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# Private Golf Clubs: Freedom of Expression and the Right to Privacy

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# PRIVATE GOLF CLUBS: FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY

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## I. INTRODUCTION

Over the past three decades, American society has fought hard to eliminate racial[1] and other types of discrimination[2] with remarkable success. Yet, society has not been overly concerned about equal treatment of women, particularly women in the professional environment.

Over the years, men have developed the "good ol' boy" network. They have organized private clubs that were devoid of blacks, Jews, and women. At first, these clubs were formed for political reasons, but as time passed, discrimination became the primary purpose for the existence of the private clubs. It is true that Americans have the constitutional right of freedom of association.[3] This right opens the door to the right to discriminate if a group of individuals wants to form a genuinely selective and exclusive, "truly" private club.[4] Yet, at the same time, Americans have the right to equal protection[5] under the law and not to be discriminated against. These

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1. Civil Rights Act of 1866, now codified as 42 U.S.C. §§ 1981, 1982 (1970), Civil Rights Act of 1964, now codified as 42 U.S.C.A. § 2000a(a-e) (West 1970), was needed for antidiscrimination legislation covering public accommodations.

2. The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

3. U.S. CONST. amend. I.

4. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Daniel v. Paul, 395 U.S. 298, 301-02 (1969); Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431 (1973), Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333, 1336 (2d Cir. 1974), and under 42 U.S.C. § 2000a, avoided serious consideration of associational interests by relying on the strong presumption which has developed in public accommodations case law that offering to serve the general public negates a right to discriminate, while leaving open the possibility that "truly" private clubs might be exempt from 42 U.S.C. § 1981.

5. The language of the Fourteenth Amendment which has had the greatest impact on discrimination provides:

No state shall. . .deprive any person, of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

two rights appear to be in conflict; but, perhaps not if the purposes for forming a genuinely selective and exclusive, "truly" private club is based on freedom of association. However, if for example, a golf club is formed by white males for the purpose of improving the business networking environment and excludes blacks, Jews, and women, the courts might not view this as an appropriate reason for discrimination.

Professional women, like men, need to join golf and other professional and social clubs to expand their business network. They are learning, however, that swinging a club can be easier than joining one. Women golfers suffer from discrimination[6], similar to Jews and blacks[7], when it comes to joining private golf clubs. In 1992, Vice President Quayle cancelled a second round at Monterey's all-white Cypress Point because he felt it might look bad to play there; but, he had no problem playing at all-male Burning Tree where he holds an honorary membership.[8]

Many private golf clubs throughout America discriminate against women in subtle ways.[9] However, outright exclusion of women from courses is rare among the nation's 5,276 private clubs.[10]

Private discrimination has been operating in the U.S. ever since the country's inception. It was not until after the Civil War that Congress began to enact legislation to curb racial subordination and discrimination.[11] In 1964, Congress[12] enacted legislation that attempted to define the parameters of a "truly" private club through the public accommodation clause. Further, in 1987, Congress enacted broader civil rights legislation to attack other forms of discrimination, namely gender.[13]

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6. Janet Nelson & Pamela A. Maclean, *Tee'd Off: Women Golfers Are Learning That Swinging a Club Can Be Easier Than Joining One,* WOMEN'S SPORTS & FITNESS, at 64, 41-48 (April 1991).

7. Mike Royko, *Jordan Can Wield a Club on his Own,* CHI. TRIB., Nov. 18, 1991, at D12; S. SMITH (1991). THE JORDAN RULES. (1991).

8. Maclean, *supra* note 6, at 48.

9. Such as: unequal tee times, restricted voting rights, and restricted access to club rooms. *Id.* at 44. A divorced wife who was awarded country club membership in the divorce settlement brought suit against the club after it terminated membership because of its policy of issuing family memberships to adult males only. However under the California Unruh Civil Rights Act, Cal.Civ. Code § 51, a non profit privately owned country club may be considered a "business establishment" and therefore cannot discriminate. Warfield v. Peninsula Golf & Country Club, 262 Cal.Reptr. 890 (Cal. Ct. App. 1989).

10. Professional Golf Associations 1991 Annual Report to the membership.

11. Chronological list of civil rights legislation during and after the civil war era: Thirteenth Amendment (1865), Civil Rights Act of 1866, Fourteenth Amendment (1868), Fifteenth Amendment (1870), Civil Rights Amendment of 1870 (Enforcement Act), Civil Rights Act of 1871 (Ku Klux Klan Act), and Civil Rights Act of 1875.

12. Civil Rights Act of 1964, 42 U.S.C.A. § 2000a (West 1970).

13. *See supra* note 2.

In 1968, *Jones v. Alfred H. Mayer Co.*[14] revitalized the Civil Rights Act of 1866[15] as an instrument with which to attack racial discrimination by private clubs. *Jones* consequently reawakened the conflict between freedom of association, which many believe gives private clubs a right to discriminate, and freedom from racial discrimination, guaranteed by the principles of equality underpinning the Thirteenth and Fourteenth Amendments.[16]

Existing[17] and present[18] legal doctrine provides no clear solution to the conflict presented. The courts will be forced to develop a new doctrine which balances the interests of the private clubs that wish to have exclusive membership and individuals who wish to be able to join any club they perceive would be of benefit to them.

Historically the courts have struggled with the question of exclusivity without strict resolve. In *Runyon v. McCrary*,[19] the Supreme Court held that Section 1981 not only required a state to give blacks and whites the same legal rights in contracting, but also forbade private racial discrimination in the making of contracts. Even before *Runyon*, the Court held that Section 1981 forbade some kinds of racial discrimination by private groups.[20] However, the Supreme Court's[21] present majority is not seeking remedies for private discrimination. After unanimously confirming *Run-*

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14. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

15. *See supra* note 1.

16. *See* Arthur Larson *The New Law of Race Relations*, WIS. L. REV. 470, 501-03 (1969); Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 523 (1974); Note, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460, 470 (1970); Note, *Constitutional Law-Private Club Discrimination*, WIS. L. REV. 595, 600-02 (1970). A more thorough treatment of the problem is needed at this time for two reasons: (1) discrimination by private clubs is coming under increasing attack, making imminent the time for resolution of the problem by the courts; and (2) several jurists have expressed a great regard for private groups, namely Justice Douglas in Bell v. Maryland, 378 U.S. 226, 313 (1964), Lombard v. Louisiana, 373 U.S. 267, 274 (1963), and Moose Lodge No. 7 v. Irvis, 407 U.S. 163, 179-80 (1972); Justice Harlan in Peterson v. Greenville, 373 U.S. 367, 374 (1963); Justice Marshal in *Moose Lodge*; and Justices White and Rehnquist in Runyon v. McCrary, 427 U.S. 160 (1976). Finally, Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441 (1975) indicates that many other judges may share these views; therefore, the creation of an exemption from § 1981 for bona fide private groups is a clear possibility.

17. *See* Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, *supra* note 16, at 1441-76.

18. *See* Kenneth L. Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, Sup. Ct. Rev. 1, 46-51 (1989).

19. 427 U.S. 160 (1976)

20. *Tillman*, 410 U.S. 431 (1973); Johnson v. Railroad Express Agency, Inc., 421 U.S. 454 (1975); and McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). It should be noted this last case was decided on the same day as *Runyon*, 427 U.S. 160 (1976).

