swim Club*,¹³² the court held that a swim club's membership selection process was not "genuinely selective," and, therefore, not exempt from the public accommodations provision, even though it undisputedly required substantial membership fees,¹³³ placed a limit on the number of shareholder members,¹³⁴ and utilized a formal admission procedure which was controlled by the shareholders.¹³⁵ In determining that the club was not genuinely selective, the court was most persuaded by the fact that the club conducted no background investigation of the character or financial status of applicants and did not require that applicants reside in a particular geographic area.¹³⁶

127. See *id.* (citing *Jordan*, 302 F. Supp. at 375).

128. See *id.* (citing *Daniel v. Paul*, 395 U.S. 298, 301 (1969); *Jordan*, 302 F. Supp. at 375).

129. See *id.* (citing *Brown*, 573 F. Supp. at 403).

130. See *id.* (citing *Nesmith v. YMCA*, 397 F.2d 96, 102 (4th Cir. 1968); *Cork Club*, 315 F. Supp. at 1151).

131. See *id.* at 797-98 (citing *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973); *Wright v. Salisbury Club Ltd.*, 632 F.2d 309, 312 (4th Cir. 1980); *Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 960 (W.D. Tex. 1987); *New York v. Ocean Club*, 602 F. Supp. 489, 495 (E.D.N.Y. 1984); *Brown*, 573 F. Supp. at 403; *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1176 (E.D. Wis. 1979); *Jordan*, 302 F. Supp. at 375).

132. See *Lansdowne Swim Club*, 713 F. Supp. at 798.

133. See *id.* at 798 (holding that charges of \$250 for a capital share or bond plus \$32 annual dues for up to three family members and \$14 for each additional member were insufficient); see also *Tillman*, 410 U.S. at 433 & n.2 (holding that \$375 in membership dues was insufficient); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1335 (2d Cir. 1974) (holding that \$2000 in dues was insufficient); *Brown*, 573 F. Supp. at 400, 403 (holding \$750 in dues insufficient).

134. See *Lansdowne Swim Club*, 713 F. Supp. at 797 (holding that a limit of 500 shareholders was insufficient); see also *Tillman*, 410 U.S. at 433 (holding that 325 members was insufficient to show selectivity); *Brown*, 573 F. Supp. at 400 (holding that 450 members was insufficient to demonstrate selectivity).

135. See *Lansdowne Swim Club*, 713 F. Supp. at 800; accord *Salisbury Club*, 632 F.2d at 312; *Ocean Club*, 602 F. Supp. at 495; see also *Tillman*, 410 U.S. at 433, 438 (holding that a requirement of recommendations was insufficient to demonstrate selectivity).

136. See *Lansdowne Swim Club*, 713 F. Supp. at 798-99.

"If there is no established criteria for selecting members, the courts are reluctant to accept the claim of private status"137 However, "[w]here there is a . . . policy of admission without any kind of investigation of the applicant, the logical conclusion is that membership is not selective."¹³⁸ Concluding that the swim club was not private the court noted that over a period of approximately thirty years, the club had admitted at least 1400 shareholder member families in addition to many associate families.¹³⁹ In its thirty-year history, only three non-black families had been denied membership by the club.¹⁴⁰

b. The "membership's control over the operations of the establishment."¹⁴¹

By its very nature, if a club is private, only its members have the authority to determine how it is organized, operated, and maintained. If the membership loses that control by allowing public access, a strong argument can be made that the club is no longer private.¹⁴² For example, in *Durham v. Red Lake Fishing and Hunting Club, Inc.*,¹⁴³ the court determined that the members of a fishing and hunting club had little control over the operations of their establishment because the roads running over the club's property were open to the public and were maintained by the county.¹⁴⁴

137. *Wright v. Cork Club*, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970) (citation omitted).

138. *Nesmith v. YMCA*, 397 F.2d 96, 102 (4th Cir. 1968) (quoting Note, 62 *Nw. U. L. Rev.* 244, 247 & n.21 (1967)).

139. See *Lansdowne Swim Club*, 713 F. Supp. at 799.

140. See *id.* at 800 (citing *Tillman*, 410 U.S. at 438 (stating "only one white applicant rejected in eleven years"); *Salisbury Club*, 632 F.2d at 312 (noting "no white residents rejected and only three white nonresidents rejected"); *Nesmith*, 397 F.2d at 101 (stating that "over 99% of white applicants accepted"); *Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 956 (W.D. Tex. 1987) (finding "only two whites rejected in fifty years"); *Ocean Club*, 602 F. Supp. at 495 (finding "100 applications and no rejections"); *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1176 (E.D. Wis. 1979) (stating that "within one-year period, only three rejections out of 1,011 applications").

141. *Lansdowne Swim Club*, 713 F. Supp. at 796 (citing *Durham*, 666 F. Supp. at 960; *United States v. Jordan*, 302 F. Supp. 370, 375-76 (E.D. La. 1969)).

142. See *id.* at 796-802.

143. 666 F. Supp. 954 (W.D. Tex. 1987).

