PRYING OPEN THE CLUBHOUSE DOOR: DEFINING THE "DISTINCTLY PRIVATE" CLUB AFTER *NEW YORK STATE CLUB ASSOCIATION V. CITY OF NEW YORK*

The door to the inner sanctum of the venerable private club recently opened a crack, allowing entrance to women, long excluded from membership. The United States Supreme Court in *New York State Club Association v. City of New York*[1] held constitutional an ordinance[2] that restricted the scope of the "private club" exemption of New York City's public accommodation law[3] and thereby prohibited the exclusion of women from membership in certain private clubs. The Court recognized that in some circumstances a compelling state interest in eradicating invidious discrimination justifies interference with an individual's right of association.[4] *New York State Club*, however, did not define a "distinctly private"[5] club, and, therefore, left open the question of when a private club might discriminate in order to protect the right of association.[6] The

1. 108 S. Ct. 2225 (1988).

2. Local Law No. 63 of 1984, § 1, app. 14-15, *quoted in New York State Club*, 108 S. Ct. at 2230-31.

3. This ordinance amended the city's Human Rights Law, which prohibits discrimination based on race, creed, color, national origin, or sex by "any place of public accommodation, resort or amusement." N.Y.C. ADMIN. CODE § 8-107(2) (1986). The Human Rights Law covers such places as hotels, restaurants, retail stores, hospitals, laundries, theaters, parks, public conveyances, and public halls. N.Y.C. ADMIN. CODE § 8-102(9) (1986). The law also exempts from its coverage various public educational facilities and "any institution, club or place of accommodation which proves that it is in its nature distinctly private." *Id.*

The Supreme Court in *New York State Club* recognized that "[t]he basic purpose of the amendment is to prohibit discrimination in certain private clubs that are determined to be sufficiently 'public' in nature that they do not fit properly within the [private club exemption]." *New York State Club*, 108 S. Ct. at 2230. The amended private club exemption provides:

> An institution, club or place of public accommodation shall not be considered in its nature distinctly private if it has more than 400 members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business . . . .

N.Y.C. ADMIN. CODE § 8-102(9) (1986).

4. *New York State Club*, 108 S. Ct. at 2233-34.

5. *See supra* note 2.

6. The Supreme Court has failed to resolve this issue on more than one occasion. In Roberts v. United States Jaycees, 468 U.S. 609 (1984), the Court held simply that Minnesota's public accommodation law—by compelling acceptance of women as members—did not infringe on Jaycees members' freedom of intimate association or freedom of expressive association guaranteed under the first amendment. It did not answer how far a statute or ordinance could go in such a requirement.

opinion suggests, nonetheless, that the Court is willing to defer to states' good faith efforts to define the "private club."

This Note will examine the conflict between the first amendment right of freedom of association and the right of freedom from discrimination.[7] Part I discusses the role of private clubs in the United States. Part II reviews the first amendment right of association. Part III examines the state's compelling interest in eradicating discrimination and the Supreme Court's analysis of state public accommodation laws in the private club context. Part IV looks at judicial approaches to identifying the private club and proposes that states adopt a four-part analysis for defining the private club.

I. THE ROLE OF THE PRIVATE CLUB

While civil rights legislation may have aided in providing minorities and women equal access to housing and jobs,[8] subtle, invidious discrimination continues in the United States today.[9] Lawmakers and judges

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Similarly, in Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987), the Court stated that it had "no occasion in this case to consider the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country." *Id.* at 547 n.6.

7. While the freedom of association receives constitutional protection from the first amendment, *see infra* notes 25-30 and accompanying text, the freedom from discrimination does not, unless a court finds that state action exists. This requirement lies in the language of the fourteenth amendment: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIX, § 1. *See, e.g.*, Moose Lodge v. Irvis, 407 U.S. 163 (1972) (Court found no state action satisfying the fourteenth amendment's equal protection clause, and therefore did not reach the issue of when a private club is constitutionally barred from discriminating). As a result of this dichotomy, the smaller a club is, the more likely it will be able both to claim the right to associate and to avoid the duty of equal protection. The issue this Note addresses is when the state can impose its own equal protection law—a nondiscrimination law—on private clubs without interfering with their constitutional right to associate.

8. *See* Fair Housing Act, 42 U.S.C. §§ 3604-06 (1982); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-2(a)-(d) (1982).

9. This Note focuses on the problem of sex discrimination in private clubs. This is not to deny that discrimination based on race and religion continues in this country. However, as one commentator observed:

> The same men who have brought male Jewish leaders into their clubs as members, and who would be appalled if Black male colleagues whom they invited to their clubs as guests were directed to enter through a side door or barred from walking on the stairs, view with equanimity and frequently vote to perpetuate both the exclusion of women as members and their second-class treatment as guests.

L. SCHAFRAN, WELCOME TO THE CLUB! (NO WOMEN NEED APPLY): REMOVING FINANCIAL SUPPORT FROM PRIVATE CLUBS THAT DISCRIMINATE AGAINST WOMEN 4-5 (1981). *See also* Note, *Sex Discrimination in Private Clubs*, 29 HASTINGS L.J. 417, 418 (1977) ("Those 'sacred' men's bars and lunchrooms are the embodiment of a strong idea: that discrimination on the ground of sex

have recognized race discrimination as a social evil and have taken steps toward its eradication; but they have done far less to erase sex discrimination.[10] In the United States today, prohibitions of race discrimination in public accommodations without counterpart prohibitions of sex discrimination exist at the federal[11] and state level,[12] as well as within most

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is reasonable even natural—not as harmful, somehow, as racial or religious bias.") (quoting Harkins, *Sex and the City Council*, N.Y. MAG., April 27, 1970 at 10).

10. *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (1982) (prohibiting race but not sex discrimination in any place of public accommodation). The Supreme Court treats state classification by race as "suspect" and therefore subject to strict scrutiny judicial review. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967). Sex discrimination, on the other hand, receives at best intermediate scrutiny judicial review by the Court. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976). Perhaps not coincidentally, many lawmakers and judges belong to private clubs that exclude women. Two justices of the United States Supreme Court only recently resigned from all-male clubs. When he became a candidate for the Supreme Court, Justice Anthony M. Kennedy resigned from the Olympic Club in San Francisco and the Del Paso Country Club in Sacramento. N.Y. Times, Dec. 2, 1987, at A26, col.1. Justice Harry A. Blackmun resigned from the Cosmos Club in the District of Columbia in February 1988. N.Y. Times, Feb. 12, 1988, at B6, col.1. The Cosmos Club since has voted to admit women. St. Louis Post Dispatch, June 28, 1988, at A1, col.2.

As one commentator noted, "[i]f a Federal judge with life tenure is unwilling through his private conduct to condemn . . . discrimination, others cannot be expected to do so." Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321, 404 (1983) (quoting *Selection and Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. 253, 328 (appendix on discrimination in private clubs) (statement of Professor Eric Schnapper)).

For a thorough discussion of steps to eradicate sex discrimination, see Burns, *supra*, who recommends:

> [T]hese "social" clubs should not be exempted from public accommodation laws. Nor should they be exempted from state and local regulations barring discrimination. They should not receive tax exemptions, and members should not be permitted to deduct club charges as business expenses. Employers who reimburse employees at discriminatory clubs should be subject to employment discrimination legislation, and the clubs themselves ought to be liable for aiding and abetting such discrimination. Finally, club members should be encouraged to take voluntary action, both individually and collectively to combat discrimination.

Id. at 324-25.

11. Title II of the Civil Rights Act of 1964 provides:

> 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.

42 U.S.C. § 2000a(a) (1982). The absence of sex from the list stands in sharp contrast to Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e-2 (1982).

Federal legislation may impose on public accommodations that either affect commerce or are supported by state action. The state action requirement has been a significant obstacle to the application of 42 U.S.C. § 2000a to clubs. *See, e.g.*, New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 858-59 (2d Cir. 1975) (no state action despite receipt of substantial government funding). For a detailed discussion of equal protection and state action, see *infra* note 66.

Title VII of the Civil Rights Act protects against sex discrimination in employment. *See* 42

state constitutions.[13] This situation suggests that discrimination against women remains legally and socially acceptable.

The right to be free from discrimination in social, business, and political settings should stand as a hallmark of equality.[14] Many business, service, and social clubs across the country, however, continue to exclude women from membership.[15] The denial of access to women may perpet-

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U.S.C. § 2000e-2 (1982). For a discussion of Title VII's interrelation with state regulations and its effect on employment discrimination in private clubs, see Garcia, *Title VII Does Not Preempt State Regulation of Private Club Employment Practices*, 34 HASTINGS L.J. 1107 (1983). *See also* Guesby v. Kennedy, 580 F. Supp. 1280, 1284 (D. Kan. 1984) (right of association more limited in employment context than in membership context); Bohemian Club v. Fair Employment & Hous. Comm'n, 187 Cal. App. 3d 1, 231 Cal. Rptr. 767 (Cal. Ct. App. 1986) (social clubs not exempt from Fair Employment and Housing Act; male gender not bona fide occupational qualification).