21. Karst, *supra* note 18, at 2.

*yon*'s vitality, the Court ruled five to four,[22] that Section 1981 does not provide a remedy in damages for an employer's racial harassment. The *Runyon* and *Patterson* decisions provide a mixed message which exemplifies the current state of civil rights in the Supreme Court.[23]

During the late eighties and early nineties, the homing principle attracting the Court's present majority has been a model of formal racial neutrality that minimizes the remedial responsibilities of both government and nongovernment actors.[24] One major reason is that the model leaves untouched the private discrimination that is, and always has been, central to racial, religious, and gender subordination. Civil rights activists interpret recent decisions as a general inclination toward strict readings of civil rights laws, and, more specifically, a rejection of the idea that private discrimination is a public responsibility.[25]

In 1989, *Richmond v. J.A. Corson Co.*[26], assisted in the consolidation of some congressional power. It is not merely the power to remedy "identified" discrimination, but according to Justice O'Connor, Congress has a broad power "to define situations which *Congress* determines threaten equality and to adopt prophylactic rules to deal with the situations."[27] To avoid any mistake about the implications of this expansive principle for affirmative action, Justice O'Connor specifies that "Congress may identify and redress the effects of society-wide discrimination."[28] If the effects of private discrimination hurt all Americans,[29] Congress does seem the most appropriate body to recognize these harms and to remedy them.

If *Fullilove v. Klutznick*[30] was a departure from the model of formal neutrality, *Corson*[31] is a greater departure. Justice O'Connor, by her comments in *Corson,* and also by her approving citation of two sweeping War-

22. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).
23. Karst, *supra* note 18, at 4.
24. *Id.*
25. Karst, *supra* note 18, at 5.
26. 488 U.S. 469 (1989).
27. *Id.* at 490.
28. *Id.*
29. Karst, *supra* note 18, at 9-11.
30. In *Fullilove,* the Court upheld an act of Congress appropriating funds to aid local public works projects and requiring 10 percent of the money be used to hire minority contractors. Fullilove v. Klutznick, 448 U.S. 448 (1980). Chief Justice Burger emphasized, 448 U.S. at 477-78, that it was permissible for Congress to conclude that minority businesses had been disadvantaged in obtaining public works contracts "by procurement practices that perpetuated the effects of prior discrimination." *Id.* at 477-78. Thus, the Chief Justice endorsed a broad congressional power to go beyond formal neutrality in remedying the present effects of past public or private discrimination against minority contractors.
31. *See S.A. Corson Co.*, 488 U.S. 469.

ren Court endorsements[32] of congressional power, are thought to be go-ahead signals to Congress.[33] The decisions consolidate in Congress a power extending beyond the powers recognized in *Jones*[34] and now *Patterson*[35], in the separate opinions in *U.S. v. Guest.*[36] Congress's power to define an inequality and provide a remedy is not limited to the spending of federal money.[37] It is not limited to affirmative action.[38] It is not limited to promotion of racial inequity.[39] It is not limited to the correction of "state action".[40] It is broad enough, for example, to support an act of Congress forbidding private discrimination against women, and lesbians and gay men, irrespective of any connection with interstate commerce or "state action". In 1988, Congress used its consolidated civil rights powers to enact the Civil Rights Restoration Act of 1987[41] over a Presidential veto.[42] This Act strengthens Title IX[43] and gives a higher priority to the women's sports movement, and women's rights in general.[44] The passing of the Restoration Act demonstrates that the present Congress is using its power to define inequality, providing a remedy for identified inequities, and supporting a broad application of Title IX.

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32. Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

33. *See* Karst *supra* note 18 at 47.

34. *See Alfred H. Mayer Co.*, 392 U.S. 409.

35. *See McClean Credit Union*, 109 S. Ct. 2363.

36. 383 U.S. 745 (1966).

37. *See* Thomas R. McCoy & Barry Friedman, *Conditioning Spending: Federalism's Trojan Horse*, SUP. CT. REV. 85 (1988).

38. Karst, *supra* note 18, at 47.

39. *Id.*

40. *Id.*

41. *See* generally, *supra* note 2.

42. Legislative history behind this Act: Since the 1984 Court ruling in Grove City v. Bell, 465 U.S. 555 (1984), numerous attempts have been made to skirt the decision. In 1984, the House passed a *Grove City* bill, but was held captive by the Senate because it was laden with amendments added by opponents in the Senate. In 1985, the bill was bottled up in a controversy over its language on abortion. Specifically, "whether the bill would effect the provision of abortion services in student and employee health insurance plans." Irvin Molotsky, *House Passes Bill to Upset A Limit On U.S. Rights Law*, N.Y. TIMES, March 3, 1988, at A1.

In January 1988 the Senate approved the bill (S-557). A month later the House approved the Act. Upon approval of Congress of the Restoration Act, President Reagan vetoed the bill, asserting that he did not oppose the concepts embodied in the *Grove City* legislation, rather he felt that its application was overbroad. On March 22, 1988 Congress overrode President Reagan's veto of the proposed Civil Rights Restoration Act (S-557).

43. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373-75 (1972), codified as amended at 20 U.S.C. §§ 1681-88 (1982).

44. P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPTS. L.J. 149, 169 (1990).

Integration is a form of acculturation. Legislation can change attitudes by changing inappropriate behavior(s). A major success story in the last thirty years can be found in the integration of southern hotels and restaurants. This success can be attributed to the Civil Rights Act of 1964.[45] The sight of black and white patrons being served alongside each other at a dime store lunch counter in Macon would have been astounding in 1950. The positive side of the current civil rights consolidation is that the Supreme Court at last has rebuilt a lasting and solid constitutional basis for Congress[46] to carry out the public responsibility to redress the effects of discrimination in general, and in particular, the effects of private discrimination that hurts all Americans. The only question left to be answered is whether Congress will continue to identify and redress the effects of society-wide discrimination.

The purpose of this article is to: (1) introduce the reader to the legal concerns relating to private golf club's admission/membership policies; (2) discuss the legal doctrines of Freedom of Association and the Right of Privacy; (3) describe the limits of federal rights legislation; (4) address a private club's right to discriminate; and (5) suggest possible strategies for the development of compromise policies to limit private club discrimination.

## II. FREEDOM OF ASSOCIATION AND THE RIGHT OF PRIVACY

This section addresses the definition of a private club, and the legal doctrines which might support a right to discriminate - (1) freedom of association, and (2) the right to privacy.

### *A. The Private Club*

PRIVATE[47] is defined as affecting or belonging to private individuals as distinct from the public in general. CLUB[48] is defined as a voluntary, incorporated or unincorporated association of persons for common purposes of a social, literary, investment, political nature, or the like. Association of persons for promotion of some common object, such as literature, science, politics, good fellowship, etc., especially one jointly supported and meeting periodically, membership is usually conferred by ballot and carries privilege of exclusive use of club quarters, and the word also applies to a building, apartment or room occupied by a club. Therefore, a PRIVATE CLUB might

45. *See supra* note 1.

46. Karst, *supra* note 18, at 51.

47. BLACK'S LAW DICTIONARY 1195 (6th ed. 1990); People v. Powell, 274 N.W. 372, 373 (Mich. 1937).

48. BLACK'S LAW DICTIONARY 256 (6th ed. 1990).

very well be a group of individuals, regardless of race, religion or gender, banded together exclusively to participate in the activity of golf. Additionally, a PRIVATE GOLF CLUB would have periodic meetings with membership conferred by ballot. Membership carries privilege of exclusive use of the club quarters and could exclude (discriminate) individuals (i.e. race, religion, and gender) who do not share the views and values that the club's members wish to promote.

New York City's Human Rights Law[49] forbids discrimination based on race, creed, sex, and other grounds by any "place of public accommodation, resort or amusement," but specifically exempts "any institution, club or place of accommodation which is in its nature distinctly private." Further, it provides that any "institution, club or place of public accommodation," other than a benevolent order or a religious corporation, "shall not be considered in its nature distinctly private" if it "has more than four hundred (400) members, provide regular meal service and regularly receives payment . . . directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." Immediately after Local Law 63 became effective, it was challenged and upheld.[50]

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49. A 1984 Amendment (Local Law 63), N.Y. Administrative Code § 8-102, subd. 9; U.S.C.A. Const. Amend. 1.

