Freedom of Association and the Private Club: The Installation of a "Threshold" Test to Legitize Private Club Status in the Public Eye

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COMMENTS

FREEDOM OF ASSOCIATION AND THE PRIVATE CLUB: THE INSTALLATION OF A "THRESHOLD" TEST TO LEGITIMIZE PRIVATE CLUB STATUS IN THE PUBLIC EYE

I. INTRODUCTION

The most natural privilege of man, next to the right of acting for himself, is that of combining his [energy, ideas and dreams] with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.... Nevertheless, if the liberty of association is only a source of advantage and prosperity to some nations, it may be perverted or carried to excess by others, and from an element of life may be changed into a cause of destruction.¹

For more than three decades,² courts have recognized a right to associate freely with others in pursuit of a wide variety of political, social, economic, religious, and cultural objectives.³ Recently, the Supreme Court has crystallized two distinct aspects of freedom of association: freedom of intimate association and freedom of expressive association. In one line of cases, the Court has concluded that the right to associate receives protection as a fundamental element of personal liberty.⁴ In another line of cases, the Court has recognized a right to associate for the purpose of engaging in protected first amendment activities such as speech, assembly, petition for redress of grievances, and the exercise of religion.⁵

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¹. A. de Tocqueville, Democracy in America 196 (1963). The desire to join with others to accomplish goals has been recognized for almost 150 years, as evidenced in the works of de Tocqueville.

². See Roberts v. United States Jaycees, 468 U.S. 609 (1984); Daniel v. Paul, 395 U.S. 298 (1969); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Douglas, The Right of Association, 63 Colum. L. Rev. 1361, 1361 (1963) ("The right of association is closely related to the right to believe as one chooses and to the right of privacy in those beliefs."). See generally The Civil Rights Cases, 109 U.S. 3, 59 (1883) (Harlan, J., dissenting) (Justice Harlan proclaimed that "[n]o government has ever brought, or ever can bring, its people into social intercourse against their wishes.").

³. Roberts, 468 U.S. at 622.

⁴. See infra notes 27-33 and accompanying text.

⁵. Roberts, 468 U.S. at 617-18; see infra notes 34-36 and accompanying text.
The right to freedom of association has been a hallmark of equality. Nonetheless, a conflict exists in the context of private clubs between individuals working toward open membership and access, and groups seeking to limit membership and access to selected individuals.6 The extent to which the government may constitutionally regulate the access and opportunities offered by private clubs is one of the most controversial issues involved in this conflict.7

At present, there is no single, well verbalized definition of the phrase “private club.”8 Nevertheless, the words “private club” are familiar and easily understood. Since most laws inadequately define “private club,” courts have taken an ad hoc rather than a conceptual approach toward distinguishing truly private clubs from those which are not in fact private, by emphasizing the importance of various characteristics which most, but not all, private clubs generally possess.9

Attempts to create a uniform standard began on July 2, 1964, when Congress passed Title II of the Civil Rights Act of 1964, with its public accommodation provision which forbids certain facilities, clubs or organizations from denying full and equal rights to any individual.10 The public accommodation provision, specifically Section 2000a of Title 42 of the United States Code,11 provides an exemption for clubs that meet the qualifications of a private club. Although this legislation provides the primary means for protecting the right to expressive association of historically disad-

8. The term “private club” is defined differently in each state. According to an interpretation elicited during a congressional debate, a private club is a “bona fide social, fraternal, civic or other organization which selects their [sic] own members.” 110 CONG. REC. 7407 (1964) (statement of Sen. Magnuson). Other interpretations have included size, location, and dues paid as factors associated with private clubs. For a discussion of state public accommodation statutes, see infra notes 46-84 and accompanying text.
9. Determining if a club is private is “not an inference discoverable from 'experience with the mainsprings of human conduct,'[sic] but an applicable legal standard whose dimensions must conform to the legislative purpose that prevailed at its inception.” United States v. Richberg, 398 F.2d 523, 526 (5th Cir. 1968). If this were not so, “the meaning of 'private club' might change with each new case, and the body of the Civil Rights Act (42 U.S.C. § 2000a(e)), fall victim to its own protean exception.” Id.
11. 42 U.S.C. § 2000a (1982); see also infra notes 41-45 and accompanying text for examples of state private club exemptions.
This Comment will begin with a discussion of what freedom of association is, where it comes from, and why it exists. It will also examine the effect that the private club exemption has on club members, as well as those excluded from membership. Next, this Comment will review federal legislative regulations pertaining to private club discrimination, and then shift its focus to attempts by states to limit discrimination through public accommodation statutes. Finally, this Comment will present a "threshold" analysis of private club status for judicial use to produce more thorough, fair, and well-reasoned results.

II. FREEDOM OF ASSOCIATION

A. Basic Principles

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the [first amendment and] the Due Process Clause of the [fourteenth amendment . . . .]14

Freedom of association is a fundamental constitutional right insofar "as association for the advancement of beliefs and ideas is concerned."15 The right to associate freely with others for social as well as political and business purposes has been a well recognized characteristic of equality in the United States.16

14. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) (footnotes omitted). The Supreme Court, in this 1958 decision, recognized and proclaimed for the first time a freedom which had been dormant through years of constitutional development. Although freedom of expression is not mentioned in the Constitution, it is nothing new. It seems reasonable to conclude, from a study of past developments and present decisions, that the right to associate is not limited to the "spreading of ideas," but includes association to other areas as well. See generally C. RICE, FREEDOM OF ASSOCIATION (1962).
15. See C. RICE, supra note 14, at 176; see also Patterson, 357 U.S. at 460 ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.") (footnotes omitted). See generally Thomas v. Collins, 323 U.S. 516, 530 (1945); DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

The Supreme Court initially treated freedom of association as a derivative and ancillary to freedoms of speech and assembly. Later, the Court recognized freedom of association as a constitutionally protected right of association. See Patterson, 357 U.S. at 461.
What are the general principles of association which prevail in a democratic society? We must begin with the individual, for it is he or she who is the ultimate concern of social order. His or her interests and first amendment rights are paramount in American society. Freedom of association is, therefore, a valuable instrument used to give greater depth and scope to an individual's needs, aspirations and liberties.\(^\text{17}\)

In *NAACP v. Alabama ex rel. Patterson*,\(^\text{18}\) the Supreme Court acknowledged the fundamental right to associate for the purpose of the advancement of such needs, interests and goals by overruling a district court order that required the NAACP to provide Alabama with a complete list of names and addresses of all NAACP members in Alabama. The Court concluded that compelling disclosure of the membership lists would have an unjustifiably negative effect on the NAACP's ability to collectively foster and implement its constitutionally protected beliefs. Further, disclosure would cause members to withdraw from the Association and dissuade others from joining out of fear of the consequences resulting from the exposure of these beliefs.\(^\text{19}\)

It is ironic that even though freedom of association has been recognized as a protected penumbra right of the first amendment, the Supreme Court has yet to define its boundaries.\(^\text{20}\) Thus, courts are continuously confronted with the task of balancing two very different interests. On the one hand, courts recognize that the conduct of an "association"\(^\text{21}\) is likely to create results that are unique to the character of an organization rather than an individual. Through the accumulation of resources, the focusing of effort, as well as the actions of the organization, an association may achieve objectives far beyond those achievable by individual effort, and which are quali-


19. *Id.* at 462-63 (The NAACP demonstrated that in the past, revelation of the names and addresses of the members "exposed them to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." The Court recognized that in order for an individual to realize his own capacities or stand up to the institutional forces that surround him, it has become almost essential that he join with others of like mind in pursuit of common objectives.). In later cases, the Supreme Court reaffirmed that the freedom to associate applies to the beliefs all shared. In Gilmore v. City of Montgomery, 417 U.S. 556 (1974), for example, the Court held that "[i]t tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." *Id.* at 575.

