

# COMMENTS AND NOTES

## DISCRIMINATION IN PRIVATE SOCIAL CLUBS: FREEDOM OF ASSOCIATION AND RIGHT TO PRIVACY

Racial and religious discrimination limiting the access of minority groups to education, vocational training, housing, and other facilities has come under increasing attack in the United States over the last 20 years.<sup>1</sup> A broadening of the scope of public interest and a corresponding narrowing of protected private interests have led to increased municipal, state, and federal limitations on "permissible" or legally protected racial and religious discrimination.

Although public accommodation laws have been enacted by the federal government,<sup>2</sup> 37 states,<sup>3</sup> and the District of Columbia,<sup>4</sup> each

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1. The modern era in anti-discrimination law can be traced from *Brown v. Board of Education*, 347 U.S. 483 (1954). That decision marks the advent of active governmental involvement in the protection of human rights. See A. COX, *THE WARREN COURT* (1968). The activist Supreme Court led the way throughout the late 1950's and early 1960's. The Court was joined in 1957 by Congress when it enacted the first civil rights statute since 1875, the Civil Rights Act of 1957, 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C. (1964)). Recently, Congress has enacted three major civil rights acts: The Civil Rights Act of 1964, dealing with public accommodations, employment, and school desegregation, 42 U.S.C. §§ 2000a-h (1964); The Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973-1973p (Supp. V, 1970); and The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (Supp. V, 1970). The Court, for its part, has both rediscovered and reinvigorated the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, and suggested that Congress has the constitutional power to reach certain private discrimination under the enabling sections of the thirteenth and fourteenth amendments. See notes 192-95 *infra* and accompanying text.

2. Title 11 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to a-6 (1964).

3. ALAS. STAT. §§ 18.80.010-300 (1969), *as amended*, §§ 18.80.145-220 (1970); ARIZ. REV. STAT. ANN. §§ 41-1401 to -1485 (Supp. 1970); CAL. CIV. CODE §§ 51-53 (West Supp. 1969), *formerly* ch. 413, §§ 1-4 [1905] Cal. Stat. 553; COLO. REV. STAT. ANN. §§ 25-1-1 to -3-6, 80-21-1 to -8 (1963), *as amended*, (Supp. 1965, 1969); CONN. GEN. STAT. ANN. §§ 31-122 to -128 (1958), *as amended*, (Supp. 1970); CONN. GEN. STAT. ANN. §§ 53-34 to -37 (1958), *as amended*, §§ 53-35 to -36 (Supp. 1970); DEL. CODE ANN. tit. 6, §§ 4501-16 (Supp. 1968); IDAHO CODE ANN. §§ 18-7301 to -7303 (Supp. 1969); ILL. REV. STAT. ch. 14, § 9, ch. 38, §§ 13-1 to -4 (1967); IND. ANN. STAT. §§ 10-901 to -902 (1956), *as amended*, (Supp. 1969); IND. ANN. STAT. §§ 40-2307 to -2317 (1965), *as amended*, (Supp. 1969); IOWA CODE §§ 105A.1-.12 (1966); KAN. STAT. ANN. §§ 44-1001 to 1013 (1964), *as amended*, (Supp. 1969); KY. REV. STAT. ANN. §§ 344.120-140 (1969); ME. REV. STAT. ANN. tit. 17, § 1301 to 1301-A (Supp. 1970); MD. ANN. CODE art. 49B, §§ 1-15 (1968), *as amended*, Md. ANN. CODE art. 49B, §§ 1-16 (Supp. 1969); MASS. ANN. LAWS ch. 151B, §§ 1-10 (1965), *as amended*, MASS. ANN. LAWS ch. 151B, §§ 1-9 (Supp. 1969); MASS. ANN. LAWS ch. 272, §§ 92A, 98 (1968); MICH. CONST. art. 5, § 29; MICH. COMP. LAWS ANN. §§ 16.575-.577 (1967); MICH. COMP. LAWS ANN. §§ 37.1-9 (1967); MICH. COMP. LAWS ANN.

statute has heretofore exempted private clubs either specifically<sup>5</sup> or through restricted definitions of public accommodations.<sup>6</sup> The availability of the statutory private club exception has produced considerable litigation concerning what is or is not a private club.<sup>7</sup> A brief outline of the judicial standards for determining whether an organization qualifies as a private club should indicate the breadth of this form of permissible discrimination.<sup>8</sup>

### PRIVATE CLUBS VERSUS PUBLIC ACCOMMODATIONS

Two factors are central to any substantive separation of private clubs from public accommodations: membership practices and ownership and control.<sup>9</sup>

§§ 750.146-.147 (1968); MINN. STAT. ANN. § 327.09 (1966); MINN. STAT. ANN. §§ 363.01-.13 (1966), as amended, (Supp. 1970); MO. ANN. STAT. §§ 314.010-.080 (Supp. 1970); MONT. REV. CODES ANN. § 64-211 (1962); MONT. REV. CODES ANN. §§ 64-301 to -303 (Supp. 1969); NEB. REV. STAT. §§ 20-101 to -102 (1962), as amended, NEB. REV. STAT. § 20-101 to -104 (Supp. 1967); NEV. REV. STAT. §§ 233.010-.080 (1965); N.H. REV. STAT. ANN. §§ 354-A:1-14 (1966), as amended, §§ 354-A:3, -A:8 (Supp. 1970); N.J. STAT. ANN. tit. 10, §§ 1-2 to -7 (1960), tit. 18, §§ 25-1 to -28 (Supp. 1967); N.M. STAT. ANN. §§ 4-33-1 to -13 (Supp. 1969); N.Y. CIV. RIGHTS LAW §§ 40-41 (1948), as amended, §§ 40-c to -h, 41, 44a (Supp. 1970); N.Y. EXEC. LAW §§ 290-301 (1951), as amended, (Supp. 1970); N.Y. PENAL LAW §§ 513-15, 517 (1967); N.D. CENT. CODE § 12-22-30 (Supp. 1969); OHIO REV. CODE ANN. §§ 2901.35-.36 (Page 1954); OHIO REV. CODE ANN. §§ 4112.01-.99 (Page 1965), as amended, (Page Supp. 1969); OKLA. STAT. ANN. tit. 25, § 1400-02 (Supp. 1970); ORE. REV. STAT. §§ 30.670-.680, 659.010-.115 (1969); PA. STAT. ANN. tit. 18, § 4654 (1963); PA. STAT. ANN. tit. 43, §§ 951-63 (1964), as amended, (Supp. 1970); R.I. GEN. LAWS ANN. §§ 11-24-1 to -6 (1969), 28-5-1 to -39 (1968); S.D. COMPILED LAWS ANN. §§ 20-12-1 to -3 (1967), as amended, (Supp. 1970); UTAH CODE ANN. §§ 13-7-1 to -4 (Supp. 1969); VT. STAT. ANN. tit. 13, §§ 1451-52 (1958), as amended, §§ 1452-53 (Supp. 1968); WASH. REV. CODE § 9.91.010 (1957); WASH. REV. CODE §§ 49.60.010-.320 (1959), as amended, (Supp. 1967); WIS. STAT. ANN. § 942.04 (1958), as amended, § 942.04(3) (Supp. 1970); WYO. STAT. ANN. §§ 6-83.1 to .2 (Supp. 1969). Those states without public accommodations laws are Alabama, Arkansas, Florida, Georgia, Hawaii, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

4. D.C. CODE ANN. §§ 47-2901 to -2911 (1961).

5. Seventeen states specifically mention and exempt private clubs. *See, e.g.*, N.J. STAT. ANN. §§ 10:1-2 to 1-7, 18:25-1 to 25-8 (1960); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1948).

6. Twenty states do not specifically mention private clubs. *See, e.g.*, DEL. CODE ANN. tit. 6, § 4502 (Supp. 1968); OHIO REV. CODE ANN. §§ 2901.35-.36 (Page 1954); VT. STAT. ANN. tit. 13, §§ 1451-52 (1958).

7. The accounts of businesses which suddenly became private clubs in 1964 are numerous. *See, e.g.*, Atlanta Journal and Constitution, Jan. 24, 1965, at 14, col. 1; Dallas Morning News, July 4, 1964, § 1, at 7, col. 6; St. Louis Post Dispatch, July 9, 1964, at 1A, col. 1; The Wall St. Journal, July 22, 1964, at 1, col. 4; Washington Post, Aug. 16, 1964, § A, at 6, col. 4.

8. For more detailed treatment of private club standards see Note, *Public Accommodations Law and the Private Club*, 54 GEO. L.J. 915 (1966); Note, *The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U.L. REV. 1112 (1969).

9. The articles cited in note 8 *supra* indicate that the courts have relied on some thirteen

### Membership Criteria

The legislative history of Title 11 of the Civil Rights Act of 1964<sup>10</sup> which exempts clubs and other establishments that are not in fact open to the public<sup>11</sup> indicates that to be considered a private club an organization must exercise some selectivity in choosing its members.<sup>12</sup> The absence of genuine selectivity is inconsistent with privacy and the concept of a club. Where a purported private club has no formal membership selection procedures,<sup>13</sup> exacts only minimal dues,<sup>14</sup> or disregards its own member-non-member distinctions and offers its facilities as a matter of course to non-members,<sup>15</sup> it is likely to be held a sham club.

More recent cases have indicated that an offer to serve all white individuals within a defined geographic area is inconsistent with the nature of a truly private club. Although the YMCA health and athletic clubs of Raleigh, North Carolina, enforced membership application procedures and elicited substantial dues, they failed to qualify as private clubs because there were no limits on white membership and no standards for admissibility within the geographic area.<sup>16</sup> In *Sullivan v. Little Hunting Park, Inc.*<sup>17</sup> the Supreme Court

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separate characteristics to distinguish a public accommodation from a private club. See 44 N.Y.U.L. REV., *supra* note 8, at 1117-18. The text represents only a short summary of the major factors considered in such analysis.

10. 42 U.S.C. §§ 2000a to a-6 (1964).

11. *Id.* § 2000a(e).

12. Senator Humphrey stated that the private club exception was designed to protect only "the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis." 110 CONG. REC. 13697 (1964). See also *id.* at 7407 (remarks of Senator Magnuson).

13. See, e.g., *Stout v. YMCA*, 404 F.2d 687, 688 (5th Cir. 1968); *Brackeen v. Ruhlman*, 3 RACE REL. L. REP. 45, 47 (Pa. C.P. 1957); *Holiday Sands, Inc.*, 9 RACE REL. L. REP. 2025, 2028 (Ohio Civil Rights Comm. 1964). The mere presence of formal procedures thinly disguising a discriminatory scheme did not satisfy the court in *United States v. Clarksdale King & Anderson Co.*, 288 F. Supp. 792, 795 (N.D. Miss. 1965).

14. "Most private clubs have annual dues in a substantial amount. The defendants have no dues but merely charge each applicant 10¢ as an admission fee, good for life." *Bradshaw v. Whigam*, 11 RACE REL. L. REP. 934, 936 (S.D. Fla. 1966). See also *Gillespie v. Lake Shore Golf Club, Inc.*, 91 N.E.2d 290, 292 (Ohio Ct. App. 1950) (no dues); *Brackeen v. Ruhlman*, 3 RACE REL. L. REP. 45, 48 (Pa. C.P. 1957) (no dues).

15. See, e.g., *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90, 93 (E.D. La. 1967); *Sutton v. Capitol Club, Inc.*, 10 RACE REL. L. REP. 791, 792 (E.D. Ark. 1965); *Gillespie v. Lake Shore Golf Club, Inc.*, 91 N.E.2d 290, 291 (Ohio Ct. App. 1950).

16. *Nesmith v. YMCA*, 397 F.2d 96 (4th Cir. 1968) "[S]erving or offering to serve all the members of the white population within a defined geographical area is certainly inconsistent with the nature of a truly private club." *Id.* at 102, quoting, 62 Nw. U.L. Rev. 244, 246 (1967).

17. 396 U.S. 229 (1969).

held that a nonstock membership corporation organized to operate community park and playground facilities was not a private social club since race was its only selective element.

### *Ownership and Control*

Ownership of club facilities by and for the benefit of all club members is more consistent with traditional notions of the private club than proprietary operation for the profit of one or a few owners.<sup>18</sup> In addition, control by the membership in such areas as the selection of new members<sup>19</sup> and the making of club rules and policies<sup>20</sup> are probably essential to the existence of a private club.<sup>21</sup> Oklahoma, having observed the experience of other states for many years, in 1968 passed the most recent public accommodations law.<sup>22</sup> In proscribing discrimination in places of public accommodation Oklahoma defined a private club in the following terms:

"[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."<sup>23</sup>

### *Social Clubs*

Left unscathed by the various public accommodations laws and the evolving judicial definition of the private club are the wide variety

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18. Justice Brennan writing for the Court in *Daniel v. Paul* observed that the establishment under consideration was "simply a business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs." 395 U.S. 298, 301 (1969). See also *United States v. Richberg*, 398 F.2d 523, 529 (5th Cir. 1968). See generally Pasley, *Exclusion and Expulsion from Non-Profit Organizations—The Civil Rights Aspect*, 14 CLEV.-MAR. L. REV. 203, 216 (1965).