50. A consortium of private clubs brought an action seeking judgement declaring unconstitutional a city law (Local Law 63) prohibiting discrimination by clubs which provided benefits to business entities and to persons other than their own members, thereby assuming sufficient public character so as to forfeit the "distinctly private" exemption under the law. The Supreme Court, Grossman, J., declared the law constitutional, and the plaintiff appealed. The Supreme Court (New York), Appellate Division, 118 A.D.2d 392, 505 N.Y.S.2d 152, affirmed, and the plaintiff appealed. The Court of Appeals, 69 N.Y.2d 211, 513 N.Y.S.2d 349, 505 N.E.2d 915 affirmed and the plaintiff appealed. The Supreme Court, Justice White, held that: (1) the consortium had standing to challenge constitutionality of law on behalf of its members; (2) law's antidiscrimination provisions were not unconstitutional on their face; and (3) consortium failed to establish exemption deeming benevolent orders and religious corporations to be "distinctly private" violated equal protection. Justice O'Connor filed a concurring opinion in which Justice Kennedy joined. Justice Scalia filed an opinion concurring in part and concurring in the judgment. New York State Club Assoc., Inc. v. City of New York, 487 U.S. 101 (1988).

### B. *Freedom of Association*

Freedom of association[51] evolved to protect the ability of an individual to join[52] with others for the expression or promotion of political ideas.[53] This freedom of association has little to do with a right to exclude others on the basis of race or gender.[54] The right to exclude impairs the freedom to associate of the person who wants to join. Most social clubs are apolitical in nature and would find it extremely difficult to prove that they require a right to discriminate for the purposes of political expression.

### C. *The Right to Privacy*

The right to privacy may provide a better basis for the right to discriminate. The Supreme Court has established this right to freedom from government intrusion in specific situations involving family, procreation, and the home.[55]

Justice Goldberg, in *Bell v. Maryland*, stated:

> "Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other

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51. In NAACP v. Alabama, 357 U.S. 449 (1958), freedom of association was formally recognized by the Court. It struck down a state statute compelling disclosure of membership lists. *See also* United States v. Robel, 389 U.S. 258 (1967); Gibson v. Florida Legislative Investigating Comm'n, 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960). *See* Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964).

52. In *NAACP*, 357 U.S. 449, at 460-61, the word "association" frequently was used to mean an act rather than a group, and the right identified by the decision was referred to as "freedom to engage in association" and "freedom to associate" in addition to freedom of association.

53. *See* Comment, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 64 DUKE L.J. 1181, 1195, 1197 (1970). Freedom of association may have no status at all independent of freedom of expression. *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (dicta suggesting that the freedom of association includes the right join nonpolitical groups as well).

54. *Runyan*, 427 U.S. 160 (1976); Cox v. Louisiana, 379 U.S. 536, 555 (1965); *N.Y. State Club Ass'n, Inc.*, 487 U.S. 101; Kiwanis Intern.v. Ridgewood Kiwanis Club, 627 F.Supp 1381 (D.N.J. 1986), rev'd 806 F.2d 468, rehearing denied 811 F.2d 247 (2d Cir. 1986) service organization lacked distinctive indicia of intimate association that would afford constitutional protection to it's members decision to exclude women solely on basis of their sex.

55. *See* Roe v. Wade, 410 U.S. 113 (1973) (right to obtain an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of unmarried couples to acquire contraceptives); Stanley v. Georgia, 394 U.S. 557 (1969) (right to possess obscene material in the home); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married couples to use contraceptives). *See* Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

rights pertaining to privacy and private association are themselves constitutionally protected liberties."[56]

Justice Douglas's opinion in *Bell* relied on the home as the locus of that right ". . . home, of course, is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public. . . ."[57]

Justice Douglas and Marshal in their dissent in *Moose Lodge No. 107 v. Iris*[58] stated:

> . . .the First Amendment and the related guarantees of the Bill of Rights. . . create a zone of privacy which precludes government from interfering with private clubs. . . Government may not tell a man or woman who his associates must be. The individual may be selective as he desires."[59]

These comments from several Supreme Court cases may suggest some Court members had held that private clubs do have a constitutional right to discriminate. However, they do not amount to binding precedent for such a conclusion. Nor can such binding conclusions be drawn from decisions of cases involving free association or right to privacy. Therefore, while the concept of a zone of privacy might be the best foundation upon which a constitutional right to discriminate could be based, no decision has established that right as a matter of law.[60]

## III. THE LIMITS OF FEDERAL RIGHTS LEGISLATION

Private clubs were left untouched by the federal[61] civil rights legislation of the past three decades.[62] The public accommodations title exempted

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56. 378 U.S. 226, 313 (1964).

57. *Id.* at 253; *See* Lombard v. Louisiana, 373 U.S. 267 (1963).

58. 407 U.S. 163, 179-80 (1972).

59. In Gilmore v. City of Montgomery, 417 U.S. 556 (1974), the Court quoted approvingly Douglas's *Moose Lodge* dictum, but countered it with the statement in Norwood v. Harrison, 413 U.S. 455 (1973), that the right to discriminate was not entitled to "affirmative constitutional protection." 417 U.S. 566 (1979). *See* Wesley v. Savannah, 294 F. Supp. 698 (S.D. Ga. 1969).

60. Henkin, *supra* note 55, at 1459.

61. Wallace F. Caldwell, *State Public Accommodation Laws, Fundamental Liberties and Enforcement Programs*, 40 WASH. L. REV. 841 (1965).

62. The major pieces of legislation were the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243; the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81; Education Amendments of 1972, Pub. L. No. 92-318, 82 Stat. 365; and Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28. Public Accommodations were dealt with in Title II of the 1964 Act (codified at 42 U.S.C. § 2000a (1970)). Employment discriminations were treated in Title VII of that Act (codified at 42 U.S.C. § 2000e (1970)). The housing discriminations were treated in provisions of the Act (codified at 42 U.S.C. §§ 3601-31 (1970)). Women's rights in educational institutions were treated in Title IX of the 1972 Act, 86 Stat. 373-75 (codified as amended at 20 U.S.C. §§ 1681-88 (1982)). The women's sports movement and women's rights in general were treated in the provisions of the Restoration Act (codified at 20 U.S.C. § 1687 (1988)).

from its coverage "private clubs . . . not in fact open to the public."[63] Because private clubs were excluded from the coverage of the legislation, the practice of exclusive membership continued.

### *A. The Public Accommodation Title and The Private Club Exemption*

A primary force behind the passage of the 1964 Civil Rights Act was the need for antidiscrimination legislation covering public accommodations.[64] The public accommodation title exempted from its coverage private clubs and other less significant establishments.[65] The exemption reflects Congress's attempt to address discrimination in public accommodations rather than in private clubs.

After the passage of the Act, a number of restaurants, amusement parks, and swimming pools sought to escape the statute by alleging private club status.[66] The resulting litigation produced a substantial amount of case

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63. 42 U.S.C. § 2000a(e) (1970).

64. John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 859-67 (1966).

65. The public accommodations provisions do not reach small bars, grocery stores, and department stores not selling food in general or for consumption on the premises, retail shops, and services such as those of doctors, dentists and skilled tradesmen. *See* Arthur Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 475-76 (1969).

The public accommodations and housing statutes exempt "A New England Bed and Breakfast" with less than five lodging units and occupied by the owner. *See* 42 U.S.C. §§ 2000a(b)(1), 3603(b)(2) (1970). The housing statute allows private clubs to give preference to members. *See* 42 U.S.C. § 3607 (1970). The employment discrimination statute exempts firms having under 15 employees and private clubs. *See* 42 U.S.C. § 2000e(b) (1970). *See* Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom From Discrimination*, *supra* note 16, at 1441-42.

