1-1-1988

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Lisa Tarin Pompa

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Rotary International v. Duarte: Limiting Associational Rights to Protect Equal Access to California Business Establishments

The right of association implicitly guaranteed by the first amendment is asserted by private organizations to protect, and thereby perpetuate, discriminatory membership practices. Fraternal organizations face legal challenges to race and gender-based discrimination under federal statutes, state public accommodation laws, and equal protection constitutional grounds. Recently, legal actions filed under state public accommodation laws have provided the courts with new opportunities for establishing the scope of associational

1. The first amendment to the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I. See L. Tribe, American Constitutional Law §§ 12-23, at 700-02 (1978) (noting that the Supreme Court considers the freedom of association to be a preferred right derived by implication from the express guarantees of the first amendment). See also Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (explaining that the right of association is necessary to make meaningful the express first amendment guarantees). The due process clause of the fourteenth amendment secures the first amendment freedoms from abridgement by the states. Gitlow v. New York, 268 U.S. 652, 666 (1925).


3. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940 (1987) (sex discrimination policies violated a public accommodation law of California notwithstanding the freedom of association of rotarians); Schwenk v. Boy Scouts of America, 257 Or. 327, 551 P.2d 456 (1976) (scouting group not a business or commercial enterprise within ambit of the Oregon Public Accommodation Act); Commonwealth v. Loyal Order of Moose, Lodge No. 107, 448 Pa. 451, 594 A.2d 694 (1972) (fraternal organization is a public accommodation whose racially discriminatory guest policies are prohibited by the Pennsylvania Human Relations Act, however membership policies are distinctly private and therefore outside the scope of the Act).

rights and the role of government in eliminating sex discrimination.

The United States Supreme Court, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, prevented the Rotary International organization (Rotary International) from enforcing a gender discriminatory membership policy against Rotary Club of Duarte (Duarte), a local affiliate of Rotary International. The Supreme Court implemented a bifurcated approach in resolving the issue of whether the associational rights of Rotary members are impermissibly infringed upon by the application of the public accommodation law of California. The law at issue, the Unruh Civil Rights Act, prohibits business establishments from engaging in discriminatory practices.

Rotary International revoked the charter of the Rotary Club of Duarte after three women were admitted to Duarte in defiance of the Rotary International male-only membership rule. Duarte alleged that Rotary International and the local affiliates are businesses whose actions are subject to the Unruh Civil Rights Act. The trial court found the Unruh Act inapplicable to both Duarte and Rotary International, after ruling that neither is a business establishment under the Act. Furthermore, the trial court concluded that the injunctive relief sought by Duarte would impinge upon the fellowship of club members and would therefore interfere with the freedom of association of Rotary members. The California Court of Appeals reversed, holding that both Duarte and Rotary International are business establishments within the scope of the Unruh Act. In addition, the

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6. Id. at 1945.
8. The Unruh Act reads in pertinent part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (West 1982). See Burks, 57 Cal. 2d at 469, 476, 370 P.2d at 316, 320, 20 Cal. Rptr. at 612, 616 (construction company prohibited from racially discriminating in the sale of its homes).
9. Rotary Int'l, 107 S. Ct. at 1943. Two of the women joined Duarte in bringing suit against Rotary International. Id.
11. Id.
court of appeals held the application of the Unruh Act does not impermissibly infringe upon the associational rights of Rotary International members. The United States Supreme Court affirmed, holding that the Unruh Act does not violate the first amendment by requiring the California affiliates of Rotary International to admit women.

This note examines the approach used by the United States Supreme Court in deciding that the discriminatory policies of Rotary International are not constitutionally protected by the right of association, of either a private or expressive nature. Part I discusses the constitutional source of the right of association and previous right of association challenges to private organizations. Part I also discusses the scope of the Unruh Civil Rights Act, a California public accommodation law. Part II summarizes the facts of Rotary International and reviews the opinion of the United States Supreme Court. Finally, Part III of this note explores the effects and legal ramifications of Rotary International on the standards applicable to the associational rights of members of quasi-public organizations.

