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The Private Club Exemption from Civil Rights Legislation—Sanctioned Discrimination or Justified Protection of Right to Associate?

Two inherent characteristics of humankind have created a clash within the law—the desire to associate with others and the desire to discriminate against others dissimilar to oneself.¹ Nearly a century ago, Congress passed the nation's first civil rights act.² Since then, courts have struggled to balance the constitutional right of association with public policy goals against discrimination.³ Identifying and eliminating discrimination involving public entities has not proven difficult for the courts,⁴ but eliminating discrimination in the private sector has posed a major difficulty.

Perhaps the most poignant examples of this tendency to discriminate arise in cases against the Boy Scouts of America (BSA).⁵ In several

1. Many membership organizations possess a wide variety of discriminatory practices. All-male organizations include: the Benevolent and Protective Order of Elks (1.6 million members), the Loyal Order of the Moose (1.3 million members), the Knights of Pythias, the Improved Order of Red Men, the Lions Club, the Optimist Club, and the Rotary Club. Other organizations which discriminate: Knights of Columbus (male Catholics), Prince Hall Masonry (black males), Hadaassah (Jewish females), B'nai B'rith Women (Jewish females), the National Association of Women's Clubs (black females), P.E.O. sisterhood (all females), and the General Federation of Women's Clubs (all females). The National Club Association has members which restrict membership based on race, sex, or religion. Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1897 n.95 (1984).

2. Civil Rights Act of 1866, 42 U.S.C. § 1981 (1992).

3. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 458-60 (1958) (determining that the Constitution protects associations from state mandated disclosure of membership lists).

4. See, e.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 234-37 (1969) (holding that anti-discrimination laws apply in housing situations); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420-22 (1968) (same); Hishon v. King & Spaulding, 467 U.S. 69, 77-78 (1984) (holding that discrimination is not allowed in employment); Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945) (same).

5. See Welsh v. Boy Scouts of America, 742 F. Supp. 1413 (N.D. Ill. 1990); Mankes v. Boy Scouts of America, Inc., 137 F.R.D. 409 (S.D. Fla. 1991); Curran v. Mount Diablo Council of the Boy Scouts, 195 Cal. Rptr. 325 (Cal. Ct. App. 1983).

cases, children were ejected from their Boy Scout dens or not admitted at all because they refused to swear a belief in God,⁶ were female,⁷ or were homosexual.⁸ The BSA contends that it is a private organization that "has every right to keep certain people out."⁹ Parents of excluded children respond that the 4.3-million member BSA is a public organization,¹⁰ and that their children simply want to be a part of the pleasures of scouting.¹¹ One of the excluded, irreligious Mark Welsh, said, "They [are] going to have bonfires and swim parties and do things I thought were a lot of fun."¹² Elliot Welsh, Mark's father, expressed with irony, "Scouts taught me tolerance in the first place."¹³ Thus, civil rights legislation, which ultimately must settle the conflict between associational rights and discrimination, plays a prominent role in some unlikely situations.

Section I of this Comment discusses federal and state civil rights legislation which impact this issue.¹⁴ Section II examines freedom of association as recognized by the Supreme Court, distinguishing intimate and expressive association.¹⁵ Section III analyzes the private club exemption from the Civil Rights Act of 1964 and discusses how courts have attempted to define this exception.¹⁶ Finally, Section IV addresses discrepancies in past decisions and future trends in this area of law.¹⁷

I. LEGISLATION

A. *The Civil Rights Act of 1866*

Congress passed the first civil rights act in 1866¹⁸ to enforce the Thir-

6. *See Welsh*, 742 F. Supp. at 1435-36 (denying membership in BSA Tiger Cubs program to a seven-year-old because he would not profess belief in "God").

7. *Mankes*, 137 F.R.D. at 410 (denying membership to an eight-year-old because of gender).

8. *Curran*, 195 Cal. Rptr. at 328 (rejecting Eagle Scout because of homosexuality).

9. Michael DeCourcy Hinds, *Boy Scouts Try to Keep Identity as Outsiders Knock*, N.Y. TIMES, June 23, 1991, at 1.

10. Haya El Nasser, *Boy Scouting Now Having to Explain Itself*, U.S.A. TODAY, June 13, 1991, at 10A.

11. Jodi Wilgoren, *Boy Scout Case Now Up to Judge, Membership Based on Beliefs at Issue*, CHI. TRIB., June 19, 1991, at 3.

12. *Id.*

13. Jerry Adler and Brooke Harrington, *Fighting the Pack Mentality*, NEWSWEEK, May 20, 1991, at 63.

14. *See infra* notes 18-47 and accompanying text.

15. *See infra* notes 48-82 and accompanying text.

16. *See infra* notes 83-310 and accompanying text.

17. *See infra* notes 311-92 and accompanying text.

18. Civil Rights Act of 1866, § 1. This statute reads:

That all persons born in the United States and not subject to any foreign

teenth Amendment¹⁹ in the "obliteration and prevention of slavery with all its badges and incidents."²⁰ This act defined citizens of the United States and declared that all citizens had the same rights to contract, sue, inherit and deal in real and personal property without regard to race or color.²¹ The Supreme Court originally interpreted the 1866 Act as applying only to public acts of discrimination,²² but the Court later broadened its application to private acts as well.²³ The 1866 Act does not contain an express exemption for private organizations.²⁴ Courts have held, however, that the 1866 Act contains an implied private orga-

power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, 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, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 13, 14 Stat. 27 (1862).

19. U.S. CONST. amend. XIII.

20. *In re Civil Rights Cases*, 109 U.S. 3, 21 (1883).

21. Civil Rights Act of 1866, § 1. This Act gave rise to two current laws, 42 U.S.C. §§ 1981 & 1982. Section 1981 gives the same rights to make and enforce contracts as are enjoyed by white citizens. The full text of the statute reads:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981. Section 1982 gives all citizens the same rights as white citizens in the conveyance of real and personal property. The full text of the statute reads: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

22. See *Hurd v. Hodge*, 334 U.S. 24, 31 (1948) (determining statute directed at governmental action only); *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926) (finding statutes do not invalidate contracts entered into by private individuals); *Civil Rights Cases*, 109 U.S. at 3, 17-18 (remedy available only for denial of rights by the state).

23. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968) (holding private real estate transactions were covered under Section 1982).

24. See Civil Rights Act of 1866, 42 U.S.C. § 1981; see also *infra* note 42 for reference to current private organization exemptions.

nization exemption, as exemplified by the inclusion of such an exemption.²⁵

B. *Civil Rights Act of 1964 and State Public Accommodation Statutes*

The second civil rights act, the Act of 1964,²⁶ prohibits "any place of public accommodation" from "discriminati[ng] or segregati[ng] on the ground of race, color, religion, or national origin."²⁷ This law removes "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly to the general public."²⁸ The statute defines public accommodation as establishments whose "operations affect commerce" and which are listed in the statute.²⁹ The list includes establishments such as hotels and inns which provide lodging to transient guests,³⁰ facilities primarily selling food for consumption on the premises,³¹ places of exhibition or entertainment,³² and any establishment physically located on the premises of any establishment otherwise covered by the statute.³³ Courts have specifically defined several terms in this statute, including "affecting commerce,"³⁴ "place,"³⁵ and "place of

25. See *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1201 (D. Conn. 1974) (implying the private club exemption of the 1964 Act into the 1866 Act). The court reasoned that when asked to extend the reach of a previous Act's vague language, courts should properly take into account a later Act. *Id.* Second, an Act designed to address a specific problem will prevail over more general Acts. *Id.* Finally, "the legislative history of the 1964 Act supports a harmonization of the statutes." *Id.* (citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967) (finding that a court may consider later statute in extending the reach of a vague earlier act); *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699, 705 (S.D.N.Y. 1966) (holding that a statute specifically controlling one problem will prevail over a more general different statute); 110 CONG. REC. 1966 (1964) (remarks of Representative Lindsay)).

26. Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (1992).

27. *Id.* § 2000a(a) (1992).

28. 914 CONG. REC. 18 (1964). Courts have relied extensively on this legislative intent in interpreting the meaning of various elements of this statute.

29. 42 U.S.C. § 2000a(b) (1992).

30. *Id.* § 2000a(b)(1).

31. *Id.* § 2000a(b)(2).

32. *Id.* § 2000a(b)(3).

33. *Id.* § 2000a(b)(4).

34. An establishment affects commerce if it deals in any good which may be involved in "travel, trade, traffic, commerce, transportation, or communication among the several States." *Id.* § 2000a(c). For case law examples of "affects commerce," see *Evans v. Seaman*, 452 F.2d 749, 751 (5th Cir. 1971), *cert. denied*, 408 U.S. 924 (1972) (holding that roller skating rink affects commerce because skates were purchased from out of state and therefore did "move in commerce"); *United States v. Central Carolina Bank & Trust Co.*, 431 F.2d 972, 974 (4th Cir. 1970) (holding that golf cart

entertainment."³⁶

Most states passed public accommodation statutes³⁷ in response to

parts were purchased out of state and thus the golf pro shop affected commerce).

35. "Place" in relation to the 1964 Act has been held to include not only specific physical locations but also organizations which carry out their activities in a large number of temporary locations. *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1420-21 (N.D. Ill. 1990). The federal court analogized and relied on state court cases interpreting state public accommodation statutes. See *United States Jaycees v. McClure*, 305 N.W.2d 764, 774 (Minn. 1981) (applying Minnesota Human Rights Act liberally to find Jaycees a "place of public accommodation"); *National Organization for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 38-39 (N.J. Super.) (applying New Jersey statute to find Little League baseball games played in fluctuating locations a place of public accommodation), *aff'd*, 67 N.J. 320 (1974).

36. A "place of entertainment" includes any place where people have direct participation in an activity or sport. See *Daniel v. Paul*, 395 U.S. 298, 306-08 (1969) (recreation area with swimming and boating); *Evans*, 452 F.2d at 751 (roller skating rink); *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342, 350-51 (5th Cir. 1968) (en banc) (amusement park). A source of entertainment also includes the observation of anyone participating in such an activity or of other observers. See *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 792 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990) ("people watching" at swim club sufficient for entertainment). Other examples of places of entertainment include: *Rousseve v. Shape Spa for Health and Beauty, Inc.*, 516 F.2d 64, 68 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) (health and beauty spas); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1336 (2nd Cir. 1974) (swim club); *Anderson v. Pass Christian Isles Golf Club, Inc.*, 488 F.2d 855, 857 (5th Cir. 1974) (golf club); *United States v. Deyorio*, 473 F.2d 1041, 1042 (5th Cir. 1973) (bar and package stores); *Central Carolina Bank & Trust Co.*, 431 F.2d at 974 (golf club).

37. Forty-four states and the District of Columbia have passed public accommodation statutes of some sort, as well as Puerto Rico and the Virgin Islands. See ALA. CODE §§ 21-7-1 to -10 (1992) (limited to the physically handicapped); ALASKA STAT. §§ 18.80.200-300 (1992); ARIZ. REV. STAT. ANN. §§ 41-1441 to -1442 (1992); CAL. CIV. CODE §§ 51-52 (West 1991); COLO. REV. STAT. §§ 24-34-601 to -605 (1992); CONN. GEN. STAT. ANN. §§ 46a-63 to -64 (1986); DEL. CODE ANN. tit. 6, §§ 4501-16 (1992); D.C. CODE ANN. §§ 1-2501 to -2504, 1-2511, 1-2519 (1991); HAW. REV. STAT. §§ 489-1 to -7 (Supp. 1987); IDAHO CODE §§ 18-7301 to -7303 (1992); ILL. REV. STAT. ch. 68, para. 5-101 to -103 (1992); IND. CODE §§ 22-9-1-1 to -3 (1992); IOWA CODE §§ 601A.1-7 (1991); KAN. STAT. ANN. §§ 44-1001 to -1019 (1991); KY. REV. STAT. ANN. §§ 344.120-145 (Baldwin 1992); LA. REV. STAT. ANN. §§ 49:146, 51:2247 (West 1987 & Supp. 1992); ME. REV. STAT. ANN. tit. 5, §§ 4551-4553, 4591-4592, (West 1989); MD. ANN. CODE art. 49B, §§ 5-13 (1979 & Supp. 1985); MASS. GEN. L. ch. 272, §§ 92A, 98, ch. 151B, § 4 (1982); MICH. COMP. LAWS ANN. §§ 37.2302-.03 (West 1985); MINN. STAT. ANN. §§ 363.01-010 (West 1991); MO. REV. STAT. §§ 213.010-130 (1983); MONT. CODE ANN. § 49-2-304 (1991); NEB. REV. STAT. §§ 20-132 to -143 (1987); NEV. REV. STAT. §§ 651.050-120 (1987); N.H. REV. STAT. ANN. §§ 354-A:1 to A:14 (1984); N.J. STAT. ANN. §§ 10:1-2 to -3, 10:5-5 (West 1976); N.M. STAT. ANN. §§ 28-1-1 to -9 (Michie 1991); N.Y. CIV. RIGHTS LAW § 40 (1976); N.D. CENT. CODE § 12.1-14-04 (1985); OHIO REV. CODE ANN. §§

deficiencies in the federal 1964 Act. The Act of 1964 prohibits discrimination on the grounds of race, color, religion or national origin.³⁸ The statute does not specifically include discrimination based on sex, which often bars sex-discrimination cases from federal court.³⁹ In response, a majority of state public accommodation statutes expressly prohibit discrimination on the basis of sex.⁴⁰ State statutes can be more restrictive in prohibiting discrimination since they are not limited by the federal commerce clause⁴¹ and because of the states' paternal interest in the protection of their residents.⁴²

4112.01-.02 (Anderson 1991); OKLA. STAT. tit. 25, §§ 1401-1402 (1987); OR. REV. STAT. §§ 30.670-.685 (1989); PA. STAT. ANN. tit. 43, §§ 951-955 (1991); R.I. GEN. LAWS §§ 11-24-1 to -8 (1981); S.C. CODE ANN. §§ 45-9-10 to -120 (Law. Co-op. Supp. 1991); S.D. CODIFIED LAWS ANN. §§ 20-13-1 to -23 (1987); TENN. CODE ANN. §§ 4-21-101 to -103 (1991); UTAH CODE ANN. §§ 13-7-1 to -4 (1986); VT. STAT. ANN. tit. 9, §§ 4501-4507 (1991); VA. CODE ANN. §§ 2.1-714 to -725 (1992); WASH. REV. CODE ANN. §§ 49.60.010, .030, .040, .215 (West 1990); W. VA. CODE §§ 5-11-1 to -19 (1990); WIS. STAT. §§ 101.22(9)(a)(2) to (5), 101.22(1m)(bp), (1990 & Supp. 1992); WYO. STAT. §§ 6-9-101 to -102 (1991); P.R. LAWS ANN. tit. 1, §§ 13, 18 (1982 & Supp. 1988); 1991 V.I. CODE ANN. tit. 10, §§ 1-3 (1982 & Supp. 1991). States without public accommodation statutes include Arkansas, Florida, Georgia, Mississippi, North Carolina and Texas. See Steven B. Arbus, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. REV. 443, 445 n.15 (1983) (for the 41 state public accommodation statutes as of 1983).