19. It is difficult to see how the admissions policy can reflect the associational preferences of the existing members unless those members determine who is to be admitted. "A private club customarily consists of individuals who, through committee action or membership action or both, approve and select their membership." *Bradshaw v. Whigam*, 11 RACE REL. L. REP. 934, 936 (S.D. Fla. 1966). See also *Williams v. Rescue Fire Co.*, 254 F. Supp. 556, 561 (D. Md. 1966).

20. See, e.g., *Holiday Sands, Inc.*, 9 RACE REL. L. REP. 2025, 2029 (Ohio Civil Rights Comm'n 1964); *Brackeen v. Ruhlman*, 3 RACE REL. L. REP. 45, 48 (Pa. C.P. 1957).

21. In *Clover Hill Swimming Club, Inc. v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966), decided under a New Jersey public accommodations law which exempts "bona fide private clubs," a swim club owned by a corporation and operated for a profit refused to admit a black applicant because of his race. There was a substantial membership fee and membership was limited to 400 families. The court, nevertheless, found this club to be a public accommodation largely because the business was operated for the profit of the owners and controlled by the shareholders, not the members.

22. OKLA. STAT. ANN. tit. 25, § 1401-02 (Supp. 1968).

23. *Id.* § 1401(1)(i).

of private social clubs which exist in this country in the form of suburban golf and country clubs, fraternal societies, athletic clubs, and downtown or city clubs.<sup>24</sup> Most of these meet the "exclusiveness"<sup>25</sup> and "internal control"<sup>26</sup> criteria. They are in danger of being termed public accommodations only so far as they are owned and operated for a profit by other than their members or relinquish their "exclusiveness" in some other manner such as advertising generally to the public.<sup>27</sup>

A unique inroad into this form of "permissible" racial and religious discrimination was made recently when Maine added to its state statute forbidding discrimination in places of public accommodation the following provision which effectively prohibits racial and religious discrimination in many private social clubs:

No person, firm, or corporation holding a license under the State of Maine or any of its subdivisions for the dispensing of food, liquor or for any service or being a State of Maine corporation authorized to do business in the State shall withhold membership, its facilities or services to any person on account of race, religion or national origin, except such organizations which are oriented to a particular religion or which are ethnic in character.<sup>28</sup>

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24. There were approximately 3,300 country clubs in 1962, with the number estimated to be growing by 100 each year. Boyle, *The Ways of Life at the Country Club—Part I*, SPORTS ILLUSTRATED, Feb. 26, 1962, at 52-53. The National Intrafraternity Conference in 1958 included some 61 national groups having local chapters at various colleges and universities. B. EPSTEIN & A. FORESTER, "SOME OF MY BEST FRIENDS . . ." 165 (1962). In addition, of course, there are local fraternities at many campuses. One author reports that there are "exclusive upper class men's clubs in most major cities" in addition to those in smaller cities. E. BALTZELL, PHILADELPHIA GENTLEMEN 338 (1958). Metropolitan athletic clubs have been founded in 38 of the 130 American cities with a population of 100,000 or more. *Discrimination in Athletic Clubs, RIGHTS*, June, 1968, at 130. See generally *The Wall St. Journal*, Sept. 10, 1969, at 1, col. 1.

25. See generally E. BALTZELL, *supra* note 24, at 338-45; *The Wall St. Journal*, Apr. 9, 1970, at 1, col. 5.

26. Approximately 90 percent of the country clubs operating in 1962 were member-owned. SPORTS ILLUSTRATED, Feb. 26, 1962, at 52.

27. See, e.g., *Nesmith v. YMCA*, 397 F.2d 96, 99 (4th Cir. 1968); *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90, 93 (E.D. La. 1967); *Clover Hill Swimming Club, Inc. v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966).

28. ME. REV. STAT. ANN. tit. 17, § 1301(A) (Supp. 1969). Another Maine statute provides that "[n]o person, corporation, firm or copartnership shall conduct, control, manage or operate, for compensation, directly or indirectly . . . any eating . . . place . . . unless the same shall be licensed by the department." ME. REV. STAT. ANN. tit. 22, § 2482 (1965). This would seem to preclude avoidance of the statute in the sale of food by a change in accounting practices. What is illegal is the taking of compensation for the operation of an eating place without a license. The Maine laws also provide that liquor cannot be sold without a license, *id.* tit. 28, § 1055, and provide specifically for licenses to be issued to clubs, *id.* tit. 28, § 701, as defined in *id.* tit. 28, § 2(4). The final sentence of the amendment excepting "organizations . . . oriented to a particular religion or which are ethnic in character" probably was included to insure against infringing

The exemption of private clubs, and more particularly private social clubs, from the operation of public accommodations laws has been premised upon the rights of freedom of association and privacy.<sup>29</sup> The assumption is made that the right to freedom of association or some concept of privacy protects not only the right to associate in a private club with others for social or recreational purposes but also the right to exclude from that association anyone for any arbitrary reason. The Maine statute may present the first real test of the breadth of the constitutional rights to freedom of association and privacy in the private social club context.

This comment will examine the development of the rights to freedom of association and privacy with special attention to their relationship to private social clubs. It will attempt to construct a conceptual framework for determining whether legislative or judicial interference with a particular activity, such as racial discrimination in a private social club, violates the right to freedom of association as applied by the courts. Finally, it will examine possible alternatives to the legislation adopted by Maine for eliminating racial and religious discrimination in certain types of private social clubs.

#### THE PRIVATE SOCIAL CLUB IN THE UNITED STATES

There are countless varieties of voluntary social associations in the United States today. The propensity of Americans to form and join these clubs has been noted by writers<sup>30</sup> and studied extensively by sociologists.<sup>31</sup> The great majority of these social clubs operate on a

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upon the first amendment guarantee of freedom of religion. *See Goshorn v. Bar Ass'n*, 152 F. Supp. 300, 306 (D.D.C. 1957).

29. *See* remarks of Hon. Wm. M. McCulloch: "Moreover, where freedom of association might logically come into play as in cases of private organizations, title II quite properly exempts bona fide private clubs and other establishments." H.R. REP. NO. 916, 88th Cong., 1st Sess., pt. 2, 9 (1963). This position is supported by commentary in the area. *See, e.g.*, Note, *Public Accommodations Laws and the Private Club*, 54 GEO. L.J. 915, 918-19 (1966); Note, *The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U.L. REV. 1112, 1122 (1969); 45 N.C.L. REV. 498, 500 (1967); 62 Nw. U.L. REV. 244, 245-46, 250-51 (1967).

30. *See, e.g.*, "The tendency of Americans to unite with their fellows for varied purposes—a tendency noted a hundred years earlier by de Tocqueville—now became a general mania . . . .

It was a rare American who was not a member of four or five societies." C. & M. BEARD, 2 THE RISE OF AMERICAN CIVILIZATION 730-31 (1929). "[N]othing could be more 'natural' to an American than to join an association in the pursuit of interests shared by others . . . ." W. WARNER, THE EMERGENT AMERICAN SOCIETY 276 (1967). *See generally* Schlesinger, *Biography of a Nation of Joiners*, 50 AM. HIST. REV. 1 (1944).

31. *See, e.g.*, T. PARSONS, CONFLICTS OF POWER IN MODERN CULTURE—A SYMPOSIUM 45

very informal basis and exist only during some brief period in the lives of their founding members. Some social clubs, however, tend to be more permanent, lasting beyond the lifetimes of their founders and members. Examples of the latter include national and local fraternal and service organizations, country clubs, city clubs, and athletic clubs. The history of these more permanent voluntary associations coupled with available evidence concerning the extent of their racial and religious discrimination provides the background for any discussion of their alleged constitutional right to restrict membership arbitrarily.

### *Country Clubs*

Spurred by the development of highly industrialized urban centers after the Civil War, wealthy Americans formed country clubs for social and recreational purposes.<sup>32</sup> The Country Club in Brookline, Massachusetts, formed in 1882, is the oldest in this country, originally providing a restaurant, bowling alley, tennis courts, horse racing track, and social events for its members.<sup>33</sup> Golfing facilities became the central attraction of most country clubs, and with the increasing popularity of golf the number of country clubs increased until there were 4,500 in 1929.<sup>34</sup>

Financial pressures caused by the Depression, World War II, and rising property taxes forced many clubs to close, their number decreasing to a low of 2,800 in 1956.<sup>35</sup> There are approximately 4,500 private country clubs in the United States today, and dues and guest fees average over \$500 per year.<sup>36</sup> Financial pressures on the private country club remain great, however, as evidenced by the increasing membership dues, and admission of social members, and the en-

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(L. Bryson, L. Finkelstein & R. Maciver 1947). Social scientists, for example, have concluded that social status is usually positively associated with group membership. R. PRESTHUS, *MEN AT THE TOP—A STUDY IN COMMUNITY POWER* 246 (1964); W. WARNER, *AMERICAN LIFE* 229 (1962); see also W. WARNER, *supra* note 30, at 282-83 & n. 5.

32. Boyle, *supra* note 24, at 52. See generally A. SCHLESINGER, *THE RISE OF THE CITY, 1878-1898*, at 288-90 (1933).

33. Boyle, *supra* note 24, at 52-53.

34. *Id.* at 53.

35. *Id.*

36. See *Our Ailing Country Clubs*, *FORBES*, March 15, 1971, at 43; *Country Clubs Fall Short of the Green*, *BUSINESS WEEK*, March 6, 1971, at 77.

couragement of the use of club facilities by non-member organizations for meetings or banquets.<sup>37</sup>

The country club is extremely important to businessmen as the scene of numerous informal business discussions, the source of new business from fellow club members, and a place where a member may entertain visiting business associates. For these reasons the ability to belong to a club may control access to job promotion:<sup>38</sup>

It is important for our business that our plant managers maintain a certain status in their communities. They must join the country club and the leading city club. Today that's where the big deals are discussed and made. . . . They must be able to maintain a free and easy association with the people who count. If we promote Jewish personnel into key, sensitive positions, we run the risk of social non-acceptability. We avoid this by picking someone else.<sup>39</sup>

### *City Clubs*

City clubs, first appearing in London, were originally coffee houses where men gathered to learn the latest news, but later developed into men's eating clubs.<sup>40</sup> The Philadelphia Club, the first city club in the United States, was informally formed in 1830.<sup>41</sup> Others soon followed in New York, Boston, San Francisco, and Baltimore. Unlike the country club, the city club is built around its eating facilities, and membership is often limited to one sex.

In a large city with more than one city club, membership in a particular club may indicate a man's business position. For example, membership in the Philadelphia Club has been described as "the final criterion of Proper Philadelphia's acceptance of new men of power."<sup>42</sup>

37. *Id.* at 53-54. See also note 36 *supra*. The author also indicates that financial pressures have forced most country clubs to build facilities to attract the entire family. This magnifies the racial or religious discrimination since it is forced on children through social association with only those racial or religious elements their parents choose to admit to the club. See E. BALTZELL, *THE PROTESTANT ESTABLISHMENT: ARISTOCRACY AND CASTE IN AMERICA* 358 (1964).

38. Although most executives will claim publicly to rely solely on managerial capability in promotion policies, see, e.g., *Who Do You Promote?* DUN'S REVIEW AND MODERN INDUSTRY, May, 1964, at 50, social considerations are also important. "[A]t the upper levels of the administrative pyramid, when the opportunities for promotion are drastically reduced, managerial capability loses some of its significance as a distinguishing element in selection." Powell, *Elements of Executive Promotion*, CAL. MANAG. REV., Winter, 1963, at 85. Studies indicate that membership in the right social club may be crucial to promotion. See *id.* at 85-86, 88. See also Bowman, *What Helps or Harms Promotability?* HARV. BUS. REV., Jan.-Feb. 1964, at 6, 16-18. A recent article reports that 15-20 percent of private country club memberships are subsidized by employers. FORBES, *supra* note 36, at 42.

39. Belth, *Discrimination and the Power Structure*, BARRIERS—A HUMAN RIGHTS READER 11 (1958).

40. See E. BALTZELL, *supra* note 24, at 336-37.

41. *Id.* at 337.

42. *Id.* at 350.

These city clubs may be more important than country clubs for business and job promotion.<sup>43</sup> Non-membership means not only loss of contacts but also the exclusion from daily business meetings held at the clubs. One author reports that in Chicago a Jewish man next in line for the presidency of a well-known firm was not selected because he would not be able to lunch with the other executives at the men's club.<sup>44</sup>

The widespread racial and religious discrimination in private social clubs is common knowledge.<sup>45</sup> The extent of religious discrimination among city and country clubs was the subject of a nationwide study by the Anti-Defamation League of B'nai B'rith in 1962<sup>46</sup> covering 803 country clubs and 349 city clubs with a total combined membership of 692,646. Some of the results of that study are summarized on the chart below:<sup>47</sup>

	COUNTRY CLUBS		CITY CLUBS		COMBINED	
	Total Clubs	Member-ship	Total Clubs	Member-ship	Total Clubs	Member-ship
TOTAL CLUBS	803	406,066	349	285,290	1152	692,646
DISCRIMINATORY CLUBS	579	263,011	202	205,280	781	468,291
PERCENT	72%		60%		67%	
NON-DISCRIMINATORY CLUBS	224	143,655	147	80,700	371	224,355
PERCENT	28%		40%		33%	

43. "[T]oday, and especially in the years since the end of the Second War, membership in one or two of the leading men's clubs, which lie at the center of commercial power in most large cities in the nation, has become a tacit prerequisite for promotion to the top positions in the executive suites of our large national corporations." E. BALTZELL, *THE PROTESTANT ESTABLISHMENT* 362 (1964).