**LEGAL BACKGROUND**

**A. Right of Association**

The freedom of association, which includes the choice not to associate with others, is considered fundamental to the liberty of every individual. Yet, the right of association is not expressly

13. *Id.* at 1065, 224 Cal. Rptr. at 231.
15. CAL. CIV. CODE § 51 (West 1982).
specified as an independent right in the Constitution. Some commentators note that the Constitution secures natural rights, and include the right of association among these inalienable freedoms. Regardless of the derivation of associational rights, the decisions of the United States Supreme Court recognize a constitutional right of association emanating from the first amendment for the effective exercise of traditional rights of expression and, to a lesser degree, for activities that promote a way of life.

The United States Supreme Court formally articulated a right of association in *NAACP v. Alabama ex rel. Patterson.* Alabama sought to enjoin the New York-based NAACP from doing business in Alabama without first qualifying under the state foreign corporation statute. The NAACP refused a state discovery request to divulge the names and addresses of NAACP members and the trial court consequently issued a contempt order against the NAACP. On review, the United States Supreme Court decided that invol-

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18. *See supra* note 1. The United States Supreme Court has established a commitment to rights not enumerated in the Constitution. *See Griswold v. Connecticut,* 381 U.S. 479, 482, 484 (1965) (the right of privacy received protection from governmental interference as a fundamental principle underlying the first, third, fourth and fifth amendments); *Crandall v. Nevada,* 73 U.S. (6 Wall) 35, 44 (1868) (right to travel recognized as necessary for the effective exercise of the right to petition the government for grievances). *See also* *Shapiro v. Thompson,* 394 U.S. 618 (1969) (right to travel); *Reynolds v. Sims,* 377 U.S. 533 (1964) (right to vote). *But cf. Kedroff v. St. Nicolas Cathedral,* 341 U.S. 94, 114-16 (1952) (right of association for religious purposes is unquestionably delineated by the free exercise clause of the first amendment). Discussion of a constitutional right of association under the religions clauses of the first amendment is beyond the scope of this note.


20. Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960) (association for advocacy purposes derives from the right to peaceably assemble); NAACP v. Button, 371 U.S. 415, 429 (1963) (litigation protected as a form of political expression); NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 460 (1958) (right of association protected because it promotes expression that the first amendment is designed to foster).

21. *Griswold,* 381 U.S. at 486 ("Marriage . . . is an association for as noble a purpose as any involved in our prior decisions."); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 541 (1973) (Douglas, J., concurring) (noting that poor persons congregating in households is a traditional way to reduce the effects of poverty and is an association that expresses the right of freedom of association); *see also* Village of Belle Terre v. Boraas, 416 U.S. 1, 15-16 (1974) (Marshall, J., dissenting) (freedom of association encompasses right to choose living companions).


23. 10 ALA. CODE §§ 192-98 (1940).

24. *Patterson,* 357 U.S. at 452-54. The NAACP considered itself exempt from the Alabama foreign corporation statute. *Id.* at 453.

25. Jurisdiction for review by the United States Supreme Court was based on federal claims after relief was denied by the Alabama Supreme Court on inadequate non-federal grounds. *Id.* at 454-58.
untary disclosure of the NAACP membership lists would violate the NAACP members' right of association. The Supreme Court recognized a nexus between a right to associate and first amendment freedoms of expression.\(^\text{26}\) As a form of political group expression, the advocacy efforts of the NAACP were thus deserving of constitutional protection. Next, the Supreme Court determined that a review of "the closest scrutiny" is applicable for any state action that attempts to abridge the freedom of association.\(^\text{27}\) Finally, in applying the close scrutiny standard, the United States Supreme Court considered whether the interest of the state was sufficiently compelling to justify infringement on the freedom of association of the NAACP.\(^\text{28}\) The Supreme Court determined that the disclosure requirement was unrelated to the issue of whether the Alabama foreign corporation registration statute applied to the NAACP, and reversed the contempt order as a violation of the freedom of association.\(^\text{29}\)