20. *See Emerson, Freedom of Association and Freedom of Expression, 74 YALE L.J. 1, 2 (1964) ("The constitutional source of 'the right of association,' the principles which underlie it, the extent of its reach, and the standards by which it is applied have never been clearly set forth.").

tatively different. On the other hand, individual rights guaranteed by the United States Constitution must be protected and upheld as the law of the land by the courts under its authority.

B. Two Aspects of Freedom of Association

Freedom of association has been viewed from two distinct perspectives: freedom of intimate association and freedom of expressive association. The majority in Roberts v. United States Jaycees, cautioned that "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case."

1. Freedom of Intimate Association

Intimate association is a part of personal liberty that is guaranteed by the Bill of Rights. Because the Bill of Rights is designed to secure individual liberty, it must protect the formation and preservation of certain kinds of highly personal relationships from excessive state interference. Such constitutional protection reflects the realization that individuals draw much of their emotional enrichment from close ties with others.

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22. See generally supra note 19.
23. The United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.
26. Id. at 618.
27. Id. The Bill of Rights is designed to secure individual liberty. See U.S. CONST. amends. I-X. Historically, courts have afforded the preservation of certain highly personal relationships a great deal of protection from unjustified governmental interference. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (right to educate one's children as one chooses); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right to study the German language in a private school).
Family relationships involve deep attachments and commitments to a relatively small number of people. Members of these groups share intimate thoughts, ideas, experiences and beliefs. These intimate groups often maintain a certain amount of seclusion from the rest of society to maintain the strong, personal relationship. See Roberts, 468 U.S. at 620.
28. See id. at 619; Carey, 431 U.S. at 684-86.
The personal relationships that exemplify these considerations include the creation and maintenance of a family, childbirth, raising and education of children, and cohabitation with one's relatives. Generally, family relationships involve deep attachments and strong commitments. They are usually distinguished by such attributes as smallness, a high degree of selectivity to maintain the affiliation, and seclusion from others in critical aspects of the relationship. Relationships with these types of qualities are likely to exhibit the elements that have led to an understanding of freedom of association as a component of personal liberty.

2. Freedom of Expressive Association

Freedom of expressive association is derived from the first amendment guarantees of free speech and peaceable assembly. The freedom to associate with others "in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends" insures the constitutional protection of those rights enumerated in the first amendment.

The right to associate for expressive purposes is not absolute. Such rights may be infringed upon by regulations which serve a compelling state

29. Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978) (state statute requiring residents who were responsible for support of a minor child to seek court approval prior to marriage was held unconstitutional).
31. Smith, 431 U.S. at 844.
32. Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion) (zoning ordinance prohibiting non-family members from residing in household violated residents' right of free association by regulating persons designated as family).
34. The Constitution guarantees freedom of association of this kind "as an indispensable means of preserving other individual liberties." Id. at 618; see also Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 294 (1981).

"Accordng protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." Roberts, 468 U.S. at 622; see, e.g., NAACP v. Clairborne Hardware Co., 458 U.S. 886, 907-09 (1982) (organized boycott of white merchants is considered protected expression); Gilmore, 417 U.S. at 575 (permitting an injunction barring a city from according exclusive use of public recreational facilities to segregated private schools) (The Gilmore Court noted that the "very exercise of freedom to associate by some may serve to infringe that freedom for others."); Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965) (right to privacy in marital relationship); NAACP v. Button, 371 U.S. 415 (1963) (NAACP's right to solicit civil rights litigation essential to free expression); Patterson, 357 U.S. at 462 (group membership list need not be disclosed if result would have a detrimental effect on freedom of association); see also Raggi, An Independent Right to Freedom of Association, 12 HARV. C.R.-C.L. L. REV. 1, 1 (1977) (freedom of association is "little more than a shorthand phrase used by the Court to protect traditional first amendment rights of speech and petition as exercised by individuals in groups").
35. Roberts, 468 U.S. at 622.
interest, unrelated to the suppression of ideas, that cannot be achieved through less restrictive means.  

Since at least 1958, American courts have been called on to balance the interests of groups seeking to invoke the right of association against those who, instead, profess "equality." 37 "Determining the limits of state authority over an individual's freedom to enter into a particular association ... unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." 38 To determine whether an association warrants constitutional protection, courts have considered factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. 39 State legislatures have incorporated these factors into their definitions of "private clubs" to resolve the battle between conflicting interests. 40

III. BROAD LIMITS OF THE PRIVATE CLUB EXEMPTION

A. Federal: Private Club Exemption

1. Purpose of the Exemption

Title II of the Civil Rights Act of 1964 41 was enacted in part to "[re]move the daily [insult] and humiliation involved in discriminatory de-

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37. See Patterson, 357 U.S. at 449.
39. Id.

§ 2000a. Prohibition against discrimination or segregation in places of public accommodation

(a) Equal access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Id.
nials of access to facilities ostensibly open to the general public.’” Although this Act does not “apply to a private club or other establishment not in fact open to the public,” it seeks to avoid the calculated expression of a continuing and pervasive policy practiced by members of a club to deter and discourage use of the facilities by minorities. Therefore, in order for an organization or group to fall under the private club exemption, it must meet certain prerequisites set forth in the statute and interpreted by the courts.

2. Judicial Interpretation of the Public Accommodation Act

The Public Accommodation Act does not clearly define the degree of privacy an organization must establish in order to satisfy the requirement that it is not in fact open to the public. Courts have struck down efforts to come under the private club exemption as a means of avoiding the application of the public accommodation statute, as exemplified in Daniel v.
In Daniel, defendants operated an outdoor recreational facility for whites only. Following the passage of Title II of the Civil Rights Act in 1964, the defendants referred to the facility as a private club and required patrons to pay a twenty-five cent membership fee, for which they received a membership card entitling them to enter the premises for an entire season and use additional facilities upon payment of additional fees. The Court found the membership drive to be "no more than a subterfuge designed to avoid coverage of the 1964 Act," since membership privileges had been routinely extended to 100,000 whites, and just as routinely denied to all blacks. The Court concluded that the facility was a public accommodation under the Act.

3. Legislative Debate Surrounding Title II

The initial version of the Public Accommodation Act exempted "bona fide private club[s]." The final draft of the exemption excluded "private club[s] or establishment[s] not in fact open to the public." This change was best explained by Senator Long:

Its purpose is to make it clear that the test of whether a private club . . . is exempt from Title II, relates to whether it is, in fact, a private club, or whether it is, in fact, an establishment not open to the public. It does not relate to whatever purpose or animus the organizers may have had in mind when they originally brought the organization or establishment into existence.

Senator Humphrey viewed the exemption as protecting only "the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis." Although these remarks are general, they illustrate the need for judicial probing of the actual operations of clubs claiming exemption.

49. Id. at 302.
53. 110 Cong. Rec. 13,697 (1964) (statement of Sen. Humphrey); see supra note 46 for Sen. Magnuson's remarks. Although Sen. Magnuson indicated the importance of selectivity in determining what is a private club, he stated that a number of variables must be considered in light of the "clear purpose" of the Civil Rights Act of 1964 to protect the genuine privacy of private clubs. See 110 Cong. Rec. 7407 (1964).
B. State: Private Club Exemption

State public accommodation statutes are patterned after Title II of the Civil Rights Act of 1964. However, they have greater latitude for a number of reasons: 1) states have a greater ability to outlaw private discrimination because they are not limited by the commerce clause; and 2) states have the right, because of the increased state interest in its residents, to enact and enforce laws that are more restrictive than federal legislation. In other words, the Constitution establishes the base below which state legislation must not fall. The ultimate authority of the states is subject to the constitutional rights of privacy and association.

1. State Compelling Interest

In Roberts v. United States Jaycees the Supreme Court recognized that the “archaic and overbroad” assumptions based on gender actually “deprive[] [individuals] of their [personal] dignity and deny[] society the benefits of wide [and diverse] participation in political, economic, and cultural life.” To enhance protection of individual rights, many states have adopted a functional definition of public accommodations and established exemptions which reach various forms of public, quasi-commercial and private conduct. This definition reflects the changing nature of national and

54. See 42 U.S.C. § 2000a. It should be noted that state public accommodation statutes also have exemption clauses for private clubs and nonprofit organizations.