44. *Id.* at 367.

45. "The characteristically American lodges and secret societies . . . in the North very rarely, if ever, include Negroes. This is also true of most social clubs, particularly and obviously those that have to do with helping to maintain the status of the white elite." W. WARNER, *STRUCTURE OF AMERICAN LIFE* 22 (1952).

46. ANTI-DEFAMATION LEAGUE, *A STUDY OF RELIGIOUS DISCRIMINATION BY SOCIAL CLUBS* (1962). Summaries of the results of this survey are reprinted in *RIGHTS*, Jan. 1962, at 83 and Boyle, *The Ways of Life at the Country Club—Part II*, *SPORTS ILLUSTRATED*, March 5, 1962, at 71.

47. The clubs represented a national cross section chosen from those employing a professional manager. Forty-six states and the District of Columbia were represented. Neither the study itself nor reports of its results mention how the survey determined whether a club

Two-thirds of the clubs contacted discriminated on the basis of religion. Of the discriminatory clubs 87 percent were Christian clubs excluding or limiting Jews, while 13 percent were Jewish clubs excluding or limiting Christians. More than 90 percent of the discriminatory clubs practice their discrimination unofficially without provision in their bylaws. The study further concluded that such religious discrimination was not confined to a single geographic area. Although the study, unique on a national level, dealt only with religious discrimination, its results may also provide an indicator of racial discrimination.<sup>48</sup>

### *The Athletic Club*

City athletic clubs, providing limited recreational rather than dining facilities for their members, also follow restrictive membership policies.<sup>49</sup> A 1968 Anti-Defamation League study indicates that of 38 major athletic clubs in cities of over 100,000 only three had open membership policies. Twenty-one allowed Jews but not blacks, while 14 barred both Jews and blacks or barred blacks while having a Jewish quota.<sup>50</sup>

### FREEDOM OF ASSOCIATION: HISTORY AND ORIGIN

Alexis de Tocqueville wrote:

The most natural privilege of man next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to be as almost

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discriminated on the basis of religion. A club maintaining a quota was considered a discriminatory club while a "non-discriminatory club" was one which "accepted Christians and Jews without regard to religion in its membership policy and practice." RIGHTS, Jan. 1962, at 84.

48. See ANTI-DEFAMATION LEAGUE, *supra* note 46, at 10. The results of a 1968 study of racial and religious discrimination in city athletic clubs reveal that racial discrimination exceeds religious discrimination in private athletic clubs. See note 50 *infra* and accompanying text.

49. The New York Athletic Club has over the last five years been the center of considerable controversy. The Anti-Defamation League reported in 1968 that the NYAC never had a black member and had very few Jewish members, indicating a quota. In 1962 Hon. Robert F. Wagner, then mayor of New York City, resigned from the club because of its discrimination. Collegiate athletes from Villanova, Georgetown, City College of New York, and Manhattan College as well as New York City high schools declined to participate in a NYAC sponsored track meet. See RIGHTS, June 1968, at 129.

— 50. The results of the study are reported at *id.* Racial and religious discrimination also exists in other private social associations. For one report of discrimination in these other clubs see B. EPSTEIN & A. FORSTER, *supra* note 24, at 159-68 (college fraternities—the author indicates that such discrimination is declining because of university pressure).

inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.<sup>51</sup>

The right to freedom of association is not specifically mentioned in the Constitution;<sup>52</sup> its boundaries must be gleaned from a series of Supreme Court cases recognizing the right.<sup>53</sup>

Before 1958 several distinct "associational" rights were recognized: the freedom to form, join, and support religious associations;<sup>54</sup> the freedom of employees to associate together for collective bargaining;<sup>55</sup> and the right to form and join political

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51. I A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 196 (Bradley ed. 1954).

52. There is very little in the way of constitutional history relating to the right to freedom of association. In fact, some fear was expressed over the dangers of factionalism and insurrection that might follow from the formation of groups. See *THE FEDERALIST* No. 9, at 124-30 (Wright ed. 1961) (J. Madison, A. Hamilton & J. Jay). De Tocqueville observed in his classic political and social criticism of America that "[i]n no country in the world has the principle of association been more successfully used or more unsparingly applied to a multitude of different objects, than in America." I A. DE TOCQUEVILLE, *supra* note 51, at 197. For a more detailed discussion of the constitutional background of freedom of association see C. RICE, *FREEDOM OF ASSOCIATION* 34-41 (1962) [hereinafter cited as RICE]. See also C. ANTIEAU, *RIGHTS OF OUR FATHERS* 82-85 (1968).

53. In addition, the United Nations has recognized the right to freedom of association. "(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association." Res. 217(III), *Resolutions* 71, U.N. Gen. Ass. Off. Rec. 3d Sess., Pt. 1 (A/810) (1948). *UNIVERSAL DECLARATION OF HUMAN RIGHTS* reprinted in 5 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 240 (1965).

54. Religious associations were among the first established in America. The right to associate voluntarily for religious purposes was basic to the aspirations of many of the original colonists in settling in the New World. Gradually, however, religious freedom in all the colonies but Rhode Island and Maryland was encumbered by laws encouraging the adopted religion of the state and discouraging minority sects. See generally E. GREENE, *RELIGION AND THE STATE* (1941). The process of separation of church and state began after the Revolution with the adoption of the first amendment but was not completed until that amendment was made applicable to the states. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Governmental neutrality toward religious association is firmly established, and the right of the individual to be free of unreasonable restraints in such association is secure. See *Niemotko v. Maryland*, 340 U.S. 268 (1951). The right to join and support as well as the right not to join or support religious associations is absolute. The freedom of religious association also includes the freedom to practice reasonable tenets of a religion. Thus, a Jehovah's Witness might be excused from saluting the flag, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Nevertheless, religious practices are subject to reasonable restraint to protect public peace and order, especially where a religious opinion is translated into an act or refusal to act. See generally *Gray v. Gulf, Mobile & Ohio R.R.*, 429 F.2d 1064, 1072 (5th Cir., 1970); RICE 48-72.

55. The history of the struggle of organized labor to overcome resistance to the formation of unions and the principle of collective bargaining is well known. See generally M. ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 180-90 (1961) [hereinafter cited as ABERNATHY]; D. FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* 42-53 (1963) [hereinafter cited as FELLMAN]. The right to freedom of association in labor unions was codified in the National

parties.<sup>56</sup> These rights arose either through legislation or as necessary adjuncts to specific constitutional guarantees and to some extent precluded governmental interference in these areas.

### *Member Disclosure*

Formal recognition of a constitutional right to freedom of association came in 1958 in *NAACP v. Alabama*.<sup>57</sup> Fined for

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Labor Relations (Wagner) Act, ch. 372, § 1, 49 Stat. 449. "Employees shall have the right to self organization to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining and other aid or protection." *Id.* § 7. The Labor-Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. § 151 (1964) provides that workers are entitled to "full freedom of association, self-organization, and designation of representatives of their own choosing . . . ."

56. The right of citizens to form, join, or support a political party is traceable from specific constitutional guarantees of the freedoms of petition and speech and the right to vote. *See generally* FELLMAN 36-52. Concerning the lack of express constitutional authority for political parties, a California court replied:

No expression is needed in the declaration of rights to the effect that electors holding certain political principles in common may freely assemble, organize themselves into a political party and use all legitimate means to carry their principles of government into active operation through suffrages of their fellows. Such a right is fundamental. It is inherent in the very form and substance of our government and needs no expression in its constitution. *Button v. Board of Election Comm'rs*, 129 Cal. 337, 61 P. 1115, 1117 (1900).

With the right to form, join, and support political parties firmly established, the cases have involved state attempts to limit access to the ballot by both small and subversive parties. *See Williams v. Rhodes*, 393 U.S. 23 (1968). In one area the Court has intervened in the operation of political parties. Whereas the right to form, join, and support a political party and the right of the party to reasonable, non-discriminatory access to the ballot is constitutionally protected, the party may not arbitrarily exclude black voters from a primary where the primary is an integral step in the election process. *Smith v. Allwright*, 321 U.S. 649 (1944). In *Terry v. Adams*, 345 U.S. 461 (1953), the exclusion restriction was extended to include a consistently successful "private" political association, which conducted its own primary to determine its candidate in the state sponsored primary. The association's candidate regularly won the state-wide primary.

57. 357 U.S. 449 (1958). The constitutional right to freedom of association was referred to several times prior to its formal enunciation in 1958. *See Watkins v. United States*, 354 U.S. 178, 188 (1957); *American Communications Ass'n v. Douds*, 339 U.S. 382, 409 (1950); *AFL v. American Sash Co.*, 335 U.S. 538, 546 (1949) (Frankfurter, J., concurring); *Whitney v. California*, 274 U.S. 357, 371 (1927). In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the Court said:

Our form of government is built on the premise that every citizen shall have the right to engage in political expression *and association*. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political association. *Id.* at 250 (emphasis added).

The Court overturned a contempt conviction arising from the refusal of the plaintiff to answer questions raised by a state investigating committee concerning his political associations. It is arguable that this only extended the existing right to form and join political parties.

contempt after refusing to produce membership lists pursuant to a foreign incorporation registration statute,<sup>58</sup> the NAACP appealed, claiming that such disclosure and accompanying pressure would inhibit membership. It had been suggested that a constitutionally protected right to freedom of association might be found in either the first or fifth amendments.<sup>59</sup> The Court, noting that group action may be essential to effective advocacy, overturned the contempt conviction and recognized a constitutional right to freedom of association:

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 Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the *beliefs sought to be advanced* by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to close scrutiny.<sup>60</sup>

The Court, with either the first or fifth amendments available for support of this position, clearly chose to base its decision on the first amendment. By relying on the illegal nature of the Klan's activities, the Court distinguished an earlier case which upheld a New York anti-Klan statute<sup>61</sup> requiring any oath-bound organization to file a roster of its members.<sup>62</sup> Such inherent illegality could not be found in the NAACP.

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58. The impairment was an indirect, but none-too-subtle, attack on the right of the NAACP to exist as a political pressure group. Attacks by southern states in particular upon the effective existence of the NAACP were commonplace in the 1950's. See AMERICAN JEWISH CONGRESS, ASSAULT UPON FREEDOM OF ASSOCIATION, A STUDY OF THE SOUTHERN ATTACK ON THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (1957); McKay, *With All Deliberate Speed: Legislative Reaction and Judicial Development 1956-1957*, 43 VA. L. REV. 1205, 1235-42 (1957).

59. See Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614, 619-24 (1958). Professor Robison suggested that a constitutional right to freedom of association could be predicated upon either the rights to free speech and press in the first amendment or upon the "liberty" protected by the due process clause of the fifth and fourteenth amendments, as a privilege "essential to the orderly pursuit of happiness by free men." *Id.* at 621. He further noted that "[v]iewed solely as a first amendment requirement, freedom of association must be regarded as ancillary, rather than equal, to the rights explicitly described by the amendment . . . . Associations would be vulnerable to state interference unless they could show that their purpose, in part at least, was to exercise freedom of press, speech, assembly or religion." *Id.* at 620-21.

60. 357 U.S. at 460-61 (emphasis added).

61. *Bryant v. Zimmerman*, 278 U.S. 63 (1928). The statute can be found at N.Y. Sess. Laws 1923, ch. 664, as amended N.Y. CIVIL RIGHTS LAW § 54 (1968).

62. 357 U.S. 449, 465 (1958). The Court said that it could take judicial notice of the nature of an organization's activities in determining whether there is a substantial state interest in disclosure of membership or other associational impairments. Compare Robison, *supra* note 59,

Two different types of associational rights emerge from the case: the right to belong anonymously to an unpopular political pressure group with lawful aims and activities and, necessary for the effective preservation of the first, the right of the association to assert the associational rights of its members. The Court in dicta suggested that the freedom of association included the right to advance beliefs and ideas in economic, religious, or cultural, as well as political, matters.

The right to freedom of association as announced in *NAACP v. Alabama* and developed in later cases appeared to be ancillary to express first amendment freedoms. That is, a constitutional freedom of association would be recognized only where the exercise of some express first amendment right was impeded by the associational restraint. In *Bates v. City of Little Rock* the secrecy of membership lists was again held to be protected by the right to freedom of association to advance ideas and air grievances.<sup>63</sup> Justices Black and Douglas concurred, indicating that "[the freedom of association] is entitled to no less protection than any other first amendment right . . . ."<sup>64</sup> Whether they too believed that the right was limited to associations for the purpose of "advancing ideas and airing grievances" is unclear since their opinion did not elaborate further on the possible scope of the protection.