12. Twelve states do not proscribe sex discrimination in places of public accommodation. Of these, Alabama, Arkansas, Georgia, Mississippi, North Carolina, South Carolina, Texas, and Virginia have no law prohibiting discrimination in public places based on race, religion or sex. For a list of state statutes banning sex discrimination in places of public accommodation, see *infra* note 70.

13. Only sixteen states have passed some form of equal rights amendment. *See* ALASKA CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAWAII CONST. art. I, § 4; ILL. CONST. art. I, § 118; MD. CONST., DECLARATION OF RIGHTS, art. XLVI; MASS. CONST. pt. 1, art. I; MONT. CONST. art. II, § 4; N.H. CONST. pt. 11, art. II; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28; TEX. CONST. art. I, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § a; WYO. CONST. art. I, §§ 2-3; *id.*, art. VI, § 1. Only these amendments, interpreted as not requiring state action, would apply to public accommodations.

14. *See* J. ELY, DEMOCRACY AND DISTRUST 87-88 (1980) (advocating judicial decisions that facilitate the representation of minorities in the political process); Burns, *supra* note 10, at 321-22 (discrimination in employment setting shatters aspirations and produces incomplete lives); Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 3 SW. U.L. 237, 271 (1982) (deprivation of right to participate fully in certain institutions diminishes self-image); *cf.* Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (separation of blacks in education negatively affects their self-image and achievement).

15. *See generally* Burns, *supra* note 10, at 323. However, some associations have opened their doors to women voluntarily. Two days before the *New York State Club* decision, the Washington, D.C., Cosmos Club voted to end its 110-year male-only membership policy. St. Louis Post Dispatch, June 28, 1988, at A1, col. 2. The Lions Club, the Kiwanis Club, the California Club in Los Angeles, the University Clubs of Pasadena, California, and Providence, Rhode Island, Philadelphia's Union League, and the Detroit Athletic Club all have voted to admit women. N.Y. Times, July 16, 1987, at 13, col.1. *See also* St. Louis Post Dispatch, Sept. 17, 1988, at A1, col.2 (St. Louis' Missouri Athletic Club voted to admit women members, ending its 85-year male-only policy).

Many of the oldest and most influential clubs, however, have refused to follow the trend toward opening access to private clubs. The Bohemian Club filed suit to enjoin enforcement of California's Unruh Civil Rights Act. Kay, *Commentary: Private Clubs and Private Interests: A View from San Francisco*, 67 WASH. U.L.Q. 855 (1989). Many clubs moved to "privatize" by changing club policies so as to avoid the reach of antidiscrimination laws. *Id.* at 858. For example, clubs try to preserve their private status by refusing corporate checks for payment and limiting the number of guests. *Id.* Even after admitting women members, clubs may not accept them very congenially. For example, at one influential San Francisco club, in response to a judge's order that the club cease its discrimina-

uate a societal view of their inferiority to men.[16] More immediately, exclusion of women from business-oriented clubs impedes women from gaining equal opportunities in commercial and community activities.[17] Through these powerful clubs, men make valuable business, political and financial contacts.[18] Further, some clubs appear to be training grounds for new government and corporate leaders.[19] Exclusion of women from membership in private clubs, therefore, effectively forecloses opportunities for business and professional advancement and community leadership.[20]

II. FREEDOM OF ASSOCIATION

The private club debate presents a quandary: the exercise by some of

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tory practices regarding facilities, several male members demonstrated their opposition by swimming nude in the club's newly coed pool. *Id.* at 860.

16. One commentator noted that exclusion from these informal centers of power "reinforces the perception that women are not appropriate participants where formal power is exercised." Schafran, *supra* note 9, at 3-4 (quoting Karen Burstein, former New York State Senator and Public Service Commissioner). Schafran went on to assert that private club discrimination "negatively influences the acceptance of women by men as peers and colleagues." *Id.* at 5. *See also supra* note 14.

17. The New York City Council recognized this problem when it amended the city's Human Rights Law:

> Although city, state and federal laws have been enacted to eliminate discrimination in employment, women and minority group members have not attained equal opportunity in business and the professions. One barrier to the advancement of women and minorities in the business and professional life of the city is the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed.

Local Law No. 63 of 1984, § 1, app. 14-15, *quoted in New York State Club*, 108 S. Ct. at 2230 (1988).

18. Burns, *supra* note 10, at 325-34.

"To the extent that club membership results in tangible professional benefits, such as enhanced professional status, mobility and contacts, would-be members are denied economic and employment interests." Goodwin, *supra* note 14, at 270.

19. *See* Note, *supra* note 9, at 419-20 & n.10 (listing members of one private club and their high positions in the corporate and government sectors).

20. *See* E. LYNTON, BEHIND CLOSED DOORS: DISCRIMINATION BY PRIVATE CLUBS: A REPORT BASED ON CITY COMMISSION ON HUMAN RIGHT HEARINGS 3 (1975). *See also* Kay, *supra* note 15, at 859.

Recognizing the value of "networking," some business and professional women have founded their own clubs. Most encourage men to join because "[m]en often are the ones with the connections." Boughton, *Club Connections*, WORKING WOMAN, Jan. 1984, at 43. Some clubs, such as the Women's Athletic Club in Boston, exclude men from membership. *See* Burns, *supra* note 10, at 332 n.35. Although the legality or constitutionality of regulating such clubs is beyond the scope of this Note, it is likely that membership policies of all-female organizations would be analyzed differently from the policies of all-male organizations. *See generally* Feldblum, Krent, & Watkins, *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171 (1986).

the club's constitutional right of association[21] clashes with individuals' rights to be free from discrimination.[22] Club members argue that the first amendment right of association carries with it a negative right *not* to associate.[23] But those excluded from membership argue that discriminatory membership policies burden their ability to achieve prominence in their professional lives.[24]

Although the Constitution does not explicitly mention a right of freedom of association, the Supreme Court has held it derives by implication from the first amendment rights of freedom of religion, speech, press, assembly, and petition.[25] Within the freedom of association, the Court has recently distinguished the right to intimate association and the right to expressive association,[26] as well as recognized a corresponding right

21. For an analysis of a private club's right of association, see Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545-49 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). For a detailed discussion of freedom of association and discrimination in private clubs, see Note, *Discrimination in Private Clubs: Freedom of Association and Right to Privacy*, 1970 DUKE L.J. 1181 [hereinafter Note, *Private Social Clubs*]. *See generally* Note, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460 (1970) [hereinafter Note, *Constitutional Conflict*].

22. *See supra* notes 8-14 and accompanying text.

23. *See infra* notes 48-55 and accompanying text. *See generally* New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2234-35 (1988); *Rotary Club*, 481 U.S. at 545; *Roberts*, 468 U.S. at 617, 627.

> The associational rights which our system honors permits all white, all black, all brown and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all Agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting), *quoted with approval in* Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974).

24. *See supra* note 16 and accompanying text.

25. The first amendment 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 of the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 483 (1964) (right of association is necessary to make meaningful first amendment's express guarantees).

26. The Supreme Court recognizes two aspects of the right of association. First, the Court considers a right of intimate association as connected to the fundamental right to privacy. *See infra* notes 46, 47 and accompanying text. The Court views the family as exemplary of the type of association protected by this right. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984). Second, the Court recognizes a right of expressive association, which entitles individuals to associate to pursue goals that the first amendment expressly and independently protects. *Id. See infra* notes 37-45 and accompanying text.

For further discussion of the right of association, see generally J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 947-52 (3d ed. 1986). These authors identify a third type of association—the right of economic association. Individuals might join together to achieve economic or other goals unconnected to any fundamental constitutional right. The ability to control one's eco-

not to associate.[27] The Court, however, is reluctant to construe broadly the right of freedom not to associate.[28]

The Court formally recognized a constitutional right of freedom of association more than thirty years ago in *NAACP v. Alabama ex rel. Patterson*.[29] The Court acknowledged that the freedom to associate for the advancement of beliefs and ideas is an inseparable aspect of the liberty protected by the fourteenth amendment due process clause.[30]

In *Patterson*, Alabama demanded that the NAACP disclose the names and addresses of all its members in the state.[31] The NAACP showed that past disclosure had led to public hostility, threats, and loss of jobs to its members.[32] The Court found the state's interest in forcing the NAACP to disclose membership not sufficiently compelling to justify infringement on the members' freedom of association.[33] The Court emphasized that an organization has a right to assert, on behalf of its members, the same first amendment rights as the members themselves may assert.[34] Further, the Court held that privacy[35] in group association often may be

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nomic associations is part of the liberty protected by due process. *Id.* *See infra* notes 37-45 and accompanying text.

27. *See infra* notes 48-55 and accompanying text.