55. 42 U.S.C. § 2000a(c) states: “The operations of an establishment affect commerce within the meaning of this subchapter if . . . [f]or purposes of this section, ‘commerce’ means travel, trade, traffic, commerce, transportation, or communication among the several [s]tates, or between the District of Columbia and any [s]tate, or between any foreign country or any territory . . . .” Id. (emphasis added).

56. The reference to constitutional rights is evidenced in 15 A.M. JUR. 2D, Civil Rights § 1, at 281-82 (1984), where “civil rights” is defined as:

[T]he enjoyment of such guaranties as are contained in constitutional or statutory law, such as the [f]irst [a]mendment right of free expression, and the precious rights of personal liberty which such [a]mendment protects, or, more specifically, to the guaranties found in the civil rights amendments to the Federal Constitution and federal statutes enacted pursuant thereto, . . . designed to prevent discrimination in the treatment of persons by reason of their race, color, sex, age, religion, previous condition of servitude, or national origin.

Id.


58. Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984) (the Court noted that discrimination based on overbroad assumptions about the relative needs and capacities of sexes forces individuals to labor under stertotypical notions that often bear no relationship to their actual abilities); see also Heckler v. Mathews, 465 U.S. 728 (1984); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). Freedom of expression is not an absolute right. Both the United States Constitution and Title II of the Civil Rights Act of 1964 neglect to establish guidelines to provide more widespread equality among Americans as well as ensure more even distribution of the protection of rights.
state economies and removes barriers to economic advancement and political and social integration that have historically plagued certain minority groups.59

Since courts have acknowledged that the right to associate for expressive purposes is not absolute, infringements on that right may be justified by state statutory regulations adopted to serve compelling state interests that cannot be achieved through less restrictive means. Courts do not enforce and uphold state statutes which aim at the suppression of speech, are not "viewpoint neutral,"60 permit enforcement authorities to enforce the statute through use of unconstitutional criteria, and/or hamper the organization or club's ability to express its protected views. State public accommodation statutes should, instead, reflect "the [s]tate's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services."61

To accomplish this goal, states have progressively expanded the scope of their public accommodation statutes with respect to the number and types of "covered" facilities, the numbers of groups protected from discriminatory practices, as well as who is exempt from statutory regulation.62 For example, the Minnesota Legislature added discrimination on the basis of sex to the types of prohibited conduct in its public accommodation statute.63 The result of state statutory prohibition of such discrimination in places of public accommodation is the increased protection of state citizenry from serious social and personal harms. In contrast with Title II,

59. See Roberts, 468 U.S. at 622-29 (the Court applied the Minnesota Human Rights Act to the Jaycees' activities by assuring women equal access to the benefits obtained through Jaycee participation, and found that the state had advanced state interests through the least restrictive means available); see also Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (A law firm "has not shown how its ability to fulfill [protected] function[s] would be inhibited by a requirement that it consider [a woman lawyer] for partnership on her merits."); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982); Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 124-26 (1981).

60. In this Comment, this author will use the term "viewpoint neutral" to refer to a state statute that does not distinguish between prohibited and permitted activity on the basis of the separate viewpoint of each.

61. Roberts, 468 U.S. at 624 (stated goal must serve a compelling state interest of the "highest order"). It is interesting to note that the Roberts Court decided that even if enforcement of the state act causes some "incidental abridgement" of the Jaycees' protected rights, that effect is no greater than is necessary to accomplish Minnesota's legitimate purposes. Id. at 628.

62. See infra notes 63 and 64 and accompanying text.

63. The Minnesota Human Rights Act provides in part: "It is an unfair discriminatory practice: [T]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." MINN. STAT. ANN. § 363.03(3) (West Supp. 1989). "Sex" was added to the Act on May 24, 1973. 1973 Minn. Laws 2164.
state statutes generally set forth more exact definitions for such terms as “bona fide private club,” “place,” and “public accommodation.” However, statutory definitions vary to a great extent in the expressed protection afforded by state statutes, and in the exemptions to their coverage. A comparison of New York and California’s public accommodation statutes will illustrate the wide diversity in two state public accommodation statutes.  

2. New York Public Accommodation Statutes

The Civil Rights Law of New York provides that all persons shall be “entitled to the full and equal accommodations, advantages, facilities, and privileges of any places of public accommodations, resort, or amusement.” The purpose of the statute is to eliminate “direct or indirect discrimination in public places, and prevent wherever possible social and economic ostracism based on racial, religious, or national prejudices.” Provisions prohibiting discriminatory practices with respect to availability

64. Note that Wisconsin’s Public Accommodation Statute, found at § 942.04(2) of the Wisconsin Statutes, states as follows:

(2) “Public place of accommodation or amusement” shall be interpreted broadly to include, but not be limited to, places of business or recreation, hotels, motels, resorts, restaurants, taverns, barber or cosmetologist aestheticians, electrologist or manicuring establishments, nursing homes, clinics, hospitals, cemeteries, and any place where accommodations, amusement, goods or services are available either free or for a consideration except where provided by bona fide private, nonprofit organizations or institutions.

(3) No person, club or organization may refuse to rent, charge a higher price than the regular rate or give preferential treatment, because of sex, race, color, creed, sexual orientation, national origin or ancestry, regarding the use of any private facilities commonly rented to the public.


66. N.Y. Civ. Rights Law § 40 (this is part of the civil liberties statutes of New York). A place of public accommodation has been defined, non-inclusively, as: “[i]nns, taverns, road houses, hotels ... restaurants, or eating houses, or any place where food is sold for consumption on the premises; [places] where spirituous or malt liquors are sold; ice cream parlors ... retail stores ... clinics, hospitals ... barber shops, beauty parlors, theatres ... amusement and recreation parks ... bowling alleys, golf courses.” Id. For a complete list of public accommodations, resorts, or amusements encompassed by the Civil Rights Law, see id. For a complete list of public accommodations according to the Human Rights Law, see N.Y. Exec. Law § 292(9).

and operation of public accommodations on the basis of race, creed, color, national origin, and sex are also found in the Human Rights Law of New York. Both statutes exempt "distinctly private" institutions, clubs or organizations.

For organizations located within New York City, however, there are stricter requirements than those set forth in the above described statutes. The New York City Council enacted an ordinance which defines private club status in more precise terms.

475 (1945) (newspaper had right to edit advertisement containing the words "select clientele" in violation of Civil Rights Law).

For an illustration of how the Civil Rights Law exemption is applied, see New York Roadrunners Club v. State Div. of Human Rights, 81 A.D.2d 519, 437 N.Y.S.2d 681 (1981) (although the Commissioner of the State Division of Human Rights found that the 1978 New York City Marathon was a "place of public accommodation" within the meaning of N.Y. EXEC. LAW § 292(9), the commissioner erred in determining that the running club which organized the marathon had engaged in an unlawful discriminatory practice by not allowing individuals in wheelchairs to participate in the race since a marathon had historically been a "foot race" and since the running club had not excluded other disabled individuals who could compete on foot), aff'd, 55 N.Y.2d 122, 432 N.E.2d 780, 447 N.Y.S.2d 908 (1982).

68. N.Y. EXEC. LAW § 296(2)(a). A major distinction between the New York Human Rights Law and the Civil Rights Law is that the former may allow restrictions based on sex to stand if motivated by bona fide considerations of public policy. Compare N.Y. EXEC. LAW § 296(2)(b) with N.Y. Civ. RIGHTS LAW § 40(c).