In *Shelton v. Tucker*<sup>65</sup> an Arkansas statute which required teachers to disclose all organizational membership was held to violate the freedom of association. Unlike *NAACP v. Alabama* and *Bates*, where no legitimate state interest in the legislation had been found, the state's legitimate interest in knowing certain organizational ties of its teachers precipitated four dissents. Nevertheless, the majority held that the required disclosure of all organizational ties constituted unnecessary overbreadth leading to "constant and heavy"<sup>66</sup> pressures on teachers to avoid controversial associations. In addition the less restrictive alternative of more limited inquiry was available. Speculation as to the extent of permissible inquiry may provide some indication of the scope of protected non-disclosure. The Court suggests that a state might legitimately ask how many organizations a teacher belongs to or how many hours that teacher spends in organizational

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at 641-47, with Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 26 (1964) [hereinafter cited as Emerson].

63. 361 U.S. 516, 523 (1960).

64. *Id.* at 528.

65. 364 U.S. 479 (1960).

66. *Id.* at 486.

activity.<sup>67</sup> But could a state ask all or even some of its teachers whether they belonged to the NAACP? It probably could not, especially where the NAACP is an unpopular or minority group and disclosure is likely to lead to the impairment of associational rights. On the other hand, could a state legitimately inquire whether a teacher belonged to a local country club? The membership disclosure cases all involve situations where disclosure may result in “reprisals against and hostility to the members.”<sup>68</sup> If this is a necessary element, then anonymity is protected only where disclosure discourages association.

The relationship of freedom of association to express first amendment rights remains unclear. In striking down a Louisiana membership disclosure statute as unconstitutional, the Court noted that “freedom of association is included in the bundle of First Amendment rights . . . .”<sup>69</sup> However, each of these early decisions involved both an organization or members of organizations whose activities were closely related to expressly protected freedoms of speech, petition, press, and assembly and a real threat to the ability of those organizations to exist without constitutional protection.

#### *Association for Expression: Subversive Activities Cases*

The freedom to associate for the advancement of beliefs and ideas has been further refined in a series of “subversive activities” cases. The Communist Party of the United States was found after investigation to be a “Communist-action organization” and ordered to register pursuant to section 7 of the Subversive Activities Control Act of 1950,<sup>70</sup> which included a requirement that the organization provide a list of its members.<sup>71</sup> When the Communist Party challenged the statute, the Court held that this compulsory disclosure

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67. *Id.* at 488.

68. *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961).

69. *Id.* at 296. Apparently at least some members of the Supreme Court are still unsure whether the right to freedom of association is entitled to independent status. “Whether the right to associate is an independent First Amendment right carrying its own credentials and will be carried beyond the implementation of other First Amendment rights awaits a definitive answer.” *United States v. Robel*, 389 U.S. 258, 283 n.1 (1967) (White, J., dissenting). Justice White relied on the Court’s dismissal of a suit involving the right of a Florida accountant to associate in his work with any nonresident accountant for failure to present a substantial federal question. *Id.* See *Mercer v. Hemmings*, 389 U.S. 46 (1967), *dismissing* 194 So. 2d 579 (Fla. 1967).

70. Subversive Activities Control Act of 1950, ch. 1024 § 7(a), 64 Stat. 993(a), *repealed* 81 Stat. 766 (1968).

71. *Id.* § 7(d).

of membership did not violate the first amendment,<sup>72</sup> predicating its finding of a sufficient state interest on a danger in anonymous membership absent in the earlier membership disclosure cases. Justice Douglas, although dissenting from the decision on other grounds, found compulsory disclosure permissible because the association was dominated by a foreign power and its activities amounted to more than mere free speech.<sup>73</sup> That same day the Court upheld a conviction under the membership clause of the Smith Act,<sup>74</sup> finding in *Scales v. United States*<sup>75</sup> that a specific intent requirement protected against any unlawful impediment to associational interests. It thus appears that the right to freedom of association is limited by both the nature of the organization's activities and the reasonableness of the restriction sought to be imposed.

Irrespective of subversive activity charges, broad protection is provided the legitimate political objectives of organizations. Thus, a Florida legislative investigating committee could not require an NAACP official to confirm whether persons suspected of being Communists belonged to the NAACP.<sup>76</sup> The Court suggested that in the absence of any showing of danger to the community inherent in the organization itself the right to anonymous organizational membership was indispensable to the right to freedom of association, "particularly where a group *espouses dissident beliefs*."<sup>77</sup> Once again, however, the Court was careful to limit its rationale for the need for

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72. *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

73. *Id.* at 172-74. Justice Douglas apparently believed that because the activities of the Communist Party in the United States involved more than what was *expressly* protected by the first amendment, their associational interests were subject to greater lawful impairment.

74. Smith Act, ch. 645, § 2385, 62 Stat. 808 (1948), *as amended* 18 U.S.C. § 2385 (1964). The membership clause provided for a fine of not more than \$20,000 or imprisonment for not more than 20 years or both for "[w]hoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group or assembly of persons, knowing the purposes thereof . . . ."

75. 367 U.S. 203 (1961). The trial court judge correctly instructed the jury that guilt could only be predicated upon a "present 'advocacy of [illegal] action'" as soon as circumstances permit and active membership including both knowledge of and support for the organization's illegal objectives. *Id.* at 220.

76. *Gibson v. Florida Legis. Invest. Comm.*, 372 U.S. 539 (1963). The Court held that because disclosure would represent a substantial abridgement of associational freedom the state could require disclosure of organizational membership only where there is some observable nexus between the organization and Communist activity.

77. *Id.* at 544 (emphasis added).

associational protection to organizations engaged in other first amendment activity: "Compelling such an organization engaged in the exercise of First and Fourteenth Amendment rights to disclose its membership presents, under our cases, a question wholly different from compelling the Communist Party to disclose its own membership."<sup>78</sup>

In *Elfbrandt v. Russell*<sup>79</sup> an Arizona loyalty oath statute<sup>80</sup> providing both perjury prosecution and dismissal from public office for any state employee who willfully became or remained a member of the Communist Party was held to violate the first amendment. The Court recognized that an organization may have both legal and illegal goals and that any blanket prohibition would invade "legitimate political . . . association" by punishing an individual for knowing but guiltless behavior.<sup>81</sup> The court did not save the statute by reading into it the specific requirements of active membership and illegal intent as in *Scales*.

In 1967 the Supreme Court found that the Subversive Activities Control Act of 1950 denied protected associational rights by its overbroad prohibition against any member of any "Communist-action organization" engaging in any defense facility employment.<sup>82</sup> The Court again was unable to read "active membership and specific intent" into the statute.<sup>83</sup> Other blanket disabilities applied to mere membership in subversive organizations have met the same fate in lower federal courts.<sup>84</sup>

The "subversive activities" cases do not extend the freedom of association beyond protection of the right to advance ideas and air grievances collectively. As such, the freedom appears ancillary to protected first amendment activity.<sup>85</sup> In *Scales* and *Elfbrandt* the Court recognized the co-existence of legal and illegal aims possible, because for any particular member the organization may be a

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78. *Id.* at 549.

79. 384 U.S. 11 (1966).

80. ARIZ. REV. STAT. ANN. § 38-231 (Supp. 1970).

81. 384 U.S. at 16.

82. *United States v. Robel*, 389 U.S. 258 (1967).

83. *Id.* at 265-66.

84. See, e.g., *Brown v. United States*, 334 F.2d 488 (9th Cir. 1964) (law making it unlawful for a Communist Party member to hold office in a labor union); *Reed v. Gardner*, 261 F. Supp. 87 (C.D. Calif. 1966) (law denying health care benefits to those required to register under the Internal Security Act of 1950).

85. See note 69 *supra*.

"vehicle for the advancement of legitimate aims . . . ."<sup>86</sup> These cases suggest the scope of the right as applied to political or other similar organizations. Federal or state laws attaching disabilities to mere membership in organizations exercising first amendment rights are probably absolutely invalid where the governmental interest can be satisfied by a narrower statute proscribing, for example, active membership and specific intent.<sup>87</sup> A narrowly drawn statute restricting either anonymous membership or the unencumbered freedom to form or join must be supported by a compelling governmental interest.<sup>88</sup>

Even if the foregoing cases can be extended to afford protection to social organizations not exercising express first amendment rights, that protection is still limited by the requirements that the activities and goals of the group be at least partially legal and the legislative attack pose a serious threat to some associational interest.

### *Freedom to Associate and Protected Group Activity*

The right to freedom of association was extended during the mid-1960's not only to prevent legislative restrictions on membership but also to protect certain associational activities closely related to express first amendment freedoms. In an attempt to curb the NAACP's legal attack on racial barriers, Virginia enacted a statute prohibiting acceptance of employment or compensation by an attorney from any person who was not a party to, or had no pecuniary right or liability in, a judicial proceeding.<sup>89</sup> The statute further prohibited soliciting of legal business by an organization for an attorney. The NAACP had retained a legal staff and encouraged private lawsuits which it financed when an NAACP lawyer was used by the litigant. Virginia's highest court, in a suit for declaratory relief, held that the soliciting, encouraging, and financing of litigation were

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86. *Scales v. United States*, 367 U.S. 203, 229 (1961). See also *Elfbrandt v. Russell*, 384 U.S. 11, 15 (1966).

87. See, e.g., *United States v. Robel*, 389 U.S. 258, 267-68 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

88. See, e.g., 367 U.S. at 229. There is some question, especially with respect to contentious organizations whose activities and goals are legal, whether any statute which chills the freedom to join or organize would be constitutionally permissible. See *Gibson v. Florida Legis. Invest. Comm.*, 372 U.S. 539, 562-65 (1963) (Douglas, J., concurring). "[I]t is clear that any restraint upon the mere forming or joining an organization for purposes of expression must be held in conflict with the first amendment." Emerson 23.

89. VA. CODE ANN. §§ 54-74, 78, 79 (1950), as amended, Acts of 1956 Ex. Sess., ch. 33, as amended, Acts of 1964, Va. Sess. Laws, ch. 201, 622.

prohibited by the statute.<sup>90</sup> Noting that litigation to the NAACP was more than a "technique of resolving private differences" and was actually "a form of political expression," the Supreme Court reversed in *NAACP v. Button*.<sup>91</sup> Recognizing that for organizations such as the NAACP "association for litigation may be the most effective form of political association,"<sup>92</sup> the Court held that the statute, as applied, violated rights of association and was unjustified by any sufficient state interest in the regulation of the legal profession.

A narrow reading of *Button* would have limited its holding to cases where litigation was found to be the equivalent of political expression for the association. However, a year later, in *Brotherhood of Railroad Trainmen v. Virginia*,<sup>93</sup> the Court held invalid a Virginia court decree relating to legal solicitation by a labor union and promotion of the legal actions of its members. Whenever a workman was injured or killed and a potential claim arose under either the Safety Appliance Act<sup>94</sup> or the Federal Employer's Liability Act,<sup>95</sup> the union would advise the worker or his family not to settle without seeing a local attorney recommended by the union. This practice resulted in channeling substantially all the labor injury claims work to the recommended attorneys. The Court held that the first amendment protected the workers' right to combine to assert most effectively their statutory rights. Specifically relying on *Button*, the Court proclaimed that "the Constitution protects the associational rights of the members of the Union precisely as it does those of the NAACP."<sup>96</sup>

Nowhere in the decision was litigation equated with political expression. Therefore, at the very least, the case extended the freedom of association beyond association for political expression. Although the right to associate to bargain collectively had been established by statute,<sup>97</sup> the *Trainmen* case extended the constitutional freedom of association for the first time to an economic, as opposed to a political, association. Despite the fact that the decision was based upon the

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90. *NAACP v. Harrison*, 202 Va. 142, 116 S.E.2d 55 (1960), *rev'd*, 371 U.S. 415 (1963).

91. 371 U.S. 415, 429 (1963). The Court remarked that "there is no longer any doubt that the First and Fourteenth Amendments protect *certain forms* of orderly group activity. Thus we have affirmed the right to 'engage in association for the advancement of beliefs and ideas.'" *Id.* at 430 (emphasis added).

92. *Id.* at 431.

93. 377 U.S. 1 (1964).

94. 27 Stat. 531, *as amended*, 45 U.S.C. §§ 1-43 (1957).

95. 35 Stat. 65, *as amended*, 45 U.S.C. §§ 51-60 (1964).

96. 377 U.S. at 8.