In *Sweezy v. New Hampshire*,\(^\text{30}\) the United States Supreme Court observed that the right of every citizen to engage in political association is protected by the first amendment. *NAACP v. Alabama ex rel. Patterson*, however, is considered the first decision to recognize a constitutional freedom of association.\(^\text{31}\) In *Patterson*, the Supreme Court expressly announced constitutional protection for a group to assert, and thus secure, the same first amendment rights as the individual members of the group.\(^\text{32}\) Moreover, the United States

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26. Id. at 460 (citing Gitlow v. New York, 268 U.S. 652, 666 (1925)).
27. Id. at 460-61. The Court found that the contempt judgment intimidated, in a potentially unconstitutional manner, the ability of the NAACP to express itself. Id. at 461. Furthermore, the Court concluded that compelled disclosure would likely impair the effectiveness of the NAACP based upon an unchallenged showing of past threats and economic sanctions imposed on known members. Id.
28. Id. at 463-64.
29. Id. at 465-66.
30. 354 U.S. 234, 250 (1957) (legislative investigation of subversive activities encroached upon the constitutional right of association when it sought to compel Mr. Sweezy to disclose the nature of his association with the Progressive Party).
32. Patterson, 357 U.S. at 459 (considering the NAACP an extension of the individual members, a vehicle for enhancing the effectiveness of their expressive activities). Compare Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (interference with political party violates first amendment political freedom of the individual party members) with Cousins v. Wigoda, 419 U.S. 477 (1975) (national political party asserting constitutional rights of voters of the Democratic Party) and Garcia v. Texas State Bd. of Medical Examiners, 421 U.S. 995 (1975) (health maintenance organization unable to assert constitutional rights for its members because low cost medical care not constitutionally protected).
Supreme Court suggested that the close scrutiny standard would apply to review state action impinging on group expression of economic, religious or cultural beliefs. Thus, the decision expanded the scope of protected association beyond political expression, to which *Sweezy*, the earlier case, was limited. Relying on *Patterson*, the United States Supreme Court continued to apply the right of association to organizations through which individuals sought enhanced expression of first amendment activities.

Individual justices support a principle of exclusion for membership clubs analogous to the broad protection for privacy in the home. Freedom of association may thus be perceived as an affirmative constitutional defense. The United States Supreme Court, however, denies affirmative constitutional protection to a right of exclusion, even at the expense of burdening a protected form of association.

In *Railway Mail Association v. Corsi*, an all-white union asserted a "right of selectivity" under the fourteenth amendment in an attempt to exclude non-white postal clerks from union membership. The United States Supreme Court denied constitutional protection, holding the union policy was not a fundamental liberty encompassed by

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33. *Patterson*, 357 U.S. at 460-61.
34. See *NAACP v. Button*, 371 U.S. 415, 429 (1963) (litigation protected as a form of political expression); *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960) (compulsory disclosure of membership lists would violate a freedom of association protected by the fourteenth amendment, as derived from the right to peaceably assemble). See also *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967) (freedom of speech, assembly and petition give the Union the right to hire salaried attorneys for its members); *Brotherhood R.R. Trailmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5-6 (1964) (rights of petition and assembly include the right to legal assistance obtained through an association).
37. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) (requirement to pay union dues may interfere with employees' freedom of association to advance ideas or to refrain from such expressive activities but is constitutionally justified because Congress has determined that unions are important for labor relations); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (parents have first amendment right to send children to schools that promote segregation, but that principle does not include a constitutional right to exclude racial minorities from those schools). See *Note, supra* note 36, 413-14; *Burns, supra* note 35, at 348, L. Tribe, *supra* note 1, at 701.
39. *Id.* at 93.
the fourteenth amendment.\textsuperscript{40} Therefore, the constitutional freedom of association does not necessarily include a right to not associate with others on the basis of race or sex.\textsuperscript{41}

In 1965, however, the United States Supreme Court suggested a larger scope of the right of association in \textit{Griswold v. Connecticut}.\textsuperscript{42} In \textit{Griswold}, Justice Douglas ascribed the right of association to the penumbra of the first amendment.\textsuperscript{43} Furthermore, Justice Douglas invoked the safeguard of associational rights in his closing discussion on marital privacy.\textsuperscript{44} Consequently, some authorities view \textit{Griswold} as support for the principle of an independent right of association.\textsuperscript{45}