For an illustration of application of the New York Human Rights Law, see United States Power Squadrons v. State Human Rights Appeal Bd., 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983) (a non-profit, tax-exempt foreign corporation and three of its local charter organizations located in New York, which offered a service or accommodation to the public through their boating courses and promotional activities, were owners of places of public accommodation, notwithstanding that the place of such public accommodation was not of fixed location; moreover, the corporation and its charter organizations failed to establish that they were distinctively private clubs within the statutory exclusion); see also Roberts, 468 U.S. 609; Eastern Paralyzed Veterans Assoc. v. Metropolitan Transp. Auth., 117 Misc. 2d 343, 458 N.Y.S.2d 815 (1982); Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Intl', 83 Misc. 2d 1075, 374 N.Y.S.2d 265 (1975), aff'd, 52 A.D.2d 906, 383 N.Y.S. 383 (1976) (mem.), aff'd, 41 N.Y.2d 1034, 363 N.E.2d 1378, 395 N.Y.S.2d 633 (1977), cert. denied, 434 U.S. 859 (1977).

69. N.Y. Civ. RIGHTS LAW § 40 and N.Y. EXEC. LAW § 292(9) (Consol. 1983). Those claiming to be within the exception as private institutions have the burden of proof; to come within the exclusion it is necessary that the institution in question be a truly private place. Castle Hill Beach Club, Inc. v. Arbury, 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957); see also McKaine v. Drake Business School, Inc., 107 Misc. 241, 176 N.Y.S. 33 (1919) (school sued for rejecting an applicant because of applicant's color had the burden of proving that it was within the statutory exemption).

A club does not lose its exemption as a private institution on account of an occasional relaxation of its "guest" rules nor would the existence of nearby signs characterizing a club as "public" preclude it from being private under the exemption. See Delaney v. Central Valley Golf Club, Inc., 28 N.Y.S.2d 932 (1941), aff'd, 263 A.D. 710, 31 N.Y.S.2d 834 (1941), aff'd, 289 N.Y. 577, 43 N.E.2d 716 (1942)(mem.).

70. The local law of New York City is intended to prohibit discrimination in those clubs which provide benefits to business entities and to persons other than their own members.
3. New York City's Local Law No. 63

On October 9, 1984, New York City exercised its police powers by adopting a local human rights ordinance which "forbids invidious discrimination in 'places of public accommodation', excluding 'any institution, club or place of public accommodation which . . . is in its nature distinctly private.'"71 The New York City Council defined "distinctly private" in Local Law No. 63 as follows:

A club "shall not be considered in its nature distinctly private if it [1] has more than four hundred members, [2] provides regular meal service, and [3] 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."72

A consortium of private clubs sought judgment declaring this ordinance unconstitutional. The Court of Appeals of New York affirmed the holding of the supreme court, appellate division that the ordinance was a valid constitutional exercise of police power of the City of New York because it was not pre-empted by or inconsistent with state anti-discrimination law and did not violate the club member's right to privacy, free speech and association under the United States Constitution.73 Local Law No. 63 is significant in that it, along with the Civil Rights Law and Human Rights Law, demonstrates how a state can stratify legislation to discourage discrimination in places of public accommodation and impose stricter qualifications at the local level for procuring an exempt status.

On two occasions the New York State Club Association ("NYSCA") was unsuccessful in its claim that this local ordinance violates members' rights to equal protection and to freedom of association, privacy, and speech.74 The NYSCA, however, continued its challenge. The NYSCA pe-

72. Id. (quoting NEW YORK CITY, N.Y., LOCAL LAW 63 (1984), amending N.Y. CITY ADMIN. CODE § 8-102[9]). The New York City Council stated that Local Law No. 63 realized the city's "'compelling interest in providing its citizens . . . regardless of race, creed, color, national origin or sex . . . a fair and equal opportunity to participate in the business and professional life of the city.'" Id. (quoting findings of the New York City Council).
73. The disposition of New York State Club Ass'n to this point is as follows: In 1986, the New York Supreme Court Appellate Division affirmed the New York Supreme Court's decision that the law was constitutional. See New York State Club Ass'n, 118 A.D.2d 392, 505 N.Y.S.2d 156 (1986). Then, in 1987, the New York Court of Appeals affirmed. See New York State Club Ass'n, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987).
74. The New York Supreme Court, the New York Supreme Court Appellate Division, and the New York Court of Appeals all held the law constitutional.
titioned the United States Supreme Court for review of the February 7, 1987, New York Court of Appeals decision.

4. The New York State Club Association Decision

On June 20, 1988, the United States Supreme Court, in a unanimous decision, ruled that New York City’s Local Law No. 63 did not infringe upon the NYSCA’s first amendment right of free association.\textsuperscript{75} In general, the Court recognized that some of NYSCA’s members may have been entitled to constitutional protection, but it affirmed the court of appeals’ enforcement of Local Law No. 63 because the law did not infringe upon the associational rights of every NYSCA member.\textsuperscript{76}

The Court asserted that Local Law No. 63 is not overbroad. It found no evidence of any club, let alone a substantial number of clubs, for whom the law impairs the ability to associate or to advocate public or private viewpoints.\textsuperscript{77} Rather than establish a uniform method to address such challenges, however, the court resolved that administrative and judicial opportunities were available for individual associations to contest the constitutionality of Local Law No. 63 as it might be applied against them. It concluded that statutory overbreadth will be curable through a case-by-case analysis of specific facts.\textsuperscript{78}

5. California Public Accommodation Statute

The California Unruh Civil Rights Act\textsuperscript{79} prohibits a “business establishment” from engaging in discriminatory activity. For purposes of the Act,

\textsuperscript{75} New York State Club Ass’n, 487 U.S. ----, 108 S. Ct. 2225. Justice White delivered the opinion for a unanimous Court with respect to Parts I, II, and III, and an opinion of the Court with respect to Part IV, in which Chief Justice Rehnquist, and Justices Brennan, Marshall, Blackmun, Stevens, Kennedy, and O’Connor joined. Justice O’Connor filed a concurring opinion in which Justice Kennedy joined. Justice Scalia filed an opinion concurring in part and dissenting in part.

\textsuperscript{76} Id. at ----, 108 S. Ct. at 2234.

\textsuperscript{77} Id. at ----, 108 S. Ct. at 2232-35.

\textsuperscript{78} Id.; see also infra notes 96-152 and accompanying text for proposed method of evaluating like problems.

\textsuperscript{79} CAL. CIV. CODE § 51 (West Supp. 1989) (Unruh Civil Rights Act). The California Unruh Civil Rights Act applies to equal rights and business establishments. The Act reads in part as follows:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, privileges, or services in all business establishments of every kind whatsoever.

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability.
courts have defined "business" as embracing "everything about which one can be employed."\textsuperscript{80} "Establishment" has been defined as "not only a fixed location . . . but also a permanent 'commercial force or organization' or a 'permanent settled position (as in life or business)'."\textsuperscript{81} Courts have identified several "businesslike attributes" such as the complex structure of the organization, the size of the staff and budget, and the extensiveness of the organization's publishing activities.\textsuperscript{82}

Many "business organizations" intentionally engage in service activities which are protected by the first amendment to avoid colliding with the Unruh Act. The United States Supreme Court interpreted the Act as not requiring clubs to abandon or alter their regular activities, but rather to maintain and pursue "their basic goals of humanitarian service, high ethical standards in all vocations, goodwill and peace."\textsuperscript{83} The Supreme Court hypothesized that if membership for leading business and professional women opened up in the community, Rotary Clubs and other "business" organizations were likely to obtain a more representative cross-section of community leaders with a more diverse attitude toward service.\textsuperscript{84}

6. The Paradox of Variety

The variety of state legislative enactments and judicial construction of statutes demonstrates the unsettled nature of the law in this area. Since most state statutes are modeled after the federal Public Accommodation Act, including the private club exemption, state courts have had to define their application to determine which organizations, because of their private nature, fall within this exemption. Some courts have interpreted the statutes strictly, with results similar to cases brought under the federal law\textsuperscript{85} and state action theories.\textsuperscript{86} Other courts have shown an increasing willing-

\textit{Id.}\textsuperscript{80.} Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 542 (1987) (citing California Court of Appeals decision in the instant case, 178 Cal. App. 3d 224 Cal. Rptr. 213 (1986)).