97. See note 55 *supra* and accompanying text.

*implied* first amendment right to freedom of association, the Court noted that *express* first amendment rights protect the right of a group to assist its members to litigate effectively:

It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another . . . . The right . . . to consult with each other . . . includes the right to select a spokesman . . . to give the wisest counsel.<sup>98</sup>

To add more traditional first amendment doctrine to the decision, the Court reasoned that to deny the right of union members to "advise and assist" one another in litigation would unduly burden the right to petition the courts.<sup>99</sup> In a subsequent case, the "advice and assistance" that could be given by a union to its members was extended to direct employment of an attorney by the union to represent any member in the prosecution of a workmen's compensation claim before a state industrial commission.<sup>100</sup> The Court found *Button* and *Trainmen* controlling, stating that the result in *Button* was not based on the presence of a political question.<sup>101</sup>

#### FREEDOM OF ASSOCIATION: SPECIFIC APPLICATION OF THE RIGHT

##### *Conceptual Model*

In constructing any conceptual framework to determine which activities are protected by the constitutional right to freedom of association, the context in which an associational right is asserted is of vital importance. The preceding cases suggested several bases of contextual classification: (1) Legality of the organization's activities and goals—the organization might be one whose goals and activities are completely legal, such as the NAACP;<sup>102</sup> one whose goals and activities are partially legal, such as the Communist Party;<sup>103</sup> or one

98. 377 U.S. at 5-6.

99. *Id.* at 7.

100. *UMW Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967).

101. *Id.* at 223. Justice Clark suggested in his dissent in *Trainmen*, 377 U.S. at 10, that the absence of the equivalent of political expression there removed the first amendment protection from the associational activity. Even though the Court in *United Mine Workers* denied the need for political expression, the opinion noted that "[t]he grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones." 389 U.S. at 223. The decision rested upon the full effectuation of express first amendment rights.

102. *See, e.g.*, 377 U.S. at 5 ("lawful purpose"); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("lawful association").

103. *See, e.g.*, *Elfbrandt v. Russell*, 384 U.S. 11, 15 (1966); *Scales v. United States*, 367 U.S. 203, 229 (1961).

whose goals and activities are completely illegal, such as a criminal gang intent upon robbing a bank.<sup>104</sup> (2) Type of organization—political, economic, social, cultural, or religious.<sup>105</sup> (3) Type of restriction imposed—the restriction might inhibit the joining or forming of the organization<sup>106</sup> or the conduct of group activity;<sup>107</sup> produce forced association;<sup>108</sup> or prohibit some form of discrimination.<sup>109</sup> (4) Conduct restricted by the regulation—is the conduct likely to be effected by the restriction expressly protected by the first amendment?<sup>110</sup>

### *Case law and the Model*

Using this model we might draw several conclusions from the preceding cases. For example, where the goals and activities of a *political* organization are *completely legal*, the organization may successfully assert the right to free association against a restriction which threatens the effective existence of the association by inhibiting *joining or forming*.<sup>111</sup> Applying the model to a private social club and

104. See generally Emerson 6.

105. Political, economic, cultural, and religious organizations which were seeking to advance beliefs were specifically mentioned in *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958). The social organization was first mentioned in the modern freedom of association cases in *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). See note 116 *infra* and accompanying text. Justice Douglas, writing the opinion of the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), stated that the Court had protected association pertaining to the social benefit of members. *Id.* at 483. See note 114 *infra* and accompanying text.

106. See, e.g., *Scales v. United States*, 367 U.S. 203, 228-30 (1961); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *NAACP v. Alabama*, 357 U.S. 449, 459 (1958).

107. See notes 89-101 *supra* and accompanying text.

108. See generally Emerson 15-19. Three cases in particular have been discussed in terms of forced association. In *Railway Employers Dep't v. Hanson*, 351 U.S. 225 (1956), the Supreme Court upheld a provision in the Railway Labor Act, 45 U.S.C. § 152 (1964), which permitted railroad unions to negotiate union shop contracts. The challenge to the law was based in part upon the right to freedom of association. The Court, however, did not discuss the constitutional issue but rather held that all employees could be required to contribute to the costs of collective bargaining. In *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), the Court upheld the same provision of the Railway Labor Act against the objection that union dues were being used to support political causes contrary to the beliefs of some union members. The constitutional issue was avoided again by a holding that the Act did not authorize such political spending. In *Lathrop v. Donohue*, 367 U.S. 820 (1961), a state law was upheld which required all lawyers in the state to become members of the State Bar of Wisconsin.

109. In a philosophical sense there are anti-associational aspects to both the unfettered practice of racial and religious discrimination and governmental intervention by statute or court decision to discourage such discrimination. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

110. See note 69 *supra* and accompanying text.

111. This represents a conceptual model of *NAACP v. Alabama*, 357 U.S. 449 (1958). See notes 57-62 *supra* and accompanying text.

a state license law which prohibits racial and religious discrimination by the licensee, the question might be phrased differently: Where the goals and activities of a *social* organization are *completely legal*, may the association, which is *not engaged in protected first amendment activity* successfully assert the right to free association against a restriction which *discourages racial and religious discrimination in the selection of its members*? This statement of the issue raises the following questions not resolved by the freedom of association cases already discussed: Can the right be asserted by a social club? Can it be asserted by a social club that can show no relationship between the express protections of the first amendment and its activities? If so, can it be asserted by such a social club to protect racial and religious discrimination? Since none of these questions has been squarely decided regarding the adult social club, the evidence supporting the extension of freedom of association to non-contentious social clubs and their choice to discriminate in withholding either membership or facilities on the basis of race or religion must be carefully analyzed.

#### *Freedom of Association and Discrimination in the Social Club*

*Association-Expression Equation.* Dicta in *Griswold v. Connecticut*<sup>112</sup> imply that the right to freedom of association might be extended beyond its first amendment roots in the appropriate case. Operators of a Planned Parenthood League Center, which dispensed birth control information and medical advice to married couples, had been convicted for violating a state statute prohibiting giving such advice and counsel. After finding that the operators had standing to raise the constitutional rights of their advisees, the Supreme Court held the statute an unconstitutional violation of the right of privacy, an implied constitutional guarantee.<sup>113</sup> Justice Douglas in the majority opinion spoke of another peripheral constitutional guarantee, the right to freedom of association: "[W]e have protected forms of 'association' that are not political in the customary sense but pertain to the *social*, legal and economic benefit of the members."<sup>114</sup> Although Justice Douglas cited *NAACP v. Button*<sup>115</sup> for this principle, this extension of associational protection to social aspects

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112. 381 U.S. 47 (1965).

113. "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483. See notes 147-52 *infra* and accompanying text.

114. *Id.* at 483 (emphasis added).

115. 371 U.S. 415 (1963). See notes 89-92 *supra* and accompanying text.

of membership was unsupported by anything in that case. In fact, the only reference to social associations in any freedom of association case prior to this was in *Shelton v. Tucker* where the Court noted that the overly broad statute would require disclosure of every conceivable "associational tie—social, professional, political, avocational or religious."<sup>116</sup>

Justice Douglas in *Griswold* seemingly equated joining any organization with expression:

The right of "association" . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion, and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.<sup>117</sup>

It might be argued that membership in any organization is an expression of approval for whatever that group does, providing a somewhat tenuous first amendment connection for discriminatory policies of a private social club.<sup>118</sup> But joining a non-first amendment exercising association seems closer to action than expression.<sup>119</sup> However, if the organization were engaged in communication such as advocating racial separation,<sup>120</sup> the act of joining might be so closely

116. 364 U.S. 479, 488 (1960).

117. 381 U.S. at 483 (dicta).

118. "In one way or another each of [the many thousands of voluntary associations] is actually or potentially a pressure group." RICE 110.

119. The principle advocate of the "expression"—"action" distinction is Professor Emerson. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 115 (1966). This distinction becomes significant in determining the standard by which any restriction is to be judged. If the act is one of pure expression, it assumes a preferred position. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945). See generally Robison, *supra* note 59, at 622-23.

120. See, e.g., *In re Association for the Preservation of Freedom of Choice v. Shapiro*, 9 N.Y.2d 376, 174 N.E.2d 487, 214 N.Y.S.2d 388 (1961).

The Association for the Preservation of Freedom of Choice, a group advocating individual choice in matters of interracial association, applied to incorporate in New York under section 10 of the Membership Corporations Law. Act of March 2, 1916, ch. 19, § 1, [1916] N.Y. Laws 39 (now N.Y. NOT-FOR-PROFIT CORP. LAW § 404 (1970)). That law provided that each certificate of incorporation required the approval of the local justice of the state supreme court. The judge interpreted his function to include an inquiry into whether the purposes and policies of the applicant were in accord with public policy and refused to grant the charter. 17 Misc. 2d 1012, 1013, 187 N.Y.S.2d 706, 707 (Sup. Ct.), *aff'd on rehearing*, 18 Misc. 2d 534, 188 N.Y.S.2d 885 (Sup. Ct.), *application denied*, 10 App. Div. 2d 604, 199 N.Y.S.2d 435 (1959), *appeal denied*, 10 App. Div. 2d 711, 199 N.Y.S.2d 439 (2d Dept.), *petition to revoke opinions denied*, 10 App. Div. 2d 873, 202 N.Y.S.2d 218 (2d Dept.), *motion to clarify order and decision of April 18, 1960 denied*, 11 App. Div. 2d 713, 205 N.Y.S.2d 878 (2d Dept.), *motion for consolidation of appeals denied*, 8 N.Y.2d 910, 168 N.E.2d 826, 204 N.Y.S.2d 151 (1960). That interpretation of the

associated with the group communication as to be protected by the first amendment.<sup>121</sup>

*Fraternity, Sorority, and Non-School Club Cases.* That there is first amendment protection for the right to form, join, and discriminate in private social clubs has been argued in a line of fraternity and sorority cases, but none of these cases which discuss the right to freedom of association has reached the Supreme Court or satisfactorily answered whether the freedom of association protects the right of the adult private social club to discriminate on the basis of race or religion. In *Sigma Chi Fraternity v. Regents of the University of Colorado*,<sup>122</sup> the most notable of the fraternity cases since it was decided after 1958<sup>123</sup> and discussed the application of the enunciated constitutional right to freedom of association to social organizations, the university had resolved to place on probation any organization "compelled by its constitution, rituals, or government to deny membership to any person because of his race, color, or religion."<sup>124</sup> Pursuant to this resolution the university placed the local Sigma Chi chapter on probation with loss of rushing and pledging privileges.<sup>125</sup>

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statute was criticized on first amendment grounds. See Vance, *Freedom of Association and Freedom of Choice in New York State*, 46 CORNELL L.Q. 290 (1961). See also McAulay & Brewster, *In Re Application of the Association for the Preservation of Freedom of Choice*, 6 HOW. L.J. 169 (1960). The Court of Appeals reversed the decision, noting that "[d]issenting organizations have equal rights, so far as freedom of expression is concerned, as any other groups, and are entitled to an equal and objective application of the statute." 9 N.Y.2d at 383, 174 N.E.2d at 490, 214 N.Y.S.2d at 392.

121. Where the act of joining is not so closely related to any communication that it might be termed expression, it becomes "action" and is subject to greater restriction. See generally Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1039 (1969). In addressing himself to Justice Douglas' association-expression equation, Professor Emerson observed:

Joining or belonging to an organization engaged in "expression" should be classified as "expression." But joining or belonging to an organization engaged in "action" cannot be considered a "method of expression," and the associational rights there involved would be governed by constitutional doctrines concerned with governmental powers over "action." Emerson 27.

122. 285 F. Supp. 515 (D. Colo. 1966). See Comment, *State Universities and the Discriminatory Fraternity: A Constitutional Analysis*, 8 U.C.L.A.L. REV. 169, 189 (1961) [hereinafter cited as *Discriminatory Fraternity*]; 45 N.C.L. REV. 1033 (1966); 39 U. COLO. L. REV. 149 (1966).

123. A considerable number of cases decided prior to the enunciation of the freedom of association in *NAACP v. Alabama* in 1958 held that a state might legitimately ban or control social fraternities in high schools and colleges. See, e.g., *Waugh v. Board of Trustees*, 237 U.S. 589 (1915); *Webb v. State Univ.*, 125 F. Supp. 910 (N.D.N.Y.), *appeal dismissed*, 348 U.S. 867 (1954); *Hughes v. Caddo Parish School Bd.*, 57 F. Supp. 508 (W.D. La. 1944), *aff'd*, 323 U.S. 685 (1945). See generally *Discriminatory Fraternity* 185.

124. 258 F. Supp. at 519 (Resolution of the University of Colorado, March 11, 1956).

125. Beta Nu Chapter of Sigma Chi Fraternity, a social fraternity at the university, filed a

The fraternity challenged the resolution, claiming that it interfered with the constitutionally protected right to freedom of association.

The three-judge federal court,<sup>126</sup> examining nearly every case since 1958 invoking the freedom of association, concluded that “[i]t can not be said that any of the . . . decisions uphold the right of association as applied to a social fraternity.”<sup>127</sup> The court refused to decide the issue independently, however, but reasoned instead that even if there were constitutional protection for the right of any social association to select members free of state regulation, such a right was not unqualified.<sup>128</sup> Therefore, since the state through its Board of Regents had a substantial interest and broad discretion in promoting education and maintaining educational discipline and since the specific objective sought to be advanced—the freedom from compulsory discrimination—was legitimate, the method used to achieve this objective was a reasonable restraint upon any first amendment rights which might exist to protect a social fraternity.