28. For example, "forced associations" must occur in public places. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 775 (1961) (Douglas, J., concurring) ("Some forced associations are inevitable in an industrial society. One who of necessity rides buses and street cars does not have the freedom that John Muir and Walt Whitman extolled.").

29. 357 U.S. 449 (1959).

30. *Id.* at 460-61.

31. *Id.* at 451.

32. *Id.* at 462.

33. The Court distinguished the NAACP from an organization with illegal ends, such as that in Bryant v. Zimmerman, 278 U.S. 63 (1928). In *Bryant*, the Court upheld a New York state requirement of disclosure of the membership roster of all unincorporated associations, which required an oath as a condition to membership, as applied to the Ku Klux Klan. *See Patterson*, 357 U.S. at 465-66.

The *Patterson* Court struck a balance between the state's interest in obtaining the names of the NAACP's members and the members' right of freedom of association. The Court found that the State failed to show a compelling justification for the likely deterrent effect of disclosure on the free enjoyment of the right to associate. *Id.* at 460-66.

34. *Id.* at 459.

35. The "right to privacy" varies in meaning. Justice Douglas, in Griswold v. Connecticut, 381 U.S. 479, 484 (1965), found the "penumbras" of several express guarantees of the Bill of Rights established a right to privacy. Specific provisions of the Constitution that support the right to privacy include: the first amendment (freedom of religion, speech, press, and assembly, and right to petition the government); the third amendment (prohibiting quartering of militia); the fourth amendment (freedom from unreasonable searches and seizures); the fifth amendment (freedom from forced self-incrimination); and the ninth amendment (retention by the people of rights not delegated). *Id.*

Under the common law, the right of privacy encompasses a freedom from intrusion by others into

"indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[36]

A. Expressive Association

Expressive association, as protected in *Patterson*, is a necessary avenue for pursuing activities expressly protected by the first amendment.[37] First amendment values such as "an individual's freedom to speak, to worship, and to petition the government for the redress of grievances" risk state interference unless the Constitution guarantees "a correlative freedom to engage in group effort toward those ends."[38] The Court thus must recognize a group right to associate freely for expressive purposes to protect fully an individual's freedom of expression.[39]

The government, however, may infringe on the right to associate for expressive purposes in certain circumstances.[40] First, regulations must serve compelling state interests unrelated to the suppression of ideas.[41] Second, means "significantly less restrictive" toward associational freedoms must be unavailable.[42] The Supreme Court in *New York State Club* recognized that a regulation prohibiting sex discrimination may satisfy the requirement of a compelling state interest.[43] Courts then will

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privately owned areas and from disclosures about an individual's private life. *See* Warren & Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

36. *Patterson*, 357 U.S. at 462.

37. *Id.* at 460-61. "Effective advocacy of both public and private points of view . . . is undeniably enhanced by group association." *Id.* at 460.

38. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (citations omitted).

39. *Id.*

40. *Id.* at 623. Some argue, on the other hand, that the right of free speech is absolute. Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("I believe that the First Amendment [contains an] unequivocal command that there shall be no abridgement of the rights of free speech . . . ."). This view arises from the Supreme Court's assertion that certain rights might properly receive more active judicial protection. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). The Court later declared: "Freedom of press, freedom of speech, freedom of religion are in a preferred position." Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). *Compare* U.S. CONST. amend. I ("Congress shall make *no* law . . . .") (emphasis added) *with* U.S. CONST. amend. IV (prohibits "*unreasonable* searches and seizures") (emphasis added). Although Justices Black and Douglas championed an absolutist view of free speech, a majority of the Court has never explicitly adopted it. Instead, the Court apparently takes a "balancing view." *See, e.g., Konigsberg*, 366 U.S. at 49-51, 56 (Justice Harlan, writing for the Court, presents justification for judicial balancing, with Black and Douglas dissenting).

41. *Roberts*, 468 U.S. at 623.

42. *Id. Cf.* New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2233 (1988) (focus on overbreadth of state law).

43. *Id.* at 2234.

examine the specific regulation at issue to determine whether its means are too restrictive[44] or whether it is overbroad.[45]

B. Intimate Association

The right of intimate association protects personal liberties such as the right to marry, the right to bear children, and the right to educate and raise one's children.[46] For an organization to invoke the right of intimate association it must exhibit some of the characteristics of family relations: "the group must be small, selective and exclude outsiders from 'critical aspects of the relationship.' "[47]

C. Right Not to Associate

The right to associate implies a right *not* to associate.[48] The Supreme Court in *Abood v. Detroit Board of Education*[49] recognized that an individual has a constitutional right not to be coerced to support, financially or otherwise, an organization's expressive activities to which she objects.[50] The *Abood* Court stated that first amendment principles allow individuals the freedom to believe what they will and require that, in a free society, individuals' minds and consciences should shape their beliefs without coercion by the state.[51]

Once the federal government or a state enacts antidiscrimination legis-

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44. *See Roberts*, 468 U.S. at 626-28 (absence of showing that state law imposed "serious burdens on the male members' freedom of expressive association").

45. *New York State Club*, 108 S. Ct. at 2234-35 (case-by-case analysis).

46. *E.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (cohabitation with family members); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (education and childrearing).

47. Feldblum, Krent & Watkins, *supra* note 20, at 191 n.87 (1986) (quoting Roberts, 468 U.S. at 620 (1984)). The Jaycees, with 295,000 members, composed of all men between the ages of 18 and 35, did not qualify for a right of intimate association. *Roberts*, 468 U.S. at 613.

48. *Roberts*, 468 U.S. 623 ("Freedom of association . . . plainly presupposes a freedom not to associate."); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977) (constitutionally protected right of "refusing to associate").

49. 431 U.S. 209 (1977).

50. *Id.* at 233-35. In *Abood*, a public school board required employees who did not join the union to pay a "service fee" equal to union dues. *Id.* at 211. The Court held that a union's expenditures for ideological causes unrelated to its duties as a collective-bargaining representative must be financed by employees who do not object to advancing those causes. *Id.* at 235-36. The union could properly use the fees to finance expenditures for collective bargaining, contract administration and grievance adjustment purposes. The Court distinguished the improper uses of the fee as not germane to the union's duties as collective bargaining representative. *Id.* at 225, 232-37.

51. *Id.* at 234-35. These principles, the Court held, prohibit the state from requiring employees

lation, an organization may argue that the right not to associate equates to a first amendment right to exclude unwanted members.[52] This asserted "right to exclude" is not without limitation. The exclusion must be in furtherance of a first amendment right to associate, be it expressive or intimate.[53] Thus, to exercise the right to exclude despite the legislation, clubs must assert more than an arbitrary right to discriminate.[54] In contexts where associational rights do not exist, the Court explicitly has refused affirmative constitutional protection for invidious private discrimination.[55]

A valid freedom of association right will act as a shield from state interference for distinctly private clubs. The public nature of certain clubs, however, distinguishes them from genuinely private associational relationships. Because the Constitution does not provide an unrestricted right of association,[56] states may proscribe sex discrimination in clubs that are not distinctly private. The difficulty lies in how states ultimately identify which clubs are "distinctly private."

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to contribute to support an ideological cause they may oppose as a condition of holding a job as a public school employee. *Id.* at 234-36.

52. *See, e.g.*, New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2234 (1988); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987); *Roberts*, 468 U.S. at 473.

53. *See, e.g., New York State Club*, 108 S. Ct. at 2234.

54. The Court in *Roberts* states that it has "long understood as implicit in the right to participate in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." 468 U.S. at 622.

55. *See* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984); Runyon v. McCrary, 427 U.S. 160 (1976); Norwood v. Harrison, 413 U.S. 455, 470 (1973). In *Hishon*, the Court held that the constitutional rights of expression and association do not preclude application of Title VII guarantees to the decision to grant partnership status to an associate in a law firm, where partnership consideration otherwise qualifies as a term, condition or privilege of employment.

In *Norwood*, the Court stated that "the Constitution . . . places no value on discrimination." 413 U.S. at 470. "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.*

In *Runyon*, the Court held that under the recognized principle of a right "to engage in association for the advancement of beliefs and ideas," parents have a right to send their children to schools that promote racial segregation and that the children have a right to attend such schools. 427 U.S. at 175-76 (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1959)). The *Patterson* principle, however, does not protect the *practice* of excluding racial minorities. *Id.* at 176.

56. *See supra* notes 40, 53-55 and accompanying text.

III. FREEDOM FROM DISCRIMINATION: PUBLIC ACCOMMODATION LAWS

States enact public accommodation laws pursuant to their compelling interest in eradicating discrimination.[57] Yet these laws commonly provide an exemption for private clubs.[58] Most statutes, however, fail to define "distinctly private" clubs,[59] leaving unresolved the question of which clubs legitimately may refuse to accept women as members.