66. An incorporated swimming club was a "public accommodation" within the Law Against Discrimination, and was not within private facility exemption, where it was organized for profit and controlled by stockholders rather than members, and it appeared to solicit membership, even though it did not engage in public advertising, was limited to specific number of members, and referred to itself as a private facility, Clover Hill Swimming Club, Inc. v. Goldsboro, 219 A.2d 161, 47 N.J. 25 (N.J. 1966); court looked to the intent of the organizers of the club, denying an exemption where the club was formed to evade the public accommodation law, United States v. Northwest La. Restaurant Club, 256 F. Supp. 151, 153-53 (W.D. La. 1966); an existing dinner club attempted to establish itself as private and failed to extend club facilities to nonmembers in disregard of club bylaws, United States v. Jack Sabin's Private Club, 265 F. Supp. 90, 92-93 (E.D. La. 1967); one of the purposes of public accommodations provisions of the Civil Rights Act of 1964 was to eliminate unfairness, humiliation, and insult of racial discrimination in facilities which purport to serve the general public, Rousseve v. Shape Spa for Health & Beauty, Inc., 516 F.2d 64, rehearing denied 520 F.2d 943 (C.A. La. 1975); statute establishing a statutory civil right guaranteeing all persons access to public accommodations free of any discrimination whatsoever is qualified by limiting language of further statutes restricting scope of prohibition to denials of equal accommodations based on race, creed, or color, Riegler v. Holiday Skating Rink, Inc., 227 N.W.2d 759, 393 Mich. 607 (Mich. 1975); and a health and exercise club which did not exercise membership selectivity and which was a business operated for profit and not controlled by club

law which gave a strict construction to the club exemption.[67] Further, in *Cornelius V. Benevolent Protective Order of Elks*,[68] the court established a set of factors to determine whether an organization is a "truly" private club

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members was not exempt from Equal Accommodations Act as a "private club," Vidrich v. Vic Tanny Intern, Inc., 301 N.W.2d 482, 102 Mich. App. 230 (Mich. App. 1980).

67. The courts developed a number of factors which could be examined to determine whether the alleged clubs were "truly" private or in fact "sham clubs" actually open only to the (white) public. One area of inquiry has been whether there is evidence of genuine selectivity. Decisions finding clubs to be public accommodations found significant the following: the absence of formal membership selection procedures, Stout v. YMCA, 404 F.2d 687 (5th Cir. 1968); Solomon v. Miami Woman's Club, 359 F. Supp. 41 (D.C. Fla. 1973); Wright v. Salisbury Club, Ltd., 479 F. Supp. 378, rev'd 632 F.2d 309 (D.D.Va. 1979); U.S. v. Trustees of Fraternal Order of Eagles, Milwaukee Aerie No. 137, 472 F. Supp. 1174 (D.C. Wis. 1979); Vidrick v. Vic Tanny Intern, Inc., 301 N.W.2d 482, 102 Mich. App. 230 (Mich. App. 1980); U.S. Power Squadrons v. State Human Rights Appeal Board, 465 N.Y.S.2d 871, 59 N.Y.2d 401, 452 N.E.2d 1199, *reargument dismissed* 468 N.Y.S.2d 107, 60 N.Y.2d 682, 455 N.E.2d 666 (N.Y. 1983); Brown v. Loudoun Golf & Country Club, Inc., 573 F. Supp. 399 (D.C. Va. 1983); Welsh v. Boy Scouts of America, 724 F. Supp. 1413 (N.D. Ill. 1990); failure to reject a significant number of white applicants, Nesmith v. Young Men's Christian Ass'n of Raleigh N.C., Inc., 397 F.2d 96, 101 (4th Cir. 1968); Durham v. Red Lake Fishing and Hunting Club, Inc., 666 F. Supp. 954 (W.D. Tex. 1987); the absence or insubstantiality of dues and exceedingly large membership lists, Bradshaw v. Whigham, II Race Rel. L. Rep. 934, 936 (S.D. Fla. 1966); advertising as evidence of a lack of selectivity, Clover Hill Swimming Club, Inc. v. Goldsboro, 219 A,2d 161, 47 N.J. 25 (N.J. 1966); U.S. v. Jordan, 302 F. Supp. 370, 376 (E.D. La. 1969); Wright v. Salisbury Club, Ltd., 359 F. Supp. 41 *rev'd* 632 F.2d 309 (D.D. Va. 1979).

Other decisions have looked to the extent to which the membership exercised rights of control over the alleged clubs. Courts denying the exemption have considered as relevant evidence that: members did not own facilities, Daniel v. Paul, 395 U.S. 298, 301 (1969); and Bell v. Kenwood Golf & Country Club, Inc., 312 F. Supp. 753 (D.C.Md. 1970); profits from the club facilities were retained by the operator, United States v. Richberg, 398 F.2d 523, 527 (5th Cir. 1968); members had no control over the operations of the establishment, Clover Hill Swimming Club, Inc. v. Goldsboro, 219 A.2d 161, 47 N.J. 25 (N.J. 1966); and Wright v. Cork Club, 315 F. Supp. 1143, 1155 (S.D. Tex. 1970).

The courts have required, in some cases, some purpose other than the exclusion of blacks from an otherwise public facility, United States v. Johnson Lake, Inc., 312 F.Supp. 1376, 1381 (S.D. Ala. 1970). Only rarely have the private club claims been sustained, Evans v. Laurel Links, Inc., 261 F. Supp. 474, 477 (E.D. Va. 1966) (dictum: although a golf course must accept black players and spectators, a golf association with 75 members, not a party defendant, would be exempted); Wesley v. City of Savannah, Ga., 294 F. Supp. 698 (D.C. Ga. 1969) (dictum: the "public accommodations" provisions of the Civil Rights Act of 1964 are not applicable to a private club or other establishment not in fact open to the public); and Gardner v. Vic Tanny Compton, Inc., 6 Cal.Rptr. 490, 182 C.A.2d 506, 87 A.L.R.2d 113 (Cal. App. 1960) (dictum: there is nothing in the civil rights statutes which had effect of preventing defendant from maintaining gymnasium for such persons as it saw proper to accommodate and from excluding such persons as is saw proper to exclude).

*See generally* Note, *Public Accommodations Laws and the Private Club*, 54 GEO. L.J. 915 (1966); Comment, *Public Accommodations: What is a Private Club?*, 30 MONT. L. REV. 47 (1968); Note, *The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U. L. REV. 1112 (1969).

68. 383 F. Supp. 1182 (D.C. Conn. 1974).

within public accommodations provision. The factors were: (a) selectiveness of group in admission of members, (b) existence of formal membership procedures, (c) degree of membership control over internal governance, (d) history of the organization, (e) use of club facilities by non-members, (f) substantiality of dues, (g) whether organization advertises, and (h) predominance of profit motive.[69] Later, in *Equal Employment Opportunity Commission v. Wooster Brush Company*, the court developed the following definition for a "private membership club" . . .

> "the organization must be a club, i.e., an association of persons for social or recreational purposes or for promotion of common literary, scientific, or political objective; organization's objective must be legitimate and not a sham; organization must be private, not public; and, organization must require meaningful conditions of limited membership."[70]

### *B. Title IX*

Many private golf clubs encourage local high schools or colleges/universities to use their courses for practice, home meets, and championship events. Interscholastic and intercollegiate athletic programs must abide by Title IX legislation. Therefore, clubs that have discriminatory admission/membership policies raise the question of the legal status of using these sites for practice and competition by girls'/women's golf teams.

In 1972 Congress passed the Educational Amendments legislation[71] which included Title IX[72] drafted to assist in the development of women's sports and women's rights in general within the education arena. However, Title IX was not constructed to implement prohibitions on athletic programs of educational institutions.[73] It was developed to force public schools

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69. Civil Rights Act of 1964, § 201(e), 42 U.S.C.A. §§ 1981, 2000a(e).

