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TEED OFF ABOUT PRIVATE CLUB DISCRIMINATION ON THE TAXPAYER'S DIME: TAX EXEMPTIONS AND OTHER GOVERNMENT PRIVILEGES TO DISCRIMINATORY PRIVATE CLUBS

JENNIFER JOLLY-RYAN*

INTRODUCTION

Discrimination by bona fide private clubs is legal. It is a constitutionally protected activity under the First Amendment.¹ In balancing individuals' freedom of association with civil rights laws, Congress specifically exempts private clubs from protections otherwise afforded to certain protected classes.² Laws in the United States, however, go further than balancing and protecting the associational rights of private club members, and this article analyzes and critiques these additional protections. Discrimination by private clubs, which would be unlawful but for the private clubs' exemption from civil rights laws, is often subsidized through government-authorized tax exemptions. Most private clubs are nonprofit and therefore exempt from paying federal income taxes.³ Private clubs may also be exempt from state franchise taxes paid on income.⁴ Many private clubs also receive substantial property tax exemptions from significant real estate holdings.⁵ Tax exemptions to private clubs that discriminate on the basis of race, gender, and religion are at the expense of the very citizens victimized by discrimination, citizens who oppose discrimination, and taxpayers who protest, "not on my dime!"

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1. See U.S. CONST. amend. I. ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . ."). *Id.*

2. 42 U.S.C. § 2000(a) (2006) (exempting "a private club or other establishment not in fact open to the public" from the antidiscrimination laws in 42 U.S.C.). *Id.*

3. 26 U.S.C. § 501(c)(7) (2006) exempts nonprofit clubs from paying income taxes; 26 U.S.C. § 501(c)(8) (2006) exempts fraternal orders from paying income taxes. See *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (holding that Congress did not violate the 1964 Civil Rights Act by exempting nonprofit clubs from paying income taxes, although some of the clubs excluded nonwhites from membership).

4. See, e.g., KY. REV. STAT. ANN. § 141.010 (10) (j) (West 2006).

5. Scott R. Rosner, *Reflections on Augusta: Judicial, Legislative and Economic Approaches to Private Race and Gender Consciousness*, 37 U. MICH. J.L. REFORM 135, 177 (2003) (advocating combating private club discrimination by denying property tax exemptions).

Heeding the protests of taxpayers and civil rights groups who do not want to foot the bill for discrimination, some state legislators have enacted statutes disallowing tax benefits to those private clubs that discriminate on the basis of certain protected classifications.⁶ However, statutes prohibiting tax benefits to discriminatory clubs may often be difficult to enforce and administer. After enacting such a law, the following questions arise: (1) who will be responsible for determining whether a private club discriminates? (2) what kind of proof should be used to demonstrate that a private club discriminates on the basis of race, gender, or religion and is, therefore, not entitled to tax exemptions? (3) should the government bear the burden of proving discrimination, or should the entity claiming the benefit or privilege show that it does not discriminate? This article explores these questions. After briefly addressing the background of discrimination at private clubs, the associational rights of club members, and the implications of civil rights laws, this article offers solutions to aid in the enforcement and administration of legislation designed to eliminate government subsidies for discrimination through United States tax laws.

Many private clubs do not discriminate on the basis of otherwise protected classifications of individuals. Furthermore, many types of discrimination are lawful. This article does not question associational rights of bona fide private clubs, even in situations where those rights result in discriminatory membership practices. The constitutional rights of bona fide private clubs are well established.⁷ It does not follow, however, that private clubs that discriminate on the basis of race, gender, or religion should be subsidized through tax exemptions, liquor licenses, or other government benefits and privileges.

I. PRIVATE CLUBS DISCRIMINATE AGAINST INDIVIDUALS ON THE BASIS OF RACE, GENDER, AND RELIGION. SO WHAT'S THE PROBLEM?

A private club, by its very nature, discriminates. It is selective about who can and can not be a member. Some private clubs may admit only members who meet certain income criteria. Some private clubs may admit only members with a certain pedigree. Other private clubs may admit only members from certain geographic areas. Still others outwardly discriminate on the basis of race, gender, and religion.⁸ Although many private clubs do not discriminate against

6. See *infra* notes 164-91.

7. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-56 (2000) (holding that the Boy Scouts is an "expressive association" that can exclude homosexual scoutmasters if including them would "significantly affect its expression").

8. Thomas H. Sawyer, *Private Golf Clubs: Freedom of Expression and the Right to*

individuals belonging to a protected class under civil rights laws, others do openly discriminate. The press has widely reported selective activities affecting individuals who would otherwise be protected by civil rights laws.⁹

Racial discrimination at private club golf courses drew the attention of the press in 1990.¹⁰ In that year, Shoal Creek Country Club in Birmingham, Alabama was scheduled to host the nationally prestigious PGA Championship.¹¹ When asked about its policy of excluding African Americans as members, the president and founder of the club responded that it was unheard of to allow African Americans into the club.¹² He explained, "[t]hat's just not done in Birmingham."¹³ Faced with threats of boycotts by the public and, most importantly, television sponsors, Shoal Creek admitted its first African American member.¹⁴ Many other host clubs for PGA tournaments, however, refused to change their discriminatory policies despite a new requirement imposed by the PGA Tour, the United States Golf Association, and the Ladies PGA Tour that clubs hosting tournaments allow minority members.¹⁵

Most private country clubs started as Protestant enclaves, excluding Catholics and Jews.¹⁶ Although the stigma against Catholics has faded, some private clubs continue to deny membership to Jews, even

Privacy, 3 MARQ. SPORTS L.J. 187, 202-03 (1993) (noting that the "concept of inherent racial, religious, or gender inequality survives in the bylaws and admission policies of private clubs which can reject a black, Jew or female applicant with no more justification than 'no ___ allowed'").

9. See, e.g., Marcia Chambers, *At Country Clubs, Gay Members Seek Privileges for Their Partners*, N.Y. TIMES, Sept. 21, 2004, at D2; Clifton Brown, *Augusta Marches On, With Its Rules Intact*, N.Y. TIMES, Apr. 10, 2003, at S1; Alex Kuczynski, *It's Still a Man's, Man's, Man's World*, N.Y. TIMES, July 21, 2002, at H1.

10. *P.G.A. Site Bars Blacks*, N.Y. TIMES, June 22, 1990, at B9.

11. *Id.*

12. Frank J. Ferraro, *Prerogative or Prejudice?: The Exclusion of Women From Augusta National*, 1 DEPAUL J. SPORTS L. CONTEMP. PROBS. 39, 39 (2003).

13. *Id.* at 39-40 (quoting Kenneth L. Shropshire, *Private Race Consciousness*, 1996 DET. C.L. REV. 629, 634).

14. Sam Lacy, *P.G.A. Must Go Beyond Token Change*, N.Y. TIMES, Aug. 5, 1990, at S8.

15. William A. Henry III, *The Last Bastions of Bigotry: A Year after the P.G.A. Banned Discrimination on the Tour, Private Golf Clubs Have Made, at Most, Token Changes*, TIME, July 22, 1991, at 66; see also Adair Lara, *The Chosen Few; S.F.'s Exclusive Clubs Carry on Traditions of Fellowship, Culture, and Discrimination*, S.F. CHRON., July 19, 2004, at A1 (noting that in the San Francisco area, the San Francisco Golf Club lost its role as host for PGA events because it had no minority members. Another golf club, Cypress Point, withdrew from the AT&T Pebble Beach Tournament rather than admit minorities).

16. David M. Halbfinger, *Public and Private Distinctions*, N.Y. TIMES, Apr. 10, 2003, at S1; see also Frank Whalen, *Few Minorities at Country Clubs*, ALLENTOWN MORNING CALL, June 5, 1997, at D1. Reportedly, Supreme Court Justice Arthur Goldberg challenged President Kennedy for his membership in the Links Country Club because it excluded Jews. President Kennedy supposedly answered with a chuckle, "Hell, Arthur . . . they don't even allow Catholics." *Id.*

in areas of the country with substantial Jewish populations.¹⁷ At one point, over two hundred Jewish families had homes that abutted a private golf club in Florida, yet none of the families were members of the prestigious club.¹⁸ Many clubs may not admit to discriminatory membership policies and instead use less openly discriminatory methods to prevent minorities from acquiring membership.¹⁹ For example, Jewish applicants often may have difficulty finding the requisite number of member sponsors to be admitted to a club.²⁰

In addition to excluding on the basis of religion, private country club golf courses also have a rich history of excluding women from membership.²¹ For example, the Chicago area reportedly has at least four male-only golf clubs.²² As of July 2004, the San Francisco Chronicle reported that San Francisco's golf clubs carried on a tradition of discrimination, noting that out of

the big four . . . the Bohemian Club, the stodgy Pacific-Union Club atop Nob Hill, the gigantic sports-minded Olympic Club, and the tiny ultra-exclusive San Francisco Golf Club . . . [only] [t]wo admit women. Two do not. One admits women in town, but not in the country — and not after dark. . . . None admits the poor, except in white jackets.²³

Augusta National Country Club is perhaps the most publicized club that discriminates against women.²⁴ One of the most prestigious and anticipated professional golf tournaments in the world, the Masters Golf Tournament, is held annually at the Augusta National Golf Club.²⁵ Competitors and spectators flock from around the world to be part of the event,²⁶ yet Augusta National Golf Club,

17. Commenting on how persnickety one San Francisco club can be, one club member noted that "[t]hey don't take Jewish people, which is outrageous." Adair Lara, *The Chosen Few; S.F.'s Exclusive Clubs Carry on Traditions of Fellowship, Culture — and Discrimination*, S.F. CHRON., July 19, 2004, at A1 (quoting San Francisco architect George Livermore).

18. John Murawski, *Club Fights Claims That It Does Not Admit Jews*, PALM BEACH POST, Apr. 30, 2001, at 1A.

19. *Id.*

20. *Id.*

21. See Keith Jones, *Northern's Exposure All Male Clubs and the United States Supreme Court*, 18 DUPAGE CO. BAR ASS'N BRIEF, 2005, at 19.

22. *Id.*

23. Adair Lara, *The Chosen Few; S.F.'s Exclusive Clubs Carry on Traditions of Fellowship, Culture — and Discrimination*, S.F. CHRON., July 19, 2004, at A1.

24. Ferraro, *supra* note 12, at 40.

25. Marcia Chambers, *Augusta's Money Matters*, GOLF FOR WOMEN MAG., May/June 2003, available at <http://www.golfdigest.com/gfw/gfwfeatures/index.ssf?/gfw/gfwfeatures/gfw200306augustamoney.html> (last visited Sept. 26, 2006).