The United States Supreme Court has developed a bifurcated right of association to protect two qualitatively different freedoms. Associational freedoms depend on their relationship to liberties encompassed intrinsically by, or enumerated in, the Constitution.\textsuperscript{46} Accordingly, groups of individuals may seek enhancement of first amendment expression by acting through organizations such as the NAACP.\textsuperscript{47} Similarly, the marital association described in \textit{Griswold}
expresses a "way of life," and married couples promoting familial purposes are protected by the first amendment.\textsuperscript{48} Recently, the two aspects of the freedom of association were set forth by the Supreme Court in \textit{Roberts v. United States Jaycees}.\textsuperscript{49} In \textit{Roberts}, the Court describes the constitutional protection afforded to highly personal relationships as a freedom of intimate association.\textsuperscript{50} The right to associate with others in the exercise of explicit first amendment activities is referred to as the freedom of expressive association.\textsuperscript{51}

The rights of expressive and intimate association are subject to separate standards of review by the United States Supreme Court.\textsuperscript{52} In \textit{Buckley v. Valeo},\textsuperscript{53} the Supreme Court established that a state may infringe on the freedom of expressive association only when the state justifies the interference with a compelling interest.\textsuperscript{54} Further, the state interest must be one which cannot be achieved through less restrictive means.\textsuperscript{55} In contrast, the freedom of intimate association is accorded greater constitutional protection because intimate association encompasses the fundamental nature of personal liberty.\textsuperscript{56} Nevertheless, the right to intimate association is limited in scope. The Supreme Court is unwilling to recognize a right of association for communal living purposes alone.\textsuperscript{57} Moreover, the Supreme Court does not extend a right of association to protect unrelated persons from government action upon the formation of an association.\textsuperscript{58}

\textsuperscript{48} \textit{Griswold}, 381 U.S. at 486.
\textsuperscript{50} \textit{Id.} 468 U.S. at 618.
\textsuperscript{51} \textit{Id.} See also \textit{Board of Directors of Rotary Int'l v. Rotary Club of Duarte}, 107 S. Ct. 1940, 1945 (1987).
\textsuperscript{54} \textit{Id.} at 25.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Roberts}, 468 U.S. at 618 (private relations are given a substantial measure of sanctuary); Moore v. East Cleveland Ohio, 431 U.S. 494, 499 (1977) (usual judicial deference to city ordinances is inappropriate with family relationships); Loving v. Virginia, 388 U.S. 1, 12 (1967) (unequivocal holding that the state cannot infringe on the freedom of choice to marry).
\textsuperscript{57} \textit{Roberts}, 468 U.S. at 618-20. See also, \textit{Village of Belle Terre v. Boraas}, 416 U.S. 1 (1974) (Douglas, J.) (statute prohibiting three or more unrelated persons from living together upheld because the statute did not infringe the ability of individuals to advocate beliefs and ideas).
B. Challenges to Discriminatory Membership Policies

The purposes of an organization often require selectivity in forming membership. Prohibitions against arbitrary discrimination, however, are embodied in the Constitution and numerous federal and state laws. Antidiscrimination litigation in the areas of housing, employment, education, and access to commercial establishments addresses the conflict between associational freedom and equality. The right of private clubs to discriminate under the auspices of freedom of association may be challenged on equal protection grounds and on federal or state statutory grounds. Proponents of equal access to private clubs may successfully contest discrimination

the right would lose all meaning); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940, 1947 n.6 (1987).

59. For example, the American Legion is a social service organization of American naval military veterans, men and women, open to veterans of World War I. See generally D. Akey, ENCYCLOPEDIA OF ASSOCIATIONS (1984) (listing and describing various associations, from blood banks to veteran's groups).

60. Section one of the thirteenth amendment to the United States Constitution states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONSR. amend. XIII, § 1. See also U.S. CONST. amend. XIV.