38. 42 U.S.C. § 2000a(a).

39. See 28 U.S.C. §§ 1331-1332 (1988). Under the Federal Rules of Civil Procedure, a federal court must have jurisdiction over the subject matter of a case based either on federal question or diversity. *Id.* Jurisdiction under diversity of citizenship requires the amount pleaded to be in excess of \$50,000 which excludes many claims from federal courts. *Id.*

40. As of 1990, 40 states and the District of Columbia had banned sex discrimination in their public accommodation statutes. These states include: Alaska, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. Paula J. Finlay, *Prying Open the Clubhouse Door: Defining the "Distinctly Private" Club After New York State Club Association v. City of New York*, 68 WASH. U.L.Q. 371, 383 n.70 (1990). See, e.g., COLO. REV. STAT. § 24-34-601(2) (1988); HAW. REV. STAT. § 489-3 (Supp. 1986); LA. REV. STAT. ANN. § 51:2247 (West 1987 and Supp. 1992); see also Alan J. Hoff, *A Proposed Analysis for Gender-Based Practices and Public Accommodations Laws*, 16 U. MICH. J.L. REF. 135, 137-38 n.19 (1982) (noting state public accommodation statutes expressly prohibiting gender discrimination as of 1982).

41. To be affected by the Civil Rights Act of 1964, the establishment must "affect commerce." 42 U.S.C. § 2000a(c) (1992).

42. Julie A. Moegenburg, *Freedom of Association and the Private Club: The Installation of a "Threshold" Test to Legitimize Private Club Statutes in the Public Eye*, 72 MARQ. L. REV. 403, 411 (1989). Some state statutes are notable for other express exemptions. For example, Alaska expressly forbids discrimination based on marital status, changes in marital status, pregnancy, and parenthood in its public accommoda-

C. Private Club Exemptions

The Civil Rights Act of 1964⁴³ and most state statutes⁴⁴ expressly exempt private clubs from their scope. Courts have inferred an exemption for private organizations when interpreting the Civil Rights Act of 1866⁴⁵ and state statutes despite the legislatures' failure to expressly include it.⁴⁶ Defining the exemption has been a continuing problem.

tion statute. ALASKA STAT. § 18.80.230 (1991). Massachusetts includes sexual orientation in its protected categories, but excludes persons whose sexual orientation involves minor children as the sex object. MASS. GEN. LAWS ANN. ch. 272, § 92A (West 1991). The District of Columbia's statute is widely inclusive, including the characteristics of "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business" in its prohibited discriminatory activity. D.C. CODE ANN. § 1-2519(a) (1987).

43. 42 U.S.C. § 2000a(e).

44. Approximately 30 state and territory public accommodation statutes exempt private clubs. These jurisdictions include: Arizona, District of Columbia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virgin Islands, Washington, West Virginia and Wisconsin. See *supra* note 37 for statutes. See also Arbuss, *supra* note 37, at 459 n.87 for state statutes exempting private clubs as of 1983.

State statutes often expressly exempt religious organizations from their scope as well. See, e.g., IOWA CODE ANN. § 601A.7 (West 1991); NEB. REV. STAT. § 20-132 (1990); N.H. REV. STAT. ANN. § 354-A:8 (1990). New Mexico's religious exemption reads as follows:

Nothing contained in this act shall bar any religious or denominational institution or organization which is operated or supervised or controlled by or is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination, or from making selections of buyers, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained unless membership in the religious or denominational organization is restricted on account of race, color, national origin or ancestry.

N.M. STAT. ANN. § 28-1-9(B) (Michie 1991).

45. 42 U.S.C. § 1981. See *supra* note 25.

46. The California Unruh Act does not specifically include an exemption for private clubs, but California courts have implied this exemption. In *Curran v. Mount Diablo Council of Boy Scouts of America*, 195 Cal. Rptr. 325 (Cal. Ct. App. 1983), the court relied on Justice Douglas' comments about the freedom of association in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972), and held that the right of association restrains the legislature from making anti-discrimination laws affecting "strictly

Section III of this Comment discusses legislation and case law pertaining to this exemption in more detail.⁴⁷

II. FREEDOM OF ASSOCIATION

The freedom to associate is a constitutional right first recognized in 1958.⁴⁸ Although not mentioned specifically,⁴⁹ the Supreme Court determined that freedom of association should have the same level of protection as the rights expressly stated in the Constitution.⁵⁰ In *Roberts v. United States Jaycees*,⁵¹ the Supreme Court recognized two distinct types of constitutionally protected freedoms of association—freedom of private or intimate association derived from the Fourteenth Amendment's implied right of privacy⁵² and freedom of expressive association derived from the First Amendment's right to engage in expressive activities.⁵³

A. Intimate Association

The right to intimate association is based on the idea that the right to enter into and maintain certain kinds of personal relationships must be protected from state interference in order to secure the individual liberties guaranteed by the Bill of Rights.⁵⁴ In *Roberts*, the Court stated that family relationships are the kinds of affiliations entitled to this constitutional protection⁵⁵ and gave examples such as marriage,⁵⁶ procre-

private clubs or institutions." *Curran*, 195 Cal. Rptr. at 336. See also *Gardner v. Vic Tanny Compton, Inc.*, 6 Cal. Rptr. 490, 494-96 (Cal. Ct. App. 1960) (holding California's Unruh Act to contain an implied private club exemption).

47. See *infra* notes 83-310 and accompanying text.

48. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958); see also *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (recognizing first amendment protection to participate in political organizations). However, *NAACP* is recognized as the first case to formally articulate a constitutional right to freedom of association. *Lisa Tarin Pompa, Rotary International v. Duarte: Limiting Associational Rights to Protect Equal Access to California Business Establishments*, 19 PAC. L.J. 399, 402-03 (1988).

49. *Linder*, *supra* note 1, at 1887.

50. *NAACP*, 357 U.S. at 461.

51. 468 U.S. 609 (1984). For the facts of this case, see *infra* notes 65-68 and accompanying text.

52. *Roberts*, 468 U.S. at 617-18; U.S. CONST. amend. XIV. The right to privacy is clearly expressed in *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that married couples may control their procreative activity by the use of birth control). For a discussion of the history of the right to privacy, see Lois M. McKenna, *Freedom of Association or Gender Discrimination?* *New York State Club Association v. City of New York*, 38 AM. U. L. REV. 1061, 1070-71 (1989).

53. *Roberts*, 468 U.S. at 617-18; U.S. CONST. amend. I.

54. *Roberts*, 468 U.S. at 617-18; U.S. CONST. amends. I-X.

55. *Roberts*, 468 U.S. at 617-20.

ation,⁵⁷ education,⁵⁸ and cohabitation with one's relatives.⁵⁹ The Court recognized that this type of freedom of association can extend beyond family relationships, noting that the relevant factors include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."⁶⁰

Yet, in *Bowers v. Hardwick*,⁶¹ the Court limited the right to privacy and intimate association to traditional family situations, holding that these rights do not extend to homosexual acts of sodomy.⁶² The Court reasoned that it could find no connection between homosexual sodomy and the fundamental individual rights relating to family, marriage, and procreation.⁶³ To aid in its determination of which types of associations to protect, the Court gave a list of factors to consider and also stated that the Court must decide this issue by locating each association's proper place on the "spectrum" of personal relationships.⁶⁴

A line of cases has shown the availability of the intimate association defense and its relative success in deflecting anti-discrimination laws aimed at private situations.⁶⁵ In *Roberts*, the Minneapolis and St. Paul chapters of the United States Jaycees filed discrimination charges after the national organization threatened to revoke their charters for admitting women as regular members.⁶⁶ The Court analyzed the size, selec-

56. *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (holding unconstitutional a requirement of court approval prior to marriage of a minor child).

57. *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-91 (1977) (striking down law prohibiting sale of contraceptives to minors).

58. *Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 844 (1977) (recognizing the importance of promoting a way of life through the instruction of children). See also *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (striking down law requiring all children to attend public schools).

59. *Moore v. City of East Cleveland*, 431 U.S. 494, 500-06 (1977) (finding that prohibiting distant family members from living in household was an unconstitutional violation of freedom of association).

60. *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984). See also *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1989).

61. 479 U.S. 186 (1986).

62. *Id.* at 189 (upholding Georgia statute prohibiting consensual sodomy).

63. *Id.* at 190.

64. *Roberts*, 468 U.S. at 620 (citing *Runyon v. McCrary*, 427 U.S. 160, 187-89 (1976) (Powell, J., concurring)).

65. See *id.* at 614; *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1989).

66. *Roberts*, 468 U.S. at 614. This suit was based on the Minnesota Human Rights Act which is substantially similar to the Civil Rights Act of 1964 except that it also

tion criteria and procedures, and other characteristics of the local chapters of the Jaycees in finding that the chapters lacked distinctive characteristics which would warrant constitutional protection.⁶⁷ In short, the Court held that the Jaycees could not exclude women members based upon its freedom of intimate association.⁶⁸

Continuing with this line of cases is *Board of Directors of Rotary International v. Rotary Club of Duarte*.⁶⁹ In this case, the international board of directors of Rotary International similarly revoked a California chapter's charter for admitting two women as members.⁷⁰ The Court noted that there are no size limits on membership of any local Rotary Club, that the clubs must continually look for new members to enlarge their membership and that each club must aid the community to promote higher standards in members' businesses and professions.⁷¹ Considering these characteristics and others, the Court decided that such activities revealed the Rotary Club's intention to keep their "windows and doors open to the whole world."⁷² Hence, they failed to show a relationship that the freedom of intimate association should protect.⁷³ In all, these cases rely on the freedom of intimate association to avoid the effects of anti-discrimination legislation, instead of the private club exemption provided by most public accommodation statutes.

B. Expressive Association

Although the Constitution does not expressly guarantee the right of expressive association,⁷⁴ courts now recognize that the right to associate protects those exercising their First Amendment rights of freedom of religion, speech, assembly, and petition for grievances.⁷⁵ Logically,

prohibits sex discrimination. MINN. STAT. § 363.03, subd. 3 (West 1991).

67. *Roberts*, 468 U.S. at 621.

68. *Id.*

69. 481 U.S. 537 (1989).

70. *Id.* at 541. This suit was based on the California Unruh Civil Rights Act. CAL. CIV. CODE ANN. § 51 (West 1982). This public accommodation statute is similar to the Civil Rights Act of 1964 except that it also precludes sex discrimination.

71. *Rotary Int'l*, 481 U.S. at 546-47.

72. *Id.* at 547 (quoting 1 ROTARY BASIC LIBRARY, FOCUS ON ROTARY 60-61 (1981), App. 85).

73. *Id.*

74. Note, *Discrimination in Private Social Clubs: Freedom of Association and the Right to Privacy*, 1970 DUKE L.J. 1181, 1191.

75. U.S. CONST. amend. I. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 12-59 (1976) (finding limitations on contributions to political candidates constitutional); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967) (holding law prohibiting retaining attorney on salary to assist union members violates freedom of speech, assembly, and petition provisions); *NAACP v. Button*, 371 U.S. 415, 444 (1963) (holding that solicitation of clients for discrimination suits protected by freedom of

courts could not protect these individual rights unless they also afforded protection to groups comprising many individuals exercising the same rights.⁷⁶ This right of association, most importantly, protects minority views from suppression by the majority.⁷⁷ The Supreme Court has recognized that the right to participate in this type of association represents "an indispensable means of preserving other individual liberties."⁷⁸

The Supreme Court has upheld freedom of expressive association rights in situations concerning religious beliefs, the political process, the promotion of ideas, and protection of unpopular political organizations.⁷⁹ The freedom of expressive association protects a group if the enforcement of the legislation in question substantially alters a group's activities.⁸⁰ This freedom is not an absolute right as it may be regulated to protect a compelling state interest which cannot be preserved by less

expressive association).

76. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

77. *Id.*

78. *Id.* at 618.

79. McKenna, *supra* note 52, at 1065 (citing Patricia E. Willard, Note, *Roberts v. United States Jaycees and the Affirmation of State Authority to Prohibit Sex Discrimination in Public Accommodations: Distinguishing "Private" Activity, the Exercise of Expressive Association, and the Practice of Discrimination*, 38 *RUTGERS L. REV.* 341, 352-53 (1986) (examples of cases using freedom of expressive association)). See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95, 98 (1982) (protecting lists of contributors to political candidates); *Larson v. Valente*, 456 U.S. 228, 255 (1982) (prohibiting mandatory registration and financial reporting by religious organizations); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 125-26 (1981) (prohibiting state interference in national political parties' selection of delegates for conventions); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298-99 (1981) (prohibiting limits on personal contributions to committees formed to influence certain votes); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (allowing street solicitation of funds for public interest organizations); *In re Primus*, 436 U.S. 412, 426 (1978) (protecting civil rights attorneys' solicitation of plaintiffs to challenge unconstitutional laws); *American Party v. White*, 415 U.S. 767, 794-95 (1974) (protecting rights of names of minor political parties to appear on absentee ballots); *Healy v. James*, 408 U.S. 169, 181-82 (1972) (protecting student political organizations' right to official recognition by state college); *Bates v. City of Little Rock*, 361 U.S. 516, 527 (1960) (protecting membership lists of political organizations from disclosure); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (protecting membership lists of political organizations from disclosure).