*Sigma Chi*'s applicability to private social clubs outside the university milieu was questionable because of the unique relationship that existed between students and a university.<sup>129</sup> The increased recognition in recent years, however, of the applicability of constitutional guarantees to both the college and high school student diminishes the present significance of any distinction between a university social fraternity and a private social club.<sup>130</sup> If *Sigma Chi* is

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“certificate of compliance” as required by the resolution even though its national organization had already suspended their Stanford chapter after it had pledged a black student. The university doubts concerning the genuineness of the chapter pledge were increased by a requirement which forbade a *Sigma Chi* chapter to propose for membership anyone “likely to be considered personally unacceptable as a brother by any chapter or any brother anywhere.” *Id.* at 518. The Beta Nu chapter attempted unsuccessfully to show that the Stanford suspension was not the result of pledging a black student and that in any event the Colorado chapter had complete autonomy. The university was not convinced.

126. The three-judge court was convened pursuant to 28 U.S.C. § 2281 (1964).

127. 258 F. Supp. at 526.

128. “[W]e hold that if the right [of association] exists it is a relative one. Thus the plaintiffs can not insist on immunity from state regulation.” *Id.* at 527.

129. The *Sigma Chi* case, of course, involved a restriction imposed by the state upon a state university. Since the case established that such a restriction is not constitutionally impermissible and not that the state was required to prohibit discrimination because of possible implications of state action inherent in the existence of a discriminatory fraternity on a state campus, the decision seems equally applicable to the case of a private university which imposes a similar restriction.

130. See *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 506 (1969). See generally Wright, *supra* note 121, at 1027; Project, *Procedural Due Process and Campus Disorder: A Comparison of Law and Practice*, 1970 DUKE L.J. 763.

still valid, adult social clubs could be dealt with in the same manner by the state as the college social fraternity was by the university.

In a similar case<sup>131</sup> the Sacramento, California, school district's governing board had outlawed non-school clubs which perpetuated their membership by decision of their members. The state appellate court upheld the regulation against a constitutional freedom of association attack. The regulation involved was much more drastic than that in *Sigma Chi* in that it denied the right of the organization to exist. This deference to the expertise of the school administrators undoubtedly resulted from the age of the complaining students and their relationship to school officials.<sup>132</sup> The court in dicta suggested that first amendment protection might exist for discriminatory policies of adult social organizations:

The right of adults freely to join together socially and to assemble for lawful purpose may be conceded to include the right to . . . maintain clubs, secret or nonsecret, the right to be as snobbish as they choose, and any attempt at interference with that right by legislative or administrative mandate may well be said to be arbitrary, unreasonable and therefore in violation of the First Amendment.<sup>133</sup>

#### FREEDOM OF ASSOCIATION: THE RIGHT TO EXCLUDE

The constitutional right to form, join, support, and discriminate in an *adult* social club has not been squarely faced. Assuming that the right to freedom of association is general and includes the right to form and join a private social club,<sup>134</sup> the vital question remains

131. *Robison v. Sacramento Unified School Dist.*, 245 Cal. App. 2d 278, 53 Cal. Rptr. 781 (1966). See Note, *First Amendment Right of Association for High School Student*, 55 CAL. L. REV. 911 (1967).

132. 245 Cal. App. 2d at 291, 53 Cal. Rptr. at 790.

133. *Id.* at 291, 53 Cal. Rptr. at 789.

134. Although application of freedom of association cases to the private social club was attempted in the *Sigma Chi* case, the court found that they did not directly support a right to form and join a private social club. See note 127 *supra* and accompanying text. See also 55 CAL. L. REV., *supra* note 131, at 918 n.5.

Some commentators have argued that the freedom of association has no applicability to private social clubs, maintaining that it was meant to assure only the full effectuation of express first amendment rights. See, e.g., *Discriminatory Fraternity* 187; Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, 46 VA. L. REV. 730, 752 (1960); cf. Wright, *supra* note 121, at 1058. Thus, where an organization can point to no protected first amendment purpose the right to freedom of association is inapplicable. This view seems consistent with those freedom of association cases relying on the presence of expressly protected first amendment rights. See text accompanying notes 51-111 *supra*.

This position, however, conflicts with other opinions which support a general constitutional right to form, join, and support *any* organization whose goals and activities are legal. See, e.g.,

whether the right to exclude or deny services based on race or religion is included in the club's protected associational rights. The immediate concern is not whether there is support for an individual's demand that a club not discriminate on the basis of race or religion.<sup>135</sup>

Dicta suggests that the affirmative right to form and join should be supplemented with a right to discriminate arbitrarily in a social context by excluding unwanted members. In the course of limiting the Court's holding in *Evans v. Newton*,<sup>136</sup> which declared that a park operated by the city as testamentary trustee could not be turned back to private trustees for the purpose of continuing racial discrimination, Justice Douglas wrote that "[a] private golf club, however, restricted to either Negro or white membership is one expression of freedom of association."<sup>137</sup> Two years earlier Justice Goldberg in distinguishing restaurants from "private places"<sup>138</sup> commented that:

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[p]rejudice and bigotry in any form are regrettable, but it is the *constitutional*

Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361, 1367 (1963). Cf. Emerson 6, who suggests that any determination that the right to form and join is absolute is really not very helpful in solving "associational" problems. The argument is made that the right to join and form legitimate political pressure groups logically includes the right to join and form less contentious groups. See Rice, *The Constitutional Right of Association*, 16 HASTINGS L.J. 491, 500 (1965). This freedom is an affirmative right to form or join a social club, regardless of whether the club can show some connection with express first amendment rights. It does not answer the third question—whether the social club has the constitutional right to discriminate on the basis of race or religion; or more specifically whether discrimination, like litigation and unlike armed robbery, is constitutionally protected associational activity.

135. This distinction is illustrated by a comparison of two Supreme Court decisions.

In *Terry v. Adams*, 345 U.S. 461 (1953), the Supreme Court faced an attempt to avoid earlier court decisions which guaranteed the right to vote in political party primaries. The Jaybird Democratic Association, formed in a Texas county, conducted a primary for its all-white membership early in the election year. The successful candidate then entered the official democratic primary in which all registered Democrats in the county could vote. For 60 years the endorsed Jaybird candidates had won the Democratic primaries. The scheme, with seemingly little active state cooperation, effectively disenfranchised the Negro voter. Upon complaint by a frustrated voter, the Court held that the party's racial discrimination violated the fifteenth amendment. This holding is the equivalent of a constitutional right to membership in a political association which plays a significant role in state election processes. The right to demand that a club not discriminate under existing law is discussed in text accompanying notes 198-203 *infra*.

The fundamental issue as to whether there is constitutional protection for the right of an organization to discriminate in selecting its members was faced in *Railroad Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). The New York Civil Rights Law prohibited labor organizations from denying membership or services based upon race, color, or creed. The union involved, a voluntary association of mail clerks, challenged the law as a violation of the due process clause of the fourteenth amendment. A unanimous Court upheld the legislation, deciding that there was no constitutional protection for the union's discrimination. Our inquiry here is more like that of the court in the latter case.

136. 382 U.S. 296 (1966).

137. *Id.* at 299.

138. *Bell v. Maryland*, 378 U.S. 226 (1964).

right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the bases of personal prejudice including race.<sup>139</sup>

An analysis of this alleged right to exclude raises perplexing associational questions. As opposed to the right to form and join, it is a negative right—a right to prevent others from joining. The rationale for such a negative right is an unwillingness to force social intercourse upon an unwilling member.<sup>140</sup> However, arbitrary exclusion from a private social club based upon race or religion limits the class of those with whom the excluded may freely associate,<sup>141</sup> particularly if the excluded happens to be a member of a minority too small to support a private facility. Therefore, it is unclear whether constitutionally protected exclusion would expand or diminish the quantum of freedom in associational relationships. It is difficult, for example, to determine whether our society enjoyed greater freedom to associate before or after discrimination was banned in public schools and public accommodations.

Threats from anti-discrimination legislation to the existence or effectiveness of a particular association present a different question.<sup>142</sup> This is particularly true in the case of a religious organization where homogeneity with respect to religion might be essential. The very existence of a small political party might depend upon its ability to

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139. *Id.* at 313 (emphasis added). See also *Wesley v. City of Savannah*, 294 F. Supp. 698, 701 (S.D. Ga. 1969).

140. See, e.g., *Frank v. National Alliance of Bill Posters*, 89 N.J.L. 380, 99 A. 134 (1916). This same argument was adopted by the Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896):

The argument [that enforced separation of the races stamps the "colored race" with a badge of inferiority] also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. *Id.* at 551.

141. See generally *Discriminatory Fraternities* 188. Of course, in this latter case the restriction on the freedom to associate is imposed by a private group as opposed to the state. Private discrimination has increasingly become the legitimate concern of government, however, as evidenced in recent civil rights laws and court decisions. See note 1 *supra*.

142. Where compulsory membership would destroy the organization from within there would be a greater danger of sensitizing the right to form and join. See *Miller v. Ruehl*, 166 Misc. 479, 2 N.Y.S.2d 394 (Sup. Ct. 1938) wherein the court, with respect to a labor union, noted that if the union which was a voluntary association organized for the good of those taken into membership and for those in industry who would be eligible to membership could be compelled to accept members, the persons whose interests were inimical to the union and its purposes could force themselves into membership in the union and from within destroy the union and thus stultify the purposes for which the union was organized. *Id.* at 480-81, 2 N.Y.S.2d at 396.

exclude its adversaries. It is doubtful, however, whether the existence of the private social club would be threatened by properly drawn anti-discrimination laws.<sup>143</sup>

Questions of the right of the private social club to discriminate on the basis of race or religion cannot be resolved in terms of a first amendment right to freedom of association. The cases since 1958 in this area relying on the right to freedom of association do not confront the issue of exclusion, much less the extent to which the personal prejudices of associational members are constitutionally protected by the first amendment. It is difficult to find any connection between the expressly protected first amendment rights and the activities of the private social club. Mr. Justice Douglas' equating of association and expression in *Griswold*<sup>144</sup> might be taken to indicate that the right to join a segregated country club and keep it that way is a form of protected expression. However, a closer nexus between the threatened associational activity and express first amendment rights has always been found where the right to freedom of association has been successfully invoked.<sup>145</sup>

Limitations upon the right of a state to regulate the membership practices of private social clubs are probably imposed, if at all, from considerations outside the right to freedom of association as it has developed in the cases since 1958.<sup>146</sup>

#### THE RIGHT TO PRIVACY

Although the right to privacy like the right to freedom of association is not mentioned specifically in the Constitution, a general constitutional right to privacy was recognized in *Griswold*.<sup>147</sup> That the

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143. See note 196 *infra* and accompanying text.

144. See text accompanying note 117 *supra*.

145. See text accompanying notes 63, 78, 91, 98, 99 *supra*.

146. Professor Emerson noted that:

Associational rights, to the extent they exist, are not derived solely from the first amendment. Rather they are implied in the whole constitutional framework for the protection of individual liberty in a democratic society. Emerson 5.

This is a position very similar to the alternative ground suggested for the decision in *NAACP v. Alabama*. See Robison, *supra* note 59. Professor Emerson suggests:

The right of the government to *compel* personal associations, as by forbidding racial discrimination in schools, housing, public facilities, clubs and the like however, is surely not subject to resolution in terms of a blanket right of association or non-association. Rather such problems . . . must be framed in terms of drawing the line between the public and private sectors of our common life. The question is, in short, one of the right of privacy . . . Emerson 20.

147. 381 U.S. 479 (1965).

Justices strained to find a constitutional basis for this right of privacy is indicated by the scope of the four concurring opinions.<sup>148</sup> Justice Douglas, writing for the Court, found that a right to privacy could be implied from the penumbra of several of the first eight amendments.<sup>149</sup> Citing the right to freedom of association as one example, he explained that there emanates from the first eight amendments not only express protections but other implied protections which "give [the express guarantces] life and substance."<sup>150</sup>

Whether the opinion of the Court in *Griswold* based this right to privacy on the associational rights of the married couple who chose to use contraceptive devices is unclear.<sup>151</sup> Nevertheless, a majority of the Court agreed that *somewhere* in the Constitution is a right of privacy made applicable to the states by the fourteenth amendment. This right to privacy, especially in the sense used by Justice Goldberg in his concurring opinion, is not the right to anonymity granted to NAACP members in *NAACP v. Alabama*,<sup>152</sup> but rather the right to an unregulated sphere of lawful activity.<sup>153</sup> A broad right to privacy based upon notions of a limited government adds a new dimension to associational preferences. That is, there may exist a right to associational privacy which protects not only associational anonymity<sup>154</sup> but also the right of an individual in certain situations to associate or refuse to associate with another for any arbitrary reason. The theory is that at some point governmental control of an

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148. In addition to Justice Douglas' opinion for the Court, the concurring opinion of Justice Goldberg found a right to privacy to be among those unenumerated but nevertheless fundamental rights contemplated by the ninth amendment. *Id.* at 486. Justices Harlan and White also wrote separate concurring opinions. *Id.* at 499 & 502. Justice Harlan felt there was no need to find a right to privacy in the Bill of Rights in order for the Court to invalidate the legislation as an unwarranted state interference with fundamental values "implicit in the scheme of ordered liberty." *Id.* at 500. Justice White pursued a "reasonable" due process inquiry finding that the statute was not necessary or rationally connected to its avowed objective. *Id.* at 505-06. For a more detailed analysis of the several opinions see Note, *Supreme Court finds Marital Privacy Immunized from State Intrusion as a Bill of Rights Periphery*, 1966 DUKE L.J. 562. See generally Symposium, *Comments on the Griswold Case*, 64 MICH. L. REV. 197 (1965).