26. *Id.*

rather than the Masters Tournament, has become the focus of media and activist discontent over recent years.²⁷ From major television networks to senators and national feminist organizations, a heated debate continues to brew over Augusta National's policy to exclude women from club membership.²⁸ Only men can be members of the club.²⁹ It is estimated that more than three hundred men are on the waiting list to become members of Augusta National, and they can only become members if recommended by current members.³⁰ The membership of Augusta National represents "the old guard of American wealth and power," men who have acquired wealth through "banking and finance, oil and gas, manufacturing, and distributing."³¹

Despite the gender discriminatory policy of Augusta National, the Masters continues to flourish as one of the most important professional golf tournaments in the United States.³² Tiger Woods, currently the top-ranked golfer in the world, won the 2005 tournament, and Phil Mickelson, another top-ranked golfer, won the coveted green jacket in 2006.³³ The 2007 spring tournament looms just around the corner.³⁴ Although many corporations refused to sponsor the 2003 and 2004 Masters, the media and the sponsors returned in droves in 2005.³⁵ Not a single player heeded the calls of the National Council of Women's Organizations (NCWO) to boycott a tournament run by a discriminatory golf club.³⁶

Augusta National Golf Club's record for admitting African Americans is not much better than its record for admitting women

27. *Id.*

28. *Id.*; see S. Res. 413, 2003 Leg. (Ga. 2003) (noting that the purpose of the resolution is to "express[] opposition to gender discrimination and urg[e] the Augusta National Golf Club to review and to reverse its discriminatory policy of excluding women from its membership").

29. A woman may play golf at Augusta only if she is a guest of a member. Ferraro, *supra* note 13, at 40.

30. *Id.* at 42.

31. *Id.* Examples of some of the most preeminent members of Augusta include: "Warren Buffet, Arnold Palmer, former Secretary of State George Shultz, Kenneth Chenault, chairman and CEO of American Express, Lou Holtz" and Bill Gates. *Id.*

32. *Id.* at 39.

33. David Westin, Mickelson Makes Second Major in A Row, *AUGUSTA CHRON.*, Apr. 10, 2006, at M1; Official World Golf Ranking (Oct. 15, 2006), <http://www.owgr.com/rankings/default.sps>.

34. The 2007 Masters Tournament is scheduled for April 2-8. The Official Site of the Masters Tournament, *Today at the Masters*, Aug. 16, 2005, http://www.masters.org/en_US/news/articles/2005-08-16/200508161140642361860.html.

35. Damon Hack, *What's Missing at Augusta? Controversy*, N.Y. TIMES, Apr. 6, 2005, at D1.

36. Charles P. Charpentier, Comment, *An Unimproved Lie: Gender Discrimination Continues at Augusta National Golf Club*, 11 VILL. SPORTS & ENT. L.J., 111, 112 (2004); Damon Hack, *Lawmakers Take Aim at Augusta*, N.Y. TIMES, Apr. 7, 2005, at D5.

as members. As one author described, "[f]rom its inception until 1975, the only African Americans allowed into Augusta National were those who worked as kitchen staff."³⁷ The club did not allow African Americans to work on the golf course until 1975.³⁸ Augusta National admitted its first African-American club member in 1990, largely in response to the bad press that Birmingham's Shoal Creek Country Club received in excluding African Americans.³⁹ By 2003, however, only two to four out of a total of three hundred members of Augusta National Golf Club were African Americans.⁴⁰

Despite its history, Augusta National remains untouched by legal sanctions.⁴¹ Unlike many private clubs, Augusta National does not take tax exemptions.⁴² The club claims that the Masters Tournament is a completely separate entity from the activities of the private membership club.⁴³ Regardless of these claims, the Masters may actually be a for-profit multi-million dollar business that funds many of the activities of Augusta National's dues-paying members.⁴⁴ Although the active campaign against Augusta National that roared in 2002 and 2003 is now barely smoldering, two members of Congress, Carolyn Mahoney (NY) and Brad Sherman (CA), recently took aim at the discriminatory practices of the club.⁴⁵ The bill that the members drafted would require Augusta National to print receipts stating that the transaction is not tax deductible, thus prohibiting companies from deducting activities they hold at the club.⁴⁶

Although Augusta National and its policy of excluding women has been a media target, it is not the sole male-only private golf club in the country. In the spring of 2003, *Golf Digest* reported that "twenty-four men-only private golf clubs continue to prohibit women from obtaining memberships."⁴⁷ Many more private golf clubs deny benefits and privileges to women members, even if they choose to admit women.⁴⁸

37. Ferraro, *supra* note 12, at 40.

38. *Id.*

39. *Id.*

40. *Id.*

41. Chambers, *supra* note 25, at 111.

42. *Id.* at 110.

43. *Id.* at 109.

44. *Id.* at 110.

45. Damon Hack, *Lawmakers Take Aim at Augusta*, N.Y. TIMES, Apr. 7, 2005, at D5.

46. Ending Tax Breaks for Discrimination Act of 2005, H.R. 1521, 109th Cong. § 2(a) (2005). As of the writing of this article, the Maloney-Sherman bill is under review by the House Ways and Means Committee.

47. Charpentier, *supra* note 36, at 128. The author notes that several of these private golf clubs allow the wives of members to play during the week, but they preserve coveted weekend and holiday tee times for the male members. *Id.* at 129.

48. Jennifer Jolly-Ryan, *Chipping Away at Discrimination at the Country Club*, 25 PEPP. L. REV. 495, 496 (1997).

Despite the fact that several clubs may have revamped their official policies in order to allow women to utilize club facilities, women may not get to play golf when they want to play.⁴⁹ A club membership “doesn’t mean . . . that she gets to play on Saturday morning.”⁵⁰ Clubs typically reserve tee times on a particular weekday for women, while maintaining Saturdays for men “who presumably maintain work schedules that do not permit them to play during the week, unlike their wives.”⁵¹

Some people see no problem with that. In the words of a male golfer and club member, “[w]omen are welcome as guests, they may play anytime they like, they have a lovely changing room, but the club is for men. What could possibly be wrong with that?”⁵²

So what is all the fuss about? While private clubs do have the right to determine club membership, people of all varieties need to be afforded the opportunities provided by private club membership.⁵³ Membership in private clubs is an important source for business opportunities, including developing business contacts, networking, and gaining new clients.⁵⁴ The most powerful executives, CEOs, and politicians in the United States play golf at private club golf courses and bring their clients.⁵⁵ Executives from “IBM, AT&T, Motorola, General Electric, Citigroup, JP Morgan Chase, NationsBank, and Berkshire Hathaway” play golf at Augusta National Golf Course.⁵⁶ George W. Bush, Gerald Ford, Henry Kissinger, Donald Rumsfeld, George Schultz, Alexander Haig, and Colin Powell are reportedly members of the prestigious Bohemian Club near San Francisco.⁵⁷ Approximately three thousand people are on the waiting list to join the

49. *Id.*

50. Tim Stephens, *Women Golfers Slowly But Surely Chip at Barriers*, ROCKY MT. NEWS, Feb. 18, 1996, at 10B (quoting Marcia Chambers, contributing editor for Golf Digest and author of *THE UNPLAYABLE LIE: THE UNTOLD STORY OF WOMEN AND DISCRIMINATION IN AMERICAN GOLF* (1995)).

51. Jolly-Ryan, *supra* note 48, at 496.

52. Charpentier, *supra* note 36, at 111 (citing Ian Brooks, “a member of the Honorable Company of Edinburgh Golfers,” as reported by Michael Bamberger in *She Means Business: A Letter Asking Augusta National to Admit Women Set Off the Boss of the Masters, and a Firestorm that Continues to Burn*, SPORTS ILLUSTRATED, July 29, 2002, P1, 2002 WL 24262648).

53. Cynthia A. Leiferman, *Private Clubs: A Sanctuary for Discrimination?* 40 BAYLOR L. REV. 71, 95 (1988) (noting that excluding members of protected classes “is detrimental to the goal of removing racial discrimination from society”).

54. *See id.* at 102-03.

55. *See* Carolyn M. Janiak, *The “Links” Among Golf, Networking, and Women’s Professional Advancement*, 8 STAN. J.L. BUS. & FIN. 317, 332-33 (2003); *see also* MARCIA CHAMBERS, *THE UNPLAYABLE LIE: THE UNTOLD STORY OF WOMEN AND DISCRIMINATION IN AMERICAN GOLF* 31 (1995).

56. *Id.*

57. Lara, *supra* note 15.

exclusive club, which has a fifteen to twenty year waiting list.⁵⁸ Marcia Chambers explains the importance of golf as a networking tool in business and law and how the gender "grass ceiling" at private clubs serves as a barrier to their advancement.⁵⁹ Golf has become so essential in the business world that some might argue it "has replaced the three-martini lunch as the preferred vehicle for sealing deals."⁶⁰

The lack of networking opportunities for women and minorities detrimentally affects careers. Women and minorities often have a difficult time climbing the corporate ladder or gaining partnership in law firms.⁶¹ These difficulties may be at least partially attributable to women's and minorities' limited networking opportunities, which are primarily available at such places as golf courses and country clubs.⁶² One commentator has noted that

exclusion from such informal centers of power reinforces the perception that women [or minorities] are not appropriate participants where formal power is exercised. When doctors, lawyers, judges, politicians, and corporate executives unabashedly practice discrimination as members of discriminatory clubs, there exists an implied sanction of discrimination in society generally. Furthermore, a serious injustice is inflicted upon the younger generation of the exclusive majority by molding their attitudes toward acceptance of discriminatory policies.⁶³

An even more serious result of discriminatory membership practices is that they reinforce perceptions that women and minorities do not belong in "the higher ranks of government, the professions, or the corporate world."⁶⁴

II. BALANCING PRIVACY RIGHTS AND CIVIL RIGHTS LAWS AFFECTING PRIVATE CLUBS; ASSOCIATIONAL FREEDOMS AND THE PUBLIC ACCOMMODATIONS EXEMPTION

Despite the negative effects of an exclusive networking environment, the United States Constitution protects its citizens' privacy of

58. *Id.*

59. CHAMBERS, *supra* note 55, at 42-53.

60. Janiak, *supra* note 55, at 329 (quoting Mark Nelson, *Golf and Business: A Perfect Couple*, BUSINESSWEEK ONLINE, (Nov. 8, 2001) at http://www.businessweek.com/lifestyle/content/nov2001/1s2001116_3182.htm).

61. *Id.* at 327-28.

62. *Id.* at 332-36.

63. M. Burns, *The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321, 333 (1983); see also Janiak, *supra* note 55.