80. See *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984) (holding that prohibition of sex discrimination in a law firm would not alter its ability to function so no protection by freedom of expressive association exists).

restrictive means.⁸¹ The Supreme Court has used a balancing test to weigh whether some government interest is sufficiently compelling to allow infringement on the organization.⁸² Once the Court establishes the compelling state interest, it then examines the limitation to ensure that a less restrictive regulation does not accomplish the same purpose.⁸³ Thus, the legislation in question must meet both of these requirements before the freedom to expressive association can be defeated.⁸⁴ Even under this test, the extent of a group's expressive association, although sufficient to ensure constitutional protection, remains unclear.⁸⁵

III. PRIVATE CLUB EXEMPTION

As stated previously, the Civil Rights Act of 1964 expressly exempts private clubs from its coverage.⁸⁶ The language of the Act, however, does not specifically define the term "private club." The Act states only that the exemption applies to establishments "not in fact open to the public."⁸⁷ This Section discusses the statutory and legislative history and the case law that have attempted to define private organizations, thus exempting them from public accommodation statutes.

A. Legislative History

Courts sometimes considered legislative history in an attempt to further define the term "private club."⁸⁸ Since the statute itself does not give aid to the courts in defining this term, courts have looked to legislative history to discover and accomplish Congress' intent in pass-

81. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

82. *Id.*; Willard, *supra* note 79, at 359.

83. *Roberts*, 468 U.S. at 623; Finlay, *supra* note 40, at 378-79.

84. *Roberts*, 468 U.S. at 628-29.

85. McKenna, *supra* note 52, at 1067 n.44 (citing Gerald L. Edgar, Note, *Roberts v. United States Jaycees: Does the Right of Free Association Imply an Absolute Right of Private Discrimination?*, 1986 UTAH L. REV. 373, 374).

86. 42 U.S.C. § 2000a(e).

87. *Id.*

88. See *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1427-28 (N.D. Ill. 1990) (considering floor debate of Congress in defining "private club" but choosing not to rely on statements made). Statements by legislators can be considered in interpreting statutes but are not controlling. *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (stating *post hoc* statements of congressional committee hold little weight); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 116-18 (1980) (noting testimony by a single legislator not controlling); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (determining statement by bill sponsor, congressional reports and other statements by congressman must be considered when analyzing congressional intent); *United States v. O'Brien*, 391 U.S. 367, 383-85 (1968) (same).

ing the Civil Rights Act.⁸⁹ During the debate over this provision of the Act,⁹⁰ Senator Humphrey gave some general guidelines to the courts by stating, "We intend only to protect the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis."⁹¹ He also recognized that the clubs included under this exemption "are bona fide social, fraternal, civic, and other organizations which select their own members."⁹² Courts have used these general statements to build a set of criteria to determine if an organization is a private club or not.⁹³

Legislative history also discusses whether specific organizations should be considered "private."⁹⁴ During the Congressional debates over Title V of the 1964 Act,⁹⁵ Representative George Meador addressed whether the private club exemption would cover "such organizations as the Boy Scouts of America, the Girl Scouts, the Future Farmers of America, the 4-H Clubs—that type of organization," stating that those "would be covered by the term 'private club' like the Kiwanis Club, the Lions Club, and so forth."⁹⁶ In those same debates, the discussion showed that Congress intended to include university fraternities and sororities under the exemption as well.⁹⁷ These statements may be considered, but are even less persuasive because they concerned Title V of the Act rather than Title II.⁹⁸

89. See, e.g., *United States v. Richberg*, 398 F.2d 523, 528 (5th Cir. 1968); *Nesmith v. Y.M.C.A. of Raleigh*, 397 F.2d 96, 101 (4th Cir. 1968); *Cornelius v. Benevolent Protective Order of Elks*, 328 F. Supp. 1182, 1201-02 (D. Conn. 1974).

90. 42 U.S.C. § 2000a(e).

91. 110 CONG. REC. 13,697 (1964).

92. 110 CONG. REC. 7407 (1964).

93. See *infra* notes 111-289 and accompanying text.

94. See *supra* notes 89-92 and accompanying text.

95. See 42 U.S.C. § 1975c(b).

96. 110 CONG. REC. 2296 (1964).

97. *Id.*

98. Another agency has defined the term "private club," but in relation to Title VII of the Act. See 42 U.S.C. § 2000e(b)(2). The Equal Employment Opportunity Commission (EEOC) released the *Policy Statement: Bona Fide Private Club Exemptions* which defines this term as used in Title VII of the Act. See *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 n.23 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990). However, the Court of Appeal for the Fifth Circuit clearly distinguished the case law defining the term "private club" under Title II from the definition under Title VII. Therefore, the policy statement and alternative definition are not relevant to this discussion. *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131-32 (5th Cir. 1980).

B. Procedural Issues

Several procedural issues arise in a case relying on the private club exemption to the 1964 Act, including who has the burden of proof and whether certain issues are questions of fact or of law. The party claiming coverage by the exemption bears the burden of proof.⁹⁹ The burden is placed on this party because that party claims the exemption¹⁰⁰ and has the facts required for proof.¹⁰¹

Another procedural issue is whether the private club determination concerns a question of fact or law.¹⁰² In the same year, decisions of the Courts of Appeals for the Fourth and Fifth Circuits handed down opposing decisions on this issue.¹⁰³ The majority of courts addressing this issue follow the Fourth Circuit in holding that the private club determination is a question of fact.¹⁰⁴ However, the Fifth Circuit's finding that this issue "is a question of law once the underlying facts are determined"¹⁰⁵ is much more persuasive. The court reasoned that it cannot decide this issue from "experience with[in] the mainsprings of human conduct" in the way it determines factual issues.¹⁰⁶ The court perceptively recognized that if this determination is not treated as a legal standard, the meaning of the term could change with each case.¹⁰⁷ The court also recognized that defining a "club" is a question

99. *United States v. Richberg*, 398 F.2d 523, 529 (5th Cir. 1968); *Nesmith v. Y.M.C.A. of Raleigh*, 397 F.2d 96, 101 (4th Cir. 1968); *Wright v. Cork Club*, 315 F.Supp. 1143, 1150 (S.D. Tex. 1970).

100. *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Javierre v. Central Altagrafia*, 217 U.S. 502, 507-08 (1910); *Richberg*, 398 F.2d at 529.

101. *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 111 (1941).

102. See *Moegenburg*, *supra* note 42, at 419 n.89.

103. *Nesmith*, 397 F.2d at 98-100 (question of fact); *Richberg*, 398 F.2d at 525-26 (question of law).

104. See *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474, 484 (E.D. La. 1974); *United States v. Jordan*, 302 F. Supp. 370, 375 (E.D. La. 1969). Courts cite *Anderson v. Pass Christian Isles Golf Club, Inc.*, 488 F.2d 855 (5th Cir. 1974) as holding that this determination is a question of fact, but that decision merely stated that the judgment below should be reversed because it was based on "an erroneous view of the factual situation." *Id.* at 857. The court does not expressly state a holding either way on the fact/law issue. For the most part, the circuit courts have not commented on this issue.

105. *Richberg*, 398 F.2d at 526. In *Wright v. Cork Club*, 315 F. Supp. 1143, (S.D. Tex. 1970), the court sees this interpretation as a "curious fact-law question" based on the language of the *Richberg* court. *Id.* at 1150 n.15.

106. *Richberg*, 398 F.2d at 526 (citing *Lundgren v. Freeman*, 307 F.2d 104, 115 (9th Cir. 1962)).

107. *Id.*

of law in other statutory interpretation contexts.¹⁰⁸ Most importantly, and as no court has pointed out, appellate courts review only whether lower courts incorrectly decided legal issues or incorrectly decided factual issues because of lack of support by the evidence.¹⁰⁹ Thus, in holding that the "private club" issue constitutes a question of law, appellate courts have much more latitude to determine this issue on appeal, which is necessary when considering the discrepancies in lower court decisions.¹¹⁰

C. Factors to Consider

When addressing the private club exemption under the 1964 Act, courts rely on many different factors. In delineating these factors, one should recognize that case law on this issue reveals a hodgepodge of bases for suits, courts and rules.¹¹¹ The basis for a suit challenging or claiming the private club exemption can come from federal or any number of state laws resulting in decisions by a multitude of federal and state courts.¹¹² Thus, this Comment will enumerate the entire ensemble of components and will discuss how the factors fit together.¹¹³

1. Genuine Selectivity of the Group in the Admission of Members

During the debates over the 1964 Act, Senator Humphrey stated, "We intend only to protect the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis."¹¹⁴ Relying on this legislative history, courts have stated that selectivity is the most important factor in the determination of exemption.¹¹⁵ To properly analyze this factor, courts break it down in-

108. *Id.* (citing *Baldwin v. Morgan*, 287 F.2d 750, 752 (5th Cir. 1961); *Jeffery v. Planning and Zoning Bd. of Appeals*, 232 A.2d 497, 499 (Conn. 1967)).

109. *See, e.g.*, CAL. CIV. PROC. CODE § 909 (West 1990).

110. *See infra* notes 297-353 and accompanying text for discrepancies in decisions.

111. *See supra* note 37 for the multitude of state public accommodation statutes. The Supreme Court has yet to decide a case relying wholly on the private club exemption, thus leaving other courts free to fashion their own rules. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (relying on freedom of association as well as private club exemption). While some decisions have been adopted and applied with some consistency, this body of law is far from settled.

112. *See, e.g.*, *Roberts*, 468 U.S. at 614-15 (based on Minnesota Human Rights Act).

113. *See infra* notes 275-94 and accompanying text.

114. 110 CONG. REC. 13,697 (1964).

115. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989),

to many sub-elements.¹¹⁶

a. Objective standards for admission

First, courts review the objective standards or criteria for admission to the organization. Often, the requirements enumerated in the bylaws or constitution of the organization set these standards.¹¹⁷ For example, in determining the status of a local Elks club in *Cornelius v. Benevolent Protective Order of the Elks*,¹¹⁸ the district court relied on constitutional standards for admission stating that "only white male citizens of the United States who believe in God and who live within the jurisdictional limits of the local lodge" could be members.¹¹⁹ The court found that these requirements constituted objective standards or criteria for admission because they excluded not only black males, but also all non-whites, women, atheists, agnostics, aliens, and non-residents.¹²⁰

However, not all admission criteria is "reasonable" and therefore, may not satisfy this element.¹²¹ Courts have consistently held that when the only selective criteria for admission is race, the standards are not reasonable and an organization does not receive private club status.¹²² As the Court of Appeals for the Fourth Circuit noted, "serving . . . all the members of the white population within a defined geographical area is certainly inconsistent with the nature of a truly private club."¹²³ A private club can discriminate in selecting members based on race, but race

aff'd, 894 F.2d 83 (3d Cir. 1990); *Brown v. Loudoun Golf and Country Club, Inc.*, 573 F. Supp. 399, 403 (E.D. Va. 1983); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974).

116. *Lansdowne*, 713 F. Supp. at 797.

117. *See Cornelius*, 382 F. Supp. at 1191 n.1 (noting membership standards delineated in *Benevolent Protective Order of the Elks Constitution*).

118. 382 F. Supp. 1182 (D. Conn. 1974).

119. *Id.* at 1203.

120. *Id.*

121. *See* 110 CONG. REC. 13,697 (1964) (statement by Senator Humphrey), *supra* notes 91-92 and accompanying text (membership must be "genuinely selective on some reasonable basis"). *See also* *United States v. Richberg*, 398 F.2d 523, 528 (5th Cir. 1968) (quoting *United States v. Clarksdale, King & Anderson Co.*, 288 F. Supp. 792, 795 (N.D. Miss. 1965)) (stating that membership must be "genuinely selective on some reasonable basis"); *United States v. Jordan*, 302 F. Supp. 370, 377 (E.D. La. 1969) (determining exclusion of all blacks is not a "reasonable basis").

122. *Runyon v. McCrary*, 427 U.S. 160, 172 n.10 (1976); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 437 (1973); *Daniel v. Paul*, 395 U.S. 298, 301 (1969); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969); *Nesmith v. Y.M.C.A. of Raleigh*, 397 F.2d 96, 102 (4th Cir. 1968); *Wright v. Cork Club*, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970).

123. *Nesmith*, 397 F.2d at 102 (quoting *United States v. Northwestern Louisiana Restaurant Club—The Spurious Club and Public Accommodation Laws*, 62 N.W. U. L. REV. 244, 246 (1967)).

cannot be the only criteria for membership.¹²⁴ Furthermore, courts exclude organizations with a single selective criteria of religious belief from the private club exemption.¹²⁵

Courts consider other standards for admission. Many organizations require current member recommendations as a part of their admission procedures.¹²⁶ While courts look favorably upon this requirement, recommendations have not shown to carry much weight. For example, in *Brown v. Loudoun Golf and Country Club*,¹²⁷ even though two current members had to sign applications for membership into the golf club, it was insufficient to show selectivity.¹²⁸ The court considered other requirements of membership, including an admission fee, membership ceiling, and board approval and still found no selectivity.¹²⁹ Another district court recognized that recommendations were required for admission to the club in *United States v. Lansdowne Swim Club*,¹³⁰ but noted disfavorably that the swim club failed to reveal the recommendation contents to the members.¹³¹ Other organizations may require an applicant to answer questions about his background and receive spon-

124. *Durham v. Red Lake Fishing & Hunting Club*, 666 F. Supp. 954, 959 (W.D. Tex. 1987). The court recognized that "a 'truly private club' . . . does have the right to discriminate against potential members based on race; but clearly the *only* criteria for selection cannot be that one be white." *Id.*

125. *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1426 (N.D. Ill. 1990). The district court relied on decisions concerning the single selection criteria of race in reaching this determination. *Id.* (citing *Daniel*, 395 U.S. at 302; *Tillman*, 410 U.S. at 438; *Durham*, 666 F. Supp. at 959). The Boy Scouts enforced this restriction by requiring members to sign a Declaration of Religious Principle stating that they "recognize an obligation to God." *Id.* at 1417-18. The court noted that the Boy Scouts does not advance a definition or interpretation of "God" and that "the concept of 'God' is sufficiently vague that it is difficult to understand how the Boy Scouts can actually use, in practice, belief in God as a criterion for membership." *Id.* at 1426-27.

126. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 800 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990); *Brown v. Loudoun Golf & Country Club, Inc.*, 573 F. Supp. 377, 403 (E.D. Va. 1983). However, a recommendation requirement alone is an insufficient demonstration of selectivity. *Lansdowne*, 713 F. Supp. at 800 (citing *Tillman*, 410 U.S. at 1094; *Wright v. Salisbury Club*, 632 F.2d 309, 312 (4th Cir. 1980); *Brown*, 573 F. Supp. at 403; *New York v. Ocean Club, Inc.*, 602 F. Supp. 489, 495 (E.D.N.Y. 1984)).