149. 381 U.S. at 483.

150. *Id.* at 484.

151. "[Marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.* at 486. See also Kauper, *Penumbra, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 256 (1965) [hereinafter cited as Kauper].

152. See notes 57-62 *supra* and accompanying text.

153. 381 U.S. at 486, 495-97.

154. See notes 63-64 *supra* and accompanying text.

individual's lawful preferences and actions must cease.<sup>155</sup> Consequently, in order to conclude that there is no constitutional protection for the choice of a private social club to withhold membership or services based upon race or religion, it is not enough to determine merely that the first amendment right to freedom of association does not apply. The inquiry must include whether and to what extent the right to privacy protects the associational preferences of the private social club.

In fact, the right of privacy is a more sensible concept to use in attempting to measure the limits of protected racial and religious discrimination than the right to freedom of association. A privacy concept seems more amenable to the differentiation necessary to distinguish a four couple bridge club from a multi-functional suburban golf, swimming, and tennis club. Even if there is a right to associational privacy which protects some sphere of individual associational preferences,<sup>156</sup> there is no right to absolute associational preference once a person chooses to step beyond such a private sphere.<sup>157</sup> The problem is to determine where that sphere ends and whether particular legislation invades it.

#### DELIMITING THE PRIVATE SPHERE

The novelty of a right to privacy, insofar as it refers to the right to a sphere of unregulated human activity, explains the absence of

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155. For a brief discussion of this approach see Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965). "In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian state." *Id.* at 229.

156. See, e.g., Beane, *The Griswold Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 979, 989-90.

157. This thesis was expressed as early as 1890. See *Ferguson v. Giles*, 82 MICH. 358, 46 N.W. 718 (1890). The court there noted:

The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him or ask that people not as good or as great as he is shall step aside when he appears. All citizens who conform to the law have the same rights in such places, without regard to race, color, or condition of birth or wealth. The enforcement of the principles of the Michigan civil rights act of 1885 interferes with the social rights of no man, but it clearly emphasizes the legal rights of all men in public places. *Id.* at 367-68, 46 N.W. at 721.

See also *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

precise tests for its future application.<sup>158</sup> In *Griswold* Justice Douglas found the Connecticut statute overbroad in its intrusion upon a fundamental right.<sup>159</sup> Justice Goldberg, after finding that the state statute impaired a fundamental right—the right to privacy in the marriage relationship—opted for a balancing test, placing a heavy burden of justification upon the state.<sup>160</sup> Justice White noted the need for “substantial justification” before the state enters the realm of family life.<sup>161</sup> This balancing process as applied to private social clubs contemplates at least two distinct inquiries. First, the state must show that it has a compelling and legitimate interest in proscribing discrimination in social associations. Second, the character and strength of the right to privacy asserted by the club must be measured in some way. It is fair to say that the strength of the privacy interest will depend to some extent upon the type of social associational relationship involved and to some extent upon the conduct regulated within that relationship. For example, the marriage relationship is entitled to greater privacy protection than the relationship of two people sitting next to one another on a bus.<sup>162</sup> Within the marriage

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necessity rides buses and street cars does not have the freedom that John Muir and Walt Whitman extolled.” *Id.*

158. See generally Emerson, *supra* note 155, at 230-31; Kauper 252.

It does not necessarily follow that a decision that a facility is a private social club under the standards established by various courts in enforcing the public accommodations laws, see notes 8-23 *supra* and accompanying text, necessitates finding such club immune from further anti-discrimination laws. The standards developed in the public accommodations-private club cases represent the judicial reaction to legislation which does not necessarily reach constitutional limits. To allow the limitation of covered establishments to operate also as a constitutional shield seems a strange way to determine constitutional limitations. It appears, therefore, that in deciding whether a particular state or federal law proscribing discrimination is constitutionally invalid that a consideration of its infringement on protected privacy must be made apart from whether the law effects what are private social clubs according to traditional public accommodations laws.

159. 381 U.S. at 485.

160. *Id.* at 497-98. Justice Goldberg cited *Bates v. Little Rock*, 361 U.S. 516 (1960), as stating the proper test: “[T]he State may prevail only upon showing a subordinating interest which is compelling.”

161. 381 U.S. at 502.

162. See note 157 *supra* and accompanying text. In a line of cases involving the right of privacy as incident to the fourth amendment right to be free of unreasonable searches and seizures, the Court has protected the reasonable expectation of privacy held by the accused. The reasonableness of the expectation of privacy depends upon the situation into which an individual voluntarily enters. Thus, the Court has said that a landlord cannot give the consent necessary to validate a warrantless search of a tenant's home, *Chapman v. United States*, 365 U.S. 610 (1961), and a hotel clerk cannot consent to the warrantless search of a guest's room, *Stoner v. California*, 376 U.S. 483 (1964). In *Katz v. United States*, 389 U.S. 347 (1967), Justice Harlan in a concurring opinion found that “an enclosed telephone booth is an area where, like a home,

relationship itself the decision to use contraceptive devices may be entitled to greater protection than the decision to marry a first cousin.<sup>163</sup> In establishing the strength of the claim to privacy made by the members of any particular social club such things as size, scope of activity, intrusions into areas of public concern,<sup>164</sup> and perhaps the actual intimacy of the social associations involved must be considered.

### *The Interest of the State*

If the doctrine of *Railway Mail Association v. Corsi*<sup>165</sup> is capable of analogical extension, it might be suggested that the policies of the fourteenth amendment are entirely consistent with state legislation which limits the practice of racial and religious discrimination by private organizations. The limitations on such an extension are obvious. That case involved a labor union which was the exclusive bargaining representative of all employees within the unit. The Court recognized that the excluded employees would not only be deprived of any voice in their economic representation but also would be bound by any contract made by the dominant union. The case suggests, nevertheless, that the state has a substantial and legitimate interest in proscribing discrimination in private associations.<sup>166</sup>

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and unlike a field, a person has a constitutionally protected reasonable expectation of privacy." *Id.* at 360 (citations omitted).

163. Every state prohibits intra-family marriages within some degree of relationship. *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-101 (Supp. 1970); ARK. STAT. ANN. § 55-103 (1947); ILL. ANN. STAT. ch. 89 § 1 (Smith-Hurd 1966); OHIO REV. CODE ANN. § 3101.01 (Anderson Supp. 1969); PA. STAT. ANN. tit. 48, § 1-5(i) (1965).

164. *See* notes 174, 183 *infra*.

165. 326 U.S. 88 (1945). *See* note 135 *supra* for a more detailed discussion of the case.

166. [A] State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color, or creed, in relations like those now before us ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts. 326 U.S. at 98 (Frankfurter, J., concurring).

Although labor organizations have been considered private associations with unimpeachable control over their individual membership policies, *see, e.g.,* *Oliphant v. Brotherhood of Locomotive Firemen & Engineers*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959); Note, *Constitutional Law—Racial Discrimination—Admission to Membership In Certified Trade Union Is Purely A Private Concern*, 27 GEO. WASH. L. REV. 730 (1958), the Civil Rights Act of 1964 prohibits a labor organization from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(c) (1964).

*Strength of Privacy Interest in the Private Social Club*

A familiar analogy is that the private club is an extension of the home and that an individual is entitled to all the privacy in his club that he is entitled to in his home.<sup>167</sup> By that analogy the state could no more require non-discrimination as to whom a person invites into his club than it could require non-discrimination as to whom a person invites into his home. The analogy is weak in that it fails to distinguish different varieties of private clubs. As a result the right of privacy has been distorted, and there has been a tendency to assume that any group which is exempt from public accommodations laws as a private club and wants to exclude some racial or religious group is also protected by the right to privacy. For example, in *Clover Hill Swimming Club, Inc. v. Goldsboro*<sup>168</sup> a membership swim club owned and operated by a corporation and not the membership was held to be a public accommodation within the New Jersey public accommodations law which exempted "bona fide private clubs."<sup>169</sup> The club was limited to 400 families by zoning requirements. Had the club been owned and operated by the membership, it presumably would not have been subject to the public accommodations laws,<sup>170</sup> and a mechanical application of the home-club analogy would have deemed that Clover Hill owed its existence to the associational preferences of the members rather than their interest in the facilities offered by the proprietors. Recently, in *Bell v. Kenwood Golf & Country Club, Inc.*<sup>171</sup> a federal district court in Maryland held that under the totality of the facts Kenwood Golf & Country Club was not

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167. See, e.g., *Bell v. Maryland*, 378 U.S. 226, 312-13 (1964) (Goldberg, J., concurring); Rice, *Federal Public Accommodations Law: A Dissent*, 17 MERCER L. REV. 338, 343 (1966). The home is used as the "horrible" example of state interference in the homeowner's choice of his guests by the opponents of public accommodations laws and the expansion of the concept of state action to reach many forms of racial and religious discrimination. For criticism of this recurring straw man see Selard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 870-71 (1966). The appropriate question is whether the social club is a "private place" deserving of the same measure of constitutional protection as is afforded the home.

168. 47 N.J. 25, 219 A.2d 161 (1966).

169. N.J. STAT. ANN. tit. 10, §§ 1-5 (1960).

170. The court in *Clover Hill* explained:

The statutory exemption for distinctly private organizations is designed to protect the personal associational preferences of its members. However, *Clover Hill* does not owe its existence to the associational preferences of its members but the coincidence of their interest in the facilities offered by the owner. 46 N.J. at 34, 219 A.2d at 166.

171. 312 F. Supp. 753 (D. Md. 1970).

a private club within the private club exemption of the Civil Rights Act of 1964. The club differed from most other country clubs in that it was organized and operated by a corporation for profit and the 2,700 members had no voice in the admission of new members, the expulsion of existing members, or the guest policies of the club. Kenwood was subject to the public accommodations laws, despite the fact that it was a bona fide social club. Because Kenwood was like so many "private" social clubs in all respects except that it was operated for a profit,<sup>172</sup> the decision may imply that the rights of privacy in private social clubs are subordinate to the will of the legislature and the public interest in eliminating racial and religious discrimination.

If indeed all private clubs should not be treated like the home, several factors suggest themselves as guidelines for evaluating the strength of associational interests of the members of any particular private social club.

*Size.* As a general rule it might be postulated that the smaller the club the greater the privacy interests are of any particular member. This distinction facilitates differentiation between the four couple bridge club and the suburban country club and between the Friday afternoon neighborhood coffee club and the city men's eating club. The size of the club is at least a preliminary indicator of the importance placed by each member upon compatible association with most other members. Where there is reason to believe that the economical use of some commonly owned facilities is of greater importance to each individual member than the identity of most other club members, less concern for privacy interests is justified.<sup>173</sup>

*Scope of Activity and Intrusion into Areas of Public Concern.*<sup>174</sup> The club that enters the field of commerce by selling food, drink, or other commodities, facilities, or services to its members or their guests may occupy a different position from clubs not operated as businesses. In a far reaching anti-discrimination law the Virgin Islands prohibits discrimination in any organization which ". . .

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172. Approximately 10 percent of the country clubs in the United States in 1962 were not owned and operated by the members. See note 26 *supra*.

173. Using the numbers from the 1962 Anti-Defamation League Survey, see note 47 *supra* and accompanying text, the average country club surveyed had 506 members and the average city club surveyed had 817 members.

174. "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." *Munn v. Illinois*, 94 U.S. 113, 125 (1879). See also Douglas, J., note 183 *infra*.

enters the field of business and commerce by selling food or drink or any other commodity . . . ."<sup>175</sup> In such a club that chooses to sell food or drink or other commodities to its members and their guests or which operates under some license of the state<sup>176</sup> the discrimination is no longer limited to associational restrictions but extends to economic discrimination restricting the availability of goods and services to those discriminated against. The practical result is that solely because of racial or religious heritage the dollars of one man are unable to purchase for himself or his family the goods, services, and use of facilities that the dollars of another man may purchase.

The influence of private social clubs on areas of public concern is manifested in several other ways. The residents of many urban and growing suburban areas find country and recreational clubs desirable both because they provide needed recreational facilities and preserve aesthetically pleasing open land. Encouragement for such enterprises is provided by favorable assessment and taxation laws.<sup>177</sup> In addition, private country and recreational clubs host national sporting events and downtown clubs host civic dinners.

Perhaps the most significant public aspect of the many private social clubs today is their business function. The availability and extensive use of business expense tax deductions<sup>178</sup> is tacit recognition

175. VIRGIN IS. CODE ANN. tit. 10, §§ 2-3 (1961).

176. In the *Kenwood* case, see notes 171-72 *supra* and accompanying text, one of the facts which led the Court to conclude that Kenwood Golf & Country Club was not deserving of the designation of private club was that "[t]he corporation and the club [had] obtained other necessary licenses and permits for the club's activities." 312 F. Supp. at 757.