144. See *id.* at 960.

c. The history¹⁴⁵ and purpose of the organization.¹⁴⁶

The central inquiry concerning the history and purpose of the organization, and its bearing upon whether a club is genuinely private, is "whether [the club] was created to avoid the effect of civil rights legislation."¹⁴⁷ As is the case with many other types of discrimination, it is doubtful that a club would be so blatant as to state such a purpose in its by-laws or other written documents. However, it could be relevant that a private club becomes more selective after the adoption of civil rights legislation¹⁴⁸ or if a change in membership procedures occurs after a victim of discrimination files a complaint with an enforcement agency.¹⁴⁹ The club's history may also indicate whether the club was designed to be selective in its membership, which is central to the private club inquiry.¹⁵⁰

d. The use of the facilities by nonmembers.¹⁵¹

Public use is directly contradictory to the true character of a private club.¹⁵² When a club permits regular use by nonmembers, it loses its private club status and is subject to discrimination laws.¹⁵³ In *Lansdowne Swim Club*,¹⁵⁴ the court held that the regular use of the swim club by nonmembers was inconsistent with the club's "purported desire to be exclusive"¹⁵⁵ and undercut its claim that it was a private club.¹⁵⁶ The court noted that, for a fee, members and associates could

145. See *Lansdowne Swim Club*, 713 F. Supp. at 797 (citing *Eagles*, 472 F. Supp. at 1175).

146. See *id.* (citing *Jordan*, 302 F. Supp. at 376); see also *New York v. Ocean Club*, 602 F. Supp. 489, 494-96 (E.D.N.Y. 1984).

147. See *Lansdowne Swim Club*, 713 F. Supp. at 802 (citing *Daniel v. Paul*, 395 U.S. 298, 301-02 (1969); *Eagles*, 472 F. Supp. at 1175).

148. See *id.*

149. See *id.*

150. See *id.* (footnote omitted) (stating that "the origins of [Lansdowne Swim Club] suggest that it was intended to serve as a 'community pool' for families in the area and not as a private club").

151. See *id.* at 797.

152. See *id.* at 803-04; *Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 960 (W.D. Tex. 1987) (holding private status lost when club opened its roads to the public).

153. See *Durham*, 666 F. Supp. at 960.

154. 713 F. Supp. 785 (E.D. Pa. 1989).

155. See *id.* at 804.

156. See *id.* at 803-04.

bring as many guests into the pool area as they liked, and members' house guests could purchase temporary memberships of their own.¹⁵⁷ In addition, the club hosted two or three swim meets per year which were open to the general public.¹⁵⁸ Each year, the club sold "splash" party tickets to the general public, the local Boys' Club utilized the swim club's parking lot to sell Christmas trees, and a basketball and volleyball court on the lot were open to the public.¹⁵⁹

Similarly, in *New York v. Ocean Club*,¹⁶⁰ the court held that the club was a public accommodation and, therefore, not entitled to the private club exemption because, in addition to non-selectivity of membership and lack of control, the club advertised and allowed the public to use its tennis courts.¹⁶¹

e. "Whether the club advertises for members."¹⁶²

Advertising to increase usage of club facilities is inconsistent with private club status.¹⁶³ In *Wright v. Salisbury Club, Ltd.*,¹⁶⁴ the Fourth Circuit held that a subdivision country club was not entitled to the private club exemption from the civil rights laws because the club publicly advertised by circulating a newsletter to subdivision residents soliciting their membership in the club.¹⁶⁵ The newsletter was entitled "Notice to All Salisbury Residents" and "invited the readers to 'take advantage of a great opportunity' in the form of reduced initiation fees during a membership drive."¹⁶⁶ In addition, the club participated in a hospitality program for new subdivision residents and distributed club application forms to real estate agents. The developer of the club and subdivision

157. *See id.* at 803.

158. *See id.*

159. *See id.* at 803-04.

160. 602 F. Supp. 489 (E.D.N.Y. 1984).

161. *See id.* at 494-96.

162. *Lansdowne Swim Club*, 713 F. Supp at 797 (citing *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 312-13 (4th Cir. 1980); *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1175 (E.D. Wis. 1979); *Cornelius v. BPOE*, 382 F. Supp. 1182, 1203 (D. Conn. 1974); *Wright v. Cork Club*, 315 F. Supp. 1143, 1152 (S.D. Tex. 1970)).

163. *See Cork Club*, 315 F. Supp. at 1152; *see also Runyon v. McCrary*, 427 U.S. 160, 172 n.10 (1976); *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90, 93 (E.D. La. 1967) (holding that the club was not private because advertisements invited the public); *Castle Hill Beach Club v. Arbury*, 144 N.Y.S.2d 747, 750-51 (Sup. Ct. 1955) (holding that the club was not private when listed in telephone directory under "Bathing Beaches—Public" instead of under "Clubs"), *modified on other grounds*, 150 N.Y.S.2d 367, 368 (N.Y. App. Div. 1956), *aff'd*, 142 N.E.2d 186 (N.Y. 1957).

164. 632 F.2d 309 (4th Cir. 1980).

165. *See id.* at 312-13.

166. *Id.* at 312.

also advertised club membership as one of the attractions of living in the subdivision.¹⁶⁷ The court held that the Salisbury Club's recruitment activities were not those of a truly private club.¹⁶⁸

f. "Whether the club is profit or nonprofit."¹⁶⁹

In determining whether a club is truly private, and therefore exempt from the antidiscrimination provisions of civil rights laws, a court will further consider the club's profit or nonprofit status.¹⁷⁰ Courts have been most willing to protect the privacy and associational interests of club members when a club's purpose is fraternal or social and that purpose cannot be maintained without selective membership.¹⁷¹ On the other hand, if the purpose of the club is economic opportunity, the club's privacy is not entitled to protection or an exemption.¹⁷² "[C]lubs must function as extensions of members' homes and not as extensions of their businesses," because "[r]acial prejudice will not be permitted to infect channels of commerce under the guise of 'privacy.'"¹⁷³

g. The "formalities observed by the club," including the bylaws, meetings, and membership cards.¹⁷⁴

Although not a dispositive factor, the court will consider whether the club has articles or bylaws, formal expulsion and admission procedures, a membership roster, and membership cards.¹⁷⁵ Moreover, it is important to examine whether the club holds formal meetings in which its members have a voice in the policies and activities of the club.¹⁷⁶ A

167. *See id.*

168. *See id.* at 313.

169. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989) (citing *Daniel v. Paul*, 395 U.S. 298, 301 (1969); *Cornelius v. BPOE*, 382 F. Supp. 1182, 1203 (D. Conn. 1974)).

170. *See id.*

171. *See United States v. Jordan*, 302 F. Supp. 370, 376 (E.D. La. 1969).

172. *See Cornelius*, 382 F. Supp. at 1204.

173. *Id.* at 1204.

174. *Lansdowne Swim Club*, 713 F. Supp. at 797 (citing *Nesmith v. YMCA*, 397 F.2d 96, 102 (4th Cir. 1968); *Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 960 (W.D. Tex. 1987); *Jordan*, 302 F. Supp. at 376).

175. *See Jordan*, 302 F. Supp. at 376; *Wright v. Cork Club*, 315 F. Supp. 1143, 1152 (S.D. Tex. 1970) ("[No] matter how elaborate the organization and well defined the by-laws, if they are ignored in practice, they are of little value.")

176. *See Cork Club*, 315 F. Supp. at 1152.

voice is an indication of membership control, vital to private club status.¹⁷⁷ At least one court has held that a club simply cannot be a "private association" if "the members do not meet together."¹⁷⁸

IV. CHIPPING AWAY AT DISCRIMINATION AT THE COUNTRY CLUB

Despite the fact that the public accommodations provisions of Title II have been in effect for over thirty years,¹⁷⁹ discrimination still prevails in one of its most blatant forms at some clubs—exclusion from membership on the basis of race, gender, national origin, or religion—because private clubs are excluded from its coverage.¹⁸⁰ It is time to reconsider the issue of private club discrimination¹⁸¹ and develop ways to eliminate the last bastion of legal segregation in our society. This section discusses actions that some professionals, organizations, and individuals have recently taken in eradicating discrimination in many private clubs and suggests areas where these efforts could be expanded.

A. *Judicial Intervention and Interpretation: A Bright Line Test*

If the First Amendment freedom of association is invoked to protect truly intimate or expressive associations, and if courts broadly construe both the public accommodations provisions of Title II and the private club exemption, it is doubtful that most country clubs could be classified as distinctly private and thus immune from liability for discriminatory membership practices. The First Amendment would not immunize country clubs because membership relationships therein are far from the intimate familial relationships protected by the right of privacy.¹⁸² The courts have noted that there are no intimate associational rights attached to members of a club playing golf together.¹⁸³ The purpose of many

177. See *id.* (quoting *Nesmith*, 397 F.2d at 102) (explaining, however, that this factor is not necessarily dispositive).

178. See *Nesmith*, 397 F.2d at 102 (quoting Robert L. Thompson, Comment, *Civil Rights Act of 1964—Public Accommodations—Private Club Exemption*, 45 N.C. L. REV. 498, 505 (1967)).

179. See 42 U.S.C. § 2000a (1994) (effective July 2, 1964).

180. See *id.* § 2000a(e).

181. See *supra* text accompanying notes 9-14 (discussing the continued prevalence of discrimination in country clubs).

182. See Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987) (holding that the "relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection"); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-21 (1984) (stating that "intimate human relationships must be secured against undue intrusion by the State" to preserve personal liberty).

183. See *State v. Burning Tree Club, Inc.*, 554 A.2d 366, 378-81 (Md. 1989) (holding that a golf club was not protected by First Amendment freedom of association despite its selective membership criteria and fraternal atmosphere); see also New York

clubs is simply to provide entertainment and recreation for their members and, therefore, should not qualify for the First Amendment protections afforded intimate associational rights.¹⁸⁴

The second category of protected associational rights deals with the free expression of ideas, the application of which should not qualify country clubs for such protections. In *Roberts*, the Supreme Court outlined the limited scope of expressive associational rights in stating that “[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of [private] grievances [can]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.”¹⁸⁵ This second category of associational rights, which protects the free expression of political, social, economic, educational, religious, or cultural ideas to preserve liberty,¹⁸⁶ is not as compelling as the state’s interest in eradicating blatant discrimination against otherwise protected persons in the case of private clubs.¹⁸⁷

Many clubs, particularly country clubs with elegant sports and social facilities, are places of public accommodation under Title II of the Civil Rights Act of 1964¹⁸⁸ because they are “place[s] of exhibition or entertainment” whose “operations affect commerce.”¹⁸⁹ Such clubs commonly host professional golf tournaments, high school and collegiate sporting events, wedding receptions, professional luncheons, and other semi-private events which subsidize and financially support club events and facilities. A narrow construction of the private club exemption and the factors weighed by the courts in making the determination of whether a club is private would likely preclude most country clubs from gaining immunity from the antidiscrimination provisions of civil rights laws. Clubs that are used in furtherance of any business opportunities should be classified as public, not private accommodations.¹⁹⁰ Defining private club narrowly will also force the majority of clubs that fail to meet the strict definition to abide by the nondiscrimination provisions for public

State Club Ass’n v. City of New York, 487 U.S. 1, 10-14 (1988) (holding that drinking, socializing, and playing golf at a club do not support a First Amendment right).

184. See *New York State Club*, 487 U.S. at 10-14.

185. See *Roberts*, 468 U.S. at 622.

186. See *id.*

187. See Leiferman, *supra* note 20, at 112.

188. 42 U.S.C. § 2000a(b) (1994).