127. *Brown*, 573 F. Supp. at 399.

128. *Id.* at 403.

129. *Id.*

130. 713 F. Supp. 785 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990).

131. *Id.* at 800.

sorship from a current member in good standing.¹³² In *Cornelius v. Benevolent Protective Order of Elks*,¹³³ the court relied on this as one element in its decision that the Elks club was clearly private.¹³⁴ Hence, the courts consider all objective standards for admission in determining if the organization has obtained private club status.

b. Formality of admission procedures

Second, courts consider the formality of the club's admission procedures.¹³⁵ While the club may have objective standards for admission on the books, courts are unwilling to find these standards sufficient for private club status unless they actually operate in practice to create selectivity.¹³⁶ For example, in a case against the Fraternal Order of Eagles, the district court cited discrepancies between the admission process as quoted from the Eagles Club statutes and the actual admission procedures used.¹³⁷ The statutes specifically required all applicants to be male, of good moral character, believe in a supreme being, live within the jurisdiction of the chapter, have two current member recommendations, and other procedural requirements.¹³⁸ In finding that the organization had not met its burden of showing private club status,¹³⁹ the court relied on one member's statement that he had been admitted to the club by simply filling out an application and paying his membership fee without any procedural safeguards.¹⁴⁰ The formal requirements "have little meaning when in fact the Club does not follow a selective membership policy."¹⁴¹ A club must have "machinery" in place for screening potential members and must actually utilize that machinery to be a private club.¹⁴² If the organization disregards this "machinery,"

132. *Id.* at 823.

133. 382 F. Supp. 1182 (D. Conn. 1974).

134. *Id.* at 1203-04.

135. *Durham v. Red Lake Fishing & Hunting Club*, 666 F. Supp. 954, 960 (W.D. Tex. 1987); *Brown v. Loudoun Golf & Country Club, Inc.*, 573 F. Supp. 399, 403 (E.D. Va. 1983); *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1176-77 (E.D. Wis. 1974).

136. *Brown*, 573 F. Supp. at 403 (citing *Wright v. Salisbury Club*, 632 F.2d 309, 312 (4th Cir. 1980)).

137. *Trustees of Fraternal Order of Eagles*, 472 F. Supp. at 1176-77.

138. *Id.* at 1176.

139. *Id.* at 1176-77.

140. *Id.* at 1176.

141. *Durham v. Red Lake Fishing & Hunting Club*, 666 F. Supp. 954, 960 (W.D. Tex. 1987) (citing *Wright v. Salisbury Club*, 632 F.2d 309, 312 (4th Cir. 1980)).

142. *Wright v. Cork Club*, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970) (citing *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90 (G.D. La. 1967); *United States v. Northwest Louisiana Restaurant Club*, 256 F. Supp. 151 (W.D. La. 1966); *Gillespie v. Lake Shore Golf Club, Inc.*, 91 N.E.2d 290 (Ohio Ct. App. 1950); *In re Holiday Sands*,

then it may not maintain private club status.¹⁴³

c. Membership control over member selection

Third, courts weigh the extent of control current members have over selection of new members.¹⁴⁴ This element is related to the formality of club procedures. Factors weighed in analyzing this element include membership committee approval of new members, a voting system such as a "black-ball" system where individual members can reject an applicant, notice to current members of pending applications, current member notification of admitted applicants, and revocation of existing membership.¹⁴⁵ In *United States v. Jordan*,¹⁴⁶ the court noted that applicants to a dining club were admitted by a two-thirds vote from a three-member committee with no input by other members who received no information regarding pending applications or revocations.¹⁴⁷ In addition, one person on the membership committee held the power to revoke a current membership.¹⁴⁸ The court relied on these facts in finding that the dining club was not private.¹⁴⁹ Thus, control over new member selection by the current membership is an important factor in deciding selectivity.

d. Statistics concerning denial of membership

Fourth, courts review the number of applicants outside the discriminated-against group who have been denied membership relative to the total number of applicants from that group or from the total number of applicants.¹⁵⁰ This element is often not difficult to identify or analyze since most organizations deny membership to all of the applicants from

Inc., 9 Race Rel. L. Rep. 2025 (Ohio Civ. Rights Comm'n 1964); *United States v. Richberg*, 398 F.2d 523 (5th Cir. 1968); *United States v. Clarksdale King & Anderson Co.*, 288 F. Supp. 792 (N.D. Miss. 1965); *Castle Hill Beach Club v. Arbury*, 142 N.E.2d 186 (N.Y. 1957)).

143. *Cork Club*, 315 F. Supp. at 1151.

144. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990).

145. *United States v. Jordan*, 302 F. Supp. 370, 375 (E.D. La. 1969).

146. 302 F. Supp. 370 (E.D. La. 1969).

147. *Id.* at 377.

148. *Id.*

149. *Id.* at 379.

150. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990).

the discriminated-against group and often do not reject any other applicants.¹⁵¹ For example, in finding a North Carolina Young Men's Christian Association (Y.M.C.A.) not a private club, the Court of Appeals for the Fourth Circuit pointed out that out of 1300 applications in one year, the Y.M.C.A. accepted more than ninety-nine percent of the white applicants and rejected one hundred percent of the blacks.¹⁵²

e. Numerical limit on membership

Fifth, in analyzing selectivity, courts consider whether there is a numerical limit on the club's membership notwithstanding the capacity of the facilities.¹⁵³ The court further evaluates the number of members and how that number relates to the population, area or group from which the members are drawn.¹⁵⁴ The courts have not set a specific number of members required to establish private club status,¹⁵⁵ but having no limits aside from the capacity of the facilities might prevent clubs from attaining private club status.¹⁵⁶ Thus, having open-ended membership appears inconsistent with private clubs' usual practice of limited membership.¹⁵⁷ Consequently, the number of members in a disputed organization has risen in importance in the national debate on

151. See *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 n.9 (1973) (noting only one applicant formally rejected in 11 years); *Nesmith v. Y.M.C.A. of Raleigh*, 397 F.2d 96, 101 (4th Cir. 1968) (accepting more than 99% of white applicants and rejecting 100% of black applicants); *Lansdowne*, 713 F. Supp. at 799 (rejecting no one in 418 applications before opening club, only four non-black families rejected from 1400 applicants in 40 years since opening); *Durham v. Red Lake Fishing & Hunting Club*, 666 F. Supp. 954, 960 (W.D. Tex. 1987) (rejecting only two white applicants in 50 years, both for peculiar circumstances); *New York v. Ocean Club, Inc.*, 602 F. Supp. 489, 495 (E.D.N.Y. 1984) (rejecting no one from 100 applications in last five years); *Brown v. Loudoun Golf & Country Club*, 573 F. Supp. 399, 403 (E. D. Va. 1983) (rejecting four white applicants with current procedures); *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1176 (E.D. Wis. 1979) (recognizing three applications rejected out of 1011 in one-year period); *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474, 485 (E.D. La. 1974) (noting no rejections in 2000 white applicants); see also *United States v. Jordan*, 302 F. Supp. 370 (E.D. La. 1969) (accepting 100% of white applicants in first year).

152. *Nesmith*, 397 F.2d at 101.

153. *Lansdowne*, 713 F. Supp. at 797.

154. *Jordan*, 302 F. Supp. at 375.

155. See *Lansdowne*, 713 F. Supp. at 798 (finding no written limit on seasonal members for each season, but limit decided each year based on use by active members and returning seasonal members, swim club not private); *Durham*, 666 F. Supp. at 956 (limiting membership to 80 members, fishing and hunting club not private); *Brown*, 573 F. Supp. at 400 (limiting membership to 450, golf club not private).

156. *Nesmith*, 397 F.2d at 101 (noting no stated or unstated limits on membership of Y.M.C.A.).

157. *Id.* at 102.

private club status, especially in the Boy Scouts cases.¹⁵⁸

f. Membership fees

Sixth, courts weigh the substantiality of dues and initiation fees required for membership.¹⁵⁹ This factor sometimes alerts the courts of an obvious "sham" club because the fees involved are minimal, such as in *Daniel v. Paul*.¹⁶⁰ In *Daniel*, patrons of a recreation center paid a \$.25 "membership fee" plus daily fees for use of swimming, boating and miniature golf facilities.¹⁶¹ The Court condemned this fee as a "subterfuge" to avoid legislation and found the club to be public.¹⁶² In other cases, even very substantial initiation and annual membership fees fail to convince the court that the organization is private.¹⁶³ In *Tillman v. Wheaton-Haven Recreation Ass'n*,¹⁶⁴ decided in 1972, a swimming pool association charged a \$375 initiation fee and \$50-60 in annual dues.¹⁶⁵ Even with these considerable fees, the Court found that the club was not entitled to the private club exemption.¹⁶⁶

All of the aforementioned factors aid a court in determining whether an organization is sufficiently selective in its membership admission practices to qualify for the private club exemption under the 1964 Act.

2. Membership Control Over Operations of Establishment

The extent of membership ownership and control over the operations of the establishment or organization also factors into determining whether that establishment can utilize the private club exemption.¹⁶⁷

158. See *El Nasser*, *supra* note 10.

159. *Lansdowne*, 713 F. Supp. at 797; *Brown*, 573 F. Supp. at 403.

160. 395 U.S. 298, 301-02 (1969). See also *United States v. Jordan*, 302 F. Supp. 370, 377 (E.D. La. 1969) (\$5.00 initiation fee and \$5.00 annual dues, not a private dining club).

161. *Daniel*, 395 U.S. at 301-02.

162. *Id.* at 302.

163. See *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 433 n.2 (1973) (finding \$375 initiation fee and \$50-60 annual dues of swimming pool association rendered it not private); *Nesmith v. Y.M.C.A. of Raleigh*, 397 F.2d 96, 101 (4th Cir. 1968) (noting \$30-100 annual membership fees charged); *Brown*, 573 F. Supp. at 400 (determining \$750 initiation fee rendered golf club not private).

164. 410 U.S. 431 (1973).

165. *Id.* at 433 n.2.

166. *Id.* at 438.

167. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989),

Self-government and member-ownership are traditional attributes of private clubs and weigh in favor of the private club exemption.¹⁶⁸ Courts evaluate issues such as whether members own the property; whether the club has a fixed meeting place; where the revenues from operations will be used (including the rates of compensation to employees and management); and whether control changed hands when the club became a membership organization.¹⁶⁹

While display of some or all of these characteristics helps establish private club status, if one person maintains all ownership and control, the court presumes that the club actually constitutes a business for the benefit of that individual.¹⁷⁰ In such a case, the organization is found to be the "alter ego" of the controlling member.¹⁷¹ As the *Richberg* court stated, a private club is a "pluralistic enterprise" and "cannot be one man's principality or domain."¹⁷² For example, in *United States v. Jordan*,¹⁷³ a "private" dining club did not fall under the exemption because it was owned wholly by the manager and his wife.¹⁷⁴ The manager made all of the decisions regarding operation, and informal consultation with his "members" regarding innovations were seen as a proprietor seeking input from customers about how changes would affect future business.¹⁷⁵ Thus, an organization must operate somewhere in the middle between no control and complete control by one person.

3. History of the Organization

Courts also consider the history of the organization when determining private club status.¹⁷⁶ Usually, this analysis will determine if the

aff'd, 894 F.2d 83 (3d Cir. 1990); *Brown v. Loudoun Golf & Country Club*, 399, 403 (E.D. Va. 1983).

168. *Daniel v. Paul*, 395 U.S. 298, 301 (1969).

169. *United States v. Jordan*, 302 F. Supp. 370, 375-76 (E.D. La. 1969).

170. *United States v. A.W. Richberg*, 398 F.2d 523, 529 (5th Cir. 1968). *See generally* *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90 (E.D. La. 1967).

171. *Richberg*, 398 F.2d at 529.

172. *Id.*

173. 302 F. Supp. 370 (E.D. La. 1969).

174. *Id.* at 378. This determination was also made in another situation, in which on the date of incorporation, a three-member Board of Trustees (Jack Sabin, his wife, and his daughter) entered the club into a contract with Jack Sabin personally. The contract stated that he would provide the club with furniture, fixtures, buildings, merchandise, and personnel in return for all the profits from operation. Not surprisingly, the court saw this arrangement as an "alter ego" ownership and not as membership control. *Jack Sabin's Private Club*, 265 F. Supp. at 94.

175. *Jordan*, 302 F. Supp. at 378.

176. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990) (changing swim club admission procedures failed to avoid legislation).

group evolved to avoid coverage by civil rights legislation.¹⁷⁷ Legislative history shows that Congress knew of this possibility and did not intend for this maneuver to exempt organizations from the effects of the legislation.¹⁷⁸ Senator Humphrey stated, "If a club were established as a way of by-passing or avoiding the effect of the law, and it was not really a club . . . that kind of a club would come under the language of the bill."¹⁷⁹ Senator Magnuson succinctly affirmed this position in saying, "No doubt attempts at subterfuge or camouflage may be made to give a place of public accommodation the appearance of a private organization, but there would seem to be no difficulty in showing a lack of bona fides in those cases."¹⁸⁰ Courts attempt to follow this legislative intent in determining if clubs were developed merely to avoid civil rights legislation.

In looking for the intent to avoid civil rights legislation, courts again weigh a variety of characteristics. For instance, the court will often look at the date of creation of the club in relation to the date of enactment of the civil rights legislation in question.¹⁸¹ If the establishment existed prior to becoming a "private" club, the court will analyze the circumstances of its transformation.¹⁸² Courts also look to see "whether the club made insubstantial changes in its prior operation to avoid the impact of civil rights laws."¹⁸³

For example, in *Daniel v. Paul*,¹⁸⁴ it was not until after the enact-

177. *Id.* at 802. There was a burst of cases after the 1964 Civil Rights Act went into effect in which organizations altered procedures to avoid the reaches of this legislation. See, e.g., *Daniel v. Paul*, 395 U.S. 298, 302 (1969) (holding recreation center became "private club"); *Jordan*, 302 F. Supp. at 378 (determining restaurant became "private dining club").

178. See 110 CONG. REC. 6008 (1964); 110 Cong. Rec 7407 (1964); see also *United States v. Clarksdale, King & Anderson Co.*, 288 F. Supp. 792 (N.D. Miss. 1965).

179. 110 CONG. REC. 6008 (1964).

180. 110 CONG. REC. 7407 (1964).

181. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 802 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990). The court noted that the swim club in question was created before the enactment of the 1964 Act. *Id.* See also *Cornelius v. Benevolent Order of Elks*, 382 F. Supp. 1182, 1203-04 (D. Conn. 1974) (tracing the history of the Benevolent Protective Order of Elks from the 1860s to determine that the local lodge was a private club).

182. See *United States v. Jordan*, 302 F. Supp. 370, 371-73 (E.D. La. 1969).

183. *Brown v. Loudoun Golf & Country Club, Inc.*, 573 F. Supp. 399, 402 (E.D. Va. 1983). See also *United States v. Trustees of the Fraternal Order of Eagles*, 472 F. Supp. 1174, 1175 (E.D. Wis. 1979).

184. 395 U.S. 295 (1969).

ment of the 1964 Act that a recreation center began to call itself a private club.¹⁸⁵ The Lake Nixon Club changed its operating procedures by requiring a twenty-five cent "membership" fee to obtain a "membership" card for admittance into the park.¹⁸⁶ However, this newly created "private club" admitted 100,000 whites each season, while denying "membership" to blacks.¹⁸⁷ The Supreme Court recognized these changes as insubstantial and merely a device to avoid the legislation.¹⁸⁸

In cases involving restaurants or other establishments serving food, important changes in operations include differences in the food and services of the previous and new establishments.¹⁸⁹ Changes in customers between the old and new establishments are also significant.¹⁹⁰ In *United States v. Jordan*,¹⁹¹ the court asked if customers of the previous establishment were solicited to become members of the "club," and if the "club" informed them of the impending changes.¹⁹² In actuality, the owner of the restaurant maintained a "sign-up list" at the restaurant, obtaining approximately 1200 names and addresses before Landry's Fine Foods Restaurant changed to Landry's Private Dining Club, Inc.¹⁹³ Not surprisingly, these facts demonstrated sufficient intent to change the nature of the establishment to avoid the 1964 Act.¹⁹⁴ Therefore, any combination of these characteristics can show intent to avoid the reach of civil rights legislation.¹⁹⁵

Another aspect of the history of the establishment is the motive for creating the club.¹⁹⁶ In *Jordan*, the court declared that if the "domi-

185. *Id.* at 301.

186. *Id.* at 301-02.

187. *Id.* at 302.

188. *Id.* See *supra* notes 154-56 and accompanying text for a discussion of *Daniel* and how it analyzes membership fees to determine selectivity of an organization.

189. *United States v. Richberg*, 398 F.2d 523, 527 (5th Cir. 1968). The restaurant kept the same food, menu, prices, and serving personnel from the prior cafe when it changed to a private dining club. The court found that the two establishments were identical in all matters concerning food and services and that this suggested that the club was formed for the purpose of avoiding civil rights legislation. *Id.* at 529.

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

191. 302 F. Supp. 370 (E.D. La. 1969).

192. *Id.* at 376.

193. *Id.* at 373.

194. *Id.* at 379.

195. Although a club created from a previous establishment to avoid legislative coverage weighs against private club status, the Court of Appeals for the Fourth Circuit has stated that existence of the club before passage of the Act, with its policies and procedures intact, does *not* weigh in favor of private club status. The court stated, "The fact that the *modus vivendi* of the organization has been the same in past years and is not a recently devised subterfuge to circumvent the 1964 Act is irrelevant." *Nesmith v. Y.M.C.A. of Raleigh*, 397 F.2d 96, 102 (4th Cir. 1968).

196. *Jordan*, 302 F. Supp. at 378-79.

nant motive" for creating a club is to exclude a certain group of people protected by civil rights legislation, then the club's creation places it outside the private club exemption.¹⁹⁷ The owner of the restaurant/private dining club claimed that the addition of a bar and lounge to his cafe required formation of a private club to keep out the "riff-raff," meaning customers who cause disturbances.¹⁹⁸ However, the court noted that other non-private establishments in the area did not have this problem with troublemakers.¹⁹⁹ In actuality, picketing, caused by his serving blacks in the cafe, forced the owner to close, and he had hoped to solve this problem by creating a private dining club.²⁰⁰ Since the dominant motive in forming the club was to exclude blacks, the court found that the club did not fall under the private club exemption of the 1964 Act.²⁰¹

In *United States v. Lansdowne Swim Club*,²⁰² another court recognized the importance of an investigation into the history of the organization because it could have initially intended to specifically serve the public and had no intention of operating as a private club.²⁰³ In *Lansdowne*, founders of the swimming pool in question testified that they formed the swim club to serve the neighborhood children and would serve the public as long as the membership fee was paid.²⁰⁴ The court concluded that this history established the public nature of the club.²⁰⁵ Thus, courts analyze all aspects of the history of an organization in order to determine if the club sought merely to avoid coverage by civil rights legislation or if the club intended to serve the public.

4. Use of Facilities by Nonmembers

Courts also consider the use of and access to facilities by nonmembers in determining the status of an organization.²⁰⁶ As one district court noted, "A genuine private club limits the use of club facilities or services to members and bona fide guests."²⁰⁷ Varying degrees of non-

197. *Id.*

198. *Id.* at 378.

199. *Id.*

200. *Id.* at 378-79.

201. *Id.* at 379.

202. 713 F. Supp. 785 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990).

203. *Id.* at 802.

204. *Id.*

205. *Id.* at 803.

206. *Id.* at 797.

207. *Wright v. Cork Club*, 315 F. Supp. 1143, 1152 (S.D. Tex. 1970) (quoting James

member use have been challenged, although most cases have found that any non-member use of facilities except for guests of members destroys private club status.²⁰⁸

*Anderson v. Pass Christian Isles Golf Club*²⁰⁹ involved an agreement between a golf course and local hotels ensuring use of the course by hotel guests as a part of their vacation package.²¹⁰ The court held that these circumstances destroyed the golf course's private club status as a matter of law.²¹¹ The court noted that besides this agreement, the golf course also allowed the public to use its facilities and quoted prices over the phone without inquiry into membership.²¹² Other cases establish that county-maintained roads open to the public on club-owned property²¹³ and tennis courts open to the general public that were used and controlled by a club²¹⁴ also exemplify non-member use which destroys private club status.²¹⁵

5. Club's Purpose for Formation and Continuing

In determining private club status, courts also review the purpose of the club's existence.²¹⁶ Seemingly in opposition to this concept, legisla-

P. Murphy, Jr., Comment, *Public Accommodations: What is a Private Club?*, 30 MONT. L. REV. 47, 52 (1968)). However, this court also noted the possibility for a private club to allow public use of some of its facilities and still retain the private club exemption under the wording of some state statutes. *Id.* at 1152 n.20 (citing REV. WASH. CODE § 9.91.010(1)(d) (1961) as an example of such a statute).

208. *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1175 (E.D. Wis. 1979); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974).

209. 488 F.2d 855 (5th Cir. 1974).

210. *Id.* at 856.

211. *Id.* at 857.

212. *Id.*

213. *Durham v. Red Lake Fishing and Hunting Club, Inc.*, 666 F. Supp. 954, 960 (W.D. Tex. 1987). The court reasoned that the county maintained the club's roads for public use and that the club did not control those roads. *Id.*

214. *New York v. Ocean Club, Inc.*, 602 F. Supp. 489, 496 (E.D.N.Y. 1984). Ocean Club owned and operated the tennis courts used both by members and the general public. The district court emphasized this as one of four factors in holding the club was not private. *Id.*

215. In *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970), the court went one step further and held that when a club exists solely for member use of certain facilities and non-members use those same facilities, the club does not get private club status. *Id.* at 1152 n.20.

216. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990). This factor is closely related to the analysis of a club's history since a court may reject a claim of private club exemption if the club was formed solely for the purpose of avoiding civil rights legislation or to exclude a certain group. *See supra* notes 176-205 and accompanying text; *see also* Solomon v.

tive history shows that Congress intended that courts should not consider the reasons for formation of an organization.²¹⁷ During the Congressional debates over the 1964 Act, Senator Long stated that the exemption "does not relate to whatever purpose or animus the organizers may have had in mind when they brought the organization into existence."²¹⁸ Yet, courts have ignored this legislative history and still consider the motive for a club's creation and the purpose for its continued existence when evaluating private club status.²¹⁹

Characteristics a court weighs to delineate the purpose or goals of an organization include: Whether the corporation has a civic, fraternal or social purpose,²²⁰ whether an alleged purpose²²¹ could be accomplished by any other means,²²² and whether the members have any rights or obligations different from customers of a previous establishment.²²³ However, the mere existence of an acceptable stated purpose will not suffice; courts also look at whether the club actively works toward its stated goals.²²⁴ In *United States v. Richberg*,²²⁵ the Dixie Diner Club's bylaws stated its purpose to cater to epicurean pleasures and strengthen fraternal membership between members.²²⁶ The court found that the club operated exactly the same as Richberg's Cafe which it had replaced and that members had not taken any steps to fulfill these objectives, so even this high-minded purpose did not fulfill the private club exemption.²²⁷

Miami Woman's Club, 359 F. Supp. 41 (S.D. Fla. 1973) (noting that the club was not formed for the primary purpose of excluding blacks). However, other purposes for a club's existence, such as its continuing goals, also weigh in the determination of private club status.

217. *Cork Club*, 315 F. Supp. at 1151 n.17 (citing *Nesmith v. Y.M.C.A. of Raleigh*, 397 F.2d 96 (4th Cir. 1968)); see, e.g., *Murphy*, *supra* note 207, at 54-55.

218. *Nesmith*, 397 F.2d at 102 (quoting 110 CONG. REC. 13,697 (1964)).

219. See *supra* notes 176-205 and accompanying text.

220. *United States v. Jordan*, 302 F. Supp. 370, 377 (E.D. La. 1969).

221. *Id.* By using the term "alleged," the courts are recognizing that a stated purpose may be a disguise for unacceptable goals. In *Jordan*, the "alleged purpose" was the owner's desire to keep out undesirable individuals, while the court-determined purpose was to keep out blacks. *Id.*

222. *Id.* at 376.

223. *Id.* at 377. This last factor is applied to clubs which replaced previously operating establishments with similar operations and goals.

224. *United States v. Richberg*, 398 F.2d 523, 527 (5th Cir. 1968).

225. 398 F.2d 523 (5th Cir. 1968).

226. *Id.* at 527.

227. *Id.* Even when a club's purpose of existence seems sufficient for private club exemption, the court may still find other factors more persuasive. In *United States v.*

Courts also look at whether the stated purpose is the actual purpose of the organization.²²⁸ In *United States v. Jordan*,²²⁹ the club, intending to serve alcohol, sought to ward off troublemakers by denying entry to the "riff-raff."²³⁰ The court found that the actual purpose was to exclude blacks from the restaurant since racial altercations had forced it to close.²³¹ Thus, an establishment or organization cannot hide behind acceptable, but false, stated goals.

A district court enunciated another possible factor in emphasizing the importance of a purpose created without any intent to discriminate. The court in *Mankes v. Boy Scouts of America*²³² noted that the Boy Scouts of America was created to develop the moral character of young boys and had not intentionally set out to discriminate against girls.²³³ However, other courts have failed to follow this concept.

6. Club Advertisement

In determining private club status, courts analyze the extent of an organization's advertising practices.²³⁴ Courts generally consider publicity and advertising inconsistent with the practices of a private club.²³⁵ This is especially true when the club advertises to increase use of its facilities by non-members.²³⁶ For example, the court, in *Wright v. Cork*

Lansdowne Swim Club, 713 F. Supp. 785, 805 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990), the purpose was "to maintain a private club for civic and social enjoyments of a moral, educational and legal nature." Yet, club history suggested that the club was created for benefit to the community, which the court found to be more indicative of a public accommodation. *Id.* at 802.

228. *United States v. Jordan*, 302 F. Supp. 370, 378 (E.D. La. 1969).

229. 302 F. Supp. 370 (E.D. La. 1969).

230. *Id.* at 378.

231. *Id.* at 378-79.

232. 137 F.R.D. 409 (S.D. Fla. 1991) (dismissed for lack of jurisdiction).

233. *Id.* at 411-12.

234. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974); *see also Jordan*, 302 F. Supp. at 376 (noting that advertising by the organization is not one of the "general characteristics which many private clubs possess"). Some courts have included this factor under the selectivity element. *See Brown v. Loudoun Golf and Country Club*, 573 F. Supp. 399, 403 (E.D. Va. 1983) (advertising for membership weighs against genuine selectivity).

235. *Wright v. Cork Club*, 315 F. Supp. 1143, 1152 (S.D. Tex. 1970). In *New York v. Ocean Club, Inc.*, 602 F. Supp. 489 (E.D.N.Y. 1984), the court said that private club advertising is acceptable if it is directed "exclusively and only to members for their information and guidance." *Id.* at 495.

236. *Cork Club*, 315 F. Supp. at 1152; *see also Castle Hill Beach Club v. Arbury*, 142 N.E.2d 186 (N.Y. 1957). In *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90 (E.D. La. 1967), Jack Sabin's Restaurant and Lounge became Jack Sabin's Private Club overnight. With the exception of the name, the club made no substantial

Club,²³⁷ held that newspaper advertisements featuring the entertainment schedule at a "private" dining club, but failing to mention that only members and guests could attend, extended an invitation to the general public.²³⁸ Furthermore, in *Anderson v. Pass Christian Isles Golf Club*,²³⁹ the court held that a golf course that regularly listed its facilities in tourist publications invited the general public to use its facilities.²⁴⁰ Courts are especially wary of clubs which advertise to attract new members.²⁴¹ Supreme Court Justice Stewart, in dicta, noted that the public nature of private schools "is clearly demonstrated . . . by the public advertisements" for new "private school" students.²⁴² When an organization relies completely on public advertising for new members²⁴³ or advertises to a large segment of the population for applicants,²⁴⁴ a court will usually place the organization outside the private club exemption. Thus, in *New York v. Ocean Club*,²⁴⁵ the court found a tennis club, which solicited membership applicants by regularly advertising in five weekly and monthly church bulletins and twice yearly in the New York Athletic Club's bulletin, which has a distribution of 9500, to have displayed an invitation of membership to a large segment of the public.²⁴⁶

change in the form or message of its advertising subsequent to the transformation. *Id.* at 93. The court found that the advertising "still clearly invite[d] the public—not just 'members'—to come and dine." *Id.*

237. 315 F. Supp. 1143 (S.D. Tex. 1970).

238. *Id.* at 1148.