A. Federal Antidiscrimination Law

Title II of the Civil Rights Act of 1964 explicitly exempts private clubs from its prohibition of race discrimination in places of "public accommodation."[60] The statute by its terms does not apply to "a private club or other establishment not in fact open to the public."[61] In failing to define "private," the act leaves the term open to broad interpretation.[62] Courts have denied use of the exemption to organizations that claim private status merely to assert a right to discriminate.[63] The federal public accom-

57. *See, e.g., Roberts*, 468 U.S. at 623-25.

58. *See infra* note 71.

59. *See infra* note 73 and accompanying text.

60. 42 U.S.C. § 2000a(a)-(e) (1982). The federal law applies to discrimination based on race, color, religion or national origin. *Id.* § 2000a(b).

61. *Id.* § 2000a(e). The exemption is limited "to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment" as defined in subsection (b). *Id.*

62. One can verify the great room for interpretation by looking at one court's laundry list of factors. The United States District Court for the Eastern District of Louisiana, in United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969), interpreted the legislative history as supplying relevant inquiries as to whether a club is private. The court's analysis posed factual questions falling into six categories: 1) whether the "membership is genuinely selective on some reasonable basis"; 2) "who controls the operations of the establishment"; 3) "the purpose of the membership corporation"; 4) the club's observed formalities; and 5) "general characteristics which many private clubs possess," such as advertising, tax-exempt status, and payment for services. *Id.* at 375-76. *See also* Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182, 1203 (D. Conn. 1974) (factors for deeming clubs private include selectivity of membership, guest policies, and business characteristics of organization). *Compare* Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970) (2850-member, all-white supper club held not private) *with Cornelius*, 382 F. Supp. at 1191 n.10 (two million-member Elks club private).

63. *See* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973) (swimming pool association with membership open to every white person within a narrow geographic area was not a private club exempt from Civil Rights Act); United States v. Jack Sabin's Private Club, 265 F. Supp. 90 (E.D. La. 1967) (restaurant with no real membership requirements except being "non-Negro, and able to pay [the] bill" not a private club); Williams v. Rescue Fire Co., 254 F. Supp. 556 (D. Md. 1966) (charging 25-cent annual membership fee for "pool club" does not convert tax-exempt facility built largely with public funds into private club).

modations law, however, does not prohibit sex discrimination.[64] Furthermore, the lack of a well-defined test for determining whether a club is private under the federal law suggests that courts will find it no easier to define private clubs under analogous, sex-based state public accommodations laws.

B. State Antidiscrimination Laws

The Supreme Court has characterized the Constitution as a floor below which the states may not descend, and not as a ceiling which limits states' attempts to eliminate discrimination.[65] States thus may provide protection against discrimination beyond that guaranteed by the Constitution. Similarly, state laws may contain broader definitions of public accommodations and more narrow exemptions for private clubs than federal law.[66] A state's compelling interest in preventing discrimination, therefore, may justify further intrusion on the individual's right of association.[67] Many state and local laws prohibit sex discrimination despite the federal law's failure to do so.[68]

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64. *See supra* note 60. *See also* Seidenberg v. McSorleys' Old Ale House, Inc., 308 F. Supp. 1253, 1255-56 (S.D.N.Y. 1969) (court denied motion of women's organization seeking to enjoin bar's male-only policy); DeCrow v. Hotel Syracuse Corp., 288 F. Supp. 530, 532 (N.D.N.Y. 1968) (same).

Additionally, neither the Constitution nor existing federal statutes provide a recognized bar against sex discrimination in private clubs. If no "state action" is found, courts will not reach the merits of what equal protection requires in a given factual situation. *See supra* note 7 and accompanying text. Some federal statutes, however, including the public accommodations law, are directed explicitly at discriminatory private behavior. The Civil Rights Act of 1866 has reached some discriminatory private behavior. This act was derived from the thirteenth amendment, which contains no state action requirement. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968). Courts, however, have refused to apply § 1981 and § 1982 to private sex discrimination. Runyon v. McCrary, 427 U.S. 160, 167 (1976). Some courts have reached racially discriminatory private behavior under § 1981 and § 1982. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976); Griffin v. Breckenridge, 403 U.S. 88 (1971); *Jones*, 392 U.S. 409.

65. *See* Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 81 (1980); Whalen v. Roe, 429 U.S. 589, 597 (1977).

66. The Supreme Court's analysis in the private club context suggests the Court will defer to states' good-faith efforts to formulate definitions. *See infra* notes 157-69 and accompanying text.

67. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984). *See supra* notes 40-41 and accompanying text. *But cf.* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982) (first amendment prohibits state from compelling campaign expense disclosures by minor political party when disclosure would lead to threats, harassment or reprisals); Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 124 (1981) (state's asserted compelling interest in preserving overall integrity of electoral process did not justify substantial intrusion into associational freedom of national political party).

68. *Compare, e.g.*, OKLA. STAT. ANN. tit. 25, § 1402 (West 1987) (discrimination "because of race, color, religion, *sex*, national origin, age, or handicap") (emphasis added) *and* N.Y.C. ADMIN.

Generally, state public accommodations laws closely parallel the provisions of the federal public accommodations law.[69] Forty states and the District of Columbia ban sex discrimination in places of public accommodation.[70] Of these, sixteen specifically exempt private clubs.[71] Others

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CODE § 8-107(2) (1986) (discrimination "because of the race, creed, color, national origin or *sex* of any person") (emphasis added) *with* 42 U.S.C. § 2000a(a) (1982) (discrimination on ground of "race, color, religion, or national origin"). Nonfederal laws often serve as the basis for challenges of discriminatory membership policies of private clubs in state courts. *See, e.g.*, United State Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981) (Jaycees deemed place of public accommodation for purposes of state statute).

69. *Compare, e.g.*, CAL. CIV. CODE § 51 (West Supp. 1990) *with* 42 U.S.C. § 2000a(a)-(e) (1982).

70. *See* ALASKA STAT. § 18.80.200 (1986); CAL. CIV. CODE § 51 (West 1982); COLO. REV. STAT. § 24-34-601(2) (1988); CONN. GEN. STAT. ANN. § 46a-64 (West 1986); DEL. CODE ANN. tit. 6, § 4504 (Supp. 1988); D.C. CODE ANN. § 6-241(a) (Supp. 1977-78); FLA. STAT. ANN. § 509.141 (West 1988); IDAHO CODE § 18-7301 to -7303 (1987); ILL. REV. STAT. ch. 68, para. 5-102 (1989); IND. CODE ANN. § 22-9-1-2 (Burns 1986); IOWA CODE ANN. § 601A.7(1)(a) (West Supp. 1988); KAN. STAT. ANN. § 44-1009(c)(1) (1986); KY. REV. STAT. ANN. § 344.145 (Michie/Bobbs-Merrill Supp. 1989); LA. REV. STAT. ANN. 49-146 (West 1987 & Supp. 1989); ME. REV. STAT. ANN. tit. 5, § 4592 (1989); MD. ANN. CODE art. 49B, § 5 (1986 & Supp. 1989); MASS. GEN. LAWS ANN. ch. 272, §§ 92A-98 (West Supp. 1984); MICH. COMP. LAWS ANN. §§ 37.2302-2303, 750.146 (1985 & West Supp. 1989); MINN. STAT. ANN. § 363.03 (West Supp. 1989); MO. ANN. STAT. § 213.065 (Vernon Supp. 1989); MONT. CODE ANN. § 49-2-304 (1989); NEB. REV. STAT. §§ 20-134 to 138 (1987); N.H. REV. STAT. ANN. § 354A: 8-IV (1984); N.J. STAT. ANN. § 10:5-12(f) (West Supp. 1989); N.M. STAT. ANN. §§ 28-1-2, -1-7, -1-9, (Supp. 1987); N.Y. EXEC. LAW § 296(2)(a) (McKinney Supp. 1984); N.D. CENT. CODE § 12.1-14-04 (1985); OHIO REV. CODE ANN. § 4112.02(G) (Anderson Supp. 1988); OKLA. STAT. ANN. tit. 25, §§ 1401-02 (West 1987); OR. REV. STAT. § 30.670 (1988); PA. STAT. ANN. tit. 43, § 955(i) (Purdon Supp. 1989); R.I. GEN. LAWS § 11-24-2 (1988); S.D. CODIFIED LAWS ANN. § 20-13-23 (1987); TENN. CODE ANN. § 4-21-501 (1985); UTAH CODE ANN. §§ 13-7-1 to -7-3 (1986 & Supp. 1989); VT. STAT. ANN. tit. 9, § 4502 (Supp. 1989); WASH. REV. CODE ANN. § 49.60.030 (Supp. 1989); W. VA. CODE § 5-11-6 (Supp. 1987); WIS. STAT. ANN. § 942-04 (West 1982 & Supp. 1989); WYO. STAT. § 6-9-101 (1988).