70. 523 F. Supp. 1256, 1264 (1981) *aff'd in part, rev'd in part* 727 F.2d 566 (D.C. Ohio 1981).

71. *See supra* note 42 and accompanying text.

72. *Id.*

73. *See generally*, Janet Laminersen Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 56-63 (1976); Villalobos, *supra* note 44; In the beginning, Title IX had limited scope, covering only those educational programs receiving federal financial assistance such as vocational, bilingual and compensatory education programs. However, the HEW interpreted the Act broadly applying to educational institutions or agencies discriminating in athletic or physical education programs. Further, in HEW's view, the only test of coverage was whether the institution or agency was a recipient of any federal assistance; if so, all activities, including the athletic program, come within the provisions of the Act. This interpretation was held until the Supreme Court decided Grove City College v. Bell, 465 U.S. 555 (1984). The Court's decision left women's athletic programs with no substantive protection under Title IX, since most sports programs receive no direct federal funding. The prior interpretation by the HEW was related to indirect federal funding to educational institutions.

and colleges and universities to make a commitment to women's athletics. During the Nixon, Ford and Carter Administrations, Title IX was applied broadly, but the Reagan Administration, while claiming to be a proponent of women's sports, backed the *Grove City College v. Bell*[74] decision and its narrowing effect.[75] However, the Bush Administration, along with the Democratic Senate, indicated that the women's sports movement, and women's rights in general, should have a higher priority now than during the Reagan era.[76] Title IX is to women's equal rights (in the athletic arena and education) as the Civil Rights Acts[77] are to the elimination of racial and other discrimination. With the failure of the attempted ratification of the Equal Rights Amendment,[78] Title IX stands alone at the Federal level to fight against gender discrimination (there is some state level legislation). The Amendment would have raised the examination of gender discrimination to a stricter standard of judicial scrutiny in equal protection and discrimination cases.[79] If the Amendment had passed, it would have supplemented and served to enhance the strength of Title IX.

### *C. The Civil Rights Restoration Act of 1987 (passed in 1988)*

During the seventies and early eighties, civil rights issues continued to appear before the bench, particularly issues that dealt with various women's rights concerns. With the *Grove City* case neutralizing Title IX and the failure of the Equal Rights Amendment to be ratified, women's rights became a focus for the courts. The leaders of the women's rights movement lobbied long and hard for the Civil Rights Restoration Act to protect the rights of women within the athletic arena.

The eighties and the Reagan era proved to be a frustrating period for women's rights in general, including those within the athletic arena. From 1984 until March of 1988, Congress struggled to enact the Civil Rights Restoration Act of 1987.[80] This legislation rendered *Grove City*[81] and

74. 465 U.S. 555 (1984).

75. Sullivan, *The Law That Needs New Muscle*, SPORTS ILLUSTRATED, March 4, 1985, at 9.

76. *Id.*

77. *See supra* note 11.

78. Equal Rights Amendment, H.R.J. Res. 208, 92d Cong., 2d Sess. (1972); The proposed Equal Rights Amendment, which would have barred all state governments and the federal government from denying "equality of rights under the law. . .on account of sex,"(Uhlir, *Athletics and the University: The Post-Women's Era*, 73 ACADEME 25, 25-29 (July-August 1987)) was defeated in 1982, when the extended period for its ratification expired.

79. *See* Villalobos, *supra* note 44, at 150.

80. *See supra* note 61.

81. *See* Caldwell, *supra* note 61.

*O'Connor v. Peru State College*[82] moot as to whether the programmatic approach and purpose distinction approach are viable. The Restoration Act changed the wording of Title IX to state that discrimination was prohibited in the programs and activities of any recipient of federal funds.[83] The Act redefined the previously troublesome terms: program or activity, and recipient. Previously these terms were vaguely defined. Program or activity was redefined to mean, in the case of higher education institutions, "a college, university, or post secondary institution, or a public system of higher education. . .any part of which is extended Federal financial assistance."[84] Recipient was defined as "any state or political subdivision thereof, . . . or any public or private agency, institution or organization, or other entity . . . to which Federal financial assistance is extended (directly or indirectly) through another entity or a person."[85] The Act clarifies that entire institutions and agencies are covered by Title IX and other federal anti-discrimination laws if any program or activity within the institution receives federal aid.[86] This Act was designed to reverse the effects of the *Grove City* ruling by assuring that Title IX now applies to all institutions whose students receive federal student aid. The passing of the Restoration Act demonstrated that the legislators in the late eighties were supporting a broad application of Title IX.

### *D. Do The Doctrines of Freedom of Association and the Right of Privacy Guarantee a Right to Discriminate?*

The conflict caused by the application of §§ 1981 and 2000a to private clubs raises the question of the legal status of the right to discriminate claimed by these clubs. If private clubs could cite no significant legal doctrine supporting discrimination, the courts could apply § 1981. On the other hand, if discrimination was clearly protected by § 2000a(e) or the Constitution, clubs could routinely be exempted from § 1981. However, there is no conclusive law supporting either of these propositions. Therefore, the courts cannot rely on existing legal doctrine to escape the ultimate task of formulating new doctrine reconciling the conflicting constitutional principles.[87] Furthermore, Congress needs to develop appropriate legislation to satisfy the need for freedom of association and the right not to be discriminated against.

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82. 605 F. Supp.753 (D.Neb. 1986), *aff'd* 781 F.2d 632 (8th Cir. 1986).
83. The Rehabilitation Act, Pub. L. No. 100-259, 102 Stat. 28 (1988).
84. *Id.* at § 3 (codified at 20 U.S.C. § 1687(2)(a) (1989)).
85. *Id.*
86. *Id.*
87. *See* Henkin *supra* note 55, at 1452.

If the exemption of private clubs to be free from discrimination in § 2000a(e) applied to § 1981, clubs meeting the test could continue to discriminate until either a new Thirteenth Amendment is enacted or state police power[88] legislation brought them within the reach of the anti-discrimination requirements. The court of appeals in *Tillman*[89] specifically held that the private club exemption "of necessity operates as an exception to the Act of 1866 in any case where the Act prohibits the same conduct which is saved as lawful by the terms of the 1964 Act."[90] The Court's conclusion has received support in the commentary on the case.[91]

While the conclusion that the private club exemption repealed part of the broad scope of the 1866 Act is plausible, it is hardly beyond dispute.[92] In order for an implied repeal to exist, there must be irreconcilable conflict between the two acts. This does not exist unless the private club exemption is interpreted as making discrimination by private clubs lawful. Yet, no language in the 1964 Act singles out any private discrimination which