239. 488 F.2d 855 (5th Cir. 1974).

240. *Id.* at 855.

241. See, e.g., *Runyon v. McRary*, 427 U.S. 160 (1976).

242. *Id.* at 172 n.10 (quoting *McRary v. Runyon*, 515 F.2d 1082, 1089 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976)). *Runyon* was a suit based on 42 U.S.C. § 1981, but the Court's analysis was very similar to that of suits based on the 1964 Act. See also *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1175 (E.D. Wisc. 1979) (delineating advertising for new members as one of five factors to consider).

243. *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474, 485-86 (E.D. La. 1974) (youth football association relied completely on newspaper publication that stated how to register for the league for its members).

244. *New York v. Ocean Club, Inc.*, 602 F. Supp. 489, 496 (E.D.N.Y. 1984).

245. 602 F. Supp. 489 (E.D.N.Y. 1984).

246. *Id.* at 496. *Ocean Club* is notable since the case involved a Christian club discriminating against Jews instead of the more common case in which white clubs have discriminated against blacks. *Id.* at 491; see also *Daniel v. Paul*, 395 U.S. 298, 304 (1969). In *Daniel*, the court noted that the recreation area regularly advertised in tourist publications, by radio, and in an Air Force newspaper. These facts demonstrat-

Not all types of advertising affect private club status. Indirect or non-intentional advertising usually will not place an organization outside the private club exemption.²⁴⁷ In *Solomon v. Miami Woman's Club*,²⁴⁸ the district court noted that publicity for a women's club was not initiated by the club, but was introduced by third parties as a result of the club's community involvement.²⁴⁹ Furthermore, the advertising did not attempt to increase use of the club's facilities.²⁵⁰ Thus, in addition to the planned results of the advertising, courts will also consider its source.

7. Profit or Non-Profit Organizations

Courts weigh whether the organization is run as a profit or non-profit business in determining status.²⁵¹ Consequently, courts should determine whether the members exercise control over the operating revenues or whether the manager of the establishment retains those revenues.²⁵² This factor may be substantially related to the analysis of the history of the organization.²⁵³ For example, when a business that previously operated for profit purposely converts to a private club, the use of profits may help determine whether the club is genuinely private or merely a sham to avoid legislation.²⁵⁴ In *Daniel v. Paul*,²⁵⁵ the Court found that a recreation center that had changed to a private club was "simply a business operated for a profit."²⁵⁶ Thus, the operations of a business might constitute a determining factor in resolving an organization's status.

8. Observed Formalities

Courts also analyze the formalities observed by the club in labeling it

ed that the owners knew they would be serving interstate travelers, in order to prove the interstate commerce requirement of the 1964 Act. *Id.* This is a good example of other reasons to scrutinize the advertising practices of the organization in question.

247. *Solomon v. Miami Woman's Club*, 359 F. Supp. 41, 45 (S.D. Fla. 1973).

248. 359 F. Supp. 41 (S.D. Fla. 1973).

249. *Id.* at 45.

250. *Id.*

251. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990); *Brown v. Loudoun Golf & Country Club*, 573 F. Supp. 399, 402-03 (E.D. Va. 1983); *see also Cornelius v. Benevolent Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974) (determining that courts should consider "the predominance" of the profit motive).

252. *United States v. Jordan*, 302 F. Supp. 370, 375-76 (E.D. La. 1969).

253. For a discussion of how the organizational history is weighed in the analysis for status, see *supra* notes 176-205 and accompanying text.

254. *See supra* note 162 and accompanying text.

255. 395 U.S. 298 (1969).

256. *Id.* at 301.

private or public.²⁵⁷ Factors considered include any documented articles, bylaws or rules, any formal membership procedures such as application forms and initiation ceremonies, formal expulsion procedures such as the right to a hearing, membership cards, roster of members, and established procedures for guest use of facilities.²⁵⁸ For example, *Nesmith v. Y.M.C.A.*²⁵⁹ involved the private nature of a local Y.M.C.A. in which the court noted that the club never held general meetings of the entire membership.²⁶⁰ The court opined that "[h]ardly can a club be a private association where the members do not meet together."²⁶¹ These procedures can be very indicative of the true nature of an organization.

9. General Characteristics of Private Clubs

The District Court for the Eastern District of Louisiana has included an additional factor involving the comparison of the general characteristics of private clubs with the characteristics of the organization in question.²⁶² Many of the characteristics which the court lumped together into this category have already been discussed previously, such as advertising,²⁶³ dues and initiation fees.²⁶⁴ However, the element of whether members pay for services with cash or receive credit is an interesting addition to the list.²⁶⁵

10. Operation for the Sole Benefit of Members

Several courts have determined whether operation of the organization solely benefits its members.²⁶⁶ In *Smith v. Y.M.C.A.*,²⁶⁷ the district

257. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990); *Durham v. Red Lake Fishing & Hunting Club*, 666 F. Supp. 954, 960 (W.D. Tex. 1987).

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

259. 397 F.2d 96 (4th Cir. 1968).

260. *Id.* at 102.

261. *Id.* (quoting Robert L. Thompson, Note, *Civil Rights Act of 1964 - Public Accommodation - Private Club Exemption*, 45 N.C. L. REV. 498, 505 (1967)).

262. *Jordan*, 302 F. Supp. at 376.

263. *See supra* notes 220-31 and accompanying text.

264. *See supra* notes 145-52 and accompanying text.

265. *Jordan*, 302 F. Supp. at 376. In *Jordan*, the court noted that members were not entitled to credit for services rendered at the club's facilities in finding that it was not a private club. *Id.* at 378.

266. *Smith v. Y.M.C.A.*, 462 F.2d 634, 648 (5th Cir. 1972); *Solomon v. Miami*

court, which raised this factor, considered the public's use of the facilities.²⁶⁸ In this case, the local Y.M.C.A. had an agreement with the city to coordinate their recreational programs so the two agencies' efforts would not overlap.²⁶⁹ Thus, programs offered by the Y.M.C.A. were not offered anywhere else and were open to the public.²⁷⁰ The court stated that the cooperative agreement displayed that the Y.M.C.A. did not operate solely for the benefit of its members, but for the public at large.²⁷¹

In *Solomon v. Miami Women's Club*,²⁷² the court also raised this factor by focusing on the purpose and goals of the group.²⁷³ The club's activities included supporting handicapped facilities in state parks and organizing a city-wide festival.²⁷⁴ The court found that even though the club functioned for the public good, this fact did not deprive it of its private club status.²⁷⁵ Another district court which considered this factor focused on the non-profit status of the organization and that the club acted solely for the benefit of its members.²⁷⁶ This factor is so intertwined with others that it is unlikely to be developed on its own in the future.²⁷⁷

11. Public Funding

When analyzing the status of an organization, courts consider whether the organization receives any funding from the public.²⁷⁸ As one district court noted, "substantial public support of an organization is inconsistent with an assertion that the organization is a private club."²⁷⁹ Both direct and indirect financing is considered. Clubs which receive

Women's Club, 359 F. Supp. 41, 44 (S.D. Fla. 1973).

267. 462 F.2d 634 (5th Cir. 1972).

268. *Id.* at 648.

269. *Id.* at 638.

270. *Id.*

271. *Id.* at 648.

272. 359 F. Supp. 41 (S.D. Fla. 1973).

273. *Id.* at 44-45 (citing *Bell v. Kenwood Golf and Country Club, Inc.*, 312 F. Supp. 753 (D.C. Md. 1970)).

274. *Id.* at 47.

275. *Id.* at 44-45.

276. *Wright v. Cork Club*, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970).

277. *See supra* notes 192-201 and accompanying text (discussing nonmember use of facilities); notes 202-15 and accompanying text (discussing club purpose).

278. *Runyon v. McCrary*, 427 U.S. 160, 172 n.10 (1976). The court noted that private schools are considered private because they are not direct recipients of public funds. *Id.*

279. *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474, 486 n.4 (E.D. La. 1974) (citing *Nesmith v. Y.M.C.A. of Raleigh*, 397 F.2d 96, 102 (4th Cir. 1968); *Smith v. Y.M.C.A.*, 462 F.2d 634, 642 (5th Cir. 1972)).

direct financial support from the public, usually in the form of donations from individuals or contributions from public agencies,²⁸⁰ are not considered private clubs.²⁸¹ Indirect financial support, such as free use of public property, also destroys private club exemption.²⁸² Even such ancillary support as revenue from the general public for football game admissions and concession sales is considered substantial public support and, thus, will prevent an organization from gaining private club status.²⁸³

Other aspects of indirect public funding include tax and licensing exemptions, which are sometimes allowed for certain organizations.²⁸⁴ In *United States v. Jordan*,²⁸⁵ the court, in holding that the club was not private, criticized the restaurant's failure to use available state licensing and tax exemptions for private clubs.²⁸⁶ However, in *Wright v. Cork Club*,²⁸⁷ the court gave little evidentiary value to an association's qualification for a "social club" federal income tax exemption²⁸⁸ or status as a "private club" under the state liquor control legislation.²⁸⁹ Such specifications by other government agencies do not carry much weight with regard to private club determination under civil rights legislation.

D. Weighing the Factors

Since the previous list of factors which courts consider in determin-

280. See *id.* (finding substantial financial contribution from the city seen as benefit from the public).

281. See *Smith*, 462 F.2d at 642 (twenty percent of Y.M.C.A.'s annual revenues came from public agencies); *Nesmith*, 397 F.2d at 102 (more than 20% of operating funds for Y.M.C.A. athletic facility, which claimed private club status, came from public support and public financing).

282. *Slidell*, 387 F. Supp. at 486 n.4 (youth football league using public property free of charge for football practices and games).

283. *Id.*

284. *Wright v. Cork Club*, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970).

285. 302 F. Supp. 370 (E.D. La. 1969).

286. *Id.* at 378 (noting that private dining club did not take advantage of alternate licensing and tax exemption provisions available to private clubs).

287. 315 F. Supp. 1143 (S.D. Tex. 1970).

288. *Id.* at 1153. The court stated that this determination was decided in an uncontested proceeding and therefore of little value. *Id.*

289. *Id.* The court stated that the Texas Liquor Control Act should not be considered because Texas liquor laws are a hypocrisy to avoid strict prohibitions regarding alcohol sales in the Texas State Constitution. *Id.* (citing TEX. PENAL CODE ANN., art. 666-15(e)) (1925).

ing private club status is so varied and lengthy, courts need to adopt a balancing test. Unfortunately, no one clear test has emerged.²⁹⁰ In a statement which has provided some guidance, the Court of Appeals for the Fourth Circuit proclaimed, "A number of variables 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.'"²⁹¹ As exemplified by this statement, courts generally accept genuine selectivity as the most significant factor.²⁹² With reference to the other factors, a court has expounded, "Courts consider a multitude of factors, no one of which is dispositive. Each factor is considered and either tips the balance for or against private club status."²⁹³ This statement represents as close to a rule for weighing the remaining factors as case law has generated, leaving the courts to apply the factors according to this concept on a case-by-case basis as they see fit.

The size of the organization seems to be emerging as another determinative factor.²⁹⁴ In *Roberts v. United States Jaycees*,²⁹⁵ the Supreme Court placed size and selectivity in the same breath as the most important factors in stating, "the local chapters of the Jaycees are neither small nor selective."²⁹⁶ The private club exemption protects associational rights, but the larger the group, the more nebulous those rights appear.²⁹⁷ The Supreme Court has identified this relationship as well. In *Board of Directors of Rotary International v. Rotary Club of Duarte*,²⁹⁸ the Supreme Court recognized that the international organization, consisting of thousands of local clubs and millions of members, could claim no protected intimate association rights.²⁹⁹ One commentator argued that the number should be much lower by asking, "How can a club claim to have the right of intimate association when it has over 400 members?"³⁰⁰ Almost by definition, a huge group is not overly se-

290. *Nesmith v. Y.M.C.A. of Raleigh*, 397 F.2d 96, 101 (4th Cir. 1968).

291. *Id.* at 101-02 (quoting 110 CONG. REC. 13697 (1964) (remarks of Senator Humphrey)); see also *Cork Club*, 315 F. Supp. at 1150-51.

292. See *supra* note 114.

293. *Cork Club*, 315 F. Supp. at 1150.

294. Genuine selectivity in membership practices is already considered a determinative factor. See *supra* note 114 and accompanying text.

295. 468 U.S. 622 (1984).

296. *Id.* at 621.

297. The huge national and international fraternal organizations claim associational rights, but a member from New York cannot have much association with a member from California, much less an association so intimate so as to be constitutionally protected.

298. 481 U.S. 537 (1987).

299. *Id.* at 545 n.4.

300. Marian L. Zabler, *When is a Private Club not a Private Club: The Scope of the Rights of Private Clubs After New York State Club Association v. City of New York*,

lective, thus the size should be as great a concern to the court as the "genuinely selective" factor.

Since the case-by-case method of decision-making has resulted in contradictory results,³⁰¹ commentators have proposed several different approaches to weighing the factors. One commentator noted that the case-by-case method not only leads to inconsistent results, but also to preemption of the legislature's role by the courts as they decide which specific organization will be affected by civil rights legislation.³⁰² As a result of these concerns, one author developed a "threshold" test that targets specific factors to determine whether an organization may utilize the private club exemption.³⁰³ Another writer suggested that courts should consider only four factors in determining private club status:³⁰⁴ size, selectivity, exclusivity, and purpose.³⁰⁵ The first three factors weigh the extent of intimate association, and the fourth factor involves necessary protection for expressive association.³⁰⁶ However, this commentator recognizes that even her suggested approach may lead to inconsistent results because the factors are so flexible.³⁰⁷ Since academics have failed to develop a bright-line test for the private club exemption, it seems probable that legislators will continue to refine the exemption to at least reduce litigation on the issue.³⁰⁸

Thus, determining whether an organization deserves private club status is a difficult task. A multitude of factors have been identified for consideration by the courts.³⁰⁹ However, no uniform method of weighing these factors has emerged,³¹⁰ leaving the prediction of future outcomes an arduous task.

55 BROOKLYN L. REV. 327, 353 (1989).

301. See *infra* notes 311-67 and accompanying text.

302. Moegenburg, *supra* note 42, at 419-20.

303. *Id.* at 420-21. The four "thresholds" which must be considered are whether the rights are protected by intimate or expressive association, whether a governing public accommodation statute exists, whether the association is commercial or expressive, and whether the court thoroughly analyzed the public club characteristics. This approach allows the court to concentrate on one issue at a time and more effectively balance the rights of the group against those of the individual. *Id.* at 421-32.