Some cities, too, have stepped in to prohibit sex discrimination by local law. Like New York City, San Francisco passed a law banning discrimination in clubs "not distinctly private." Kay, *supra* note 13, at 857 (quoting SAN FRANCISCO, CAL., MUN. CODE art. 33B (1987)). The law defines a club as not distinctly private if it has more than 400 members, provides regular meal service, and regularly accepts payment from nonmembers. *Id.*

For a thorough review of state and federal public accommodation laws, see Note, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (Spring 1978).

71. The following jurisdictions exempt private clubs from their public accommodation laws: the District of Columbia, Idaho, Iowa, Kansas, Kentucky, Maryland, Michigan, Nebraska, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, West Virginia, and Wisconsin. For example, Michigan's law provides:

> [t]his article shall not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment are made available to the customers or patrons of another establishment that is a place of accommodation or is licensed by the state . . . .

do not mention private clubs explicitly but exempt "distinctly private" accommodations.[72] Few of the state laws, however, define "private" or "private club."[73]

State public accommodations laws that do define private club focus on membership selectivity and the degree of exclusion of nonmembers from club facilities.[74] Oklahoma's statute, for example, provides that "a private club is not a place of public accommodation *if* its policies are determined by its members *and* its facilities or services are available only to its members and their bona fide guests."[75]

Only Louisiana's law explicitly identifies factors for determining whether an organization is a private club.[76] Those factors are: 1) selectiveness of the group in adding new members; 2) existence of formal membership procedures; 3) membership governance; 4) history of the organization; 5) use of club facilities by nonmembers; 6) substantiality of dues; 7) advertisement of the organization; and 8) predominance of a profit motive.[77] While these factors may help determine whether an organization is in fact private,[78] they are not as specific as the standards set forth in New York City's Human Rights Law.[79]

New York City's law is unusual in that it defines what does not consti-

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MICH. COMP. LAWS ANN. § 37.2303 (West 1985).

New Mexico's Human Rights Act, N.M. STAT. ANN. §§ 28-1-1 to -1-15 (Supp. 1987) defines "public accommodation" as "any establishment that provides or offers its services, facilities, accommodations or goods to the public, *but does not include* a bona fide private club or other place or establishment which is by its nature and use distinctly private." *Id.* § 28-1-2(H) (emphasis added).

72. *See, e.g.*, PA. STAT. ANN. tit. 43, § 954(1) (Purdon Supp. 1988) (simply exempting "any accommodations which are in their nature distinctly private").

73. A typical state law is the Oregon statute, which provides that "a place of accommodation does not include any institution, bona fide club or place of accommodation which is in its nature distinctly private." OR. REV. STAT. § 30.680(2) (Supp. 1987). The Oregon law, however, fails to define "bona fide" or "private club." *See id. See also, e.g.*, MICH. COMP. LAWS ANN. § 37.2303 (West 1985); N.M. STAT. ANN. §§ 28-1-1 to -1-15 (Supp. 1987).

74. *See, e.g.*, LA. REV. STAT. § 49: 146(3) (1987); OKLA. STAT. ANN. tit. 25, § 1401(1)(i) (West 1987). Selectivity and exclusion of nonmembers are important indicators of the degree of intimate association present in a particular club. For a more thorough discussion of these factors, see *infra* notes 135-51 and accompanying text.

75. OKLA. STAT. ANN. tit. 25, § 1401(1)(i) (West 1987) (emphasis added).

76. LA. REV. STAT. § 49:146(3) (1987).

77. *Id.*

78. *See infra* notes 122-56 and accompanying text. The first three factors of Louisiana's statute indicate the degree of the club's selectivity, exclusion of nonmembers, and purpose. Use of club facilities by nonmembers indicates the club's exclusivity. Substantiality of dues and advertising show both selectivity and exclusion of nonmembers. The club's history and the predominance of a profit motive may indicate a commercial purpose.

79. N.Y.C. ADMIN. CODE §§ 8-102(9), 8-107(2) (1986). *See supra* note 2.

tute a "private club." According to the ordinance, the following shall *not* be considered distinctly private:

> any institution, club or place of accommodation [that] has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly or on behalf of nonmembers for the furtherance of trade or business.[80]

The lack of such an express definition in most state statutes, however, leaves unanswered the question of when purportedly private clubs legitimately may discriminate against women.

IV. DEFINING THE PRIVATE CLUB

A. The Supreme Court Framework

The Supreme Court first established a framework to determine which clubs are exempt from state public accommodations laws in *Roberts v. United States Jaycees*.[81] In *Roberts*, the United States Jaycees argued that Minnesota's Human Rights Act,[82] which prohibited sex discrimination in public accommodations,[83] unconstitutionally impinged upon its members' first amendment right of association.[84] The Court upheld the Minnesota Supreme Court's decision to interpret "public accommodation" so broadly as to prohibit the United States Jaycees from discriminating against women in membership selection.[85]

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80. *Id.*

81. 468 U.S. 609 (1984).

82. *Roberts* involves state regulation that goes beyond federal constitutional requirements. Minnesota included sex discrimination within the prohibitions of its public accommodation law. MINN. STAT. § 363.03 (1982), *construed in Roberts*, 468 U.S. at 615. *See supra* notes 57-59 and accompanying text.

83. The act provided in pertinent part:

> It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.

MINN. STAT. § 363.03 (1982), *quoted in Roberts*, 468 U.S. 614-15.

The act defined "place of public accommodation" as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." MINN. STAT. § 363.01, *quoted in Roberts*, 468 U.S. at 615. The *Roberts* Court noted that the Minnesota statute provided "a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct." 468 U.S. at 625 (citations omitted).

84. *Roberts*, 468 U.S. at 615-17.

85. *Id.* at 629-31. The Minnesota court found the Jaycees to be a place of public accommoda-

Writing for the majority, Justice Brennan suggested a continuum upon which the right of freedom of association would receive varying degrees of constitutional protection.[86] As the group's size increases and its selectivity decreases, the amount of constitutional protection it receives diminishes.[87] The Supreme Court accepted the Minnesota court's finding[88] that the Jaycees' activities were substantially open to nonmembers and that the membership was too large and nonselective to warrant constitutional protection of an intimate association right.[89] The Court also agreed that the state's compelling interest in assuring equal access to all its citizens justified any infringement on the group's expressive rights.[90]

The Supreme Court had an opportunity to expand its freedom of association analysis in *Board of Directors of Rotary International v. Rotary Club of Duarte*.[91] In *Rotary Club*, Rotary International revoked the charter of a local chapter, which had admitted women contrary to the Rotary Constitution.[92] The local club and two of its women members filed suit alleging that the international organization's actions violated California's Unruh Civil Rights Act,[93] one of the broadest state public

tion. *Id.* The Supreme Court's acceptance of this finding and the difficulty of creating a bright-line constitutional test in this area suggest that the Court may defer to state definitions of a private club.

86. *Id.* at 620. This analysis is analogous to Justice Marshall's sliding-scale approach for equal protection review. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J. dissenting). In *Rodriguez*, Marshall argued in favor of a "sliding scale" of review, whereby the degree of scrutiny in equal protection cases would vary along a continuum depending on the importance of the interest at stake and the suspectness of the classification. *Id.* at 81-101. *See also* Dandridge v. Williams, 397 U.S. 471, 508-30 (1970) (Marshall, J., dissenting).

87. *Roberts*, 468 U.S. at 619-620. *See also Rotary Club*, 481 U.S. at 546-47.

88. The Court accepted Minnesota's good faith effort at line drawing in an area in which constitutional standards are unclear. *Roberts*, 468 U.S. at 619-20.

89. *Id.* at 620-21. *See supra* notes 46-47 and accompanying text. The Jaycees had approximately 295,000 members in 7,400 local chapters. *Roberts*, 468 U.S. at 613. Men over age 35 and women made up the Jaycees 11,915 associate members. *Id.* "Apart from age and sex, neither the national organization nor the local chapters employ[ed] any criteria for judging applicants for membership . . . ." *Id.* at 621.

90. *Id.* at 623. *See supra* notes 37-45 and accompanying text. The Court found no basis to conclude that admission of women as full-voting members would impede the Jaycees' expression on political, economic, cultural, and social affairs. This was because nothing in the Jaycees' ideology was based on sex. *Id.* at 626-27.

91. 481 U.S. 537 (1987).

92. *Id.* at 541.

93. The Unruh Civil Rights Act states in pertinent part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (Deering Supp. 1987) (section 51 is known as the Unruh Civil Rights Act).

accommodations laws.[94]

The California Court of Appeals found substantial business benefits[95] from Rotary membership, and therefore held Rotary International to be a "business establishment" within the meaning of the California statute. The Supreme Court decided the act did not violate the club members' associational rights.[96] As in *Roberts*, the Court found the membership too large and nonselective to assert the right of intimate association.[97] Additionally, the Court found no evidence that the admission of women would hamper the club's message, thereby violating the right to expressive association.[98]

The Court in *Rotary Club* did little to resolve the conflict between freedom of association and sex discrimination in private clubs.[99] The Court failed to define explicitly characteristics of private clubs or to establish the boundaries of the right of association. Instead, the Court increased the ambiguity by proposing that lower courts judge clubs on the "objective characteristics of the particular relationships at issue."[100] Such a proposal leaves both states and purportedly private clubs without guidance in determining what activities are private.