64. Burns, *supra* note 63, at 333.

personal association.⁶⁵ Citizens of the United States value their rights of intimate and expressive association, which give them the freedom to associate with persons of their choice, without government intervention or interference.⁶⁶ Most pertinent to private clubs, the United States Supreme Court has pronounced that there is “no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”⁶⁷ While the government has a compelling interest in eradicating discrimination, the courts must balance individual rights of association with discrimination laws, beginning with an analysis of the strength of the associational right implicated.⁶⁸ Congress exempts a private club from the public accommodations provision of the civil rights law, as long as it qualifies for protected associational rights.⁶⁹

*A. Private Clubs’ Constitutional Rights to Discriminate:
Associational Freedoms*

Possible associational freedoms of private clubs fall into two categories. First, members of private clubs may have the protected freedom of expressive association.⁷⁰ Second, members of private clubs may have the protected freedom of intimate association.⁷¹

1. Expressive Association

Citizens of the United States have the protected right of freedom of expressive association to “associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion.”⁷² The right of freedom of expressive association is most

65. See U.S. CONST. amend. I.

66. *Roberts v. U. S. Jaycees*, 468 U.S. 609, 622 (1984) (acknowledging that there is a “right to associate with others in pursuit of a wide variety of . . . social . . . and cultural ends”).

67. *Id.* at 623; see also Kenneth L. Shropshire, *Private Race Consciousness*, 1996 DET. C.L. REV. 629, 639.

68. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that the governmental interest in ending racial discrimination in schools “outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs”). *Id.*

69. For a discussion of the associational rights paired with private clubs, see *supra* notes 64-68 and accompanying text.

70. Beth Parker, *Membership has its Privileges: Defiant Private Clubs are Testing the Boundaries of Associational Rights*, 8 CAL. LAWYER, June 1988, at 46, 49-50.

71. *Id.* at 49.

72. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

fundamental to our Constitution and receives the highest degree of protection.⁷³ Freedom of expressive association is an "indispensable means of preserving" First Amendment rights and other fundamental liberties.⁷⁴ This most fundamental freedom of expressive association is seldom implicated in the controversy over discrimination at a private club golf course or social country club, as usually the purpose of joining these organizations is for recreation, sport, or social opportunities, rather than for engaging in free speech or expression.⁷⁵

2. *Intimate Association*

Citizens of the United States also have the freedom of intimate association.⁷⁶ They have the constitutional right to "enter into and maintain certain intimate human relationships" that are "secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."⁷⁷ The freedom of intimate association is implicated when balancing civil rights laws prohibiting discrimination against the selective practices of private clubs.⁷⁸

The Constitution only protects those interpersonal relationships that qualify as "intimate associations."⁷⁹ The most intimate relationships involve family, such as marriage, childbirth, child-rearing and education, and cohabitation with relatives.⁸⁰ In *Roberts v. U.S. Jaycees*, the Supreme Court determined that "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessary few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."⁸¹ At the other end of the constitutional spectrum, impersonal relationships are not protected.⁸² For example, the First Amendment does not shield the typical relationships found in large corporations and those between employers and employees from government intervention and interference.⁸³

The United States Supreme Court has nonetheless made clear that some relationships outside of the family may qualify as intimate

73. *See id.*

74. *Id.*; *see also* N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958).

75. *See* Parker, *supra* note 70, at 50.

76. *See id.* at 49.

77. *Roberts*, 468 U.S. at 617-18.

78. Parker, *supra* note 70, at 49.

79. *Id.*

80. *Id.*; *see also* *Roberts*, 468 U.S. at 619.

81. *Roberts*, 468 U.S. at 619-20.

82. *Id.* at 620.

83. *Id.*

associations.⁸⁴ The Supreme Court's more expansive view of what constitutes an intimate association is important when considering a First Amendment challenge by a private club. Declining to identify every type of relationship that will be protected by the First Amendment, the Supreme Court has noted that

certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideas and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State . . . [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others.⁸⁵

Many relationships fall between the heightened constitutional protections for the most intimate of relationships and absence of protections for impersonal relationships.⁸⁶ Some relationships developed at private country clubs or golf course clubs may fall within this "in between" category.⁸⁷ Many personal relationships, such as friendships and other personal bonds, develop between members as a result of membership in private clubs.⁸⁸ The membership of many selective clubs is homogeneous, with members often sharing common ideas and beliefs.⁸⁹ The close relationships formed in these organizations may be constitutionally protected.⁹⁰

In determining the level of intimacy of a relationship, the court engages in "a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."⁹¹ In the case of a private club asserting First Amendment rights of intimate personal associations, the court will scrutinize a number of characteristics of an ostensibly private club, including "size, purpose, policies, selectivity, congeniality, and other characteristics."⁹² It will consider how many members belong to the club and whether there is a numerical limit on club membership.⁹³ The larger the club, the less likely it is private and

84. *See id.*

85. *Id.* at 618-19.

86. *Id.* at 620.

87. *See Roberts*, 468 U.S. at 620.

88. *Id.* at 619-20.

89. *Id.* at 620.

90. *Id.*

91. *Id.*

92. *Id.*

93. *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 801 (E.D. Penn. 1989) (noting a lack of selectivity when the club allowed 500 persons to buy shares and did not cap the number of associates admitted to the club); *Brown v. Loudoun Golf & Country*

the less likely club members share the necessary close ties to establish an intimate association.⁹⁴

A court will scrutinize a club's purpose if its goal is to make a profit or to provide substantial economic opportunities for its members, purposes that are not protected by associational rights.⁹⁵ A profit-making purpose is indicative of a relationship between club members more akin to an impersonal business relationship, which is not constitutionally protected.⁹⁶

Courts will also consider whether a club has gone to the trouble of formalizing itself through articles or bylaws, formal expulsion and admission procedures, a membership roster, and membership cards.⁹⁷ Additionally, they will consider whether the club holds formal meetings.⁹⁸ If, however, the members of the club do not hold meetings, then the court will find it difficult to find a protected association.⁹⁹

Furthermore, courts will also consider whether a club has formalized admissions policies and whether those policies indeed promote the private nature of the club.¹⁰⁰ For example, if a club has an admission policy to conduct no investigation of potential members and is not selective in admitting members, then the club is likely not a bona fide private club.¹⁰¹ In order to determine if a club is truly private, courts will scrutinize whether a club is genuinely selective in the admission of its members.¹⁰² Courts will also consider other factors,

Club, Inc. 573 F. Supp. 399, 403 (E.D. Va. 1983) (noting the relevance of the number of white applicants); *United States v. Jordan*, 302 F. Supp. 370, 375 (E.D. La. 1969) (measuring selectivity in part by "[w]hether the number of members is limited in any way other than by the capacity of the facilities"). *Id.*

94. See *Nesmith v. Young Men's Christian Ass'n*, 397 F.2d 96, 102 (4th Cir. 1968) (holding that the Raleigh Y.M.C.A. was not a private club, in part because the club had a large membership and did not apply any criteria to acquire membership, except by excluding African-American applicants).

95. *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 313 (4th Cir. 1980) (holding that a subdivision club was not private in part because the club largely functioned to commercially benefit the subdivision developer).

96. See, e.g., *id.*

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

98. *Wright v. Cork Club*, 315 F. Supp. 1143, 1152 (S.D. Tex. 1970); *Nesmith*, 397 F.2d at 101 (noting that there is no "private association [if] the members do not meet together") (citing Robert L. Thompson, Note, *Civil Rights Act of 1964 — Public Accommodations — Private Club Exemption*, 45 N.C. L.Rev. 498, 505 (1967)).

99. *Id.*

100. See *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Penn. 1989); *Brown v. Loudoun Golf & Country Club, Inc.*, 573 F. Supp. 399, 403 (E.D. Va. 1983); *Nesmith v. Young Men's Christian Ass'n*, 397 F.2d 96, 102 (4th Cir. 1968).

101. *Nesmith*, 397 F.2d at 102.

102. *Lansdowne Swim Club*, 713 F. Supp. at 796; *Durham v. Red Lake Fishing & Hunting Club*, 666 F. Supp. 954, 960 (W.D. Tex. 1987); *Loudoun Golf & Country Club*, 573 F. Supp. at 402-03; *United States v. Trustees of Fraternal Order of Eagles, Milwaukee Aerie No. 137*, 472 F. Supp. 1174, 1175-76 (E.D. Wis. 1979); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974); *United States v.*

such as the amount of any membership fee¹⁰³ and members' control over the selection of new members.¹⁰⁴

The membership's control over the operation of the club is also an important factor in determining private club status.¹⁰⁵ For example, a fishing and hunting club lost its status as a private club because its members could claim little control over the club operations when roads running over the club's property were open to the public and were maintained by the county.¹⁰⁶ In addition, private club status can be lost if the club membership allows the public regular use of club facilities.¹⁰⁷ Clubs have lost private club status by sharing swimming and tennis facilities with the public and advertising the open use of club facilities by the public.¹⁰⁸

*B. The Private Clubs' Exemption from Title II of the Civil Rights Act of 1964*¹⁰⁹

If a club meets the criteria of a truly private club, privacy rights will prevail over civil rights laws.¹¹⁰ Congress has attempted to balance First Amendment rights of bona fide private clubs and anti-discrimination laws in public accommodations by providing an exemption for private clubs.¹¹¹ In essence, a private club's size, social purpose, and selectivity is contrary to the definition of a public accommodation.¹¹²

1. Title II of the Civil Rights Act and Public Accommodations

To avoid government scrutiny of its selective membership policies and practices, a club will likely argue that it is not a public

Jordan, 302 F. Supp. 370, 375 (E.D. La. 1969).

103. *Lansdowne Swim Club*, 713 F. Supp. at 797.

104. *Id.*; Jordan, 302 F. Supp. at 375.

105. Jordan, 302 F. Supp. at 375-76.

106. See *Redlake Fishing and Hunting Club*, 666 F. Supp. at 960.

107. See, e.g., *Nesmith v. Y.M.C.A. of Raleigh*, 397 F.2d 96, 101-02 (4th Cir. 1968) (noting that the Y.M.C.A. facilities were "in practice fully available to any white applicant" and thus was constructively open to most members of the public).

108. *Lansdowne Swim Club*, 713 F. Supp. at 803 (noting that regular use of swim club by nonmembers was inconsistent with claim that club was private); see also *New York v. Ocean Club*, 602 F. Supp. 489, 496 (E.D. N.Y. 1984) (stating that the tennis club was not private because it advertised its facilities to the public and the public regularly used its tennis courts); *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 312-13 (4th Cir. 1980) (finding that a country club that circulated a newsletter to the public and solicited new members was not a private club).

109. 42 U.S.C. § 2000a (2006).

110. *Id.*

111. *Id.*

112. *Roberts v. U.S. Jaycees*, 468 U.S. 610, 620 (1983).

accommodation. To eradicate discrimination by private individuals in places of public accommodation, Congress enacted Title II of the Civil Rights Act of 1964.¹¹³ The public accommodations law of Title II of the Civil Rights Act of 1964 prohibits "discrimination or segregation on the ground of race, color, religion, or national origin" in places of "public accommodation."¹¹⁴ Although many types of discrimination in public accommodations are prohibited by Title II, gender discrimination is not explicitly prohibited.¹¹⁵ Women are notably absent from the categories of individuals covered by Title II.¹¹⁶

Section 2000a(a) specifically provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."¹¹⁷ Under the Act, a place of "public accommodation" includes any place or organization which falls under any one of the following categories:

- (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests
- (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises
- (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
- (4) any establishment . . . which is physically located within the premises of any establishment otherwise covered by this subsection, or . . . within the premises of which is physically located any such covered establishment, and . . . which holds itself out as serving patrons of such covered establishment.¹¹⁸

These categories of "public accommodation" are broad. A place of accommodation is any "place of exhibition or entertainment" whose "operations affect commerce"¹¹⁹ "Entertainment" is also a broad term and includes such activities as participating in and viewing sports activities.¹²⁰

113. 42 U.S.C. § 2000a (2006).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. 42 U.S.C. § 2000a(b) (2006).