88. States have recently indicated increasing interest in moving against private club discrimination. A Maine statute prohibits discrimination by holders of state licenses to dispense "food, liquor or any service," corporations chartered under Maine law, and corporations authorized to do business in the state. Me. Rev. Stat. Ann. tit. 17, § 1301-A (Supp. 1974). *See also* Ill. Ann. Stat. ch. 43, § 133 (Smith-Hurd 1944); N.M. Stat. Ann. § 46-10-13.1 (Supp. 1973). *See* James Kilpatrick, *Social Clubs Have Right to Privacy*, THE BLADE, Toledo, OH, Feb. 15, 1991, at A5; and Reed Mackenzie, *Open Tee Times Test Positive After Minnesota Passes Law*, USA TODAY, October 29, 1991, at C10. The refusal of the Maine State Liquor Commission to renew the liquor licenses of 15 Elks Lodges was upheld in B.P.O.E. Lodge No. 2043 v. Ingraham, 297 A.2d 607 (Me. 1972), 411 U.S. 924 (1973). The opinion has been criticized for ignoring the possibility that by requiring a waiver of associational freedom the statute imposes an unconstitutional condition on the issuance of licenses. See 7 SUFFOLK U. L. REV. 1069, 1074-75 (1973). However, Ingraham has been distinguished in later cases because it involved the unique power of the state under the Twenty-first Amendment to regulate liquor use, California v. LaRue, 409 U.S. 109 (1972) (state power to prohibit in bars sexual displays otherwise protected as First Amendment expression). *See* Note, *The Scope of Permissible State Interference with Racial Discrimination by Private Fraternal Organizations*, 4 RUT.-CAM. L.J. 338, 353-60 (1973). A consortium of private clubs sought to have declared unconstitutional a city law prohibiting discrimination by clubs which provide benefits to business entities and to persons other than their own members, thereby assuming sufficient public character so as to forfeit "distinctly private" exemption from the city anti-discrimination law. The court held that the law was a valid constitutional exercise of "police power" and that it did not violate club members' right to privacy, free speech and association under the Federal Constitution in N.Y. State Club Ass'n v. N.Y.C., 118 A.D.2d 392, 505 N.Y.S.2d 152 (N.Y.App.Div. 1986) *aff'd* 69 N.Y.2d 211, 505 N.E.2d 915 (N.Y. 1987) *aff'd* 108 S.Ct. 2225 (1988); N.Y. Administrative Code § 8-102, subd. 9.

89. Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 451 F.2d 1211 (4th Cir. 1971).

90. *Id.* at 1214.

91. *See* Note, *Private Clubs: The Right to Discriminate in Admission Policies*, 34 U. PITT. L. REV. 447 (1973); *See generally* Note, *Private Clubs Expressly Excepted from the Coverage of the Civil Rights Act of 1964 Constitute an Exemption from the Civil Rights Act of 1866*, 6 GA. L. REV. 813, 821 (1972).

92. *See* Henkin *supra* note 55.

"shall be lawful." Further, a saving clause was included providing that "nothing in this subchapter shall preclude any individual. . .from asserting any right based on Federal or State laws which are not inconsistent" are saved, the correct meaning of the private club exemption must be determined.[93]

## IV. A PRIVATE CLUB'S RIGHT TO DISCRIMINATE: BUT AT WHAT COST?

There seems to be no clear cut constitutional or legislative solution to the question of whether or not a private club has the right to discriminate. The process of creating a policy defining permissible discrimination, whether it be racial, religious or gender, by clubs requires a weighing of strong opposing interests. Before a process can be initiated to create such a policy, the costs of protecting private club's rights to discriminate, and the cost of restricting such rights, must be reviewed.

### *A. The Costs of Preserving and Protecting Private Club Discrimination*

If society decides to preserve and protect private club discrimination, it opens the door wide to (1) perpetuating the all white male private club, (2) judicial validation of discrimination, (3) the denial of equal opportunities for all citizens, and (4) the demise of social integration.

#### 1. Perpetuating the All White Male Private Club

America is considered a free country by most. The Thirteenth Amendment[94], the Civil Rights Act of 1866[95], the Civil Rights Act of 1964[96], the Educational Amendments of 1972[97], the Civil Rights Restoration Act of 1987[98], and many cases over the years have attempted to establish a discrimination-free society. Yet today, the concept of inherent racial, religious or gender inequality survives in the bylaws[99] and admission policies[100] of

93. *See* Note, *Private Clubs: The Right to Discriminate in Admissions Policies*, *supra* note 91, at 450-51.

94. *See supra* note 11.

95. Civil Rights Act of 1866, *supra* note 1.

96. Civil Rights Act of 1964, *supra* note 12.

97. *See* Educational Amendments of 1972, *supra* note 43.

98. Civil Rights Act of 1987, *supra* note 2.

99. United States Jaycees v. Massachusetts Commonwealth Against Discrimination, 463 N.E.2d 1151, 391 Mass. 594 (Mass. 1984); Isbister v. Boys' Club of Santa Cruz, Inc., 707 P.2d 212, 219 Cal. Rptr. 150, 40 Ct. App. 3d 72, reh'g *denied and modified* (Cal. 1985); and Rotary Club of Durate v. Board of Directors of Rotary Intern., 224 Cal.Rptr. 213, 178 Cal. App. 3d 1035 (Cal. App. 2d Dist. 1986), *review denied; jurisdiction postponed* 107 S.Ct. 396, 93 L.Ed.2d 350 (1986).

private clubs which can reject a black, Jew or female applicant with no more justification than "no —— allowed." The use of classifications is psychologically harmful to any group being discriminated against. This type of discrimination signals to other members of the white male "good ol' boy" network that deliberate discrimination has not yet become discredited enough to express proudly and openly. The civil rights legislation over the years presents an opportunity to eliminate some of the remaining vestiges of discrimination which would be lost by a court decision broadly protecting private discrimination.

2. Judicial Validation of Discrimination

In numerous cases over a period of years, the Supreme Court has emphatically established the proposition that discrimination is irrational and wrongful.[101] The Court could not make a decision legitimating discrimination practiced by private clubs because it would imply government approval of the theory of inequality among blacks, Jews, and women. It is very doubtful that any court will establish a foothold for private club discrimination in America.

3. The Denial of Equal Opportunity to All Citizens

White-only private social clubs have been part of American society prior to the founding of this country.[102] Membership in many of the private clubs can be an important source of business opportunity (developing new contacts, expanding networks, or gaining new clients). There is evidence that executive job attainment and promotion is often dependent on club membership.[103] In many small communities these clubs may, and most likely do, hold a monopoly on a particular type of recreational facility (golf course, swimming pool, or tennis courts) and/or dining establishment. The continuance of blanket discriminatory exclusion would deny these advantages to blacks, Jews, and women, regardless of how well they might meet other nondiscriminatory admissions criteria.

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100. *See* United States Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983); People of State of N.Y. by Abrams v. Ocean Club, Inc., 602 F. Supp. 489 (D.C. N.Y. 1984); United States Jaycees v. Cedar Rapids Jaycees, 614 F. Supp. 515 (D.C. Iowa 1985), 794 F.2d 379 (6th Cir. 1985).

101. *See Tillman, supra* note 4 and 89; *N.Y. State Club Ass'n, Inc., supra* note 88; and *Rotary Club of Duarte, supra* note 99.

102. *See supra* note 83, at 1186-90; these clubs take the form of thousands of country clubs (golf), lawn and tennis clubs, city clubs, athletic clubs, fraternal orders, etc.

103. *Id.* at 1188, 1216-17; *see also supra* note 88.

4. The Demise of Social Integration

Private clubs are often indistinguishable in their operations from public restaurants, pools, golf courses, tennis courts, rod and gun clubs open to the public. Yet, by establishing the policies outlined in the *Cornelius*[104] case, many groups (not just white males) can escape social integration mandated by court decisions and legislation. To that extent that there is a national policy of promoting integration (race and gender) for its own sake, this policy is undermined by the maintenance of a system in which any group can, in effect, purchase the right to maintain segregation (§ 2000a(e)).

In many private clubs, the significance of being unwanted by some of the members may be relatively unimportant compared to the benefits of gaining access to the business network. Section 1981 can promote actual integration by invalidating restrictive covenants and bylaws in organizations; Section 2000a(e) defines what "truly" private clubs are while outlining what a "public accommodation" is in the eyes of the justice system; Title IX of the Educational Amendments can assist women in developing sports programs. Finally, the Restoration Act further strengths the women's foothold in the athletic arena as well as women's rights in general.

The legislation discussed in Part III has acutely limited the opportunities for segregation. Further, it has begun to change the over-all behavior of society by encouraging social integration and discouraging discrimination. This legislation has encouraged nonprejudiced club members to invite blacks, Jews, and women to associate with them. Furthermore, local groups can eliminate discriminatory membership criteria/restrictions without the threat of sanctions from affiliated groups nationally or internationally.