\textit{Id.}\textsuperscript{82.}

\textit{Id.}\textsuperscript{83.} at 548.

\textit{Id.}\textsuperscript{84.} at 549 n.7. Note that "[i]n 1980 women were reported to make up 40.6% of the managerial and professional labor force in the United States." \textit{Id.} (quoting U.S. Department of Commerce, Statistical Abstract of the United States 400 (1986)).


\textit{See} 42 U.S.C. § 1983 for which a private party is seeking damages because the state has violated that party's civil rights. Common
ness to liberally interpret public accommodation statutes to reach new definitions of public accommodations.

Due to the close parallels between federal and state public accommodation statutes, the federal standards used to determine whether clubs are private are often used in state cases as well. It should be noted, however, that there is no single test which can be applied and easily understood to be determinative of whether an establishment is in fact a private club or public accommodation. A number of factors must be examined in light of the purpose of the federal law87 or the state public accommodation statute so as to protect only "the genuine privacy of private clubs ... whose membership is genuinely selective ..."88 Although it has been conclusively established that the burden of proof rests on the one claiming the private club exempt status, the courts have not agreed as to whether the determining test is factual or legal.89

IV. PROBLEMS WITH AD HOC DECISION MAKING

A. General Problems With the Current Approach

The question of whether or not a club or organization falls under the private club exemption provokes a judicial consideration of a multitude of factors, no one of which seems to be dispositive. Even though courts have consistently placed greater emphasis on two or three factors,90 they most

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89. For a detailed discussion of who carries the burden, see Jordan, 302 F. Supp. 370 (E.D. La. 1969); United States v. Richberg, 398 F.2d 523 (5th Cir. 1968); Daniel, 395 F.2d 118.
90. The three factors most often considered by the courts are: 1) the selectiveness of the group in the admission of members; 2) the existence of formal membership procedures; and 3) the degree of membership control over internal governance, particularly with respect to admission of new members and revocation of membership rights. For further discussion of these factors and other factors, see infra notes 121-52 and accompanying text.
frequently take an ad hoc approach in deciding whether a club is in fact private. This method inevitably leads to inconsistent results, as well as preemption by the judiciary of the legislature’s role, and pre-emption of the state courts by the federal courts. In several cases the decisions categorized like-factors to achieve a more systematic approach. In other cases the courts applied those factors it determined were appropriate to a given set of facts to reach an outcome.

The solution to these inconsistent results is the application of a “threshold” test. This method would require the court to decide a specific legal issue and synthesize facts to produce a “thorough,” “fair” and “well-reasoned” result. When courts engage in a complete “interest analysis” at four separate stages, those interests with legitimate goals and objectives will

91. Most recently, the Supreme Court admitted that statutory overbreadth issues must be decided on a case-by-case basis. See New York State Club Ass’n v. City of New York, 487 U.S. __, 108 S. Ct. 2225, 2235 (1988) (The Court concluded that “whatever breadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.” Id. (quoting Breadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973)).

92. “The obligation of the judiciary is to give that meaning (of ‘a place of public accommodation’) to words accorded by common experience and understanding. To go beyond this is to intrude upon the policy-making function of the legislature.” United States Jaycees v. McClure, 305 N.W.2d 764, 774 (Minn. 1981) (Sheran, J., dissenting). In a caveat to Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1204 (D. Conn. 1974), the district court stated that the “immunity” it gave to the Elks Club is limited. The court demonstrated how legislative regulations and laws will prohibit the club from acting in a discriminatory fashion. The court noted that if the Elks deviated from “approved” activities, they stood to forfeit state aid. Furthermore, if a club promoted prejudice for profit, it would cease to be exempt under Title II of the Civil Rights Act of 1964. Finally, the court stated that clubs must operate as extensions of members’ homes, not extensions of their businesses where prejudice would affect channels of commerce. Id.

93. See Kiwanis Int’l v. Ridgewood Kiwanis Club, 806 F.2d 468, 477 (3d Cir. 1986), reh’g denied, 811 F.2d 468, cert. dismissed, 483 U.S. 1050 (1987)(The construction of a New Jersey statute by a federal court “must be controlled by the New Jersey court’s construction of its own legislation.”); see also National Surety Corp. v. Midland Bank, 551 F.2d 21, 29 (3d Cir. 1977) (quoting Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) which states: “[W]hile the decrees of ‘lower state courts’ should be ‘attributed some weight . . . the decision [is] not controlling . . .’ where the highest court of the State has not spoken on the point.”).

These courts propose that an intermediate appellate court holding is merely presumptive evidence, rather than an absolute declaration, of state law. Therefore, if a state court has not thoroughly interpreted and documented the law passed by the state legislature, other courts are not bound to follow the appellate court’s “statement of law.”

94. “Synthesize” in this context means to combine all applicable factors together.

95. The “interest analysis” looks at the interests of the plaintiff, defendant, judicial system, and the public. The plaintiff’s interest is to remove discriminatory practices by clubs and organizations and to restore equal opportunity. The defendant wants the court to enforce the constitutional right of freedom of association and enjoin the plaintiff from gaining entrance to its organization. The courts’ goal is to utilize the most consistent, thorough and well-reasoned method possible to reach an equitable result and uphold the law of the land. The public wants to ensure that we continue to live in a society which abides by the Constitution and provides opportunities for everyone which are consistent and fair.
be furthered and protected. These thresholds are broken down into four categories. Under the constitutional right of freedom of association, courts must: 1) determine if the association is "intimate" or "expressive"; 2) determine if there is an applicable state statute; 3) on the conclusion that the activity is expressive, determine whether it operates as strictly "expressive" or "commercial" when looking at the surrounding facts and circumstances; and 4) define the pertinent factors and characteristics that the court will consider.

B. Threshold Analysis

1. **Threshold No.1: Whether the Particular Freedom of Association Rights Claimed by the Defendant are "Intimate" or "Expressive"

   Freedom of intimate association envelops freedoms within the penumbral constitutional right of privacy. The law recognizes that an organization cannot claim a right of association as a result of "'marriage, procreation, contraception, family relationships, and child rearing and education.'" Such intimate associations identify certain zones of privacy which receive the utmost in constitutional protection. In other words, if the association is deemed "intimate" there is no room for governmental interference.

   Freedom of expressive association, however, is not so sacred. Courts have held that freedom of association is needed to guarantee those expressed rights in the first and fourteenth amendments. However, in *Gilmore v. City of Montgomery*, the Supreme Court recognized that the "very

96. The Supreme Court has found privacy rights based on general principles inherent in the Constitution. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984) ("certain types of highly personal relationships are to be free from unwarranted state interference"); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (state abortion legislation violative of individual's privacy rights); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965) (receipt of information relating to contraceptives should be "private" in order to exercise fundamental right to make procreational choices); see also *Karst, The Freedom of Intimate Association*, 89 YALE L.J. 624, 635 (1980) (intimate associations "have a great deal to do with the formation and shaping of an individual's sense of his own identity").


98. In her concurrence, Justice O'Connor stated that "an association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members." *Roberts*, 468 U.S. at 633; see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue.") (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)).
exercise of the freedom to associate by some may serve to infringe that freedom for others." 99 Determining the limits of governmental authority over an organization's freedom to engage in particular association is not an easy task. The Supreme Court found that this process "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal [relationships]." 100 In this spectrum and subsequent enforcement of constitutional rights, complete consideration of all of the thresholds is required before reaching a decision.

2. THRESHOLD NO. 2: Is There a State Public Accommodation Statute, Human Rights Act, Civil Rights Act or Other Type of Legislation Which Purports to Ensure Equal Rights and Equal Access for All?