119. 42 U.S.C. § 2000a(b)(3) (2006); *see also* *Daniel v. Paul*, 395 U.S. 298, 306 (1968).

120. *See Daniel*, 395 U.S. at 305-06; *see also* *Brown v. Loudoun Golf & Country Club, Inc.*, 573 F. Supp. 399, 402 (E.D. Va. 1983); Beth Parker, *Membership Has Its Privileges: Defiant Private Clubs Are Testing the Boundaries of Associational Rights*, CAL. LAWYER, June 1988, at 46.

Once a court determines that an organization, association, or physical facility is a place of "public accommodation" covered by the Act, the court will usually find that it also affects commerce.¹²¹ The statute provides that a place of entertainment affects "commerce if it customarily presents . . . athletic teams, . . . or other sources of entertainment which move in commerce"¹²² Many activities conducted by ostensibly private clubs may also affect commerce. For example, clubs have "affected interstate commerce" by using a diving board that was manufactured out-of-state,¹²³ by allowing out-of-state guests in a club,¹²⁴ by hosting an annual golf tournament attended by "out-of-state professionals and club members,"¹²⁵ and by allowing an out-of-state golf team to play on a golf course once a year.¹²⁶

Despite Title II's many categories of public accommodations and its seemingly broad application, Title II is not effective for eradicating discrimination at private clubs. Although Title II proscribes racial, religious, and ethnic discrimination in places of accommodation, women are not protected by the Act.¹²⁷ Moreover, because Title II includes no definition of "private club," the determination of whether a particular club is a bona fide private club is made by the courts on a case by case basis.¹²⁸ One commentator has noted that "[t]he private club exemption and corresponding uncertainty in the interpretation of this standard make Title II of the Civil Rights Act of 1964 an unlikely weapon for those combating discrimination within private country clubs."¹²⁹

2. The Private Club Exemption

Once a court makes the determination that a particular club is indeed private, the club is specifically exempt from the coverage of the Civil Rights Act.¹³⁰ Section 2000a(e) of the 1964 Civil Rights Act provides that

121. See, e.g., *Daniel*, 395 U.S. at 308 (holding that the Lake Nixon Club affected commerce as it leased boats from another state, owned a juke box that was constructed outside of the state, and "play[ed] records manufactured outside the [s]tate"). *Id.*

122. 42 U.S.C. § 2000a(c).

123. *United States v Lansdowne Swim Club*, 713 F. Supp. 785, 791 (E.D. Pa. 1989).

124. *Id.*

125. See *Loudoun Golf & Country Club, Inc.*, 573 F. Supp. at 402.

126. *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474, 477 (E.D. Va. 1966).

127. See *supra* notes 115-17.

128. 42 U.S.C. § 2000a(e) (2006).

129. Scott R. Rosner, *Reflections on Augusta: Judicial, Legislative and Economic Approaches to Private Race and Gender Consciousness*, 37 U. MICH. J.L. REFORM 135, 159 (2003).

130. See 42 U.S.C. § 2000 a(e) (2006).

this subchapter . . . shall not apply to a private club or other establishments not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.¹³¹

If a club is deemed a bona fide private club with constitutionally protected associational rights, the law will not only shield it from the civil rights laws, it will be entitled to government privileges under tax exemption laws.

III. TAX EXEMPTIONS FOR PRIVATE CLUBS: GOVERNMENT SUBSIDIES TO CLUBS THAT DISCRIMINATE

Private clubs are not only exempt from civil rights laws, but in many cases the government subsidizes discrimination at clubs by exempting them from paying taxes.¹³² Private clubs receive public tax breaks through their federal nonprofit status, which exempts them from paying federal income tax.¹³³ In addition, private clubs receive state tax benefits as they are often exempt from the state franchise tax paid on income.¹³⁴

Private clubs are exempt from income tax liability because they are social clubs and non-profit organizations.¹³⁵ Section 501 states that "[a]n organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503."¹³⁶ Tax exempt social clubs are "[c]lubs organized for pleasure, recreation, and other non-profitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder."¹³⁷

Although Congress intended to give preferential tax treatments to social clubs and non-profit organizations, Congress never intended to reward discrimination by granting tax benefits to clubs that discriminate against otherwise protected classes in membership or club privileges.¹³⁸ Recognizing that tax exemptions may directly subsidize

131. *Id.*

132. See *McGlotten v. Connally*, 338 F. Supp. 448, 457-58 (D.D.C. 1972) (noting that an income tax exemption to a private club with discriminatory admissions policy is constitutional. An exemption is not equivalent to government involvement in or approval of racial discrimination).

133. 26 U.S.C.A. § 501(c)(7) (2006) (exempting nonprofit clubs from paying income taxes); 26 U.S.C.A. § 501(c)(8) (2006) (exempting fraternal orders from paying income taxes).

134. See, e.g., KY. REV. STAT. ANN. § 141.010 (West 2006).

135. 26 U.S.C. § 501(c)(7) (2006).

136. 26 U.S.C. § 501(a) (2006).

137. 26 U.S.C. § 501(c)(7) (2006).

138. See S. REP. NO. 94-1318, at 8 (1976).

private club discrimination, Congress enacted a law denying tax exempt status to clubs that blatantly discriminate "on the basis of race, color, or religion" in written "charter[s], bylaws, or other governing instrument[s]." ¹³⁹ The written policy exclusion provides: "[a]n organization . . . is to lose its exempt status . . . for any taxable year if, at any time during that year, the organization's charter, bylaws, or other governing instrument . . . contains a provision which provides for discrimination against any person on the basis of race, color, or religion." ¹⁴⁰

Congress intended to avoid subsidizing discrimination through the grant of government benefits. ¹⁴¹ The legislative history of the Internal Revenue Code contains this statement: "[I]t is inappropriate for a social club or similar organization described in section 501 (c)(7) to be exempt from income taxation if its written policy is to discriminate on account of race, color, or religion." ¹⁴² Despite Congress's good intentions, however, the written policy exclusion has little teeth, as few clubs today are bold enough to include written statements in bylaws and other important instruments that they intentionally discriminate on the basis of race, color, or religion. ¹⁴³ Moreover, as the exclusion does not include gender, it does nothing for women who are denied membership and benefits at many private clubs across the country. ¹⁴⁴ Like Title II, gender is not even mentioned in Congress's written policy exclusion. ¹⁴⁵

Scholars have repeatedly criticized Congress's nondiscrimination provision as overly restrictive and ineffective in remedying discrimination at private clubs. ¹⁴⁶ Most discrimination today is not blatantly written in a policy. ¹⁴⁷ In arguing that racial and gender bias is prevalent in the tax exemption law, particularly as applied to private social clubs, David A. Brennen, professor of tax law at Mercer University asks, "[d]oes this mean that official and authorized discrimination by words or actions of key members of a tax-exempt social club cannot cause the organization to lose its federal tax exemption?" ¹⁴⁸ Professor Brennen suggests that a tax exemption statute written by black Congressmen and Congresswomen would likely not be as restrictive as the one enacted by Congress in 1976. ¹⁴⁹ This hypothetical statute

139. See 26 U.S.C. § 501(I) (2006).

140. S. REP. NO. 94-1318 at 8 (1976).

141. *Id.*

142. *Id.*

143. Rosner, *supra* note 129, at 175.

144. See *supra* notes 140 and 142 and accompanying text.

145. See S. REP. NO. 94-1318 (1976).

146. See, e.g., Rosner, *supra* note 129, at 174-76.

147. *Id.* at 175.

148. David A. Brennen, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336, 346 (2004).

149. *Id.* at 346-47.

"would likely address discrimination in various forms, whether reflected expressly in written documents or not."¹⁵⁰ Professor Brennen also suggests that Congress's failure to prohibit gender discrimination as a prerequisite to obtaining federal tax exempt status constitutes unacceptable gender bias in tax exemption law.¹⁵¹ In sum, Congress's written policy exclusion is underinclusive and ineffective in the battle to eradicate discrimination at private clubs.

If Congress does nothing to eradicate discrimination at private clubs, it should at the very least refrain from subsidizing discrimination on the taxpayer's dime by granting tax benefits or other government privileges to discriminatory clubs. Private clubs' favorable treatment under civil rights laws and tax exempt laws, combined with Congress's ineffective written policy exclusion, reaps private clubs substantial financial benefits. One author has noted that "[e]very year in Texas, private recreational clubs save an estimated \$1.1 million by not paying state franchise taxes; several clubs in Dallas save approximately \$1.7 million each in federal income taxes every year because of the exemption."¹⁵² In addition, individual members in private clubs can take income tax deductions.¹⁵³ Questioning tax exemptions for such private clubs, one Texas state representative, who unsuccessfully sought to end the Texas tax exemption for private clubs, stated that "[n]ot unlike vampires, their exemptions allow [private clubs] to suck the financial resources which normally would go, for instance, toward public education."¹⁵⁴ When discrimination takes place in private clubs, it is being funded on the taxpayer's dime.¹⁵⁵

IV. NOT ON THE TAXPAYER'S DIME: ABOLISHING GOVERNMENT SUBSIDIES FOR DISCRIMINATION BY DENYING TAX EXEMPTIONS TO DISCRIMINATORY PRIVATE CLUBS

"[T]he power to tax involves the power to destroy,"¹⁵⁶ and as a corollary, "the power to exempt involves the power to flourish."¹⁵⁷

150. *Id.* at 347.

151. *Id.*

152. Rosner, *supra* note 129, at n.253.

153. See, e.g., Parker, *supra* note 120, at 51; Rosner, *supra* note 129, at 139.

154. Mark Wrolstad & Tracy Everbach, *Most-Elite Country Clubs Haven't Admitted Blacks*, DALLAS MORNING NEWS, May 22, 1997, at 1A (quoting state representative Ron Wilson, Houston).

155. See *id.*

156. Lynn Lu, *Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Educational Organizations That "Advocate[] a Particular Position or Viewpoint,"* 29 N.Y.U. REV. L. & SOC. CHANGE 377, 377 (2004) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)).

157. *Id.* at 377.