189. See *id.*; see also *Daniel v. Paul*, 395 U.S. 298, 306 (1969).

190. See *Sawyer*, *supra* note 21, at 188.

accommodations and would finally eliminate the last stronghold of legal segregation.¹⁹¹

B. State and Local Legislation: A Price for Club Membership

The assessment of "what is a private club" has often been a difficult one for courts because of the tension between possible First Amendment associational rights and enforcement of civil rights laws. The clubs assert their right to make their own rules relating to club membership and privileges, while the government is obligated to prevent discriminatory conduct. In construing the private club exemption, courts have been engaged in a highly complex balancing act. Many state and local governments have taken a much clearer approach to the fight against discrimination.¹⁹²

In order to eradicate discrimination, a state may choose to broaden the definition of a public accommodation and expand the application of the state's civil rights law. For instance, in 1991, the Kansas legislature amended the "Kansas Act Against Discrimination"¹⁹³ to provide that "nonprofit recreational or social association[s]" are automatically nonexempt and prohibited from discriminating in regard to membership if they have over 100 members, provide regular meal service, and "receive payment for dues, fees, use of space, use of facility, services, meals or beverages, directly or indirectly, from or on behalf of nonmembers."¹⁹⁴ The Act provides a narrow exemption for any "religious or private fraternal and benevolent association or corporation."¹⁹⁵

Rather than trying to determine which clubs are distinctly private, many states simply withhold "government-regulated privileges, such as property tax benefits, liquor licenses, and environmental permits," from clubs that discriminate.¹⁹⁶ These state actions have been constitutionally upheld, as the courts have recognized that associational rights, even when they exist, do not wholly remove the right of the state to regulate

191. Some commentators have suggested that the freedom of association, coupled with a limited right to discriminate in order to effectuate that right, should be confined to situations in which it is necessary to preserve the purpose and nature of the club. See Marc Rohr, Note, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460, 469-70 (1970); Note, *Developing Legal Vistas for the Discouragement of Private Club Discrimination*, 58 IOWA L. REV. 108, 136-41 (1972); see also Sawyer, *supra* note 21, at 206-07.

192. See *infra* notes 193-231 and accompanying text (discussing state and local approaches to eliminating discrimination).

193. KAN. STAT. ANN. § 44-1001 (1993).

194. *Id.* § 44-1002(i)(2).

195. See *id.*; Worth & Landis, *supra* note 67, at 35.

196. See Sawyer, *supra* note 21, at 212-13; *infra* notes 204-31 and accompanying text.

private clubs.¹⁹⁷ The right to associate for expressive purposes is balanced against compelling state interests which justify regulations infringing upon First Amendment rights.¹⁹⁸ Clearly, the states have a compelling interest in eradicating discrimination.¹⁹⁹ Accordingly, many states have now adopted laws to assure women and minorities equal access to club membership, as well as benefits such as equal tee times, access to club rooms, and voting rights.²⁰⁰ Such government intervention in the fight against discrimination is appealing from both moral and political standpoints. As Justice Brennan has stated, "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."²⁰¹ Moreover, it seems inherently unfair to provide state benefits and privileges to clubs that discriminate in their membership policies and practices, particularly because it is often at the expense of other taxpayers who would not condone such discriminatory policies.

While government has not literally involved itself in racial or gender discrimination by providing tax exemptions²⁰² or liquor licenses²⁰³ to private clubs, the elimination of certain benefits and privileges provided by the state would serve as a great incentive for clubs to adopt nondiscriminatory policies and practices.

1. Liquor Licenses

The price for clubs with discriminatory policies or practices in many states is that the members of such clubs must unwillingly become teetotalers. Connecticut, Illinois, Maine, Michigan, New Mexico, Utah, and New Jersey are a few of the states that will confiscate liquor licenses

197. See Sawyer, *supra* note 21, at 212-13; *infra* notes 204-31 and accompanying text.

198. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

199. See *id.*; see also *Beynon v. St. George-Dixie Lodge No. 1743, BPOE*, 854 P.2d 513, 516-17 (Utah 1993).

200. See *infra* notes 204-31 and accompanying text.

201. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190 (1970) (Brennan, J., concurring in part and dissenting in part).

202. See *McGlotten v. Connally*, 338 F. Supp. 448, 458 (D.D.C. 1972). *But see* *Bob Jones Univ. v. United States*, 461 U.S. 574, 595-96 (1983) (noting that the government cannot justify allowing tax-exempt status under § 501(c)(3) of the Internal Revenue Code of 1954 to private schools that practice racial discrimination).

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

from clubs which discriminate in their membership practices on the basis of race or gender.²⁰⁴

A state may constitutionally refuse to issue or reissue a liquor license to a club that discriminates in its membership practices, because the grant of such a license involves the unique power of the state under the Twenty-First Amendment to regulate liquor use.²⁰⁵ A Maryland court has held that a city ordinance may condition the grant or renewal of a liquor license to a private club upon proof that the club does not discriminate in its membership policies on the basis of race, gender, religion, physical handicap, or national origin.²⁰⁶ In upholding the municipi-

204. 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. 1997); N.M. STAT. ANN. § 46-10-13.1 (Michie 1973); UTAH CODE ANN. §§ 32A-5-102(3)(a), -102(3)(b), -103(7), -105(2)(c) (1994). In *Elks Lodges Nos. 719 & 2021*, the court held that by entering the public sphere and stream of commerce, members of Elk and Moose Lodges, who had applied for and were granted liquor licenses, voluntarily surrendered the rights they would have had in their private lives to discriminate. See *Elks Lodges Nos. 719 & 2021*, 905 P.2d at 1200. By agreeing to become licensees of the Department of Alcohol Beverage Control, the members became subject to the Utah Civil Rights Act. See *id.* A recently enacted statute in Connecticut bans country clubs from denying membership to applicants on the basis of gender, race, religion, national origin, marital status, or sexual orientation and would allow courts to revoke liquor licenses held by country clubs that make women wait behind men to tee off. CIV. RTS. NEWSL., May 26, 1997. In February, 1997, the New Jersey Senate passed a bill that requires all private clubs to "eradicate any benefits for men that are not also given to women." See CIV. RTS. NEWSL., June 16, 1997. The bill pertains to "all private clubs that also open their doors for public functions, such as weddings" and authorizes the state to withhold liquor licenses from clubs that discriminate. See *id.* The bill was initiated when the president of a New Jersey country club told a woman member that she would not be able to play golf, even if she paid a full membership. See *id.*