If the answer to this threshold question is "NO," then Title II of the Civil Rights Act of 1964, more specifically 42 U.S.C. 2000a(a)-(e), will apply. 101 If the answer is "YES," then the court must go on to ask: Is the organization seeking the exempt status a place of public accommodation within the meaning of the state statute? There are a number of approaches which the court may take to analyze this issue. Three approaches which are uniquely similar as well as different are: The Fixed Situs Approach; The Public Business Facility Approach; and The Fletcher Approach.

a. Fixed Situs Approach

In National Organization for Women v. Little League Baseball, Inc., 102 which involved a challenge to all-male baseball programs, Little League asserted that it was not a place of public accommodation within the meaning of the New Jersey statute because it did not "operate from [a] fixed parcel of real estate . . . of which it had exclusive possession by ownership or lease." 103 The court held that Little League was a place of public accommodation because the invitation to participate in its activities is "open to

99. 417 U.S. 556, 575 (1974); see also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-09 (1982) (NAACP launched a boycott, supported by speeches and non-violent picketing, of white merchants); Larson v. Valente, 456 U.S. 228, 244-46 (1982) (State Charitable Solicitations Act found to grant denominational preferences and was therefore held to violate the first amendment).


103. Id. at 530, 318 A.2d at 37.
children in the community at large, with no restriction (other than sex) whatever."\textsuperscript{104} The court stressed that the term "place" is a term of convenience, not limitation, and used to "reflect the fact that public accommodations are commonly provided at fixed 'places'."\textsuperscript{105}

Some state public accommodation statutes contain "laundry lists" of the locations wherein a membership club or like organization may not discriminate.\textsuperscript{106} A statutorily-required fixed location leaves loopholes for membership clubs to avoid following public accommodation provisions. For example, a club may adopt certain physical characteristics, not included in the expressed "list," to circumvent enforcement of the statute upon it. Internal activities, however, may not be truly private. To avoid this problem, many states have broadened their statutory language to "de-emphasize" the role of the fixed situs.

\textbf{b. The Public Business Facility Approach}

The Minnesota Human Rights Act\textsuperscript{107} defines the phrase "place of public accommodation" as "a business, accommodation, refreshment, entertainment, recreation or transportation facility of any kind . . . whose goods, services, facilities . . . or accommodations are extended . . . or otherwise made available to the public."\textsuperscript{108} Under this statute the process of

\textsuperscript{104} Id. at 531, 318 A.2d at 37-38. The court indicated that the "place" in this case is the ballfield where tryouts are arranged, instructions are given, practices are held and games are played. The court went on to note that the Little League was public in the sense that local governmental bodies make the playing areas available to local leagues without charge. \textit{Id.}

\textsuperscript{105} Id. at 530, 318 A.2d at 37. The court illustrated this point with such examples as hotels, restaurants, and swimming pools. The court also recognized that a train was a place of public accommodation even though it has a moving situs. \textit{Id.}

\textsuperscript{106} See, e.g., \textsc{Alaska Stat.} § 18.80.300 (14) (Supp. 1988). The Alaska statute defines a "public accommodation" as:

[A] place that caters or offers its services, goods or facilities to the general public and includes a public inn, restaurant, eating house, hotel, motel, soda fountain, soft drink parlor, tavern, night club, roadhouse, place where food or spirituous or malt liquors are sold for consumption, trailer park, resort, campground, barber shop, beauty parlor, bathroom, resthouse, theater, swimming pool, skating rink, golf course, café, ice cream parlor, transportation company and all other public amusement and business establishments, subject only to the conditions and limitations established by law and applicable alike to all persons. \textit{Id.}

\textsuperscript{107} \textsc{Minn. Stat. Ann.} § 363.01(18) (West Supp. 1989).

\textsuperscript{108} \textit{Id.} (emphasis added). California's and Minnesota's Public Accommodation Statutes also regulate business establishments; see supra notes 63 and 91 and accompanying text; see also \textsc{Don Wilson Builders v. Superior Court}, 220 Cal. App. 2d 77, 33 Cal. Rptr. 621 (1963).
determining if an organization (i.e. Jaycees, Kiwanis, Rotary or Lions Club) is a public business facility involves a three-prong approach.109

First, the court must address whether the national organization is a business. In United States Jaycees v. McClure,110 the Supreme Court of Minnesota analyzed how the national organization treated its current and prospective members. It concluded that the Jaycees regarded its members more as customers than as owners of the organization.111 Furthermore, the suggested sales approach to potential members ("Jaycees, the product you are selling . . .")112 turned out to be soliciting membership in an organization whose goal is to advance its members. The court concluded that the sale of individual memberships placed the national organization into a "business" classification.

Using the second prong, the court considers whether the national organization is a public business. Courts have consistently used two criteria to decide whether a group is private or public: 1) selectiveness of the organization in the admission of members; and 2) limits on the size of membership.113 A national organization whose only act of selectiveness is categorizing its members into one of two groups (i.e. associate membership versus regular membership) is not legitimately selective. The initial process of admitting members into the organization must be selective. Internal procedures thereafter are irrelevant. The McClure court found that more than eighty percent of a Jaycees officer's time is devoted to "spurring" the sale of memberships. Also, the Committee Chairman's Workbook declared that the "Jaycees are in the People business — not the project business."114 Additionally, the court determined that more than half of the organization's "achievement" awards are based, in part, on the number of new members recruited. Thus, according to the Minnesota Supreme Court, an unselective, energetic sale of memberships will undoubtedly place an organization into a public business classification.115

The third and final consideration is whether the organization is a public business facility. The term "business facility" generally means a business at

109. For a complete analysis of this three-prong "public business facility" approach, see United States Jaycees v. McClure, 305 N.W.2d 764, 768-74 (Minn. 1981).
110. 305 N.W.2d 764 (Minn. 1981).
111. Id. According to the McClure court, the Jaycees' Officers & Directors' Guide referred to members as the officers' customers. Id.
112. Id. at 769 (citing the Jaycees' Recruitment Manual) (emphasis added).
113. See Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968); Cornelius, 382 F. Supp. 1182. For a more elaborate discussion on these two factors, see infra notes 139-47 and accompanying text.
114. McClure, 305 N.W.2d at 771 (quoting the Committee Chairman's Workbook) (emphasis in original).
115. For the court's analysis of these two factors, see Id. at 770-71.
a physical location within the state which invites the general public and solicits members from a fixed spot. In *McClure*, the court creatively defined "public business facility" as follows: "Leadership skills are 'goods,' business contacts and employment promotions are 'privileges' and 'advantages,' and each site in the State of Minnesota where the sale of those 'goods' is solicited, promoted, and consummated is unquestionably a 'business facility.'"116 In sum, a meeting place wherein an unscreened, unselective, and unlimited number of persons is invited constitutes a public business facility.117

c. The Fletcher Approach

In a case before it, the Massachusetts Commission on Discrimination applied a special test to determine whether a club or organization was a place of public accommodation. Its conclusions were produced in *Fletcher v. United States Jaycees*.118 In the first step, the Commission looked to see if the organization's offices and activities were located and generated from a certain building. Second, the organization had to demonstrate that membership acceptance was in fact selective rather than a "community-wide" attempt to recruit, and that the organization was a self-supporting group rather than one which relied on public funds. Finally, a location must offer a service to the public to be a public accommodation. The public offering may be indirect. For example, an organization which offers to its members personal development of their business and professional careers, indirectly benefits the public.119 In theory, people who belong to these clubs will offer to the public a more innovative and educated product.

116. *Id.* at 772. The court relied on *Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33, for its reasoning regarding the situs of the club. The court illustrated several "mobile" locations which were business facilities: door-to-door and company-to-company solicitation of members for the organization. Cf. *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 137 (1969) (armored car picking up merchants' cash boxes and checks is both a branch bank and a place of business).