These statements are particularly true when considering government-granted tax exemptions to private clubs. Congress exempts private clubs from civil rights laws and from paying taxes, which allows discrimination to flourish at some clubs.¹⁵⁸ Denying those exemptions, however, could “be perceived as an indication that an organization’s activities fail to meet governmental standards or pursue government-approved policies, although they fall short of being sanctionable.”¹⁵⁹ Even though discrimination is legal at private clubs, many club members would not engage in such activities if doing so had financial costs. Increased government scrutiny of private club practices could raise awareness of discriminatory practices, perhaps resulting in fewer citizens desiring membership.

Contrary to the bona fide private clubs exemption under the public accommodations provisions of civil rights laws and the codification of freedom of association, a tax exemption is a matter of government privilege or benefit.¹⁶⁰ Thus tax-exempt status for discriminatory private clubs is a “symbol of government tolerance, if not outright approval of [discriminatory] activities.”¹⁶¹ Taxpayers become the “indirect and vicarious ‘donors’” of private clubs’ discrimination.¹⁶²

Taxpayers have an interest in the fair administration of tax laws and in seeing that the grant of government benefits and privileges does not promote discrimination. A club’s freedom of intimate association, although constitutionally protected, does not outweigh the State’s compelling interest in eliminating tax subsidies for illegal discrimination. A tax benefit or preferential treatment is not a constitutionally protected right. A state may remove tax benefits to private clubs that discriminate on the basis of race, gender, or religion, even if the private clubs qualify as highly selective in accepting members.¹⁶³ A number of state legislatures have done just that, determining that discrimination should not occur at private clubs on the taxpayer’s dime. They have enacted legislation requiring private clubs to surrender their tax-exempt status if they discriminate against certain individuals.

158. *See id.*

159. *Id.* at 379.

160. Rosner, *supra* note 129, at 174.

161. Lu, *supra* note 156, at 379; *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 190 (1969) (Brennan, J., concurring in part and dissenting in part) (noting that racial discrimination is particularly “grave when government has or shares responsibility for it. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment and the setting of worthy norms and goals for social conduct”). *Id.*

162. Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1982).

163. State v. Burning Tree Club, Inc., 554 A.2d 366, 378-81 (Md. 1989) (holding that freedom of intimate association did not outweigh Maryland’s removal of tax benefits to a sizable all-male organization devoted to playing golf, even though the organization was highly selective in accepting members).

Many of these state provisions are broader than the federal provisions, as they prohibit discrimination against more categories of individuals. Many of them also define public accommodation broadly enough to include many private country clubs and golf clubs.

A. Overview of State Laws Abolishing Government Subsidies for Discrimination

State legislatures primarily decline to extend government privileges and benefits to discriminatory private clubs in three areas. In some states, discriminatory private clubs are excluded by legislation from taking income tax deductions.¹⁶⁴ Some states refuse to give liquor licenses to discriminatory private clubs.¹⁶⁵ Private clubs, often holding valuable property and expansive open space, cannot take property tax deductions.¹⁶⁶ In many situations, the statutory exclusions and denial of benefits applicable to private clubs are much broader and perhaps easier to administer than federal efforts.

1. Income Tax Benefits

California denies both personal income tax deductions and corporate tax deductions to private clubs "restrict[ing] membership or the use of its services or facilities on the basis of age, sex, race, religion, color, ancestry, or national origin."¹⁶⁷ In addition, whereas the Civil Rights Act of 1964 fails to provide a definition of "private club" and only addresses public accommodations, California's Unruh Civil Rights Act provides that "[a]ll persons . . . are free and equal, . . . no matter what their sex, race, color, religion, ancestry, [or] national origin" and provides that they "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."¹⁶⁸

Similarly, Colorado denies personal income tax deductions incurred by taxpayers claiming expenditures at any club which has a

164. See, e.g., CAL. REV. & TAX CODE §17269 (West 1997); CAL. REV. & TAX. CODE §24343.2 (West 1987); COLO. REV. STAT. §39-22-104(3)(e)(I) (1997).

165. See, e.g., CONN. GEN. STAT. §52-571D(h) (2004); 235 ILL. COMP. STAT. ANN. 5/6-17 (LexisNexis 1993); ME. REV. STAT. ANN. tit. 17 §1301-A (1974).

166. See, e.g., MD. CODE ANN., TAX-PROP. §8-214 (West 2001); MINN. STAT. §273.112.3 (2000).

167. CAL. REV. & TAX CODE § 17269 (West 2004); CAL. REV. & TAX. CODE § 24343.2 (West 2004).

168. CAL. CIV. CODE. § 51 (West 2001). Notably, the Unruh Act includes women. The Act was successfully invoked by a woman in California who had been denied country club membership at Peninsula Golf and Country Club. See *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 782, 798 (Cal. 1995).

policy restricting membership on the basis of race, sex, religion, color, ancestry, or national origin.¹⁶⁹ In Colorado, the burden is placed upon discriminatory clubs to print a statement of non-deductibility on each receipt furnished to members.¹⁷⁰ The requirement may provide a disincentive to clubs inclined to discriminate and provide an enforceable mechanism of denying tax benefits to members of discriminatory clubs. Placing the burden upon the clubs in the first instance may allow them to self-regulate and avoid costly litigation.

Like California and Colorado, the Commonwealth of Kentucky has attempted to abolish state tax subsidies that benefit discriminatory private clubs. The Kentucky Revenue Code prohibits deductions from taxpayers' net incomes of any amount

paid to any club, organization, or establishment which has been determined by the courts or an agency . . . charged with enforcing the civil rights laws . . . not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations to any person because of race, color, religion, national origin, or sex¹⁷¹

Although the Kentucky statute does not distinguish between public accommodations and private clubs, it does require a finding of discrimination by the courts or civil rights agency as a prerequisite to enforcement.¹⁷²

2. *Liquor Licenses*

Many states withhold government-regulated privileges such as liquor licenses from clubs that discriminate against individuals who otherwise would be protected by civil rights laws.¹⁷³ The grant of a liquor license involves the unique power of the state under the

169. COLO. REV. STAT. § 39-22-104(3)(e)(I) (1997).

170. *Id.*

171. KY. REV. STAT. ANN § 141.010(11)(d) (LexisNexis 2006).

172. *Id.*

173. See *Vaspourakan, Ltd. v. Alcoholic Beverages Control Commission*, 516 N.E.2d 1153, 1159 (Mass. 1987) (upholding a liquor license revocation where a night club deliberately discriminated against African Americans seeking entrance in violation of a state anti-discrimination statute); *B.P.O.E. Lodge No. 2043 of Brunswick v. Ingraham*, 297 A.2d 607, 608, 615, 619-20 (Me. 1972) (holding that the Maine Liquor Commission was within its lawful authority when denying renewal liquor licenses to fifteen Elks Lodges under a state statute prohibiting licensees from withholding membership on the basis of race); see also *Beynon v. St. George-Dixie Lodge No. 1743*, 854 P.2d 513, 515, 517-18 (Utah 1993) (finding that the Elks qualified as an "enterprise regulated by the state" and were subject to the antidiscrimination provisions of the Utah Civil Rights Act).

Twenty-First Amendment to regulate liquor use.¹⁷⁴ Therefore, the refusal to issue or renew a liquor license to a club that discriminates in its membership practices is permissible under the Constitution.¹⁷⁵

For example, a Maine statute prohibits discrimination by holders of state licenses.¹⁷⁶ By agreeing to become licensees of the Department of Alcohol and Beverage Control, private clubs and their members may become subject to state civil rights laws.¹⁷⁷ Connecticut allows courts to revoke liquor licenses of golf country clubs that discriminate on the basis of race, religion, sex, or sexual orientation, among other characteristics.¹⁷⁸ This provision could be applied to clubs that make women wait behind men to tee off. Similarly, the New Jersey Senate passed a bill requiring all private clubs to equalize any club benefits between men and women.¹⁷⁹

Kentucky recently adopted a statute that requires golf courses to voluntarily comply with the state's civil rights laws, even though they may be otherwise exempt from civil rights laws, as a prerequisite to selling alcoholic beverages.¹⁸⁰ The statute provides that

the Office of Alcoholic Beverage Control shall not issue a license to an applicant authorized to apply for a license to sell alcoholic beverages by the drink . . . unless the applicant and the golf course . . . agree to voluntarily comply [with the Kentucky Civil Rights Act] whether or not the applicant and the golf course is a private club.¹⁸¹

The Office has the power to "revoke or suspend any license . . . if the office or the Kentucky Commission on Human Rights makes a finding that the applicant . . . has violated a requirement specified" in the state civil rights laws.¹⁸²

3. *Property Taxes*

Many private clubs, including country clubs and golf clubs, own substantial acres of valuable land that states exempt from property

174. See *California v. LaRue*, 409 U.S. 109, 114 (1972); *B.P.O.E. Lodge No. 2043*, 297 A.2d at 612 n.3.

175. *B.P.O.E. Lodge No. 2043*, 297 A.2d at 607.

176. ME. REV. STAT. ANN. tit. 17, § 1301-A (2005); see also 235 ILL. COMP. STAT. ANN. 5/6-17 (West 2006); N.M. STAT. § 46-10-13.1 (West 1973).

177. See *Elks Lodges Nos. 719 & 2021 v. Dept. of Alcoholic Beverage Control*, 905 P.2d 1189, 1200 (Utah 1995); see also UTAH CODE ANN. § 13-7-1 (LexisNexis 2006).

178. CONN. GEN. STAT. § 52-571D(h) (2004).

179. N.J. STAT. ANN. § 10:5-12(f)(2) (West 2002).

180. KY. REV. STAT. ANN. § 242.1232 (LexisNexis 2006) (requiring golf courses to agree to comply with the provisions of KRS Chapter 344).

181. *Id.*

182. *Id.*

tax laws in exchange for an agreement to keep the property as open space. Some states deny this property tax exemption to private clubs that discriminate against individuals who are otherwise protected under the civil rights laws.