304. Finlay, *supra* note 40, at 390.

305. *Id.* at 391-95.

306. *Id.* at 390.

307. *Id.* at 395.

308. See *infra* notes 366-98 and accompanying text for a discussion of modifications in public accommodations laws.

309. See *supra* notes 114-289.

310. Nesmith v. Y.M.C.A. of Raleigh, 397 F.2d 96, 101 (4th Cir. 1968).

IV. FUTURE INDICATIONS

A. *Discrepancies in Decisions*

In attempting to identify trends for the future, the conclusions drawn by courts must first be analyzed. The complicated, case-by-case weighing of factors has led to inconsistent results in some areas.

The suits involving recreational sports clubs (including golf, tennis, fishing, hunting, football, beaches), private dining clubs, and swimming clubs have generally been decided as public accommodations based on the factors delineated earlier.³¹¹ However, cases involving fraternal orders or lodges have proven to be the most controversial and the most difficult. The following is a brief synopsis of several judicial decisions regarding these organizations.

Rotary International comprises 19,788 local Rotary Clubs in 157 countries, with a total membership of approximately 900,000.³¹² According to the international constitution, only males, working in a leadership capacity in their business or profession and approved by two local committees, may become members.³¹³ Except for these rules, each local Rotary club may devise its own admission requirements and procedures.³¹⁴ The organization's purpose is to "provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world."³¹⁵ Although the constitution excludes women from membership, they may attend meetings, give speeches, receive awards, and form their own associations.³¹⁶

311. For swimming pools, see *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *United States v. Lansdowne Swim Club*, 894 F.2d 83 (3d Cir. 1990), 713 F. Supp. 785 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990). For recreation areas, see *Daniel v. Paul*, 395 U.S. 298 (1969); *Wright v. Salisbury Club Ltd.*, 632 F.2d 309 (4th Cir. 1980); *Anderson v. Pass Christian Isles Golf Club, Inc.*, 488 F.2d 855 (5th Cir. 1974); *Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954 (W.D. Tex. 1987); *New York v. Ocean Club, Inc.*, 602 F. Supp. 489 (E.D.N.Y. 1984); *Brown v. Loudoun Golf and Country Club, Inc.*, 573 F. Supp. 399 (E.D. Va. 1983); *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474 (E.D. La. 1974); *United States v. Johnson Lake, Inc.*, 312 F. Supp. 1376 (S.D. Ala. 1970); *Bell v. Kenwood Golf and Country Club, Inc.*, 312 F. Supp. 753 (D. Md. 1970). For dining clubs, see *United States v. Richberg*, 398 F.2d 523 (5th Cir. 1968); *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970); *United States v. Jordan*, 302 F. Supp. 370 (E.D. La. 1969); *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90 (E.D. La. 1967).

312. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 539-41 (1987) (citing Brief for Appellants at 7). This information is as of August 1982.

313. *Id.* at 540-41.

314. *Id.* at 540 (citing ROTARY MANUAL OF PROCEDURE 7, App. 35) (1981).

315. *Id.* at 539 (quoting ROTARY MANUAL OF PROCEDURE 7, App. 35 (1981)).

316. *Id.* at 541. Women in these associations are then allowed to wear the Rotary

In *Rotary International*, the Supreme Court considered the constitutionality of excluding women under California's Unruh Civil Rights Act in relation to the First Amendment freedoms of intimate and expressive association.³¹⁷ The Court noted that the sizable Rotary International could not claim a constitutionally protected right of private association and that its activities did not involve expressive association.³¹⁸ The Court, focusing on the application of the Unruh Act to local chapters, held that the local Rotary chapters were not protected by either intimate or expressive association.³¹⁹ Thus, the Court applied California's public accommodation law requiring the admittance of women.³²⁰ However, California's Unruh Act does not contain a private club exemption.³²¹ So, while the Rotary Club constitutes a public accommodation under this law, whether the Rotary operates as a private club under other public accommodation statutes remains unresolved.

The United States Jaycees consists of approximately 7400 local chapters, 51 state organizations and 295,000 members nationwide.³²² The organization's bylaws define its purpose as promotion of the development of young men's civic organizations in the United States, "Americanism," civic interest, personal development, and "develop[ing] true friendship and understanding among young men of all nations."³²³ Men between the ages of eighteen and thirty-five years can be "regular" members, and any ineligible individuals can be "associate" members.³²⁴

lapel pin. Two organizations, Interact and Rotaract, are sponsored by Rotary International and allow admittance of women between the ages of 14 and 28 years. *Id.*

317. *Id.* The Unruh Act forbids discrimination in any "business establishment" and contains no private club exemption. CAL. CIV. CODE § 51-52 (West 1991).

318. *Id.* at 545 n.4; see also Barbara A. Perry, Comment, *Like Father Like Daughter: The Admission of Women into Formerly All Male "Private" Clubs: A Case Comment on Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 23 NEW ENG. L. REV. 817 (1988/1989).

319. *Rotary Int'l*, 481 U.S. at 549.

320. *Id.* at 546, 549. The Court noted that a slight intrusion into the right of expressive association is justified because of the compelling state interest in eliminating sex discrimination. *Id.*; see also Kimberly S. McGovern, Note, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte: Prying Open the Doors of the All-Male Club*, 11 HARV. WOMEN'S L.J. 117 (1988).

321. CAL. CIV. CODE § 51-52 (West 1991).

322. *Roberts v. United States Jaycees*, 468 U.S. 609, 613 (1984). These statistics are as of August 1981.

323. *United States Jaycees v. Richardet*, 666 P.2d 1008, 1010 n.4 (Ala. 1983) (quoting U.S. JAYCEES BYLAW 2-1 (1978-79)).

324. *Roberts*, 468 U.S. at 613. The Court notes that associate members are principally older men and women, with women associate members making up approximately

Several courts have examined the Jaycees with conflicting results. The Supreme Court inferred that the Jaycees operate as a public accommodation, applying Minnesota's statute to the group, but the Court ultimately couched its reasoning in terms of a lack of constitutionally protected freedom of intimate and expressive association.³²⁵ At the lower court level, the United States District Court for the District of Minnesota certified the question of whether the Jaycees operated as a place of public accommodation within the Minnesota Human Rights Act to the Supreme Court of Minnesota, which answered affirmatively in a well-reasoned opinion.³²⁶

Notwithstanding these opinions, the Supreme Courts of Alaska, Iowa, and the District of Columbia all have held that the Jaycees does not constitute a public accommodation by reasoning that the Jaycees was not a "place" under the meaning of the statute because it had no physical location.³²⁷ However, as noted previously, other courts have interpreted this term liberally, as not requiring a specific physical site.³²⁸ With similar reasoning, the Supreme Judicial Court of Massachusetts held that the Jaycees are not a public accommodation.³²⁹ Yet, while the court held that it could not force the Jaycees to admit women as a public accommodation,³³⁰ it also found that the Jaycees may not discriminate in a place of public accommodation.³³¹ The court noted that the statute "greatly . . . limit[ed] the places at which the United States Jaycees could conduct a meeting in Massachusetts."³³² While the Su-

two percent of the total membership. *Id.*

325. *Id.* at 625-26. This case was based on MINN. STAT. ANN. § 363.01-10 (West 1991), a state public accommodation statute. See also Gerald L. Edgar, Note, *Roberts v. United States Jaycees: Does the Right of Free Association Imply an Absolute Right of Private Discrimination?*, 1986 UTAH L. REV. 373.

326. *United States Jaycees v. McClure*, 305 N.W.2d 764, 772 (Minn. 1981).

327. *United States Jaycees v. Iowa Civil Rights Comm'n*, 427 N.W.2d 450, 455 (Iowa 1988); *Richardet*, 666 P.2d at 1011-12; *United States Jaycees v. Bloomfield*, 434 A.2d 1379, 1381 (D.C. 1981). Each of these cases was based on the respective state's public accommodation statute. See ALASKA STAT. § 18.80.200-300 (1992); D.C. CODE ANN. § 1-2501 to 2504, 1-2511, 1-2519 (1991); IOWA CODE § 601A.1-7 (1991); see also Chai R. Feldblum, et al., *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171, 186-87 (1986) (discussing the court's reasoning in *Bloomfield* and *Richardet*).

328. See *supra* note 35.

329. *United States Jaycees v. Massachusetts Comm'n Against Discrimination*, 463 N.E.2d 1151, 1153 (Mass. 1984).

330. *Id.*

331. *Id.* at 1159-60.

332. *Id.* at 1160. The court recognized that the organization's practices of discriminating against women in voting, holding office, and receiving awards could be violative of the state statute if it occurred in any of the profusion of places which are places of public accommodation under the statute. See MASS. GEN. L. ch. 272, § 92A,

preme Court has determined that the Jaycees are a public accommodation under one state statute, some state courts have chosen not to follow suit.³³³ How other state courts may interpret their statutes remains uncertain.

Kiwanis International consists of 8200 chapters and a worldwide membership of more than 313,000 people.³³⁴ The club's purpose is community service and other charitable goals.³³⁵ The Kiwanis Constitution limits membership to males over eighteen years of age, employed in a trade or profession, sponsored by one current member, and accepted by a vote of the local board.³³⁶ In one case, the chapter strictly limited its membership solicitation to individuals known by a current member.³³⁷ Courts have consistently held that Kiwanis operates as a private club. The Court of Appeals for the Third Circuit held that the Kiwanis Club was not a place of public accommodation under the New Jersey statute based on a finding that its membership practices were neither open nor unrestricted.³³⁸ Therefore, the club could continue to discriminate against women in admission requirements.³³⁹ The Court of Appeal of New York found the Kiwanis Club to be under New York's private club exemption to its public accommodations law in a very brief opinion.³⁴⁰ Thus, courts appear to view Kiwanis as a private club under at least some civil rights statutes.

The Fraternal Order of Eagles is an international organization with the Grand Aerie setting international policies, but leaving local chapters free to establish their own membership and house rules.³⁴¹ The

98, ch. 151B, § 4 (1982).

333. The national Jaycees organization changed its bylaws in 1984 to allow the admission of women as regular members in reaction to the Supreme Court's application of Minnesota's public accommodations statute. *United States Jaycees v. Iowa Civil Rights Comm'n*, 427 N.W.2d 450, 451 (Iowa 1988). Thus the question of the Jaycees' status might be moot if all chapters employ this modification and admit female members. However, given previous examples of discriminatory groups' recalcitrance to embrace enlightened practices, this issue will likely continue to be a fertile source of litigation.

334. *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 F.2d 468, 469 (3d Cir. 1986).

335. *Id.* at 470.

336. *Id.* (citing *KIWANIS CONST.* art. V, § 4(a), *KIWANIS BYLAWS* at II, § 2).

337. *Id.* at 475.

338. *Id.* at 476.

339. *Id.* at 477.

340. *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l*, 363 N.E.2d 1378 (N.Y. 1977).

341. *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 237 (6th Cir. 1990) (citing

organization's purpose is "to unite fraternally for mutual benefit, protection, improvement, social enjoyment and association."³⁴² In reality, since each local chapter owns its own meeting hall that serves alcohol and/or food,³⁴³ the group's activities often revolve around social events at these halls.³⁴⁴ In an example of local membership specifications, one local aerie limited membership to males over 21, of good moral character, sponsored by two members, and approved by two-thirds of the members present and voting.³⁴⁵ Local groups may also vote according to the blackball system: three "no" votes excludes the person from admittance.³⁴⁶ Since chapters do not admit women as members, each chapter has a Ladies Auxiliary.³⁴⁷ Both the regular chapters and the auxiliaries tend to be quite large.³⁴⁸

In cases challenging the Eagles, courts have ruled with varying statutory bases and have yielded inconsistent results. In *Watson v. Fraternal Order of Eagles*,³⁴⁹ a procedural error kept the Sixth Circuit Court of Appeals from reaching the question of whether the local or national organization was a private club under the Civil Rights Act of 1964.³⁵⁰ However, at the trial level, the District Court for the Northern District of Ohio held that the Eagles did operate as a private club under the federal public accommodation statute.³⁵¹ Nonetheless, the Court of Appeal found that a Tucson chapter was not a private club under a city public accommodation ordinance.³⁵² This court relied on language in

FRATERNAL ORDER OF EAGLES CONST. art. VII, §§ 6, 8, J.A. at 223-24).

342. *Fraternal Order of Eagles, Inc. v. City of Tucson*, 816 P.2d 255, 256 (Ariz. Ct. App. 1991). The Court of Appeals for the Sixth Circuit describes the Eagles' purpose as "to organize social events, recreation, and charitable activities for its members, their children, and members of the 'Ladies Auxillary.'" *Watson*, 915 F.2d at 237.

343. *Watson*, 915 F.2d at 237-38.

344. Events at the halls include public fish fries, dances and bingo games. One group held several Elvis Presley impersonator shows that were open to the public. *City of Tucson*, 816 P.2d at 256.

345. *Id.*

346. *Watson*, 915 F.2d at 237.

347. *City of Tucson*, 816 P.2d at 256.

348. In *Watson*, the Akron, Ohio chapter had 700 members. *Watson*, 915 F.2d at 237. In *United States v. Trustees of the Fraternal Order of Eagles*, 472 F. Supp. 1174 (E.D. Wis. 1979), the Milwaukee, Wisconsin chapter had 7000 to 8000 members. *Id.* at 1176. In *City of Tucson*, the Tucson, Arizona chapter had 900 regular members, and the Ladies Auxiliary had nearly 1100 members. *City of Tucson*, 816 P.2d at 256.

349. 915 F.2d 235 (6th Cir. 1990).

350. *Id.* at 242. The court held that the appellants could not maintain an action under Title II because the plaintiffs must first present their case to a state agency before progressing to federal court. *Id.*

351. *Id.* at 239.