61. See, e.g., 42 U.S.C. § 20003 (1982) (creating the Equal Employment Opportunity Commission); 42 U.S.C. §§ 3604-3606 (Fair Housing Act reaches private sex discrimination in sales, rentals, financing, and brokerage services); CAL. EDUC. CODE § 992150 (West 1978) (state funds cannot be dispensed on behalf of the University of California, or University-sponsored activities, to private clubs with discriminatory membership policies).


65. Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 438 (1973) (recreation club inviting residents within three mile radius of its swimming pool could not invoke private club exception when membership was based solely on race).


67. See infra text accompanying notes 74-101. See also Burns, supra, note 35, at 269 (for regulations impinging on constitutional freedoms, courts will weigh the purposes of the statute against the countervailing interests of the party infringed upon).
unrelated to the purposes of the organization. Gender-based challenges to the membership policies of private organizations often contend with old stereotypes and mischaracterizations. Furthermore, the particular elements and exemptions of antidiscrimination laws present obstacles to legal attacks against the prejudicial membership practices of private organizations.

1. Equal Protection

The equal protection clause of the fourteenth amendment is not applicable to private action, as the Constitution limits only government action. Under equal protection analysis, the courts review state action for improper and arguably indistinguishable classifications. An equivalent guarantee that prohibits unreasonable discrimination by the federal government is implicit in the due process clause.

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68. Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 75, 707 P.2d 212, 214, 219 Cal. Rptr. 150, 152 (1985) (decision that girls be admitted to the Boys' Club of Santa Cruz not so broad as to include organizations maintaining objectives to which the operation of facilities is incidental); Pinsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 166, 460 P.2d 495, 499, 81 Cal. Rptr. 623, 627 (1969) (noting reluctance of courts to interfere with the internal affairs of membership associations, but arbitrary rejection of dentist's application to professional society justifies judicial intervention under common law). See also Note, supra note 36, at 415 (truly private associations, such as poker games and rare blood groups, are unlikely to be challenged under antidiscrimination laws because they affect no political, social, or economic advantage in larger society in the exercise of their organizational purposes); Burns, supra note 35, at 332-46 (implied in the exclusion of women from influential men's clubs is the notion that men are superior, and as such, only men should direct the public sphere of markets and government).

69. See, e.g., Erlinger v. Thomas, 324 F. Supp. 1329, 1332 (D.S.C. 1971) (female denied right to work as Senate page and told she could receive similar experience by observing the Senate from the public gallery). See also Goodwin, Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door, 13 Sw. U.L. Rev. 237, 244 (1982) (concluding that judicial review at level of rational basis scrutiny results in perception of sex discrimination challenges as trivial); Burns, supra note 35, at 332-46 (implying in the exclusion of women from influential men's clubs is the notion that men are superior, and as such, only men should direct the public space of markets and government).


of the fifth amendment. The significant state involvement is required when invidious discrimination originates with private action. Thus, discriminatory membership practices of men-only clubs must be intertwined with state action before a denial of equal protection can be claimed.

In *Moose Lodge No. 107 v. Irvis,* the United States Supreme Court considered the issue of state action. The bylaws of the Loyal Order of Moose, of which the local lodge is a member, limits lodge memberships to white males. The local lodge refused dining room service to a black male guest of a member in good standing. The guest sought injunctive relief under federal civil rights law. The district court invalidated the liquor license of the Lodge, but the Supreme Court reversed, finding that the state liquor board regulations provided an insufficient nexus between the State and the discriminatory guest practices for equal protection purposes. *Moose Lodge* demonstrates the limitations of equal protection grounds for individuals confronting association arguments in private settings.

2. Federal Statutory Law

The commerce clause empowers Congress to restrict private discrimination affecting interstate commerce. Federal prohibitions en-
acted pursuant to the commerce clause regulate private race and sex discrimination in employment,82 housing,83 and education.84 The federal public accommodation law,85 Title II of the 1964 Civil Rights Act, prohibits discrimination which affects interstate commerce or is supported by state action.86 While the commerce clause authority is construed to grant broad regulatory power to Congress, the federal accommodation law does not extend to sex discrimination.87 Moreover, the federal public accommodation law specifically exempts clubs not “in fact” open to the public.88 Thus, federal statutory law represents a limited avenue for challenges to sex discrimination by private clubs.