205. See *BPOE Lodge No. 2043 v. Ingraham*, 297 A.2d 607, 608-16, 619-20 (Me. 1972) (holding that the Maine Liquor Commission was within its lawful authority in denying renewal of liquor licenses to fifteen Elks Lodges under a state statute prohibiting private clubs from withholding membership on the basis of race); see also *Vaspourakan, Ltd. v. Massachusetts Alcoholic Beverages Control Comm'n*, 516 N.E.2d 1153, 1154-55 (Mass. 1987) (upholding the revocation of a liquor license where a night club deliberately discriminated against African Americans seeking entrance in violation of a state antidiscrimination statute); *Beynon v. St. George-Dixie Lodge No. 1743*, BPOE, 854 P.2d 513, 514-19 (Utah 1993) (holding that the Elks Lodge's sale of alcoholic beverages qualified it as an "enterprise regulated by the state" and subjected it to the antidiscrimination provisions of the Utah Civil Rights Act).

206. See *Coalition For Open Doors v. Annapolis Lodge No. 622*, BPOE, 635 A.2d 412, 413 (Md. 1994). The city ordinance provided that "[a]n establishment licensed under the [various club class] provisions . . . shall not exclude from membership solely on the basis of race, sex, religion, physical handicap or national origin in its membership." *Id.* at 413-14 (alteration in original) (quoting ANNAPOLIS, MD., CODE § 7.12.430(A)(1) (1986, Cum. Supp. No. 11, 1993)). "Under the ordinance, any new or

pal ordinance, the court further held that even though private clubs are exempt from the antidiscrimination provisions of the state's public accommodations statute,²⁰⁷ that exemption was never intended to be an "affirmative authorization to discriminate."²⁰⁸ States can make that point very clear and can go far to discourage discrimination, even in clubs that are distinctly private, by requiring an affirmative showing that they are open to all otherwise protected classifications of persons as a prerequisite to obtaining a liquor license.

2. Tax Exemptions

Private clubs receive public tax breaks through their federal nonprofit status, which exempts them from paying federal income tax.²⁰⁹ The federal government may constitutionally provide significant tax exemptions to nonprofit clubs which blatantly discriminate against minorities and women, provided the clubs are distinctly private.²¹⁰ In addition, private

renewal alcoholic beverage license application for a private club must be accompanied by an affidavit declaring that the establishment for which the license is sought is not required by any organizational by-laws to engage in any [discriminatory] practice." *Id.* at 414 (alteration in original) (quoting ANNAPOLIS, MD., CODE § 7.12.430(A)(1)).

207. *See id.* at 421. The Maryland public accommodations law is similar to Title II of the Civil Rights Act of 1964, and contains a specific exemption for private clubs, providing in part that the public accommodations law "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 establishments are made available to the customers or patrons of an establishment within the scope of this section." *Id.* (quoting MD. ANN. CODE art. 49B, § 5(e) (1957)).

208. *See id.* at 423.

209. *See* I.R.C. § 501(c)(7) (1994) (exempting nonprofit clubs organized for recreation or pleasure from paying income taxes); I.R.C. § 501(c)(8)-(10) (1994) (exempting both fraternal orders operating under a lodge system and beneficial societies and associations).

210. *See* *McGlotten v. Connally*, 338 F. Supp. 448, 457-58 (D.D.C. 1972). The tax-exempt status for nonprofit clubs under Internal Revenue Code § 501(c)(7) is constitutionally sound even when those clubs discriminate on the basis of race, because the criteria for the exemption does not have the effect of putting a stamp of government approval on the club's discriminatory practices. *See id.* On the other hand, the court held that the criteria for tax exempt status under Internal Revenue Code § 501(c)(8) for fraternal orders would demonstrate an approval of the discriminatory practices of such entities if they did discriminate, thereby making that exemption unconstitutional. *See id.* at 459.

clubs receive state tax benefits because they are often exempt from the state franchise tax paid on income.²¹¹

The benefits to private clubs, and the detriment to the state, resulting from state tax exemptions, can be substantial. It is estimated that in the State of Texas alone, country clubs and yacht clubs save approximately \$1.1 million per year by not paying franchise taxes.²¹² Some clubs in Dallas report annual income of more than \$5 million on Internal Revenue Service forms; these clubs would have paid about \$1.7 million each in federal income tax per year if not for their tax-exempt status.²¹³

Tax exemptions for such private clubs have been questioned. One state representative, who unsuccessfully sought to end the state tax exemption in 1977, stated that “[n]ot unlike vampires, the exemptions allow [private clubs] to suck the financial resources which normally would go, for instance, toward public education.”²¹⁴ The image problem of giving tax-exempt status to private clubs is exacerbated when they remain segregated despite their assertions that they will admit any qualified applicant.²¹⁵

In the past, individual taxpayers were also able to take deductions for club dues, luncheons, and expenses.²¹⁶ Although the argument may be moot because the Internal Revenue Code no longer allows deductions for any “amounts paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purposes,”²¹⁷ these historical tax deductions indicate that there are very few distinctly private clubs. One commentator noted that “[t]he clearest evidence of business activity at private clubs is the federal and state income tax deductions taken by members” and that employers reimburse club dues and expenses.²¹⁸ If private clubs have a limited constitutional right to discriminate because of a right to associate with whom they choose, they should have to surrender their tax-exempt status. Other taxpayers, most of whom

211. See Everbach & Wrolstad, *supra* note 1, at 1A.

212. See *id.* (citing Andy Welch, spokesman for the Texas Comptroller's Office).

213. See *id.*

214. *Id.* (quoting Texas State Rep. Ron Wilson, Houston).