Under Minnesota's Open Space Property Tax Law, the state denies tax exemptions and lower property tax rates to private country clubs with fifty or more members and more than five acres if they discriminate on the basis of gender or marital status.¹⁸³ Furthermore, "[a] golf club that has food or beverage facilities or services must allow equal access to those facilities and services for both men and women members in all membership categories at all times."¹⁸⁴ This provision assumes open tee times for all adult members with playing privileges and guarantees spouses equal access privileges.¹⁸⁵ Unlike federal tax provisions, the Minnesota statute places at least some burden on the club to show that it qualifies for preferential tax treatment by requiring the club to demonstrate that it does not discriminate within its bylaws, rules, or regulations.¹⁸⁶ The club may be required to prove, "by affidavit or other written verification that the bylaws or rules and regulations of the club meet the eligibility requirements" and the county attorney may require the club to "furnish information that the county attorney considers necessary in order to determine eligibility."¹⁸⁷

Maryland also denies property tax exemptions to private clubs that discriminate on the basis of "race, color, creed, sex, or national origin" in membership practices or services or privileges to guests.¹⁸⁸ Maryland's statute prohibits country clubs or golf courses from maintaining discriminatory membership or guest privilege policies once they agree to maintain their land for open spaces in exchange for favorable tax treatment.¹⁸⁹ The Maryland statute provides:

(a) . . . If a country club that meets the qualifications of § 8-212 of this subtitle allows or practices discrimination based on race, color, creed, sex, or national origin in granting membership or

183. MINN. STAT. ANN. § 273.112.3 (West 1999). *But cf.* MINN. STAT. ANN. § 363.02 (West 2004) (noting that the provisions prohibiting gender discrimination "do not apply to restricting membership on an athletic team or in a program or event to participants of one sex if the restriction is necessary to preserve the unique character of the team, program, or event and it would not substantially reduce comparable athletic opportunities for the other sex"). *Id.*

184. MINN. STAT. ANN. § 273.112.3 (West 1999).

185. *Id.* Nevertheless, a limited number of separate, but equal, tee times are permitted. *Id.* at § 273.112.3(3)(d) (noting that tee times may be limited on the basis of sex up to one weekend per month and two weekdays per week).

186. MINN. STAT. ANN. § 273.112.6 (West 1999).

187. *Id.*

188. MD. CODE ANN., TAX-PROP. § 8-214 (LexisNexis 2001).

189. *Id.*

guest privileges, the country club may not make or continue an agreement under this subtitle.

(b) . . . A country club may not discriminate or retaliate against any person who has opposed any discrimination practice prohibited by subsection (a) of this section or who has filed a complaint, testified, or assisted a party in any manner in an investigation, proceeding, or hearing conducted under § 8-215 of this subtitle.¹⁹⁰

Enforcement powers in Maryland are vested in the state's Attorney General.¹⁹¹

B. Difficulties Proving Discrimination at Private Clubs and Administering State Laws Designed to Abolish Government Subsidies for Discrimination

Private club membership practices or the denial of club benefits motivated by a person's race, gender or religion is discriminatory, but legal, because of the constitutional right of intimate association.¹⁹² Even though discrimination is legal, proving disparate treatment of individuals at private clubs based upon race, gender, or religion is essential to avoid subsidization of discrimination at the taxpayer's expense. Some state statutes require a finding of discrimination at a private club before the state will deny any government benefits or privileges.¹⁹³ Proving discrimination without infringing upon individual member's privacy rights may be difficult. In addition to the constitutional issues of delving into private clubs, it is often difficult to produce direct evidence of discrimination, as "clever men may easily conceal their motivations."¹⁹⁴ Even if discrimination can be proven in the first instance, it is a difficult task to administer laws designed to eliminate tax exemptions or other privileges to discriminatory clubs.

1. Who is Responsible for Determining Whether a Private Club Discriminates?

Once a state enacts legislation designed to abolish subsidies for discrimination through favorable tax treatment, a question remains: who is responsible for determining whether a club discriminates in

190. *Id.* The statute was upheld against a constitutional challenge in *State v. Burning Tree Club, Inc.*, 554 A.2d 366, 381, 387 (Md. 1989).

191. See 89 Md. Op. Att'y Gen. 38 (1989).

192. See U.S. CONST. amend. I ("the right of the people peaceably to assemble"); 42 U.S.C. § 2000(a)(e) (exempting private clubs from public accommodation laws).

193. See, e.g., CONN. GEN. STAT. § 52-571(h) (2004); ME. REV. STAT. ANN. tit. 17, § 1301-A (2005).

194. *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974).

the first instance? Will the responsibility lie with the courts, a federal agency, or a state agency?

Recently, in *Commonwealth v. Pendennis Club, Inc.*, the Supreme Court of Kentucky resolved the question of whether any agency within the Commonwealth had the authority to determine whether private golf and country clubs, which are exempt from the state's civil rights laws, discriminate.¹⁹⁵ The Kentucky Supreme Court determined that the state agency charged with enforcing the Kentucky civil rights laws had the "authority to investigate private clubs to determine if they engage[d] in discriminatory conduct in such a manner that members would be prohibited from deducting payments."¹⁹⁶ The opinion of the court was confined to the issue of enforcement and investigative powers of the state agency charged with administering and adjudicating civil rights cases, rather than whether the clubs actually discriminated against certain individuals.¹⁹⁷ The Kentucky Supreme Court found that the Kentucky Commission on Human Rights (KCHR) had an implied statutory right to investigate alleged discriminatory practices of private clubs to prevent the clubs and their members from finding shelter in the tax code.¹⁹⁸

195. See *Commonwealth v. Pendennis Club*, 153 S.W.3d 784, 789 (Ky. 2004).

196. *Id.* at 785.

197. *Id.*

198. *Id.* at 788-89. *Pendennis Club* originated with a complaint of alleged discriminatory membership practices against several Kentucky country clubs. *Id.* at 786. An original complaint against the country clubs about membership practices was dismissed by the Kentucky Commission on Human Rights (KCHR), which determined that the clubs had a statutory right to discriminate without fear of legal liability, pursuant to the state's private club exemption to its public accommodations provisions, KRS § 344.130(1). *Id.* Shortly thereafter, State Representative Anne Northup requested an opinion from the Attorney General to clarify the effect of KRS § 141.010(11) (d); specifically, Representative Northup questioned whether the statute granted KCHR the authority to investigate tax deductions of discriminatory clubs and its members. *Id.* The Attorney General's opinion determined that although private clubs were not liable for discriminatory membership practices, KCHR was not prohibited from investigating these clubs to determine if they received state tax benefits. *Id.*

The Federal Court determined that the statute did not give KCHR the authority to investigate the clubs. *Id.* On appeal, the Sixth Circuit vacated the ruling, finding that the district court "should have abstained from ruling on the case while administrative proceedings were underway." *Id.* KCHR then sought "a declaratory judgment as to its power to investigate the clubs" from the Jefferson Circuit Court. *Id.* The circuit court ruled in favor of "the clubs, holding that KRS § 344.130 specifically exempted the clubs from the KCHR's [oversight]." *Id.* The court of appeals affirmed, and the supreme court granted discretionary review of the decision. *Id.*

The Kentucky Legislature enacted the KCHR "to safeguard the rights of citizens to be free from discrimination on the basis of race and other enumerated characteristics." *Id.* at 786-87. The supreme court noted that the legislature required courts to interpret the statute in such a way that would fulfill the purposes and objectives of the Civil Rights Act. *Id.* at 787. As a result, any exceptions to the Act would be interpreted narrowly. *Id.*

The court noted that although private clubs may be exempt from public accommodation laws, they are not entirely exempt from civil rights laws.¹⁹⁹ For example, while discriminatory clubs may not be liable for damages for withholding membership benefits, they could be civilly liable for discriminatory employment practices.²⁰⁰ Under these circumstances, the state agency charged with investigating and adjudicating discrimination claims "would have authority to exercise its powers."²⁰¹ Relying upon *Watson v. Fraternal Order of Eagles*,²⁰² the Supreme Court reasoned that alternate forms of recovery against discriminatory clubs exist, demonstrating that clubs do not have a "carte blanche" ability to discriminate.²⁰³

The Kentucky Supreme Court reasoned that the power to investigate is inherent in the power to make determinations.²⁰⁴ Although this principle is implicit in the Necessary and Proper Clause of the United States Constitution,²⁰⁵ the court found the same authority in the Kentucky General Assembly's power to interpret statutes in the furtherance of the statute's purpose.²⁰⁶ The court reasoned that allowing KCHR to take investigatory actions enabling it to make determinations mandated by the legislature is "common sense."²⁰⁷

Although state laws provide no explicit authority for investigatory powers, these powers are implied from the necessity of collecting information before a determination can be made as to discriminatory practices by clubs.²⁰⁸ The court clarified KCHR's ability to ensure that

199. *Id.* at 787.

200. *Pendennis Club*, 153 S.W. 3d at 787.

201. *Id.*

202. 915 F.2d 235, 241 (6th Cir. 1990).

203. *Pendennis Club*, 153 S.W. 3d at 787. The clubs argued that KRS § 141.010(11)(d) does not grant KCHR authority to investigate [because, 1) the statutory] language parallels the language in the public accommodation provision found in KRS § 344.120[, and 2)] the language . . . cannot grant, the KCHR independent authority to make determinations because [the statute was] drafted in the past tense.

Id. at 788. The court distinguished the two statutes, noting that KRS § 141.010 "applies to 'any club' without limitation," not just non-private clubs, as does KRS § 344.120. *Id.* This application "includes clubs that fail to 'afford full and equal membership' [benefits] because of race," not just those clubs that deal with public accommodations. *Id.* The court reasoned that this language was not found in the other statutes, therefore the other statutes did not give immunity. *Id.* As to the second argument, the court concluded that "the language [was] written in the past tense because the Revenue Cabinet [could not] deny a tax deduction until the KCHR [had] made a determination that the club discriminates." *Id.*

204. *Id.* (relying upon *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

205. U.S. CONST. art. I, § 8, cl. 18.

206. *Pendennis Club*, 153 S.W.3d at 788.

207. *Id.* at 789.

208. *Id.*

discriminatory clubs find no sanctuary in the tax code by acknowledging the power to investigate clubs.²⁰⁹

Similar reasoning applies to determine that the federal agency created to enforce federal civil rights laws and civil rights agencies in other states can determine whether a club qualifies for favorable tax treatment. Although federal provisions and state statutes may exempt private clubs from public accommodations provisions, private clubs' associational rights should not shield them from scrutiny if they or their members choose to take advantage of government benefits and privileges.

2. How is Discrimination by a Private Club Proven without Interfering with Privacy Rights?

Once the legislature or the courts determine who or what government agency has the authority to investigate private clubs for purposes of denying government benefits or privileges to discriminatory private clubs, the next question becomes, how the government can prove discrimination within the bounds of the Constitution. Despite the large amount of the litigation involving private clubs that has focused upon the constitutional protections of individual club members, courts have provided little guidance as to how to prove discrimination for the limited purpose of avoiding subsidization of private club discrimination through tax laws. The burden of proof standards used in employment discrimination cases and fair housing law may be useful and transferable to cases involving private club discrimination for the purpose of enforcing and administering tax laws. In combating the subsidization of discrimination at private clubs through the tax laws, the government has in its arsenal theories based on direct evidence of discrimination, disparate treatment of individuals, and disparate impact.

a. Proving Discrimination at Private Clubs by Written Policies, Direct Statements, or Admissions

A private club may legally discriminate against any individual and be as blatant about it as it chooses.²¹⁰ Blatant discrimination goes far in helping the government determine whether a private club is being subsidized through tax laws at other taxpayers' expense. If a club has a written policy of discrimination, the privacy rights of individual members are not implicated and the problem of proof is straightforward. The written policy provides direct proof of discrimination

209. *Id.*

210. See *supra* note 192 and accompanying text.

without scrutinizing membership lists or other documents, which may reveal the identities of individual members. As a result, privacy rights are not implicated.