117. It is interesting to note that courts since 1898 have defined the term "facility" even more liberally than *McClure*. For a discussion of other definitions of this term, see *Cheney v. Tolliver*, 234 Ark. 973, 977, 356 S.W.2d 636, 639 (1962) ("facilities" not restricted to inanimate things); *State ex rel. Knight v. Cave*, 20 Mont. 468, 52 P. 200 (1898) (teachers can be considered "facilities"); *Nekoosa-Edwards Paper Co. v. Railroad Comm'n*, 193 Wis. 538, 547, 213 N.W. 633, 636 (1927) ("facilities" include human agencies).

118. 3 MDLR 1036 (1981), cited in *Goodwin, supra* note 16, at 275 n.264. For a complete analysis of this decision, see *Goodwin, supra* note 16, at 275-79.

119. *Goodwin, supra* note 16, at 275-76. It is interesting to note that the public accommodation statute of Massachusetts, *Mass. Gen. Laws Ann.* ch. 272, § 92A (West Supp. 1989), does not have a "private club" exemption. Massachusetts' courts use factors invoked by states with such exemptions to determine whether a "place" in their state is a public accommodation.
If the court determines, by applying one of the above tests, or a different test, that the club fits the definition of a public accommodation, then it has the duty to require the organization to comply with the statute.\textsuperscript{120} If such a determination is not made, then, before the court considers whether a particular association is sufficiently private, it must determine whether the form of activity is "expressive" or "commercial." Failure to determine if the organization's activity is "commercial," before analyzing the objective factors, results in inconsistent results and a waste of judicial time.

3. THRESHOLD NO.3: Whether the Type of Association in Which the Organization is Engaged is "Commercial" or "Expressive?"

The third threshold provides a significant focus for the court's overall consideration of the possibility of the organization qualifying as a private club. Defining the organization's type of expression at the outset is important because it affects the "tests" and "factors" which the court will apply to reach its final determination.\textsuperscript{121}

a. Choosing the Right Market

It is important that an organization choose its market. Once it enters the marketplace of commerce, it loses the complete control and constitutional protection over its membership that it would otherwise have if it restricted its activities to the "marketplace of ideas."

Business is often conducted and professional contacts initiated and renewed at private clubs. Sensitive to these activities, "public accommodation" legislation strives to prohibit discrimination in such clubs wherein benefits are given to business entities and to persons other than their own members. Such generosity leads to forfeiture of private club status.\textsuperscript{122}

\textsuperscript{120.} When a court decides that the club fits within the definition of "public accommodation," the defendant-club often relies, in the alternative, on the due process concerns of the void-for-vagueness doctrine which strikes down statutes that are unconstitutionally vague and overbroad. For further discussion of the void-for-vagueness doctrine, see Roberts, 468 U.S. at 629-31; Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (in the context of a penal statute); Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33.

\textsuperscript{121.} For a complete discussion on "expressive" association, see supra notes 34-36 and accompanying text.

\textsuperscript{122.} For an illustration of such legislation, see NEW YORK CITY, N.Y., LOCAL LAW 63 (1984) (cited in New York State Club Ass'n, 69 N.Y.2d at 212, 505 N.E.2d at 915, 513 N.Y.S.2d at 350).

The New York City Council concluded that the "denial of access to club facilities constitutes a significant barrier to the professional advancement of women and minorities since business transactions are often conducted in such clubs, and personal contacts valuable for business purposes,
Courts have recognized that business advantages afforded by members in an organization are not merely incidental. Oftentimes, business concerns are the motivating factor in joining a club because business opportunities are gained by the members and capitalized upon by them. For example, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court noted with approval the California Court of Appeal's finding that members receive "copies of the Rotary magazine and numerous other Rotary publications, are entitled to wear... the Rotary emblem, and may attend conferences that teach managerial and professional techniques."  

b. "Affecting Commerce"

Title II of the Civil Rights Act of 1964 provides a very broad definition of "affecting commerce." Courts have regularly held that a profit-making establishment without member-ownership or regular dues is not exempt from the public accommodations act on the ground that it is more like a commercial enterprise than a bona fide private club. Moreover, in the landmark case of *Daniel v. Paul*, Justice Black, in his dissent, warned that an extension of the principle of "commerce" set forth by the majority would "[stretch] the Commerce Clause so as to give the Federal Government complete control over every little remote... place of recreation in every nook and cranny..." Not all courts have followed the majority in *Daniel*. In *Graham v. Kold Kist Beverage Ice, Inc.*, the court actually held that a "corporation engaged in the wholesale business of selling commercial equipment at whole-
sale for use in retail stores . . . ’ is not engaged in the sale of ‘public’ goods, is not a ‘public accommodation’ and does not affect commerce.131

c. Regulation for Commercial Association

There is only minimal constitutional protection of the freedom of commercial association. Some constitutional protection of commercial speech is available, however, for purposes of promoting a commercial transaction with the speaker.132

Federal courts generally apply minimal first amendment protection to commercial activity; a statute which infringes upon commercial activity will be upheld if it is rationally related to the end result.133 In other words, government regulation of commercial recruitment of new members, stockholders, customers, and membership dues is valid ‘if rationally related to the government’s ends.’134

Deciding just how much of an association’s involvement in commercial activity is enough to restrict the association’s first amendment right to control its membership cannot be easily reduced to a formula. In reality even the most expressive of associations is likely to affect commerce. Justice O’Connor, in her concurring opinion in Roberts v. United States Jaycees,135 stated her view as follows:

[A]n association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activity, when, and only when, the association’s activities are not predominantly the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its member-

131. Id. at 1042, 607 P.2d at 762. The wholesaler in this case agreed to sell its ice machines to plaintiff and then refused because plaintiff was black.

132. The following illustrations may clarify: Practicing law to advance social goals may be protected speech, NAACP v. Button, 371 U.S. 415, 429-31 (1963), but ordinary commercial law practice is not protected, Hishon v. King & Spalding, 467 U.S. 69, 78 (1984). In addition, group refusal to act for political purposes may be protected speech, but a similar boycott for purposes of maintaining a cartel is not. Claiborne Hardware Co., 458 U.S. at 913-14.

For a detailed explanation of commercial association and examples of its application to the field of law and to labor union activity, see Roberts, 468 U.S. at 631-40 (O’Connor, J., concurring in part and concurring in the judgment).

133. Roberts, 468 U.S. at 634 (O’Connor, J., concurring in part and concurring in the judgment).

134. Id. at 635. State regulations of purely expressive activity must be reasonable, content-neutral regulation of the time, place, and manner of the organization’s relationship with its members, and be narrowly tailored to serve a compelling state interest. Id. at 634; see also Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 960-61 (1984); Village of Schaumburg, 444 U.S. at 636-37.

135. 468 U.S. 609 (O’Connor, J., concurring in part and concurring in judgment).
ship will necessarily affect, change... or silence one collective voice that would otherwise be heard.\textsuperscript{136}

It is evident that courts must distinguish non-expressive (i.e. commercial) association from expressive association and, therefore, recognize that the former lacks the constitutional protections possessed by the latter. If the organization is to maintain its private club status, it must demonstrate compliance with the tests and standards which are outlined in the next section.