215. See *id.*

216. In 1986, Congress limited all valid business-related entertainment and meal expense deductions to fifty percent of the amount paid. See SANFORD M. GUERIN & PHILIP F. PROSTLEWAITE, PROBLEMS AND MATERIAL IN FEDERAL INCOME TAXATION 507-08, 524-25 (4th ed. 1994); see also I.R.C. § 274(n) (1994). The deductibility of club dues under an individual's business expense account, however, was completely eliminated as of 1993. See GUERIN & PROSTLEWAITE, *supra*, at 513; see also I.R.C. § 274(a)(3) (1994).

217. See I.R.C. § 274(a)(3).

218. See Parker, *supra* note 23, at 51.

would never condone discrimination, should not be required to support such clubs.

Many states have eliminated tax exemptions for clubs that discriminate. In Minnesota, clubs with five or more acres of "open space" that discriminate on the basis of gender are denied property tax deferments and exemptions.²¹⁹ California allows no deduction for a taxpayer's "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."²²⁰ Although Kentucky's public accommodations law²²¹ contains a private club exemption modeled after the exemption found in Title II of the Civil Rights Act of 1964,²²² the Kentucky Revenue Code prohibits personal income tax deductions by taxpayers of any amount:

paid to any club, organization, or establishment which has been determined by the courts or an agency . . . charged with enforcing the civil rights laws . . . not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages or accommodations to any person because of race, color, religion, national origin, or sex.²²³

The foregoing Kentucky provision has faced two obstacles in functioning as an effective means of eradicating discrimination by country clubs. First, one Kentucky court noted that any discrimination investigation premised on the ability of a club member to deduct club dues appears now to be moot because the Internal Revenue Code no longer allows deductions for any amount paid or incurred for membership in any other club organized for business, pleasure, recreation, or other social purpose.²²⁴

219. See MINN. STAT. ANN. § 273.112 (West Supp. 1998).

220. CAL. REV. & TAX. CODE § 24343.2(a) (West 1992). In California, the Unruh Civil Rights Act also bars businesses from discriminating on the basis of race, religion, ancestry, national origin, gender, or disability. See CAL. CIV. CODE § 51 (West Supp. 1998). The Act was recently applied to provide a remedy to a woman who had been denied country club membership. See *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 777 (Cal. 1995). Mary Warfield, a champion female golfer at Peninsula Golf and Country Club, was awarded her husband's membership to the San Mateo Country Club in a divorce settlement but was denied admission by the club on the basis of her gender. See *id.* at 781-82. The California Supreme Court held that the San Mateo Country Club was a business establishment subject to the antidiscrimination provisions of the Act. See *id.* at 793, 798.

221. See KY. REV. STAT. ANN. § 344.130 (Michie 1997).

222. See *supra* notes 90-114 and accompanying text (discussing the public accommodations exceptions in Title II).

223. KY. REV. STAT. ANN. § 141.010(11)(d) (Michie Supp. 1996).

224. See *Louisville Country Club v. Kentucky Comm'n on Human Rights*, Civ. No.

In addition, the same court questioned whether any agency within the commonwealth has the authority to determine which clubs discriminate because private clubs are exempt from enforcement under Kentucky's civil rights laws.²²⁵

In addition to the recent revisions of the federal tax laws reducing the number of deductions allowed by individual taxpayers²²⁶ and the possible jurisdictional issues posed by perceived conflicts between the private club exemption and tax provisions,²²⁷ administrative difficulties plague state tax deductions and exemptions as a tool for chipping away at discrimination at private clubs. In 1991, Kentucky's Commissioner of the Revenue Cabinet's Department of Tax Compliance reported that a newly-enacted state provision disallowing deductions for individual members who belong to discriminatory clubs would be cumbersome to enforce.²²⁸ Once a discriminatory club was identified, the Revenue Cabinet would alert accountants and "conduct audits to determine which taxpayers had illegally deducted expenses from that club."²²⁹ The process could take a year to attend to a single taxpayer.²³⁰

Despite the cumbersome administration of disallowing tax exemptions and deductions as a result of discrimination at private clubs, this device is attractive from moral, social, and political standpoints. As one state representative who successfully fought for a revision of state tax laws in Kentucky stated, "[w]e can't force people to change who they associate with, but they should not enjoy any government benefit at all if they choose to discriminate."²³¹

C. Professional Ethics and State Licensure: Leading the Way.

Another effective means of eradicating discrimination in private clubs is the use of professional organizations' codes of ethics or conduct. Because the members of such organizations often hold prestigious and influential positions and are bound by strict codes of conduct or licensure,

95-48 (E.D. Ky. May 13, 1997).

225. *See id.* (granting summary judgment to three country clubs and holding that the Kentucky Commission on Human Rights has no authority to investigate a "private club" in order to determine whether it is engaged in discriminatory membership practices which are subsidized by the Kentucky Revenue Code).

226. *See supra* note 216 and accompanying text (discussing Congress's limitation on and elimination of certain deductions).

227. *See supra* note 225 and accompanying text (discussing the authority to determine discrimination).