To avoid subsidizing discrimination through tax deductions, clubs could file their charters, bylaws, or other governing instruments with the appropriate agencies charged with administering civil rights laws, tax laws, or liquor licenses. Private clubs would thereby be encouraged to consider the wording of their charters, bylaws, or other governing instruments. Requiring the filing of non-discriminatory written documents as a prerequisite to the receipt of government privileges would serve as a disincentive to clubs that discriminate without intruding upon the privacy rights of individual club members.

Most cases of discrimination, however, are not so blatant and cannot be proven by a written document. Moreover, the prospect of government scrutiny of tax forms serves as a disincentive to clubs putting a discriminatory policy in writing. Even if a club spells out its discriminatory policy in writing, the filing of a policy may not go far in preventing individual members from taking tax deductions for club activities. As a first step in going beyond the writing limitation, and as a prerequisite to receiving favorable tax treatment, liquor licenses, or other government privileges, Congress could expand the law to require an affirmative statement by clubs that they do not discriminate, much like the statement required in the employment context.²¹¹ Clubs that choose to discriminate or choose not to comply could be required to include statements on all sales receipts stating that members can not take tax deductions for services or items provided by the club.²¹²

Placing the burden upon the club in the first instance to comply with the amended statute or place the disclaimer on receipts, will discourage individual club members from using club receipts as the basis for tax benefits. The tax exemption laws should be no more difficult to enforce than deductions taken for charitable contributions.²¹³ Thus, if audited, a taxpayer claiming charitable deductions may be required to produce valid receipts for contributions with no disclaimer that they can not be used for tax purposes.

211. While many employers voluntarily include on employment applications an equal employment opportunity policy statement against discriminatory hiring, federal contractors are required to provide an equal employment opportunity statement on contracts and applications. 41 C.F.R. § 60-20.3 (2006) ("Written personnel policies . . . must expressly indicate that there shall be no discrimination against employees on account of sex. If the employer deals with a bargaining representative for his employees and there is a written agreement on conditions of employment, such agreement shall not be inconsistent with these guidelines.").

212. *See, e.g.*, CAL. REV. & TAX. CODE § 17269(b) (West 2004); COLO. REV. STAT. § 39-22-104(3)(e)(I) (2004).

213. 26 U.S.C. § 170 (2006) (establishing an income tax deduction for charitable contributions).

b. Proving Discrimination at Private Clubs Through Disparate Treatment

If a club treats some people less favorably than others because of their race, gender, or religion, a causal connection may be proven under a disparate treatment theory.²¹⁴ The disparate treatment theory requires proof of discriminatory intent.²¹⁵ Circumstantial evidence can be used to prove a club's motivation and intent.²¹⁶

The government may utilize the burdens of proof for Title VII, which prohibit discrimination in employment,²¹⁷ to prove discrimination in private club cases involving the question of the legality of tax deductions. For example, the government has relied upon a disparate treatment theory to prove discrimination in cases under the Fair Housing Act (FHA).²¹⁸ The Second Circuit, in *Soules v. U.S. Department of Housing and Urban Development*, employed the *McDonnell Douglas* burden shifting procedure in a case brought under the Fair Housing Act (FHA).²¹⁹ The court stated that "to make out a *prima facie* discriminatory housing refusal case, a plaintiff must show that he is a member of a statutorily protected class who applied for and was qualified to rent or purchase housing and was rejected though the housing remained available."²²⁰ The defendant was then given the opportunity "to explain whether his actions were motivated by impermissible considerations. . . . If, however the defendant declines the opportunity to present evidence toward this end, the plaintiff is entitled to relief."²²¹

A member of a class traditionally protected by civil rights laws, who has been denied membership or benefits by a private club, could likely provide the impetus for a disparate treatment claim asserted against a private club for tax law purposes. In housing discrimination cases, the government often utilizes "testers" to prove disparate treatment.²²² "Testers" are members of a protected class who apply for housing in an attempt to determine whether landlords are

214. *Int'l Bhd. Teamsters v. United States*, 431 U.S. 324, 335 (1977); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

215. *U.S. Postal Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

216. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

217. 42 U.S.C.A. § 2000(e)(2) (2006).

218. *See, e.g., Soules v. U.S. Dept. of Hous. & Urban Dev.*, 967 F.2d 817, 821-22 (2d Cir. 1992).

219. *Id.* at 822.

220. *Id.*

221. *Id.*

222. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368 (1982); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 94 (1979); *see also Tandy v. City of Wichita*, 380 F.3d 1277, 1281 (10th Cir. 2004); *O'Neal v. City of New Albany*, 293 F.3d 998, 1004 (7th Cir. 2002).

employing discriminatory practices.²²³ The government could similarly utilize testers to determine whether private clubs discriminate in membership practices for the limited purpose of determining whether the club or membership qualifies for any tax deductions. Using the burden shifting procedure for a disparate treatment claim announced in *McDonnell Douglas Corp. v. Green*,²²⁴ the government would need to prove that

1. the person was a member of a class otherwise protected by the civil rights laws;
2. the person applied for membership or benefits in the private club and was qualified for the membership or benefits. For example, membership in a private club might require a certain income level or residence in a certain geographic area. If it can not be proven that she meets the required criteria, the disparate treatment theory fails;
3. the person was denied membership or benefits by the private club; and
4. the opportunity for membership or benefits remained available thereafter.²²⁵

If the government meets the above prima facie case of discrimination, the private club may rebut the case by bringing forth evidence of legitimate, nondiscriminatory reasons for the adverse decision.²²⁶ If the private club is successful, the burden would shift back to the government to prove that the private club's legitimate, nondiscriminatory reason for the decision is merely a pretext for discrimination.²²⁷

c. Proving Discrimination at Private Clubs Through Disparate Impact

Disparate impact theory allows conduct that, although equally applied to all, has an adverse effect on protected class members as compared to majority class members.²²⁸ It also allows recovery when there is proof of a pattern or practice of discrimination.²²⁹ In private

223. *Id.*

224. 411 U.S. 792, 801 (1973).

225. *Id.*

226. *Id.*

227. *Id.* at 804.

228. *Id.* See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (noting that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

229. *McDonnell Douglas Corp.*, 411 U.S. at 804. See *Int'l Bhd. Teamsters v. United States*, 431 U.S. 324, 336 (1977) (requiring the government to demonstrate that "racial

club cases based upon disparate impact theory, the standard of proof might be similar to the test set forth by the United States Supreme Court in *Griggs v. Duke Power Company*.²³⁰

To bring a disparate impact claim against a private club, first the government needs to present a *prima facie* case of disparate impact. To formulate a *prima facie* case, the government needs to identify a membership practice that has caused a statistical under-representation of members of an otherwise protected class.²³¹ Second, the government would need to show that the membership practice is not reasonably connected to an applicant's qualifications for club membership and "has caused the exclusion of . . . applicants because of their membership in a protected group."²³²

Disparate impact theory has been used outside of the employment context and could be useful in proving that tax exemptions or deductions should not be permitted by private clubs or their members.²³³ For example, the theory has been used in the area of housing.²³⁴ In *United States v. City of Black Jack*, "the complaint alleged that the City had denied persons housing on the basis of race . . . by adopting a zoning ordinance which prohibited construction of any new multiple-family dwellings."²³⁵ The complainants asserted that, although fair in form, these practices were discriminatory in operation.²³⁶ The United States brought a claim under the Fair Housing Act of the Civil Rights Act of 1968 against the city and used statistics to prove its claim that the ordinance had a disparate impact upon African Americans.²³⁷ The statistics showed that although the City of Black Jack's population was ninety-nine percent white, forty percent of African-American families in the city lived in overcrowded units.²³⁸ The court held that these statistics were sufficient to raise a presumption of discrimination and satisfied a *prima facie* case.²³⁹ Once the plaintiff established a *prima facie* case by demonstrating a racially discriminatory

discrimination was the company's standard operating procedure" if the government claimed that there was a "systemwide pattern or practice of resistance to the full enjoyment of Title VII rights").

230. 401 U.S. 424, 436 (1971) (holding that standardized tests and certain graduation requirements violated Title VII because they had a discriminatory effect and were not found to measure job performance accurately).

231. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988).

232. *Id.*

233. See *infra* notes 236-45 and accompanying text.

234. *Id.*

235. 508 F.2d 1179, 1181 (8th Cir. 1974).

236. *Id.* at 1184.

237. *Id.* at 1183.

238. *Id.*

239. *Id.* at 1186.

effect, the burden shifted to the defendant to demonstrate that its conduct was the result of a nondiscriminatory reason for the practice.²⁴⁰ Proof of discriminatory intent can be inferred from the difference in treatment.²⁴¹

Statistical evidence can be used to make out a prima facie case of discrimination in a disparate impact case, such as a case against a private club.²⁴² Statistics showing a racial or ethnic imbalance in membership can signal purposeful discrimination.²⁴³ A claimant may use a statistical analysis of the membership to show a disparity in membership among minorities and women. This evidence could be used to prove discrimination at a private club for purposes of preventing illegal tax deductions.

The use of statistics to prove discrimination at private clubs could be very advantageous. Rather than focusing upon individual members of a private club, the demographics of the club would be scrutinized. Discovery requests might be designed to elicit numbers showing the proportion of minority and women members or prospective members of the club, without the necessity of discovery of individual names of club members.

Nonetheless, a problem that could arise with the use of statistics to show discrimination at a private club may be the unavailability of a significant sample size. A disparate impact can be established by statistical proof alone, but the statistical pool must be logically related to the adverse selection decision and the statistical application must be meaningful.²⁴⁴ The use of statistics may prove unreliable when determining whether a selective private club, with a small number of members, discriminates on the basis of race, gender, or religion.²⁴⁵

3. Once Discrimination is Proven, How Can Tax Deductions by Individual Club Members be Prohibited Without Violating Privacy Rights?

As a threshold matter, the government can determine whether a private club discriminates against individuals on the basis of race,

240. *Id.*

241. *Id.* at 1185.

242. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *Int'l Bhd. Teamsters v. United States*, 431 U.S. 324, 339 (1977).

243. *See id.*; *United States v. City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974).

244. *See Moore v. Southwestern Bell Telephone Co.*, 593 F.2d 607, 608 (5th Cir. 1979).

245. A number of courts have emphasized the importance of ensuring that statistics be derived from an adequate sample. *See, e.g., Int'l Bhd. Teamsters*, 431 U.S. at 340 (explaining that the applicability of statistics depends upon the "surrounding facts and circumstances"); *Morita v. S. Cal. Permanente Med. Group*, 541 F.2d 217, 220 (9th Cir. 1976) (noting that a sample of eight persons is too small to be statistically significant).

gender, and religion without implicating privacy rights of individual club members. The initial determination of discrimination may be based upon the policies or actions of the club as an entity, or based upon statistics showing the demographics of club membership or the club's selective activities. However, the determination of what triggers an audit of individual taxpayers' returns, as a result of investigating a club, may have significant constitutional ramifications. An individual taxpayer audit, triggered by mere membership in a private club, is a chilling thought.