The Court's most recent pronouncement on the issue, *New York State Club Association v. City of New York*,[101] suggests that states need not shy away from more explicit legislative definitions of the private club. New

94. *Rotary Club*, 481 U.S. at 542. California has defined public accommodations broadly to encompass "all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (Deering Supp. 1987).

95. *Rotary Club*, 481 U.S. at 542-43.

96. *Id.* at 547.

97. When the case came to trial, Rotary International consisted of 19,788 Rotary Clubs in 157 countries, with a total membership of about 907,750. *Id.* at 540. Local clubs admit members according to a "classification system" designed to represent "all business, professional and institutional activities in the community." *Id. See supra* notes 46-47 and accompanying text.

98. *See supra* notes 37-45 and accompanying text. The Court found that, "as a matter of policy, Rotary Clubs do not take positions on 'public questions,'" *Rotary Club*, 481 U.S. at 548, and that the Unruh Act did not require the clubs to abandon or alter any of their service activities that are protected by the first amendment. *Id.*

99. We have no occasion in this case to consider the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country. Whether the "zone of privacy" established by the First Amendment extends to a particular club or entity requires a careful inquiry into the objective characteristics of the particular relationships at issue.

Id. at 548 n.6 (citations omitted).

100. *Id.* at 548 n.6.

101. 108 S. Ct. 2225 (1988). For a general discussion of the case, see Comment, *Redefining the Private Club: New York State Club Association, Inc. v. City of New York*, 36 WASH. U.J. URB. & CONTEMP. L. 249 (1989).

York City amended its Human Rights Law to prohibit discrimination in clubs that are not "distinctly private."[102] The law essentially sets out a three-prong test to determine which clubs meet the definition of private. Under the city's ordinance, a club is not private if it has more than 400 members, provides regular meal service, and receives regular payment from nonmembers.[103] The ordinance specifically deems benevolent orders and religious corporations "distinctly private."[104]

The New York State Club Association (NYSCA) challenged the ordinance on its face, claiming the law violated club members' first amendment rights of intimate and expressive association and fourteenth amendment right to equal protection.[105] The Supreme Court rejected plaintiff's claim that the law was overbroad[106] because the NYSCA failed to "demonstrate from the text of the Law and from actual fact" that the law threatened any particular club's "ability to associate together or to advocate public or private viewpoints."[107] The Court also rejected an equal protection claim because no evidence indicated that benevolent orders and religious corporations, which the law specifically exempted, had the same business orientation as clubs subject to the antidiscrimination provisions.[108]

The Court in *New York State Club* correctly deferred to New York City's good faith effort to define the private club. New York's ordinance reasonably focused on club size, exclusivity, and purpose—elements important to claims of associational rights.[109] The law rationally provided an exemption for benevolent orders and religious corporations, the prac-

102. N.Y.C. ADMIN. CODE §§ 8-102(a), 8-107(2) (1986). *See New York State Club*, 108 S. Ct. at 2229 & n.1, 2230; *supra* note 2.

103. N.Y.C. ADMIN. CODE § 8-102(9) (1986). *See New York State Club*, 108 S. Ct. at 2229-30; for the text of the amended law see *supra* note 2.

104. N.Y.C. ADMIN. CODE § 8-102(9) (1986). *See New York State Club*, 108 S. Ct. at 2230.

105. *New York State Club*, 108 S. Ct. at 2231. For a general discussion of problems of equal protection challenges to private clubs, see *supra* note 65.

106. *New York State Club*, 108 S. Ct. at 2234-35. *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 26, at 840-45 (discussion of the overbreadth doctrine).

107. *New York State Club*, 108 S. Ct. at 2234-35. Because the NYSCA failed to prove that in "a substantial number of instances" the statute "threatens to undermine the [clubs'] associational or expressive purposes," the Court could not find New York City's Human Rights Law "substantially overbroad." *Id.*

108. *Id.* at 2235-37. The Court decided that strict scrutiny did not apply, and found a rational basis for this legislative classification. *Id.* at 2235-37. It held the New York City Council reasonably could have believed that the exempted organizations were different from the plaintiff club, based on the noncommercial practice and purpose of these exempted clubs. *Id.* at 2236.

109. *See supra* notes 86-98 and accompanying text.

tices and purposes of which differ from other private clubs.[110] The ordinance essentially operates as a rebuttable presumption of certain clubs' public nature, leaving a purportedly private club the burden of proving its status.[111]

B. Lower Courts Attempt to Define

Lower courts have had no greater success in articulating a standard for private clubs. Given the Supreme Court's decisions in *Roberts* and *Rotary Club*, lower courts understandably have utilized differing standards in assessing private clubs' associational rights. Courts have looked to a number of factors including size,[112] membership selectivity,[113] formal membership procedures,[114] degree of membership control over governance,[115] and history of the organization.[116] Courts also have considered use of club facilities by nonmembers,[117] substantiality of dues,[118] adver-

110. *New York State Club*, 108 S. Ct. at 2236.

111. *Id.* at 2235. *See infra* note 161.

112. *See, e.g.*, Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 469-70 (3d Cir. 1986) (313,000 members); Rogers v. International Ass'n of Lions Clubs, 636 F. Supp. 1476, 1479 (E.D. Mich. 1986) (membership "essentially unlimited" with more than 1,350,000 members nationally; 28 members in local club).

113. *See, e.g.*, *Ridgewood Kiwanis*, 806 F.2d at 475 ("to be subject to the prohibitions of the statute, the organization or club must invite an unrestricted and unselected public to join as members"); *Rogers*, 636 F. Supp. 1476, 1479-80 (formal application procedure for screening applicants is "cursory" and allows vast numbers of members); Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 81, 707 P.2d 212, 217, 219 Cal. Rptr. 150, 155 (1985) (sole condition for use of recreational facilities was that users be male); United States Power Squadrons v. State Human Rights Appeals Bd., 59 N.Y.2d 401, 413, 452 N.E.2d 1199, 1205, 465 N.Y.S.2d 871, 877 (1983) (membership extended to all males who pass basic boating safety course).

114. *See, e.g.*, *Rogers*, 636 F. Supp. 1476, 1480 (application procedure had only appearance of being elaborate, formal, and structured); *Power Squadrons*, 59 N.Y.2d at 412, 452 N.E.2d at 1204, 465 N.Y.S.2d at 876 (factor is whether club has permanent machinery established to screen applicants carefully on any basis or no basis at all).

115. *See, e.g.*, *Isbister*, 40 Cal. 3d 72, 81, 707 P.2d 212, 218, 219 Cal. Rptr. 150, 156 (boys who joined club had no control over its affairs or selecting membership); *Power Squadrons*, 59 N.Y.2d at 413, 452 N.E.2d at 1205, 465 N.Y.S.2d at 877 (organization's relationship with federal and state government boating safety officials not consonant with claim of being wholly private).

116. *See, e.g.*, Kiwanis Int'l v. Ridgewood Kiwanis Club, 627 F. Supp. 1381, 1383 (D.N.J. 1986) (Kiwanis limited membership to men since its inception in 1915).

117. *See, e.g.*, *Isbister*, 40 Cal. 3d at 81, 707 P.2d at 217, 219 Cal. Rptr. at 155 (recreational facilities generally open to all males in community); *Power Squadrons*, 59 N.Y.2d at 413, 452 N.E.2d at 1205, 465 N.Y.S.2d at 877 (club encouraged and solicited public participation in their programs, courses, and membership). *But cf. Ridgewood Kiwanis*, 806 F. 2d at 474-75 (mere fact that club meets in public restaurant does not render it "public accommodation").

118. *See, e.g.*, United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981) (Jaycees' annual membership dues few dollars less for women associate members than regular members).

tising,[119] purpose,[120] and predominance of a profit motive.[121] Because neither legislation nor the Supreme Court has identified the definitive private club, courts must glean from other sources a framework for analysis.

C. Applying a Quantified Continuum to the Private Club

The private club escapes ready definition. While a bright-line test may be unattainable, analysis of a private club should be quantified into a four-factor test.

The four factors particularly crucial to the private club determination are size, selectivity, exclusion of nonmembers, and purpose.[122] These factors indicate the nature of the club's intimate and expressive associations and thus the constitutional protection to which the club is entitled.[123] The first three factors—size,[124] selectivity,[125] and exclusivity[126]—measure the degree of intimate association involved. The last factor, purpose, demonstrates the club's need for expressive association protection.[127] This four-factor analysis should lay the groundwork for a legislature to define, and courts to identify, the "distinctly private" club. Legislatures and courts must assess all four factors, because no single consideration is determinative of a club's private status.