228. *See Holly Holland, Complaints Use New Law to Probe Private Clubs*, COURIER-J. (Louisville, Ky.), Apr. 19, 1991, at 1A.

229. *See id.* (citing the commissioner of Kentucky's Revenue Cabinet).

230. *See id.*

231. *Id.* (quoting Kentucky State Rep. Ann Northup).

professional organizations are in a unique position to change the way some clubs select their members.

The Model Code of Judicial Conduct, which is applicable to federal judges, exemplifies the notion that justice cannot tolerate discrimination.²³² The Model code prohibits a federal judge from being a member of any discriminatory organization because "invidious discrimination gives rise to perceptions that the judge's impartiality is impaired."²³³ Under the Model Code, an organization "discriminate[s] invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership."²³⁴ Whether a candidate for a federal judgeship is a member of a private club with any history of discrimination is an important question because such membership could potentially imperil a candidate's confirmation.²³⁵ The Model Code states further that whether a club discriminates cannot always be determined by examining the club's membership rolls; thus, the question is a complex one "to which judges should be sensitive."²³⁶ To preserve the judiciary's important role of maintaining justice and impartiality, the Model Code should be broadly construed. Accordingly, judges should avoid even the appearance of impropriety, such as avoiding the use of a discriminatory club's facilities or receiving the benefits of club membership through a spouse.²³⁷ Furthermore, many states have adopted similar standards for candidates seeking judicial office and enforce the same high standards of maintaining the appearance of impartiality.²³⁸

232. See MODEL CODE OF JUDICIAL CONDUCT Canons 1-5 (1990).

233. *Id.* Canon 2(C) commentary.

234. *Id.*; see also Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 979-84 (1996) (discussing the Code's statements relating to the impropriety of a judge's membership in clubs that invidiously discriminate).

235. See MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990). In 1990, The American Bar Association added the following language to Canon 2 of the Code of Judicial Conduct: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin." *Id.* Canon 2(C).

236. *Id.* Canon 2(C) commentary.

237. See *id.* Canon 2(B) (providing that a judge should not allow his family or other relationships to influence his judicial conduct or judgment).

238. See Abramson, *supra* note 234, at n.3 ("As of early 1996, the following jurisdictions have adopted all or part of the 1990 Model Code: United States Judicial Conference, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island,

Lawyers comprise another group that could be instrumental in eradicating discrimination at private clubs. Many lawyers are influential leaders in their respective communities. Additionally, they are subject to regulation through licensure and are bound by a strict code of ethics.²³⁹ Most importantly, lawyers are officers of the court and are bound to uphold the law.²⁴⁰ Before joining a club or organization, a lawyer should question whether the club or organization is distinctly private or illegally discriminates in its membership policies or practices.²⁴¹

Although judges and lawyers are officers of the court and are in a prime position to eradicate discrimination at private clubs, other professionals are also heavily regulated by the state and may also serve as an impetus for positive change at private clubs. Similar to the grant of a liquor license, a state may condition the grant of a professional license upon refraining from illegal, discriminatory activities.²⁴² For example, Kentucky real estate agents, licensed and regulated under state law, may be subject to disciplinary action for unlawful discriminatory activity.²⁴³

Because many ostensibly private clubs which maintain elaborate golf courses and other sports facilities are interested in the publicity and prestige gained by hosting professional tournaments, professional and intercollegiate sports associations are also in a unique position to eradicate discrimination. The Professional Golfers' Association has been a leader in opening the doors for minority membership and equal benefits for women at private clubs. After one country club founder said that blacks were not admitted to his club, the Association pledged that clubs hosting its event must be "demonstrably open."²⁴⁴ Since 1995, clubs desiring to host or keep tournaments must accept minority members.²⁴⁵ The United States Golf Association has adopted a similar policy.²⁴⁶ Public schools which utilize the facilities of private clubs for sporting activities and

South Dakota, Texas, Utah, West Virginia, Washington and Wyoming.”).

239. See MODEL RULES OF PROFESSIONAL CONDUCT (1995).

240. See *id.* Rule 3.30.

241. See *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) (finding a community pool was not private but did discriminate in its membership policies).

242. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

243. See KY. REV. STAT. ANN. § 324.160(2) (Banks-Baldwin 1997) (providing that “[a]ny conduct constituting an act of discrimination regarding a person’s race, color, creed, sex, or national origin . . . shall be considered improper conduct”); see also Jennifer Jolly-Ryan, *A Real Estate Professional’s and Attorney’s Guide to the Fair Housing Law’s Recent Inclusion of Familial Status as a Protected Class*, 28 CREIGHTON L. REV. 1143, 1144 & n.3 (1995).

244. See *supra* note 14 (discussing the efforts of the PGA).

245. See *supra* note 14 (discussing the efforts of the PGA).

246. See *supra* note 14 (discussing the efforts of the USGA).

practices should also be mindful of whether such clubs discriminate against minorities or women, because such schools are obligated to assure equal opportunities to women in education under Title IX.²⁴⁷

D. Political Pressure: Skeletons in the Closet.

The electorate is in a position to stand up against discrimination by scrutinizing those who seek public office. Today, the electorate may question whether it is appropriate for United States Senators or local officials and representatives to be members of exclusive all-white clubs. Any candidate seeking political office should consider exclusive private club membership as a possible skeleton in the closet.²⁴⁸

E. Changing from Within: Combatting Discrimination Through Club Channels.

Perhaps the most effective means to combat discrimination by private clubs is through the use of club channels.²⁴⁹ Many private club members have the influence, money, and power to serve as the impetus for change by speaking out against discriminatory practices. Through effective club leadership, color-, religion-, and gender-blind-membership policies and benefits may be implemented. If the members express the idea that discrimination is not appropriate, there is collective pressure on the club to change. Thus, club members can take effective actions to eliminate discriminatory practices by private clubs simply by asking ques-

247. See *supra* notes 84-89 and accompanying text (discussing the guaranty of equal opportunity in education provided by Title IX of the Education Amendments).