Moreover, determining whether individual taxpayers are taking improper deductions may be cumbersome. To ascertain whether individuals claimed improper tax deductions, "[e]very member of the club, their guests, and any outside groups that used the club's facilities for business purposes would need to be audited."²⁴⁶ Club members assert that interference with privacy through massive audits of club members or prospective club members would greatly change the club environment and alter the very essence of a private club, whose members "cherish their personal relationships, established after a painstaking selection process."²⁴⁷ Moreover, they argue, the open discovery of club membership lists would have a chilling effect on membership.²⁴⁸ Present members would be discouraged from maintaining club membership and new members would be reluctant to join.²⁴⁹ Furthermore, the risk of a random tax audit based upon club membership would certainly discourage prospective club members from joining the club.²⁵⁰ Few individuals would relish submission to a tax audit simply because of their membership in a private club.²⁵¹

Since requests for club membership lists implicate individual privacy rights, there must be a compelling state interest or specific evidence of members' violations before a club should be required to respond to a subpoena for a list of individual club members.²⁵² Even if the government has a compelling interest in discovering club membership lists, the state cannot access these lists if less intrusive means are available for discovering illegal tax deductions.²⁵³

246. Rosner *supra* note 129, at 177. The process could take a year to straighten out a single taxpayer. Holly Holland, *Complaints Use New Law To Probe Private Clubs*, COURIER J., April, 19 1991, at 1A.

247. *Pacific-Union Club v. Super. Ct. of San Francisco County*, 283 Cal. Rptr. 287, 296 (Cal. Ct. App. 1991).

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Buckley v. Valeo*, 424 U.S. 1, 64-68 (1976); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463 (1958).

253. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

a. What is a Compelling State Interest in Constitutionally Protected Club Membership Lists?

The right of intimate associational privacy is not absolute.²⁵⁴ Where the State can demonstrate a compelling state interest in disclosure, a limited disclosure of constitutionally protected membership lists in private clubs is permitted.²⁵⁵ No doubt the State has a compelling interest in combating discrimination.²⁵⁶ Moreover, the fair administration of tax laws is likely also a compelling state interest. The State may further these interests by disallowing tax deductions by private club members if they subsidize discrimination. However, any compelling interest in combating discrimination and avoiding subsidizing it through tax deductions should not permit the government to engage in random, mass tax audits of individual club members merely because they belong to a private club.

The California Court of Appeal's decision in *Pacific-Union Club v. Superior Court of San Francisco County* is instructive when setting limits as to how far the government should go in subpoenaing private club membership lists for purposes of prohibiting tax deductions and conducting tax audits.²⁵⁷ The California Franchise Tax Board petitioned the court for the enforcement of an administrative subpoena duces tecum for the membership list, names, addresses, and social security numbers of the members of the private Pacific Union Club.²⁵⁸ The purpose of the subpoena was to assure that members of an allegedly discriminatory club were not taking illegal tax deductions.²⁵⁹ The Board admitted during oral arguments that it had no information concerning any illegal deductions by members:

We [need] to determine the audit pool to find out whether or not any member of the Club has violated the regulations. It is the only way we have of determining who the members are . . . at this time we do not have any information — specific information about whether any specific member is in violation of the regulations.²⁶⁰

The club objected to the request for the private membership list, arguing that the request for the membership list and personal information about club members violated the members' First and Fourteenth

254. *Pacific-Union Club v. Super. Ct. of San Francisco*, 283 Cal. Rptr. 287, 297 (Cal. Ct. App. 1991).

255. *Id.*

256. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

257. 283 Cal. Rptr. 287, 297-300 (Cal. Ct. App. 1991).

258. *Id.* at 290.

259. *Id.* at 288.

260. *Id.* at 290.

Amendment right to freedom of association “without unwarranted governmental intervention or interference.”²⁶¹ After establishing itself as a purely private, intimate association, whose primary function was to facilitate camaraderie between members,²⁶² the club argued that disclosure of the membership list would put this intimate association with members at risk.²⁶³

The court agreed that the membership lists were constitutionally protected and concluded that in the absence of a compelling state interest, the clubs were not required to disclose their membership lists.²⁶⁴ Absent a “particularized need or specific relationship to a precise, suspected act of wrongdoing,” the court found no “compelling state interest sufficient to overcome the right of privacy.”²⁶⁵ The court then determined what a “particularized need or specific relationship to a precise, suspected act of wrongdoing,” means for purposes of disclosing private club membership lists that result in taxpayer audits.²⁶⁶

Much of the evidence in *Pacific Union* focused upon the club itself rather than upon any act of wrongdoing by individual club members or a particularized complaint of discrimination by any individual.²⁶⁷ The club provided evidence that it prohibited members from conducting business transactions on the premises and sent members monthly statements as reminders that deductions for club expenses were illegal.²⁶⁸ The club conceded that it discriminated on the basis of age.²⁶⁹ The club also had a general reputation in the community for excluding women from membership.²⁷⁰ The court noted, however, that there was no record evidence of gender discrimination from which to base any state interest, except for a forty-year-old corporate exemption tax application.²⁷¹ Additionally, the Franchise Tax Board did not have any evidence of specific violations by individual members.²⁷² The court noted that “even if the Board had some information that a member or a few members violated the regulations, it would still not be permitted to violate the constitutional rights of the hundreds of

261. *Id.* at 292.

262. *Id.* at 294.

263. *Pacific-Union Club*, 283 Cal Rptr. at 296.

264. *Id.* at 297.

265. *Id.* at 299.

266. *Id.*

267. *Id.* at 289-90.

268. *Id.* at 290.

269. The club required all prospective members to be at least twenty-five years old. *Pacific-Union Club*, 283 Cal Rptr. at 289.

270. *Id.*

271. *Id.* The exemption application defined its membership qualifications as “[a]ny male over 25 years of age approved by the current members.” *Id.*

272. *Id.*

other innocent members.”²⁷³ Thus, the court held that mass audits of individual club members would be nothing more than a “fishing” expedition.²⁷⁴

Under the *Pacific Union* analysis, a private club’s general reputation in the community for discrimination is insufficient to overcome the privacy concerns of individual club members in regards to disclosing club membership lists for tax audits.²⁷⁵ To access these lists, the state must present evidence of specific wrongdoing by individuals.²⁷⁶ The *Pacific Union* analysis appears to require, at a minimum, a direct allegation of discrimination, such as a complaint of discrimination in club membership practices or services directed toward a member of an otherwise protected class, and some knowledge of the individuals involved in violating the tax regulations.²⁷⁷ It also appears that any subsequent tax audit resulting from the disclosure would be limited to those individuals suspected of violating the tax regulations, versus the membership at large.²⁷⁸ Therefore, under the *Pacific Union* analysis the state cannot establish a compelling interest in acquiring club membership lists. The government would have to raise any action taken to deny tax benefits against the direct violator at the private club.

b. Are There Less Intrusive Means to End Tax Subsidies for Discrimination at Private Clubs?

Less intrusive ways for the state to discover violators of the prohibition on tax deductions for club-related activities may exist other than collecting massive personal information about club members and conducting audits at random.²⁷⁹ The state could require clubs to disseminate information about illegal deductions in membership policies and monthly statements. The state could audit specific groups who are likely to be members of private clubs, such as wealthy males in cities with clubs known to discriminate on the basis of race or gender. The court in *Pacific-Union* suggested that it would be less intrusive to audit wealthier males in the San Francisco area with certain professions or income levels, versus individual club members at random.²⁸⁰

273. *Id.* at 299.

274. *Id.* at 298.

275. *Pacific-Union Club*, 283 Cal Rptr. at 289.

276. *Id.* at 298.

277. *Id.*

278. *Id.* at 299.

279. *Id.* at 299.

280. *Id.* Note that such an investigation of specific groups could create equal protection problems.

Alternatively, the State Franchise Tax Board could "require attachment of a [tax] schedule listing the names of all organizations to whom the taxpayer has paid business expenses" for which he or she claims a deduction.²⁸¹ These options may accomplish the same goal of ensuring that state tax benefits do not support discriminatory practices.

Moreover, discovery involving illegal tax deductions could focus on the private clubs themselves rather than upon random individual taxpayers who are club members. One author suggests that the government could discover information about businesses that pay for dues, or other club benefits for employees through the use of interrogatories directed to the club.²⁸² An investigation would focus on business entities and organizations without focusing upon individual club members or divulging membership lists.

CONCLUSION

While bona fide private clubs have the right to discriminate against individuals on any basis, they do not have the right to do so on the taxpayer's dime. Even though private clubs are specifically excluded from certain provisions of civil rights laws, they are still subject to some state and federal antidiscrimination laws. For example, private clubs may be liable for discrimination against individuals under employment law. It is not unreasonable, therefore, to question whether private clubs that discriminate against individuals who would otherwise be protected under civil rights laws should receive government subsidization of discrimination through tax laws. Private clubs are still subject to the investigative powers of state and federal agencies for the limited purpose of determining whether they qualify for government benefits and privileges such as liquor licenses and tax privileges.

The problem, however, arises when the state or federal government conducts an investigation or enforces the laws granting or denying government benefits and privileges against individual taxpayers. Wholesale tax audits of individual members of private clubs, or even discovery of individual names of club members, may have a chilling effect on club membership and may violate members' freedom of intimate association. The membership at large may not be engaged in the discriminatory activity. Therefore, government agencies should focus their inquiries in the following areas.

281. *Id.*

282. Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs*, 2 MICH. J. GENDER & L. 27, 81 n.189 (1994).

First, when there is a particularized complaint of discrimination by an individual, the investigation and enforcement should proceed against the members involved in the discriminatory conduct, without violating the constitutional rights of the membership as a whole. Mass discovery of membership lists and mass audits of taxpayers would not be required, as the offenders involved would likely be known by the complainant.

Second, when there is direct evidence or statistical proof of discrimination, the club itself may be denied government benefits or privileges, such as property tax exemptions or liquor licenses, without violating the associational rights of individual club members. The tax savings could be substantial, given the non-profit status of most clubs and the vast amount of valuable property, such as golf courses and tennis courts, owned by many private clubs.

Moreover, if a private club claims tax exemptions and other government privileges, it should bear the burden of demonstrating that it does not discriminate on the basis of race, gender, or religion. The club could do so by publicly filing policies and statistics and indicating on sales receipts whether the receipts qualify for preferential tax treatment. It only makes sense to place the burden upon the entity claiming a government benefit. Placing the burden upon government agencies to prove discrimination at a private club through protracted litigation and administrative hearings is incredibly cumbersome. This increased burden is unjustified and defeats the laudable public policy of preventing discrimination on the taxpayer's dime.