3. State Statutory Law

State regulations can prevent discrimination indirectly by conditioning receipt of state licenses and tax benefits on non-discriminatory policies.89 States may enact laws that implement specific antidiscrimi-

83. 42 U.S.C. § 3604 (West 1964) (Fair Housing Act).
87. The federal public accommodation law in Title II provides: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.” 42 U.S.C. § 2000a (1983).
88. The federal public accommodation law exemption reads:
The provisions of this subchapter shall not apply to a private club or other establishment 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.
42 U.S.C. § 2000a(e).
The specific language of the exemption to the federal public accommodation law has been attacked. See Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l, 52 A.D. 2d 906, 909, 383 N.Y.S.2d 383, 387 (1976) (Shapiro, J., dissenting) (objecting to a definition of private club as one that becomes so by merely barring a portion of the public); Evans v. Newton, 382 U.S. 296, 298-99 (1966) (public may not be defined by the proprietor of a restaurant to include only the people of the proprietor's choice).
89. See, e.g., CAL. BUS & PROF. CODE §§ 23428.20-23428.26 (West 1985) (defines various "clubs" that are subject to antidiscrimination regulation as liquor licensees, including homeowner associations, cultural exchange organizations, letter carrier unions, and social clubs of 350 or more members after five years existence). Regulations that combat discrimination indirectly meet with varying success. See, e.g., Commonwealth v. Loyal Order of Moose,
minatory policies by withholding state funds. State and city public accommodation laws directly prohibit sex discrimination in restaurants, places of amusement, business establishments, and other public facilities. Despite legislative concerns for individual equality, courts are reluctant to undermine the right of association. Many antidiscrimination laws include exemptions for truly private clubs. However, early abuses of the federal private club exemption led the courts to define the relevant factors in determining whether a club is truly private. Therefore, in public settings the individual right of equal access generally outweighs the interests of private proprietors in unrestricted association.

State courts borrow from federal public accommodation law in defining the parameters of bona fide private clubs. Membership selectivity, payment of dues, and member participation in selection procedures are relevant considerations. Courts also regard the commercial nature of an entity as an important factor in determining the status of private clubs under public accommodation statutes. In

Lodge No. 107, 448 Pa. 451, 595 A.2d 694 (1972) (racially discriminatory guest policies of fraternal organization prohibited by the Pennsylvania Human Relations Act, however, distinctly private membership policies are outside the scope of the Act).

90. See, e.g., CAL. EDUC. CODE § 92150 (West 1982 & Supp. 1987) (University of California may not fund memberships or sponsor activities at private clubs with discriminatory membership policies).

91. Project, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Laws, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 241-43 (1978) (listing the public accommodation laws enacted by 38 states). See, e.g., MINN. STAT. ANN. § 363.03(3) (West 1982). This state statute provides in pertinent part: "It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." Id.

92. See, e.g., LOS ANGELES, CAL., ORDINANCE 162426 (May 28, 1987).

93. Unlike California, some states also codify the definition of public accommodation. E.g., MINN. STAT. ANN. § 363.03(18) (West 1982) (providing that a public accommodation includes "any business facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.")


95. Project, supra note 91, at 241-43.


97. Bell v. Maryland, 378 U.S. 226, 313 (1964) (characterizing the interest of a restaurant proprietor in private or unrestricted association as "slight").