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119. *See, e.g., Rogers*, 636 F. Supp. at 1480 (Lions engaged in intensive and continuous recruitment of new members, and gave rewards and prizes for recruiting numbers of new members); *McClure*, 305 N.W.2d at 769-70 (Jaycees recruitment manual refers to memberships as a product to be sold); *Power Squadrons*, 59 N.Y.2d at 413, 452 N.E.2d at 1205, 465 N.Y.S.2d at 877 (club did not direct publicity exclusively to members for their information and guidance).

120. *See e.g., Isbister*, 40 Cal. 3d at 88-89, 707 P.2d at 233, 219 Cal. Rptr. at 161 (no evidence that offering recreation only to boys serves primary purpose of combatting delinquency).

121. *See, e.g., id.* at 82, 83, 707 P.2d at 218, 219 Cal. Rptr. at 156 (nonprofit); *Power Squadrons*, 59 N.Y.2d at 413, 452 N.E.2d at 1205, 465 N.Y.S.2d at 877 (nonprofit).

122. The Supreme Court has considered these four factors as "critical aspects" of the association's personal or private relationships. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987) (citing *Roberts*, 468 U.S. at 620). District courts scrutinizing private clubs have not adopted these factors exclusively. Courts continue to consider myriad other factors. *See supra* notes 112-21. *See also* notes 76-78 and accompanying text (Louisiana public accommodations law identifies nine factors).

123. See *supra* notes 86-87 and accompanying text for a discussion of Justice Brennan's sliding scale of freedom of association.

124. *See infra* notes 129-34 and accompanying text.

125. *See infra* notes 135-42 and accompanying text.

126. *See infra* notes 143-51 and accompanying text.

127. *See infra* notes 152-56 and accompanying text.

1. Size

Size indicates the organization's degree of intimacy and selectivity.[128] Because the Supreme Court recognizes family relationships as exemplary of protected intimate associations,[129] a court more likely may find a club private if it functions as an extension of the living room, instead of the board room.[130] Thus, relative smallness demonstrates a private relationship that warrants constitutional protection.[131] Large clubs' claims of private status are therefore unlikely to prove successful.[132] No magic number, however, can dictate a club's private status. The Supreme Court in *New York State Club* upheld a local statute that considered private any club of up to 400 members.[133] Nevertheless, the *Rotary Club* Court found the Rotary Club, with local clubs having as few as twenty members, not a private association entitled to constitutional protection.[134]

2. Selectivity

Selectivity is a crucial component of the private club. As with the family, intimate organizations exercise a high degree of selectivity in the decision to begin and end relationships.[135] "The essence of privacy is selectivity. If there is little or no selectivity, there is no basis to claim

128. Selectivity is a separate factor in the analysis. *See infra* notes 135-42 and accompanying text. However, a large club may indicate a lack of selectivity.

129. *See* Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984) (citing earlier Court decisions recognizing the right of association in the family context) (citations omitted).

130. One court observed: "The clubhouse is of course not on the same constitutional plane as is the bedroom or study." Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182, 1195-96 (D. Conn. 1974) (three-judge court). "To have their privacy protected clubs must function as extensions of members' homes and not as extensions of their businesses." *Id.* at 1204.

131. In the race context, courts have questioned the size of organizations claiming to be private to escape coverage of the federal public accommodations law. In *Cornelius*, 382 F. Supp. 1182, a court deemed private a club with more than 2 million members. But in Wright v. Cork Club, 315 F. Supp. 1143 (D. Conn. 1970), a court rejected a club with fewer than 500 members as not private. In both cases, the courts focused primarily on the clubs' membership practices.

132. In Rogers v. International Ass'n of Lions Clubs, 636 F. Supp. 1476 (E.D. Mich. 1986), the international organization revoked the club's charter following a local Lions Club's admission of a woman. The local club and the woman sued under Michigan's civil rights statute. The court found that, because the club had more than 1,350,000 members internationally, "the size of the local and International Lions club is essentially unlimited." *Id.* at 1479. *But see Cornelius*, 382 F. Supp. at 1203-04 (local lodge of Elks club with more than two million members held private Club in context of race discrimination challenge).

133. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2229-30, 2235-37 (1988).

134. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987).

135. *See Rotary Club*, 481 U.S. at 545-46.

privacy."[136] States' definitions of the private club, therefore, in some way should prescribe a standard for selectivity.

Various club practices might indicate the degree of selectivity: recruitment of new members,[137] selection procedures,[138] and standards for admission.[139] Whether the club has established permanent machinery in order carefully to screen applicants on any basis also serves to measure selectivity.[140] To fall within the definition of a private club, the club must select members by using more than merely "perfunctory scrutiny."[141] Sex commonly does not serve as a legitimate criterion for membership; rather, it more likely indicates a pretext for discrimination.[142]

136. Rogers v. International Ass'n of Lions Clubs, 636 F. Supp. 1476, 1480 (E.D. Mich. 1986) (citing Nesmith v. YMCA, 397 F.2d 96, 102 (4th Cir. 1968)); United States Jaycees v. McClure, 305 N.W.2d 764, 770 (Minn. 1981).

137. *See, e.g., Rogers*, 636 F. Supp. at 1480.

138. Rotary International, for example, instructed its local clubs to "keep a flow of prospects coming." *Rotary Club*, 481 U.S. at 546. The Jaycees' membership manual provided directions on how to sell the "product" of a Jaycees membership. *McClure*, 305 N.W.2d at 769.

139. The standards for admission must be more than a pretext for discrimination. *See, e.g.*, 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). *Cf.* Tillman v. Wheaton-Haven Recreation Ass'n., Inc., 410 U.S. 431, 438 (1973) (organization whose only selection criterion is race has "no plan or purpose of exclusiveness" that might make it a private club exempt from federal civil rights statute) (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969)).

140. The court in 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), held that organizations that routinely accept applicants and place no subjective limits on the numbers of persons eligible for membership are not private clubs. In *Power Squadrons*, any male, age 18 or over, who passed a basic boating course received a membership invitation. *Id.* at 413, 452 N.E.2d at 1205, 465 N.Y.S.2d at 877. The court found that actual and potential membership was more public than private and there was no plan or purpose of exclusivity other than sex discrimination. The club, therefore, was subject to the state's Human Rights Law prohibiting sex discrimination. *Id.*

141. Rogers v. International Ass'n of Lions Clubs, 636 F. Supp. 1476 (E.D. Mich. 1986). In *Rogers*, the international organization revoked the charter of a local club after it admitted a woman. The district court found that, while the organization's application procedure had "the appearance of being elaborate, formal and structured," it was not selective. *Id.* at 1480. The international organization and the local club engaged in intensive recruitment of new members, gave rewards and prizes for recruiting new members, and admitted virtually all male applicants who met minimal standards for membership. "In short, the court finds that while the Lions are a club, they are a public club. They have vast numbers of members, who are selected with only perfunctory scrutiny." *Id.* As a "public club," the Lions did not come within the statutory exemption in the state civil rights law. *Id.*

142. In *New York State Club,* the Court noted that selectivity means more than simply excluding some persons on the basis of sex. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2234 (1988). "[T]he Law merely prevents an association from using race, sex, and other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership." *Id.*

Single sex organizations, however, may be justified in certain circumstances. The club must

3. *Exclusion of Nonmembers*

Those seeking protection of an intimate association must draw the blinds to outsiders rather than keep their "windows and doors open to the whole world."[143] Thus, another key aspect of private status is that the club excludes others from "critical aspects" of the membership.[144] A club's guest policy is one indicator of the degree of exclusion of nonmembers. The Supreme Court in *Rotary Club* noted that because the Rotary Club carried on many of its central activities in the presence of strangers,[145] the Court could not conclude that the state public accommodations law unduly interfered with any freedom of intimate association.[146]

Excluding not only nonmembers, but nonvoting members as well, may be crucial to recognizing a protected intimate association. In *Roberts*,

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demonstrate "that it is organized for specific purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion." *Id.* at 2234. The Court went on to say that "it seems sensible enough to believe that many of the large clubs covered by the law are not of this kind." *Id.*

Some have expressed concern that laws banning sex discrimination in places of public accommodation will lead to such things as unisex bathrooms. This concern is easily set aside because the purpose of such facilities justifies single-sex admission. However, some states have safeguarded unisex public restrooms through express language in their public accommodations laws. *See, e.g.*, ILL. ANN. STAT. ch. 68, para. 103 (Smith-Hurd 1989) ("Nothing in this Article shall apply to . . . [a]ny facility, as to discrimination based on sex, which is distinctly private in nature such as restrooms, shower rooms, bath houses, health clubs and other similar facilities."); IND. CODE § 22-9-2(p)(1) (1986) ("It shall not be a discriminatory practice to maintain separate restrooms."); KAN. STAT. ANN. § 44-1009(c)(1) (1986) (discrimination prohibited "except where a distinction because of sex is necessary because of the intrinsic nature of such accommodation"); MICH. COMP. LAWS ANN. § 750.146 (West Supp. 1989) ("Rooming facilities at educational, religious, charitable or nonprofit institutions or organizations, and restrooms and locker room facilities in places of public accommodation may be separated according to sex.")