248. In the 1996 United States Senatorial race in Kentucky, the Republican and Democratic candidates disparaged one another for membership in exclusive all-white clubs. See *All-White Club Also in McConnell Past*, CINCINNATI ENQUIRER, Oct. 9, 1996, at B3. Likewise, in Georgia, Democratic U.S. Senate candidate Max Cleland attacked his opponent, who had resigned from a racially exclusive country club, stating, "We don't need leaders who belong to private clubs that exclude over half of Georgia." See Mark Sherman, *'96 Senate Debate Gets Ugly*, ATLANTA J. & CONST., Oct. 20, 1996, at G1.

249. In responding to reporters as to the cumbersome administrative problems posed by new legislation disallowing tax deductions, Kentucky Senator David Karem remarked, "truth be told, the only way to change (discrimination) [sic] is that the members have to have a modification of their mindsets. Because no matter how many laws we pass in the legislature, people will find 100 ways to say they've complied—or go around it." See Holland, *supra* note 228, at 1A.

tions.²⁵⁰ Many clubs subsidize their facilities and activities by opening their doors to members and their guests for business luncheons, meetings, and other events for a fee. Club members, as well as their guests, can check their company's or employer's policies and practices regarding private clubs and inquire as to the following: (1) whether the company or employer holds meetings or events at clubs that discriminate, or offers memberships in discriminatory clubs to executives or other employees; and (2) whether the company or employer holds fundraising events at private clubs that discriminate. If so, club members should insist that their company or employer adopt a policy against such practices.²⁵¹

CONCLUSION

At a time when hate crimes are on the rise, churches with predominantly black congregations are burned,²⁵² and women and minorities are attempting to break the glass ceiling by reaching the higher echelons of the business world,²⁵³ discrimination in private clubs may not seem

250. See Sawyer, *supra* note 21, at 210-11.

251. See *id.* Author Thomas Sawyer has suggested that club members scrutinize whether their club is "truly private" and can pass the private club exemption test" by asking:

- [D]oes the club . . .
- have an admission procedure that is genuinely selective?
- have formal membership procedures?
- have a degree of control over its governance?
- make a profit?
- have a history of selectivity?
- allow nonmembers to use the facilities?
- have substantial dues?
- advertise for members?
- have a statement of purpose that is consistent with its actions?
- have formalities?
- operate a food stand that is open to nonmembers and interstate travelers?
- have annual tournaments that involve nonmembers from other states?
- allow visiting athletic teams to play on its course?
- link membership benefits to residency in a narrow geographical area?
- reject a significant number of applicants for membership?
- purchase equipment or food products from another state?
- have a liquor license?
- allow the furtherance of business opportunities for members?
- have a lower tax rate?

Id. at 210-11.

252. See Joseph M. Fernandez, *Bringing Hate Crime Into Focus—The Hate Crime Statistics Act of 1990*, *Pub. L. No. 101-275*, 26 HARV. C.R.-C.L. L. REV. 261, 261-67 (1991) (discussing the history of the Hate Crime Statistics Act of 1990 and specific examples of recent hate crimes which prompted Congress to enact new legislation).

253. See Diane E. Lewis, *No Break in Glass Ceiling Found*, BOSTON GLOBE, Mar. 16, 1995, at 39. It appears that women and minorities still need a great deal of help and

like the most pressing issue. However, it is an important issue. It is obvious that racially motivated assaults, batteries, murders, and arsons, committed by a few individuals, are all illegal. On the other hand, discrimination by respectable members at some private clubs is not so obvious. Perhaps it is even more harmful to the excluded individuals and society as a whole because it is entirely legal, no matter how blatant. Moreover, for many years, society has looked the other way when clubs discriminate and, in fact, we have all supported such discrimination through tax exemptions and other government benefits. The issue has been characterized as one of simple courtesy and respect.²⁵⁴

For many years, the focus of the issue of discrimination by private clubs was upon both judicial construction of the definition of public accommodation and the private club exemption, including a thorough development of the factors to be weighed in determining whether a particular club qualifies as private.²⁵⁵ Despite the passage of thirty years, the most blatant form of discrimination still exists at some of the most prestigious country clubs around the country. It is time to take a fresh look at the private club exemption and construe it most narrowly in light of the limited purposes of the First Amendment freedoms of association. At the very least, state and local governments should not subsidize private clubs that discriminate by providing tax exemptions and other government benefits ultimately funded by society as a whole. However, society cannot rely simply upon the judiciary and the legislature to fight the battle against blatant discrimination in some private clubs. The most effective means of eliminating discrimination will come from those who insist that their organizations adopt and enforce nondiscriminatory policies and elect representatives who will not take the battle against discrimination lightly.

networking opportunities in breaking that glass ceiling. *See id.* In 1995, U.S. Labor Secretary and Chair of the bipartisan Glass Ceiling Commission, Robert Reich, reported that the majority of senior managers of Industrial Fortune 1000 and Fortune 500 companies are predominantly white males. *See id.* Findings revealed that "[o]nly [five] percent of all Fortune 2000 industrial and service company managers are women and virtually all are white." *See id.*

254. *See* Stephens, *supra* note 8, at 108. Professional golfer Emily Lawson stated that "at its heart, the issue is not about voting rights, all-men's grills or tee times . . . It's about common courtesy . . . And about respect." *See id.*

255. *See supra* notes 122-78 and accompanying text (discussing factors applied by courts in determining whether a club is private).