352. *City of Tucson*, 816 P.2d at 258. The ordinance is very similar to the federal public accommodation statute. See TUCSON CITY CODE § 17-12(a). The private club exemption to the Tucson code reads in part: "This article shall not be applicable

the private club exemption requiring that the group use its profits "solely for the benefit of the organization," thereby excluding the group because it donated funds to charity.³⁵³ Finally, the District Court for the Eastern District of Wisconsin, on a motion to dismiss, held that there was not a sufficient showing of private club status under the federal public accommodation statute to procure the motion.³⁵⁴

The Boy Scouts of America has had an interesting judicial history.³⁵⁵ In 1976, the Supreme Court of Oregon held that the Boy Scouts was not a public accommodation by relying on legislative history implying that only businesses fall under the Oregon civil rights legislation.³⁵⁶ The court also questioned whether the Boy Scouts operated as a private club under the exemption.³⁵⁷ In 1987, the Supreme Court of Connecticut would not exclude the Boy Scouts from Connecticut's public accommodations statute³⁵⁸ because it did not have a "fixed physical situs."³⁵⁹ However, the court held that excluding a woman from serving as scoutmaster based upon gender was not a discriminatory public accommodation practice.³⁶⁰ The Boy Scouts denied only her opportunity to volunteer her services, not her access to the facilities.³⁶¹ The public accommodation statute would not protect her offer of services.³⁶²

to . . . any bona fide social, fraternal, educational, civic or religious organization . . . when the profits of the accommodations, advantages, facilities and services, above reasonable and necessary expenses, are solely for the benefit of such organization." *City of Tucson*, 816 P.2d at 257-58 (quoting TUCSON CITY CODE § 17-13(a)).

353. *City of Tucson*, 816 P.2d at 258.

354. *United States v. The Trustees of the Fraternal Order of Eagles*, 472 F. Supp. 1174, 1176 (E.D. Wis. 1979). Selection procedures according to the bylaws of the local chapter indicated a highly selective process. Yet, the court relied on affidavits of two members stating that the procedures were not followed in finding that the group had now proven sufficient selectivity to be protected under the private club exemption. *Id.* at 1176.

355. *Mankes v. Boy Scouts of America*, 137 F.R.D. 409 (S.D. Fl. 1991); *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413 (N.D. Ill. 1990); *Schwenk v. Boy Scouts of America*, 551 P.2d 465 (Or. 1976).

356. *Schwenk*, 551 P.2d at 467; OR. REV. STAT. § 30.670-685 (1989).

357. *Schwenk*, 551 P.2d at 469.

358. CONN. GEN. STAT. ANN. § 46a-63 to -64 (1986). At the time of the case, the same statute was codified as CONN. GEN. STAT. ANN. § 53-35 (1977). The Connecticut statute contains no private club exemption.

359. *Quinnipiac Council v. Commission on Human Rights and Opportunities*, 528 A.2d 352, 358 (Conn. 1987).

360. *Id.* at 360.

361. *Id.* at 358, 360 n.11.

362. *Id.* at 360.

Thus, by limiting its consideration to the specific scoutmaster position, the court did not indicate whether it would find other discriminatory practices violative of the statute or find other reasoning to exclude those practices as well.³⁶³ In 1990, on a motion to dismiss by the Boy Scouts, a district court refused to rely on legislative history³⁶⁴ and held that the organization was not a private club under the 1964 Act.³⁶⁵ In 1991, another district court dismissed a case against the Boy Scouts for lack of subject matter jurisdiction.³⁶⁶ However, this court also maintained that it had found "nothing inherently discriminatory about the Boy Scouts' goals," implying that the court would find the organization a private club if allowed to decide the case on the merits.³⁶⁷ Thus, whether the Boy Scouts is a private club exempt from civil rights legislation or a public accommodation has yet to be determined.

These cases demonstrate amazingly erratic results. The descriptions of the Rotary, Jaycees, Kiwanis and Eagles clubs are strikingly similar, yet courts have held some to be private clubs under exemptions and have held others to be public accommodations. These inconsistencies reveal the need for future courts to further develop the law to remedy the present situation.

B. Future Trends

The law tends to change due to pressure from change in societal values and will do so in public accommodation law as well. Discrimination has a long and prosperous history in this country, and the law has developed to protect different classes of people as public views change. For example, the United States initially accepted the widespread practice of slavery, but in 1865, Congress passed the Thirteenth Amendment to abolish slavery, reflecting society's changing view on this issue.³⁶⁸ Furthermore, the country discriminated against women by denying them the right to vote until public opinion generated enactment of the

363. See Gregg Thornton, Note, *Boy Scouts . . . Be Prepared: Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities*, 22 U.S.F. L. REV. 689, 691, 710 (1988) (arguing that this decision should not be used as precedent by other courts).

364. In the Congressional debate over Title V of the Civil Rights Act of 1964, Representative George Meader was asked whether the private club exemption from Title V would cover "such organizations as the Boy Scouts of America, the Girls Scouts, the Future Farmers of America, the 4-H Clubs—that type of organization." Meader answered that those groups would be exempted. 110 CONG. REC. 2296 (1964).

365. *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1428 (N.D. Ill. 1990).

366. *Mankes v. Boy Scouts of America*, 137 F.R.D. 409, 411 (S.D. Fla. 1991).

367. *Id.*

368. U.S. CONST. amend. XIII. The Thirteenth Amendment was ratified on December 6, 1865.

Nineteenth Amendment in 1920.³⁶⁹ Finally, the Civil Rights Movement against race discrimination in the 1960s prompted enactment of the federal Civil Rights Act of 1964.³⁷⁰

In the last twenty-five years, other varieties of discrimination have come to the public's attention as offensive, and states have incorporated these changes into public accommodation laws. When states realized that the federal Civil Rights Act did not sufficiently protect women, they passed state public accommodation statutes to make sex discrimination illegal.³⁷¹ Modification of other statutes has helped to correct definitions and to include other characteristics in the list of prohibited discriminatory actions.³⁷² Additional characteristics include marital status and sexual preference as society has come to accept, or at least tolerate, alternative marital and sexual relationships.³⁷³ It appears that some parts of the country have reached the point where *any* kind of discrimination will no longer be tolerated because of detrimental effects on society.³⁷⁴ Just as society recognized that private country clubs and all-male organizations inherently discriminate and adversely affect our society,³⁷⁵ we need to address discrimination which hides so subtly in familiar institutions such as the Boy Scouts. Contradictory court interpretations of the private club exemption reflect the national turmoil over this issue.³⁷⁶ Tim Curran, a former Eagle Scout fired from his assistant scoutmaster post because of his homosexuality, declared that

369. U.S. CONST. amend. XIX. The Nineteenth Amendment was ratified on August 18, 1920.

370. 42 U.S.C. § 2000(a).

371. See *supra* notes 37-42 and accompanying text.

372. Thornton, *supra* note 363, at 693-94 (following history and development of Connecticut public accommodation statute); see also *Quinnipiac Council v. Commission on Human Rights and Opportunities*, 528 A.2d 352, 357 (Conn. 1987) (stating Connecticut's "public accommodation statutes have repeatedly been amended to expand the categories of enterprises that are covered and the conduct that is deemed discriminatory").

373. See *supra* note 40.

374. A 1991 *Los Angeles Times* poll reveals a nearly even split in the country over the Boy Scouts issue. The poll's results include 66% support for excluding females from Boy Scout troops and 52% opposition for the Boy Scout oath containing the word "God." Stephen Braun, *Boy Scouts in a Knot of Disputes*, L.A. TIMES, July 14, 1991, at A1; see also *Lettertine*, U.S.A. TODAY, June 25, 1991, at 11A.

375. See, e.g., *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Daniel v. Paul*, 395 U.S. 298 (1969); *Brown v. Loudoun Golf and Country Club, Inc.*, 573 F. Supp. 399 (E.D. Va. 1983).

376. See *supra* notes 311-67 and accompanying text.

the recent lawsuits represent the "explosion of people waiting to make Scouting more responsive" to societal changes.³⁷⁷ Thus, court decisions and statutes may evolve to narrow the scope of the private club exemption as views on acceptable behavior change.

New York City's Local Law 63 is a good example of the new direction in public accommodation statute modifications. The new statute extends the scope of the statute to include 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."³⁷⁸ The law states that any such club is not private by definition, but specifically excludes any corporation incorporated under the benevolent orders law of the state.³⁷⁹ The statute responded to women's and minority group members' concerns that the laws did not sufficiently protect them in business and professional matters, because they were still excluded from the all-male, private dining clubs in which many business deals and personal contacts were made.³⁸⁰ This law, upheld by the Supreme Court, gives significantly more power to the state to regulate against discrimination in smaller, more selective organizations.³⁸¹ However, the law is pivotal in public accommodations law because it narrows the private club definition in an attempt to remedy a specific situation deemed inappropriate by a legislative body. Other legislatures may follow or go further in legislating against other discriminatory organizations.

Other changes may come about by internal compliance within the organizations. Some clubs have already begun to respond to the current wave of litigation. In 1984, the national Jaycees organization amended its bylaws to allow the admission of women as regular members in response to the Supreme Court applying Minnesota's public accommodations statute.³⁸² The national Eagles recognized that local ordinances take precedence over Eagles' rules by giving local chapters permission to admit women if local law requires.³⁸³ Thus, other national and in-

377. See Braun, *supra* note 357, at A1.

378. N.Y.C. ADMIN. CODE § 8-102(9) (1986); see also *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 6-7 (1988).

379. *New York State Club Ass'n*, 487 U.S. at 6-7. In this case, the Supreme Court upheld the constitutionality of this New York law. *Id.* at 8.

380. *Id.* at 5. One commentator "applauds" Local Law 63 as successfully drawing the line to stop discrimination and protect associational rights. Zabler, *supra* note 300, at 349.

381. Zabler, *supra* note 300, at 331.

382. *Roberts v. United States Jaycees*, 468 U.S. 607 (1984); *United States Jaycees v. Iowa Civil Rights Comm'n*, 427 N.W.2d 450, 451 (Iowa 1988).

383. *Fraternal Order of Eagles v. City of Tucson*, 816 P.2d 255, 259 (Ariz. Ct. App.

ternational organizations may follow suit and comply to the laws on their own.

Other pressures besides legislation may force the clubs to change their practices internally. Legal scholars speculate that if the current surge of litigation does not stop discriminatory practices of large membership organizations, legislatures and charity organizations which fund these groups may use financial pressure.³⁸⁴ Especially in cases involving groups such as Little League Baseball and the Boy Scouts, which are largely dependent on indirect funding through the free use of facilities, or direct funding by organizations such as the United Way, the threat of removal of this support might be too much pressure for a group to endure.³⁸⁵ In San Francisco, the United Way has threatened to stop funding six local Boy Scout councils unless the group agrees to a plan to stop discrimination against homosexuals.³⁸⁶ Other pressure comes from prominent public figures resigning from discriminatory organizations, political warnings and lobbying to stop employer reimbursement of employees' dues for discriminatory clubs.³⁸⁷ This loss of financial and other support might ultimately convince organizations to eliminate discriminatory practices.³⁸⁸

Another trend in this area of law may reveal an increase of attacks on all-female or all-minority organizations.³⁸⁹ State statutes prohibiting discrimination on the basis of sex can protect men from discrimination

1991).

384. Braun, *supra* note 374, at A1.

385. *Id.*

386. *Boy Scout Boycott, the United Way*, NEWSWEEK, Apr. 13, 1992, at 8. The United Way of the Bay Area gives \$849,000 annually to the San Francisco Boy Scouts and will withdraw those funds if the Boy Scouts do not agree to the plan by April 1992.

387. Note, *State Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations*, 104 HARV. L. REV. 1835, 1835 n.1 (1991). Justices Blackmun and Kennedy have both resigned from men's clubs in response to discriminatory policies. *Id.* (citing Note, *Prying Open the Doors of the All-Male Club*, 11 HARV. WOMEN'S L.J. 117, 120 n.16 (1988)).-

388. However, in response to the United Way threat of withdrawal of funds, a Boy Scout spokesman says the group will not admit gays, even if the withdrawal of financial support spreads. The spokesman stated, "Our values are not for sale." *Boy Scout Boycott, the United Way, supra* note 386, at 8.

389. Feldblum, *supra* note 327. An organization which limits membership to some minority of the population inherently shows more selectivity and, thus, may more easily qualify for protection under the freedom of intimate association. William Buss, *Discrimination by Private Clubs*, 67 WASH. U. L.Q. 815 (1989). Such a group also may more easily qualify for a private club exemption.

just as easily as it protects women.³⁹⁰ The last fifteen years have shown both an increase in sex discrimination suits and "reverse" discrimination suits.³⁹¹ Just as women attempt to enter clubs open only to men, men may venture to do the same.³⁹²

V. CONCLUSION

Civil rights legislation was enacted to abolish discriminatory practices from our society. The private club exception was intended to protect the constitutional right to freedom of association. The emotional nature of this clash between discrimination and freedom of association made these cases much more arduous. As one district court noted, "difficult cases [are] made more difficult when both parties act as if the Holy Grail is a permanent possession in their own trophy case."³⁹³ So much case law has developed over the private club exception because citizens have tried again and again to avoid the law to continue to discriminate.

Justice Douglas, joined by Justice Marshall, stated in his dissenting opinion in *Moose Lodge No. 107 v. Irvis*,³⁹⁴ "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed."³⁹⁵ While the Supreme Court continues to interpret associational rights as the right to discriminate, discrimination and attempts to avoid civil rights legislation will continue. The courts' recognition that a club cannot be private if its only selective criterion is race or religion takes a step in the right direction, but further progress is necessary in determining private club status so that decisions across the United States will uniformly combat discrimination more forcefully.

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390. Diane S. Worth & Nancy M. Landis, *Does Membership Have Its Privileges? The Limits on Permissible Discrimination in Private Clubs*, 60 KAN. B. ASS'N 27, n.60 (1991) (citing *City of Clearwater v. Studebaker's Dance Club*, 516 So.2d 1106, 1108 (Fla. 1987) (dance club with drink specials available only to women is discriminating public accommodation)).

391. Feldblum, *supra* note 327, at nn.4-6; see *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727-31 (1982) (holding that all-female nursing school must consider male applicants); *Trustees of Smith College v. Board of Assessors of Whately*, 434 N.E.2d 182, 182-83 (Mass. 1982) (challenging tax-exempt status for all-female college); *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 296 (Mass. 1979) (finding that boys can play on girls' high school athletic teams).

392. Several commentators suggest that all-female organizations should be analyzed differently from all-male groups since the state interests are less compelling due to historical disadvantages women have suffered. Feldblum, *supra* note 327, at 1.

393. *Solomon v. Miami Woman's Club*, 359 F. Supp. 41, 42 (S.D. Fla. 1973).

394. 407 U.S. 163 (1971).

395. *Id.* at 179-80 (1971) (Douglas, J., dissenting).