143. Rotary Clubs, "rather than carrying on their activities in an atmosphere of privacy, seek to keep their 'windows and doors open to the whole world.' " Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 547 (1987) (quoting ROTARY BASIC LIBRARY, FOCUS ON ROTARY 60-61 app. 85 (1981)).

144. Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984). "As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." *Id.*

A club's preventing access to the general public may indicate that it is distinctly private. In *Power Squadrons*, the court found the club encouraged and solicited public participation in its boating safety programs. 59 N.Y.2d at 413, 452 N.E.2d at 1205, 465 N.Y.S.2d at 877. That the club did not direct its publicity solely to its members for their information and guidance indicated the Power Squadrons was not a "distinctly private club." *Id.*

145. *Rotary Club*, 481 U.S. at 547. Local Rotary clubs were required to admit any member of any other Rotary club to their meetings. Members were encouraged to bring business associates and competitors to meetings. The national organization encouraged clubs to seek newspaper coverage of their meetings and activities. *Id.*

146. *Id.*

the Jaycees prohibited women from voting or holding office but allowed them to hold associate memberships, attend various meetings, participate in select projects, and engage in many of the organization's social functions.[147] The Court found that "much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship."[148] The Court concluded that "the Jaycees chapters lack[ed] the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women."[149]

Payment by nonmembers may reveal that the club fails to exclude outsiders and thereby fails to meet private status. In *New York State Club*, the Court upheld a statute that looked to whether the club regularly received payment—directly or indirectly—from nonmembers for dues, fees, use of space, facilities, meals, or beverages.[150] Receipt of such payment indicated the nonexclusive nature of such clubs and thereby removed clubs from the private club exemption of the city's antidiscrimination law.[151]

4. Purpose

A club's purpose also may suggest its private or public character.[152] The Supreme Court has recognized that a closed membership may be necessary to carry out certain political, social, educational, religious and cultural ends.[153] In *Roberts*, the Court considered the extent to which the Jaycees' activities may constitute protected expression on political, economic, cultural, and social affairs.[154] It decided that the admission of women would not hamper the Jaycees' message, particularly because wo-

147. *Roberts*, 468 U.S. at 612-13, 621.

148. *Id.* at 621.

149. *Id.*

150. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2233 (1988).

151. *Id.*

152. Clubs with the goal of providing public service are not likely to be found private. In Rogers v. International Ass'n of Lions Clubs, 636 F. Supp. 1476, 1480 (E.D. Mich. 1986), the court looked to the Lions' active provision of numerous community and humanitarian services. Additionally, the court considered the private benefits to Lions members of leadership skills and useful business contacts, concluding that the Lions Clubs were "public in terms of the services they provide to others and to their members." *Id.* *See also* United States Power Squadrons v. State Human Rights Appeals Bd., 59 N.Y.2d 401, 413, 452 N.E.2d 1199, 1205, 465 N.Y.S.2d 871, 877 (1983) (purpose of boating safety through education led to finding club public).

153. *Rotary Club*, 481 U.S. at 548; *Roberts*, 468 U.S. at 622.

154. *Roberts*, 468 U.S. at 626-27.

men already attended meetings and participated in the organization as associate members.[155]

Renting out club facilities and providing meal service may also negate claims of private club status. Providing meal and beverage service may indicate a nonexpressive, commercial purpose and thus remove the club from the realm of constitutional protection.[156]

D. Proposal for Defining the "Private Club"

The private club escapes easy definition. Although a club's size, selectivity, exclusivity and purpose plainly are important factors, these standards may vary on a case-by-case basis so that they will not allow consistent predictions of what would constitute a private club.[157] Each factor is so malleable under any particular circumstance that the elements fail to operate individually or as a group to provide a bright-line test. The Supreme Court has avoided establishing plain guidelines and instead has deferred to states' attempts to do so.[158] Because the constitutional line is difficult—or perhaps impossible—to draw, the Court likely will treat with some deference states' good faith efforts to demarcate the border.

States, therefore, must actively provide guidelines for defining the private club. New York City's Human Rights Law serves as a starting point for fashioning legislation.[159] States should incorporate this Note's four-factor analysis[160] to create a rebuttable presumption[161] that clubs meeting its criteria are not distinctly private. This analysis strikes a bal-

155. *Id.* at 627. Similarly, in Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 470 (3d Cir. 1986), a court found that "[n]either the goals nor the activities of the organization are sex-specific." The primary function of the organization was to perform charitable service in the community. Promoting camaraderie among its members was a secondary goal. The court found neither objective would be hampered by the admission of women. *Id.* Nonetheless, based on the club's selectivity in membership, the court of appeals determined the Kiwanis was not a place of public accommodation and reversed the trial court, which had concluded that the club must comply with the state's antidiscrimination law. *Id.* at 478.

156. *See* New York State Club Ass'n v. New York City, 108 S. Ct. 2225, 2233 (1988).

157. *See generally supra* notes 122-56 and accompanying text.

158. *See supra* notes 88, 99, 109 and accompanying text.

159. *See supra* note 2.

160. *See supra* notes 122-56 and accompanying text.

161. In applying the federal public accommodations law, *see supra* note 8, courts have held that clubs bear the burden of proving their private status so as to be exempt from the act. *See, e.g.*, United States v. Richberg, 398 F.2d 523 (5th Cir. 1968); Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968); Kyles v. Paul, 263 F. Supp. 412 (E.D. Ark. 1967), *aff'd sub nom.*, Daniel v. Paul, 395 F.2d 118 (8th Cir. 1968), *rev'd on other grounds*, 395 U.S. 298 (1969).

ance between the important interests of the right to choose one's own associates and the right to be free from discrimination.[162]

States' discretion, however, is not necessarily limitless. First, state laws still may infringe inappropriately on first amendment rights.[163] One such infringement would be a sex discrimination law that provides no exemption for private associations. The New York City law avoided this pitfall explicitly by exempting certain types of clubs, as well as benevolent orders and religious organizations.[164] Second, states may draw a line that is too bright. For example, the San Francisco ordinance, unlike the New York law,[165] does not give clubs an opportunity to rebut the presumption of being a public club.[166]

The Supreme Court should defer to states' judgments of what constitutes a private club, provided states stay within these relatively simple boundaries.[167] This deference to states in an area of first amendment rights is unusual, but appropriate. In the first amendment context, the Court typically does not defer to state judgment.[168] Here, however, because of the clash between the right to speech and society's interest in eradicating discrimination, the Court should allow states to perform their own good faith line-drawing to advance the compelling interest of eradicating discrimination.[169]

IV. CONCLUSION

The *New York State Club* decision suggests that large, business-oriented private clubs represent more an extension of the board room than the living room. More than a friendly bridge game, these clubs shuffle

162. *See supra* notes 14-55 and accompanying text.

163. A state law may not be valid if there are significantly less restrictive means to achieve its compelling state interest. *See Roberts*, 468 U.S. at 623; *supra* notes 41-42.

164. *See supra* note 108 and accompanying text. The Supreme Court in *New York State Club* found the New York City Council reasonably could have believed that benevolent orders and religious corporations were different from other purportedly private clubs in the crucial respect of whether business activity is prevalent among them. 108 S. Ct. at 2235-37. Additionally, the Court stated that the New York law indicates that benevolent orders and religious corporations are unique and that a rational basis existed for this exemption. *Id.* at 2236.

165. *See New York State Club*, 108 S. Ct. at 2235; University Club v. City of New York, 842 F.2d 37, 41 (2d Cir. 1988); Local Law No. 63 of 1984 § 1, App. 14-15.

166. *See* Kay, *supra* note 15, at 857. Courts may find such a hard line too uncompromising to survive a first amendment overbreadth challenge.

167. *See supra* notes 88, 99, 109 and accompanying text.

168. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 26, at 19-20.

169. *See supra* notes 7, 14 and accompanying text.

deals among the country's most powerful political, business, and financial leaders. The *New York State Club* Court did not strip individuals of their first amendment right to choose their associates for expressive and intimate purposes. Rather, the court protected the state's right to prevent exclusion of individuals from business associations because of irrelevant considerations such as sex. The decision, however, left the right of freedom of association for truly private clubs unscathed.

The remaining question involves defining the parameters of the private club. The *New York State Club* opinion suggests that the Court is willing to defer to states' good faith efforts to draw these lines. The case thus invites states to enact legislation banning sex discrimination by private clubs.

New York City took a step in the right direction by prohibiting invidious discrimination in purportedly private clubs. States should follow this direction by outlawing sex discrimination in public clubs and creating a rebuttable presumption that clubs are public unless they can show by their size, selectivity, exclusion of nonmembers, and purpose that they are private. States must not allow clubs to wrap themselves in a cloak of privacy to shield their discriminatory practices.

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