### *B. The Costs of Eliminating Private Club Discrimination*

Private clubs are no longer fashionable in American society. If a study was done to ascertain the composition of private clubs, the results would more than likely indicate that the vast majority of the members are "pre-baby boomers".[105] The "baby boomer" generation are not joiners or heavy church goers. This generation may be the demise of the "truly" private clubs in America. Like all male colleges in America, private clubs will become extinct. There are basically three costs of eliminating private club discrimination to society - (1) forced social integration, and (2) impairment of freedom to associate, and (3) impairment of the right to privacy.

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104. *See supra* note 68.

105. The baby boomer generation includes those born from 1946 through 1966.

1. Forced Social Integration

Section 1981 does not, nor is it intended to, completely eliminate discretion in the admission of new persons to the club. It merely prohibits the use of discriminatory criteria to deny admission to blacks, and Section 2000a protects others from discriminatory actions in places of public accommodation. The Ninth Amendment to the Constitution protects the "natural rights" that everyone has, such as the right to: (a) join voluntarily with others for any benign purpose; (b) establish by mutual consent reasonable rules for governing group activity; (c) extend invitations to others to join as a matter of unfettered discretion; and (d) leave the group or disband it at will.

The specific interest threatened is the desire of some people to prevent inter-racial, or -religious social contact because they find it unpleasant to have to talk to blacks or Jews, to see them, to be in close proximity to them, or to have them participate in club activities. In American society, these people are forced to interact with blacks and Jews on a daily basis. Why not disregard past prejudices and open the door to social intercourse? The worst that could happen is that they might find they like them.

The right of a person to select others to invite into one's home on a completely arbitrary basis might be considered a basic element of liberty.[106] It may be desirable to extend this sort of sanctuary from government supervision beyond the home to private clubs. Then again, it might not be desirable.

2. Impairment of the Freedom to Associate and the Right to Privacy

Americans' freedom to associate and the right to privacy are "natural rights" (see Part II). These rights predate government and the mere elimination of private clubs will not prove to be an impairment. These rights are guaranteed by the Ninth Amendment. It is not necessary to have a private club in order to freely associate with whomever one wants to or to maintain the right to privacy in one's life.

## V. STRATEGIES FOR THE DEVELOPMENT OF POLICIES TOWARD PRIVATE CLUB DISCRIMINATION

Private clubs were around long before America was founded and they continue to exist today. It is likely that private clubs will exist far into the future. Therefore, it would be wise to develop strategies for the development of policies toward private club discrimination rather than wait for

106. The Rehabilitation Act, Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1988).

their demise. If the courts and government can agree that private clubs are an extension to the freedom of association and the right to privacy, then it is appropriate to develop a strict definition of a private club exemption that seeks a remedy to the discrimination issue(s). In a previous commentary[107] on Section 1981, the commentator suggested a few alternatives to Section 1981, with corresponding degrees of infringement on private clubs freedom to discriminate. The alternatives were: (a) to define an exemption from § 1981; and (b) to apply § 1981 to private clubs subject to interpretative limitations.

### *A. Defining an Exemption from § 1981*

Section 2000a(e) provides a private club exemption within the public accommodation title. However, courts are continually frustrated when forced to apply § 1981 to a case, since the decision is not as simple as merely granting or denying an exemption. Because the costs of protecting private discrimination may be substantial, it is important that future courts interested in preserving some degree of private club autonomy choose something less than a blanket exemption from § 1981 and have alternatives to consider.

#### 1. Exempting All Bonafide Private Clubs

A bonafide private club would be defined as a club "not in fact open to the public", and it would have the right to discriminate under federal law. Further, the criteria to be used in determining if a club is "truly private" would be (a) § 2000a(a-e)[108], and (b) the factors defined in *Cornelius*.[109] This solution would open the door to the costs of protecting private discrimination as discussed previously.

#### 2. Exempting Only Private Clubs in Which Extraordinary Associational Interests are Threatened

Some commentators have suggested that a constitutional right to discriminate could be based on a showing that discrimination is necessary to preserve the purpose and nature of the particular club.[110] The factual characteristics which would satisfy this test[111] might be (a) members have joined

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107. *See* Henkin *supra* note 55, at 1470-76.

108. Civil Rights Act of 1966, *supra* note 1.

109. *See supra* note 68.

110. *See* Note, *Association, Privacy and Private Clubs: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460, 469-70 (1970); Note, *Developing Legal Vistas for the Discouragement of Private Club Discrimination*, 58 IOWA L. REV. 108, 136-41 (1972); *see Runyon*, 427 U.S. 160.

111. *See* Henkin, *supra* note 55, at 1471-72.

together primarily for fellowship with each other or primarily to share the use of a facility (in some recreational clubs, or to obtain services); (b) the nature of the activity within the club (none business nature); (c) the size of the membership;[112] (d) the members all know each other; and (e) regularity of club meetings and use of the club facilities whether it be independently or randomly.

This approach would improve the potential for access to clubs by all oppressed groups and facilitate some integration. However, it would still preserve a private club's right to discriminate.

### *B. Applying § 1981 to Private Groups Subject to Interpretative Limitations*

The following are suggestions of how the courts could interpret § 1981 to provide limitations to discrimination yet allow private clubs their freedom to associate. It has been suggested[113] that there are four interpretative limitations that could be employed: (a) prohibiting the use of race, religion, and gender by groups employing objective admissions criteria; (b) freezing past admission criteria; (c) requiring that groups justify the use of subjective screening procedures which have the effect of excluding blacks, Jews, or women; and (d) judicial review of admissions decisions.

#### 1. Prohibiting the Use of Race, Religion, and Gender by Groups Employing Objective Admissions Criteria

It is important to understand that there are two types of private clubs: (a) those which exercise selectivity by excluding categories of persons, and (b) those which interview prospective applicants and decide on extending membership on the basis of subjective criteria that are usually unstated. The first group may restrict entry on the basis of criteria such as education, income, political affiliation or professional status.[114] The members of the group do not attempt to judge the individual personal characteristics of applicants who fit into acceptable categories. Since private clubs in this category resemble a public accommodation[115], any person who belongs to the appropriate category will be admitted and served. The courts applying a strict interpretation of §§ 1981, 2000a would not allow such a club to use

112. *See* N.Y. State Club Association, Inc., 118 A.D.2d 392.

113. *See* Henkin *supra* note 55, at 1472-76.

114. These clubs are generally large clubs such as Elks, Kiwanis, Lions, Rotary, and United States Jaycees; or professional associations such as American Medical Association, American Bar Association, American Physical Therapists Association, etc.

115. *See* Civil Rights Act of 1964, 42 U.S.C.A. § 2000a.

discriminative criteria. This means that blacks, Jews, and women who meet every other qualification will be admitted.

The second type of club[116] has preserved the ability to reject an applicant because he/she "would not fit in" or because members "do not like him/her." Even a white male applicant in many ways similar to the existing members will not be admitted if a number of existing members could be expected not to "like" him. A strict application of any of the civil rights legislation would not guarantee a black, Jew, or female applicant admission to these clubs. The civil rights statutes entitle people to the "same right" as white males; such a right would not include actual admission because no white male has guaranteed admission to these highly selective clubs. As stated before, this type of club could reject a non-white male applicant after formal consideration because the membership simply "did not like" the applicant. The court could force the club to integrate, but the disruption would far outweigh the benefit.

The major benefit of this approach, at least with the first type of club, which includes the vast majority of private clubs, would be the abandonment of racist and discriminatory bylaws and admissions policies and the practice of summarily rejecting blacks, Jews, and female applicants. However, actual integration would be limited by the fact that groups could shift their admissions policies and continue to exclude blacks, Jews, and women for "subjective" reasons.[117] Therefore, after eliminating overt discriminatory practices, the next obstacle to social integration of private clubs is the improper use of "subjective" criteria.