177. See, e.g., MD. ANN. CODE art. 81, § 19(e) (1969), which provides for special assessment for country club property. The court in *Kenwood* noted also that the club there had benefited from favorable zoning. 312 F. Supp. at 757. In Montgomery County, Maryland, this subsidy amounts to between \$130,000 and \$170,000 for 18 clubs according to a report prepared by one of Ralph Nader's associates. See *Washington Post*, Dec. 27, 1970, § B, at 1, col. 7, at 5. Under section 501(c)(7), of the INT. REV. CODE OF 1954, "[c]lubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder" are exempt from corporate tax. It is interesting to note that while the exemption from taxation for discriminatory private schools has been withdrawn, see IRS Press Release, Aug. 2, 1967, 1967 CCH STD. FED. TAX REP. ¶ 6734. See also *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), *appeal dismissed sub nom. Coit v. Green*, 39 U.S.L.W. 3294 (Jan. 12, 1971) (No. 820), the exemption for discriminatory private clubs has remained. See also *Washington State Liquor Control Board, Rules and Regulations No. 26*, which allows the private club to purchase liquor for sale to its members from the state authority at a reduced rate.

178. Under section 274 of the INT. REV. CODE OF 1954, certain entertainment, amusement, and recreation expenses are deductible when they are directly related to, or precede or follow a substantial business discussion associated with the active conduct of the taxpayer's trade or

of the business function performed by most private clubs. The concentration of political and economic power in many private social clubs not only makes membership essential for many businessmen but also may dictate some companies' hiring and promotion practices.<sup>179</sup> Statutory guarantees of equality of employment opportunity<sup>180</sup> may become hollow when the disability imposed by discriminatory membership practices of the town's leading clubs prevents the promotion of a black or Jewish executive. As the private club affects the public either in the recreation or commercial sense, the protected privacy interests would seem naturally to decrease. Such a club becomes more an extension of a man's business than his home.

Because the privacy interest of the typical private country club, eating club, or athletic club is small and the state's interest in eradicating racial and religious discrimination is substantial and legitimate, legislation such as that adopted by Maine, which prohibits racial and religious discrimination by those licensed to serve food or drinks, or incorporated or licensed to do business within the state,<sup>181</sup> appears to be a valid exercise of a state's licensing power.

#### OTHER LEGISLATIVE PROSPECTS

To this point the discussion has centered upon possible constitutional objections to legislative discouragement of racial and religious discrimination by private social clubs. A conclusion that constitutional protection for the racial and religious discrimination practiced by many private clubs is at best limited leads logically to an inquiry into the type of legislative or judicial action that might be constitutionally appropriate to discourage such discrimination.

#### *State*

The Maine statute<sup>182</sup> seeks to discourage racial and religious discrimination by denying state licenses or incorporation privileges to individuals or groups which discriminate on racial or religious bases. Although this is a logical primary remedy because of the possibility

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business. Meals at a club and guest use charges qualify for the deduction if they can be related to conduct of the taxpayer's business. See 26 C.F.R. § 1.274-2(f)(2) (1970).

179. See notes 38-39, 43-44 *supra* and accompanying text.

180. See, e.g., Civil Rights Act of 1964, tit. VI, 42 U.S.C. §§ 2000e-2000e-15 (1964). See generally M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966).

181. See text accompanying note 28 *supra*.

182. See text accompanying note 28 *supra*.

that such licensing could be found to represent "state action,"<sup>183</sup> it may not be the most appropriate. A private club having no need for a state license escapes the law when its privacy interests arguably may be no stronger than those clubs requiring a license. State laws based upon various state constitutional provisions which guarantee the right to make contracts or acquire property<sup>184</sup> are preferable to licensee restrictions. Of course, these laws must necessarily account for the legitimate privacy interests which attend the existence of some private clubs.<sup>185</sup>

State legislation, however well drawn, is limited in its application. The likelihood of achieving national coverage relying on state initiative is small as evidenced by the continued absence of public accommodations laws in thirteen states.<sup>186</sup>

### *Federal*

Expanded notions of federal legislative power in the Civil Rights area suggest several possible bases for new federal legislation to curb racial and religious discrimination in private clubs. The commerce power, the basis for the public accommodations section of the Civil Rights Act of 1964,<sup>187</sup> could be used to prohibit discrimination in those private clubs which affect interstate commerce. Not only do most private clubs have out-of-state members, but the food they serve and much of the equipment they use moves or has moved in interstate

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183. Mr. Justice Douglas, concurring in *Garner v. Louisiana*, 368 U.S. 157 (1961), prior to the Civil Rights Act of 1964, found state action in the licensing of a retail store to operate a segregated lunch counter and noted that "restaurants in Louisiana have a 'public consequence' and affect the community at large." *Id.* at 183. Furthermore, he stated that

[o]ne can close the doors of his home to anyone he desires. But one who operates an enterprise under a license from a government enjoys a privilege that derives from the people. . . . [T]he necessity of a license shows that the public has rights in respect to those premises. The business is not a matter of mere private concern. *Id.* at 184-85.

But see *Bell v. Maryland*, 378 U.S. 226, 333 (1964) (Black, J., dissenting). For more detailed discussion of this theory see Comment, *Current Developments in State Action and Equal Protection of the Law*, 4 GONZAGA L. REV. 233, 270 (1969); Note, *Constitutional Law—Private Club Discrimination*, 1970 WIS. L. REV. 595, 597-602. See generally Selard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 870-72 (1966).

184. See, e.g., CALIF. CONST. art. 1, § 1; MASS. CONST. art. 1, § 2.

185. For one suggested method of legislating in this area while protecting desirable privacy interests see text accompanying note 196 *infra*.

186. See note 3 *supra* and accompanying text. The states without such laws are Alabama, Arkansas, Florida, Georgia, Hawaii, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

187. 42 U.S.C. §§ 2000a-2000a-6 (1964).

commerce.<sup>188</sup> The commerce clause, however, is a rather disingenuous basis,<sup>189</sup> especially in light of the alternatives available. Use of the commerce power is subject to the difficulties and delay attendant in determining whether an establishment affects interstate commerce<sup>190</sup> and does not frankly admit that the federal government has broad powers to proscribe seemingly private discrimination.<sup>191</sup>

The thirteenth amendment to the Constitution outlaws slavery and further provides that "Congress shall have power to enforce this article by appropriate legislation."<sup>192</sup> Possibly, the widespread exclusion of blacks from certain private social clubs is so serious a form of discrimination as to be termed a badge or vestige of slavery appropriate for elimination by Congress.<sup>193</sup>

Likewise, the enabling section of the fourteenth amendment authorizes Congress to "enforce, by appropriate legislation"<sup>194</sup> the equal protection provisions of section 1 of that amendment. Whether the section permits legislation only with respect to state action which denies equal protection or due process or whether Congress may reach private discrimination under section 5 is the subject of substantial controversy.<sup>195</sup> It is unlikely, however, that properly drawn federal legislation based either on the thirteenth or fourteenth amendments would be held unconstitutional.

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188. See *Daniel v. Paul*, 395 U.S. 298, 305, 308 (1969).

189. See Cox, *The Supreme Court 1965 Term*, 80 HARV. L. REV. 91 (1966).

190. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 280 (1964) (Douglas, J., concurring).

191. In *Heart of Atlanta*, the Court upheld Title II of the Civil Rights Act of 1964 as a proper exercise of the commerce power. Justice Douglas, concurring, indicated that he would have preferred to have upheld the law as a proper exercise of congressional power under section 5 of the fourteenth amendment. He felt that state enforcement of trespass laws to keep public accommodations segregated provided the requisite "state action." *Id.* at 280.

192. U.S. CONST. amend. XIII, § 2.

193. In *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), the Court indicated that Congress had broad power to define "badges of slavery" under section 2 of the thirteenth amendment. *Id.* at 439-44. For the suggestion that racial discrimination in private social clubs may be a badge of slavery, see Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 502. The court in *Kenwood* considered this argument but specifically refused to base its decision on these grounds. 312 F. Supp. at 758. Congressional action under the thirteenth amendment, however, unlike the fourteenth, is limited to racial discrimination.

194. U.S. CONST. amend. XIV, § 5.

195. Several members of the Court have indicated that Congress pursuant to section 5 of the fourteenth amendment may legislate to reach private actions where there is no state involvement at all. See *United States v. Guest*, 383 U.S. 745, 761-62 (1966) (Clark, J., concurring, joined by Black & Fortas, JJ.); 383 U.S. at 781-84 (Brennan, J., partially dissenting, joined by Warren, C.J. & Douglas, J.). Whether this was the original understanding has been the subject of considerable discussion. See authorities collected in Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 n.4 (1964).

Legislation in this area not resting on the artificial grounds of licensing or interstate commerce should look to the essence of the relationship. Where the essence of membership is essentially the exchange of money for goods, services, or the use of facilities, the association is an appropriate object of legislation<sup>196</sup> based upon the philosophy that there should be no racial or religious distinctions between what men may buy with their dollars.<sup>197</sup> Using this criterion, an adequate distinction can be drawn between an extension of a man's home and an extension of his dealings in the market place to satisfy the requirements of the right to privacy.

#### JUDICIAL PROSPECTS

In the absence of legislation, pressure on the judiciary to narrow the private club exception to the Civil Rights Act of 1964 has been increasing. A slight expansion of the "state action" concept could be made to include any associational activity licensed by the states.<sup>198</sup> Perhaps the most potent weapon available, however, is the Civil Rights Act of 1866.<sup>199</sup> In the landmark case of *Jones v. Alfred H. Mayer Co.*<sup>200</sup> the Supreme Court held that section 1982<sup>201</sup> of the Act reached beyond state action to regulate the unofficial acts of private individuals. Since most clubs are owned by the members, a denial of

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196. See Larson, *supra* note 193, at 502. For another apparently less restrictive approach see Note, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 460, 469-70 (1970).

197. As the Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), noted:

Negro citizens . . . would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. *Id.* at 443.

198. For a discussion of licensing as state action see note 183 *supra*. In *Irvis v. Moose Lodge No. 107*, 318 F. Supp. 1246 (M.D. Pa. 1970), the court found state action where a discriminatory private club purchased liquor from the state at a discount under the terms of a liquor license granted by the state, was subject to extensive control by the state liquor authority, and was required by the state to "adhere to all the provisions of its constitution and by-laws," and where one of the provisions in the club's constitution was a "whites only" clause.

199. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, *re-enacted by* Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140. The Act is presently codified in 42 U.S.C. § 1981-82 (1964).

200. 392 U.S. 409 (1968).

201. 42 U.S.C. § 1982 (1964) (originally enacted as Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27). The Act provides:

[C]itizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts . . . [and] to inherit, purchase, lease, sell, hold, and convey real and personal property . . . any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding. *Id.*

the right to join because of race is arguably a denial of the right to "purchase, lease, sell, hold, and convey real and personal property."<sup>202</sup> Subsequently, in *Sullivan v. Little Hunting Park*<sup>203</sup> the Court held that section 1982 applied to the refusal of a nonstock corporation which operated a community park and playground to approve an assignment of a membership share to a black assignee.

Likewise, section 1981 of title 42<sup>204</sup> has been held to apply to private discrimination.<sup>205</sup> Since the relationship between a club and its members may be described as contractual in many respects, this section could possibly be applied to force a club to end its discriminatory policies.<sup>206</sup>

### CONCLUSION

Public policy notions of inalienable individual liberty undoubtedly must play a significant role in determining the breadth of associational privacy when the state attempts to promote social, economic, and political equality. Because of the magnitude of the impact of the private social club in American life, it is doubtful that either political or economic equality can be achieved without some measure of equal access to club benefits. Attempts to legislate social equality should be drawn narrowly to preserve a necessary measure of

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202. A more detailed discussion of sections 1981 and 1982 as they may be applicable to the discrimination practiced by the private social club may be found in 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* note 196, at 461-63.

203. 396 U.S. 229 (1969).

204. 42 U.S.C. § 1981 (1964). Section 1981 provides:

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

205. See, e.g., *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970). See generally 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* note 196, at 462, n.12. There is some controversy as to whether section 1981, like section 1982, is derived from the Civil Rights Act of 1866 or 1870. Compare *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442 n.78 (1968) (dicta) and *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 482 (7th Cir. 1970), with *Cook v. The Advertiser Co.*, — F. Supp. — (M.D. Ala. 1971). The derivation may be significant as the 1866 Act was enacted pursuant to the thirteenth amendment while portions of the 1870 Act are based upon the fourteenth amendment. Section 1982 is clearly derived from the 1866 Act and *Jones* dealt with 1982 and may therefore be inapplicable to section 1981. See Note, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 DUKE L.J. 1223.

206. See 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* note 196, at 462; 1970 WIS. L. REV., *supra* note 183, at 605-06.

associational privacy, but they should be drawn. Whether this society is capable of free evolution to social equality seems irrelevant in light of the influence of the social club in perpetuating general racial and religious economic and social inferiority and in light of the urgent need for reversal of racial polarization. Many private social clubs have become so affected with the public interest that some regulation of their membership practices is not only a proper but also a necessary exercise of legislative power.