4. **THRESHOLD NO.4: Whether the Court Performed a Thorough Analysis of the Public Club Characteristics?**

To determine whether a particular organization is sufficiently private to receive constitutional protection, a court must consider a variety of factors, some of which carry more weight than others. The judiciary has examined only a few factors — selectivity, size, and control — to determine if an organization deserves private club status. This method bypasses the critique of other very important considerations which would lead to a more sound and thoroughly reasoned decision. The results of a more complete and detailed application of factors would be: greater public approval, fewer appeals, advance notice to defendant-organizations of the requirements to be met, and stronger foundation upon which plaintiffs can base their complaints.\textsuperscript{137} This Comment will present an illustrative analysis of three such factors. There are, of course, others which courts must not ignore.\textsuperscript{138}

\textit{a. Inquiry Into Membership Requirements}

The most important point of inquiry is into the membership policies of the alleged private club. In other words, a court must dissect factors which determine whether the membership is genuinely \textit{selective} on some sound

\begin{itemize}
\item \textsuperscript{136} Id. at 635-36.
\item \textsuperscript{137} For an excellent analysis of the relevant inquiries which the court should make in each instance, see United States v. Jordan, 302 F. Supp. 370, 375-76 (E.D. La. 1969).
\item \textsuperscript{138} This Comment will focus on “membership practices,” “size,” and “manner and purpose of operations.” Other important factors include: formalities which the club observes (i.e. bylaws, annual meetings, maintenance of minutes of such meetings), general characteristics which private clubs may or may not possess (i.e. non-profit versus profit oriented nature, public advertisements, outside sponsorships, listing in the phone book, special license and tax benefits), and whether the club engages in practices discouraging minorities from trying to join with a comparison of private club with like places in the near vicinity (i.e. purposes, activities, opportunities offered by each). For a thorough analysis of factors, see Jordan, 302 F. Supp. at 370.
\end{itemize}
basis. If there are no established criteria for selecting members, courts are reluctant to accept the claim of private club status.\textsuperscript{139} An important aspect of this broad category deals with the amount of control the members have over admission, recommendation, and revocation processes.\textsuperscript{140} It is essential that the court look for a well-organized and structured admission system. Certain issues should be addressed each time the court reviews a claim: Does the organization place greater emphasis on quantity or quality of members?\textsuperscript{141} Does a representative "committee," chosen by the members, select new members? Do the members receive notice of pending membership applications and rejections? Do existing members provide personal recommendations to applications? If so, are existing members permitted to recommend and/or endorse minorities? Is there a "disciplinary committee" which, with the use of a set of rules, reviews problems and makes appropriate revocation decisions? Are there any genuine qualifications for membership?\textsuperscript{142}

A second aspect of "control" is related to who regulates the operations of the establishment, and who or what provides the funds for such operations. Courts must determine whether the members own the club's property, and whether the members retain the revenue. If the club is operated for a profit (i.e. a commercial enterprise operated for the benefit of one person or select group), then it is not a private club.\textsuperscript{143}

The most direct evidence of a club's selectivity and control is its past record of rejections and acceptances. Minimum refusal of applicants with particular backgrounds constitutes prima facia evidence of non-selectivity. For example, the Supreme Court examined the practices of the United States Jaycees and decided that they were unselective. In 1981, the United States Jaycees organization had about 295,000 members (regular and associate) in 7400 local chapters. There were no female regular members. Yet,


\textsuperscript{140} Another aspect of control deals with who controls the operations of the establishment. Courts should look at whether the members exercise complete control over the operations. In other words, records of the organization should reveal the owner of the property which houses the facilities, how revenue is spent, if regular dues are paid, and if the organization receives specific tax breaks due to its status.

\textsuperscript{141} Kiwanis Int'l, 806 F.2d at 474 (citing McClure, 305 N.W.2d at 771).

\textsuperscript{142} Such qualifications may contain the following: residence in a particular location, position in a particular social class, good reputation or character, balance between number of applicants rejected and number accepted. For further illustrations, see 302 F. Supp at 375.

almost every male member who applied for admission was accepted. Out of approximately 11,900 associate members, only two percent were women.  

b. Inquiry Into Size of Organization

The size of the organization's membership usually sets the stage for judicial review of the entire operation. Courts are more apt to grant private club status to a small, stable organization with a cap built into the acceptance program. Ridgewood Kiwanis Club, a local subsidiary of Kiwanis International, was granted immunity by the court due to its size and practices to remain small. The local club was composed of only twenty-eight members, ten of whom were members for more than twenty years. Every prospective member had to be sponsored by an existing member. Although the international organization encouraged large-scale solicitation of new members, the "mailings" were sent only to known prospects. The largest membership drive performed by the local club sought only to elicit interest in the club, not to promise membership.

Contrast Kiwanis International with Board of Directors of Rotary International v. Rotary Club of Duarte, where the Supreme Court was asked to uphold California's Unruh Civil Rights Act which prohibited local clubs from excluding women. The Court reviewed the evidence and concluded that the local club was not in fact "private." It based its conclusion on the following factors: 1) the size of the local clubs across the country ranged from approximately twenty members to more than nine hundred members; 2) there existed no upper limit on the membership; 3) the annual attrition rate in the local clubs was approximately ten percent. To compensate for loss in members, the local clubs were "instructed to 'keep a flow of prospects coming' to make up for" the loss and enlarge the base.

Another consideration relevant to size is the limitation of membership in any way other than its relationship to the size of the facility. Much can be inferred from comparing the difference between the size of the organization and the pool from which the members were drawn.
c. Manner in Which the Organization Was Created

The courts must consider the fact that organizations may engage in certain activities in order to qualify for private club status. In *United States v. Jordan*, 148 "Landry's Fine Foods and Restaurant" converted itself into "Landry's Private Dining Club, Inc." in order to discriminate against blacks. The District Court of Louisiana determined that the purpose of the converted private club was no different than the purposes of the restaurant which preceded it. Furthermore, membership in the converted club was solicited in an unrestricted and nonselective manner from only white customers of the former restaurant. 149 The court examined the alleged reasons for the "conversion" to determine whether the alleged purpose of the club, a desire to keep out trouble makers and "riff-raff," could be accomplished through less restrictive means. 150 It held that the converted club did not qualify as an exemption, granted injunctive relief, and forced the club to restore an open-door policy. 151

In *Kiwanis International*, the court of appeals disagreed with the district court's conclusion that the club's practice of conducting meetings in public restaurants qualified it as a public accommodation. It concluded that the district court failed to look at the subject matter of the meetings or at the group which attended these meetings. The court of appeals held that membership organizations do not become public accommodations just because they conduct meetings in public places. Further, instead of placing emphasis on where the gathering takes place, greater scrutiny need be given to whether the invited members came from an unrestricted and unselected pool and whether the meeting is in fact open to the public at large. 152

V. CONCLUSION

Freedom of association is currently being tugged in two directions by conflicting interests. 153 In one direction, individuals who are striving to-

149. Id. at 373.
150. Id. at 376-78; see also Richberg, 398 F.2d at 527-29 (A cafe cannot, by drafting itself a set of bylaws, become an exempt club. In determining whether the cafe has been, in fact, transformed into an exempt club, the court must consider such matters as the similarity of operations before and after the club's transformation, whether all profits from the operation go directly to benefit the owner, whether there is total absence of club meetings, and whether there is a lack of genuinely collective action surrounding the acceptance of new members.).
152. Kiwanis Int'l, 806 F.2d at 474-75; see also Little League Baseball, Inc., 127 N.J. Super. at 522, 318 A.2d at 33.
153. See Goodwin, supra note 16, at 270 (freedom of association is restricted by "counter-vailing interests").
ward equal access and opportunity want courts to prohibit private club discrimination. In the other direction, clubs and organizations claim their constitutional right of association protects their business, political, social, cultural, and educational goals.

It is recognized that some private clubs challenged under public accommodation statutes are superficial shams and can easily be categorized as public accommodations. If this were the case for all clubs, courts could easily draw a line between shams and truly private organizations to determine eligibility for the exemption. However, this is not the case. There have been, are currently, and always will be those close cases which will require courts to focus conceptually on the nature of the private organization.

Application of an ad hoc approach to determine the status of the close cases has lead to inconsistent results. The solution is a comprehensive scheme of thresholds which balance the rights of the group against the rights of the individual. The threshold method presented herein requires the court to concentrate on one legal issue at a time and synthesize its facts to produce a thorough and well-reasoned result. In addition, both federal and state legislatures can set forth stricter requirements that must be fulfilled to qualify as a private club. The approach embodied in New York City's Local Law No. 63 provides an excellent model for other jurisdictions seeking to balance the individual's right of equal access to public accommodations against the club's freedom of association and right to selective membership.154

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154. For a discussion of the balancing of interests, see Note, supra note 7.