2. Freezing Past Admissions Criteria

This approach would deny groups which had used only objective admissions criteria the right to subjective criteria that would allow them to continue excluding blacks, Jews, and women. The intimate social clubs where discrimination is profound will not change in their use of "subjective" criteria for admissions. However, they are the clubs least likely to want to be penetrated by blacks, Jews, and women. This approach would offer the greatest access to private clubs for blacks, Jews, and women.

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116. Examples of these type of clubs might be country clubs, supper/dinner clubs, lawn and tennis clubs, polo clubs, etc.

117. The first private club case to confront this issue was Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974).

3. Requiring that Clubs Justify the Use of Subjective Screening Procedures Which Have the Effect of Excluding Blacks, Jews, or Women

This option would require all clubs to justify why subjective admissions procedures, that have the effect of excluding blacks, Jews, and women, are necessary to preserve the purpose and nature of the club. The court would look to characteristics of the private club and compare it with the factors discussed earlier.[118] The test would be whether the club requires the use of "subjective" admissions criteria. No club would be permitted to justify an exclusion on the basis of discrimination itself.[119]

The legal basis of this option would be that the unnecessary use of the "subjective" criteria is an indirect method of denying blacks, Jews, and women the "same right" guaranteed by § 1981.[120]The test here might be thought of as requiring a showing of "social necessity" rather then "business necessity" as shown in the *Griggs* case.[121] The club would have to show a "social necessity" before it would be allowed to exercise "arbitrary" personal preference in the selection of new members to the detriment of blacks, Jews, and women.

4. Judicial Review of Admission Decisions

This alternative would be the most extreme. It suggests that the court attempt to second-guess the club's reasons for excluding an applicant. The club would be required to show rational reasons other than race, religion, gender, or other arbitrary preference for excluding blacks, Jews, or women. This solution would come the closest to eliminating the ability of clubs to exercise preference in judging the nondiscriminatory characteristics of an applicant.[122]

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118. *See supra* note 68.

119. While a requirement of approval by two-thirds of the membership might be acceptable for a small "bona fide private membership club, Kemerer v. Davis, 520 F. Supp. 256 (D.C. Mich. 1981), it might serve no purpose independent of discriminatory exclusion of blacks, Jews, and women when used by a large golf or tennis or swimming club, Bell v. Kenwood Golf & Country Club, Inc., *supra* note 54; *Olzman*, 495 F.2d 1333.

120. *See* generally *supra* note 52, at 1475. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

121. *Id.*

122. *See* Henkin *supra* note 55, at 1475.

### C. *Questioning Why it is Appropriate or Necessary to Maintain a Private Club*

American society is very complicated and always in flux. Everyone must be patient and continually apply diplomatic and economic pressure toward private clubs that discriminate against women and minorities as one positive way to encourage behavioral change. Beyond this effort, here are a few examples of actions every individual can take, and questions that should be asked in order to reduce the discriminatory practices of private clubs:[123]

- ACTION:
  Check your company's policies regarding private clubs.
  QUESTIONS:
  - Does it hold meetings or events at clubs that discriminate in any way?
  - Does it offer memberships to discriminatory clubs to executives?
  - If you answered yes to either or both of the foregoing questions, strive to have the policies changed.
- ACTION:
  Check your organization's policies on fundraising events.
  QUESTIONS:
  - Are they held at private clubs that exclude different groups?
  - If there is no policy regarding this, suggest that one be drafted.
- ACTION
  - Check your city, county, and state's policies relating to private clubs.[124]
- ACTION
  If you belong to a club that has discriminatory policies, find allies within the club and work together to change them or take them to court.
- ACTION
  Investigate whether or not the club is 'truly private' and can pass the private club exemption test:

  QUESTIONS:
  - does the club . . .
    have an admission procedure that is genuinely selective ?
    have formal membership procedures?

123. *See* Sawyer, *Tee'd Off Women Golfers*, J. of LEG. ASPECTS SPORT 3:1 (Spring 1993).

124. Many regional governments have defined "private club" narrowly, forcing those who do not meet the definition to abide by nondiscrimination statute for public accommodations.

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

° ACTION

Develop your own private club to your needs.

## VI. CONCLUSION

While discrimination (whether it be equal access to admission/membership into a club, equal tee times, or equality in governance) is unacceptable in any forum, the right to form and belong to private clubs is also a basic American right, no matter how distasteful it is. These issues create polarities that need to be managed.

Recently, a great deal of attention has been given to issues of discrimination in golf. The LPGA and the PGA tours have taken strong positions against discrimination. While some clubs have refused to change their policies, many clubs are considering the minority and women's issues very seriously.

Kerry Graham,[125] president of the LPGA's teaching division and a teaching professional at McCormick Ranch Golf Club (Scottsdale, AZ), in-

125. *See* Sawyer, *Tee'd off women golfers*, Journal of Legal Aspects of Sport, 3:1 (Spring, 1993), p.10.

dicates that separate tee times have historical reasons for existing. For many years, when most women did not work, women golfers were pleased to play their primary golf on weekdays, leaving weekends golf times for the men. Golf mirrors our cultural transitions, so as women play a bigger role in business, government, and corporate America, women want greater accessibility and control of their leisure time.

When the difficult economic conditions are added to the cultural transitions, more and more clubs (new ones in particular) are trying to attract minorities and women as members and customers. Further, the trends of continued cultural change are evidenced clearly by litigation and legislation across the country during the eighties and early nineties. Bellwether states like Minnesota, Michigan, and California have taken action by passing laws against discrimination in admissions/membership policies relating to private clubs. As a result, many clubs are searching for ways to reduce restrictions, such as restricted tee times.

Graham suggests the following creative solutions to reduce restrictions such as "priority membership" systems, "special fees" for priority times, and priority tee times by "handicap". She further indicates that we are in a period of increasing women's involvement and leadership. The pressures to continue toward more equal tee times access, etc., will continue. While it cannot happen overnight, private clubs will need to be creative in finding ways to serve women.

## IS THERE ANY REASON FOR A PRIVATE GOLF/TENNIS CLUB NOT TO HAVE GENDER-NEUTRAL RULES REGARDING ADMISSION/ MEMBERSHIP?

In Minnesota,[126] a recently passed state law denies a lower property tax rate for private golf courses that discriminate on the basis of gender. Tee-time restrictions based on sex disappeared.

The broader issue behind the tee-time controversy is the clash between the traditional right of the private clubs and associations to make their own rules about membership and privileges, versus the obligation of government to act to prevent discriminatory conduct.

Changing societal values have caused state legislatures and courts to re-evaluate this issue. They have decided that government-regulated privileges, such as property tax benefits, liquor licenses, and environmental permits, may be withheld from private clubs that discriminate. They have decided that some clubs that receive revenue from nonmembers or where

126. *See supra* at 10.

the club is used for furtherance of business opportunities, are places of public, not private, accommodation. Therefore, they are subject to the same rules that apply in the workplace and school.

Across the country, numerous laws and ordinances addressing these questions will be passed. Many are in existence currently, and many are being introduced by state or local governments as legislators respond to the urging of constituents, primarily women. With courts more willing to uphold the validity of such legislation, there is no question that there will be more laws passed soon. While some clubs (very few) will be able to remain "truly" private by eliminating nonmember revenue, paying higher taxes, and foregoing liquor licenses, the majority will be forced to change their policies.

In closing, given the minimal impact of the changes on most private clubs, the war over open tee times might be a battle clubs should have never fought. This small controversy has ignited a greater challenge for society, to equally protect the rights of all citizens regardless of race, religion, or gender. The battle has been actively fought for the last three decades to protect the rights of blacks and Jews with success. It is now time for the fight to include women, and continue until all discrimination is eliminated.