99. Id. at 631-40 (O'Connor, J., concurring) (Justice O'Connor advocates a commercial-
United States Jaycees v. McClure,\textsuperscript{100} the Eighth Circuit Court of Appeals held that the Jaycees, although not strictly private, is a genuine membership organization rather than a commercial enterprise.\textsuperscript{101} Thus, the Minnesota public accommodation law unconstitutionally infringed upon the right of association of the Jaycees.\textsuperscript{102} The United States Supreme Court, however, reversed the Jaycees decision in Roberts v. United States Jaycees.\textsuperscript{103} Since the Jaycees' activities are substantially open to nonmembers and the membership is large and unselective, the Supreme Court held that the Jaycees organization is a commercial entity.\textsuperscript{104} Roberts was the first United States Supreme Court review of the conflict between the equal access rights of women and the associational rights of a fraternal organization. The United States Jaycees were subject to the public accommodation laws of Minnesota because the Jaycees did not fall within the category of highly personal relationships entitled to protection under the right of intimate association.\textsuperscript{105} The response to Roberts was generally restrained,\textsuperscript{106} perhaps because the Jaycees are considered aggressive and indiscriminate recruiters.\textsuperscript{107} The Roberts decision is limited to associations qualified as public accommodations under Minnesota law.

4. California Public Accommodation Law

As early as 1872, the California legislature recognized a common law duty against discrimination for enterprises providing goods and

\begin{itemize}
  \item \textsuperscript{100} 704 F.2d 1560 (8th Cir. 1983), \textit{cert. granted sub nom.} Roberts v. United States Jaycees, 468 U.S. 609 (1983).
  \item \textsuperscript{101} Id. at 1571.
  \item \textsuperscript{102} \textit{Id.} at 1576.
  \item \textsuperscript{104} \textit{Id.} at 620.
  \item \textsuperscript{105} \textit{Id.} at 621. The Court deferred to the analysis used by the Minnesota Supreme Court in determining that the Jaycees were a public accommodation. \textit{Id.} at 627. See United States Jaycees v. McClure, 305 N.W. 2d 764, 774 (1981), \textit{rev'd sub nom.}, Roberts v. United States Jaycees, 468 U.S. 609 (1983).
  \item \textsuperscript{107} Linder, \textit{supra} note 106, at 1901. Significantly, the Minnesota Supreme Court excluded the Kiwanis International organization from the scope of the Minnesota public accommodation law. United States Jaycees v. McClure, 305 N.W. 2d 764, 771 (1981), \textit{rev'd sub nom.}, Roberts v. United States Jaycees, 468 U.S. 609 (1983). Rotary clubs, on the other hand, are arguably more selective than the Jaycees because Rotarians use a "classification system" to determine membership. \textit{See infra} notes 140-45 and accompanying text.
\end{itemize}
services to the public. The California state legislature first enacted a public accommodation law in 1897. The statute listed places of public accommodation, including hotels, restaurants, skating rinks and public conveyances. In 1955, however, the California Court of Appeals limited the state public accommodation law by upholding a white-only burial policy in *Long v. Mountain View Cemetery*.

In cases following the *Long* decision, private schools, dentist offices and publicly advertised gymnasiums were held to be outside the racial prohibitions of the California public accommodation law. These constrictive judicial efforts led to the enactment of the Unruh Civil Rights Act in 1959. As an amendment to the existing law, the Unruh Act declared all citizens of California free and equal, and prohibited race discrimination in all business establishments.

The Unruh Civil Rights Act is framed in terms of the business nature of an establishment. In *Burks v. Poppy Construction Co.*, the California Supreme Court considered whether the on-site sale of

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108. [CAL. PENAL CODE § 365 (West 1970)](https://www.law.cornell.edu/codes/cpc/365) (misdemeanor criminal offense for innkeepers or common carriers to discriminate without just cause). See also Archibald v. Cinerama Hotels, 73 Cal. App. 3d 152, 156, 140 Cal. Rptr. 599, 603 (1977) (common law duty on innkeepers assures travelers will be received on equal basis).


117. The Unruh Act reads in pertinent part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." [CAL. CIV. CODE § 51 (West 1982)](https://www.law.cornell.edu/codes/cpc/51).

118. 57 Cal. 2d 463, 370 P.2d 313 (1962).
tract homes constitutes a business establishment. The court determined that the Unruh Act covers businesses at fixed locations and all permanent commercial forces or organizations. The California courts continue to broadly construe the 1959 language, "business establishments of every kind whatsoever," without restricting the reach of the statute to places specified in the original public accommodation statute.

The Unruh Act is not limited to profit-making enterprises. Unlike California housing and employment antidiscrimination laws, which exempt nonprofit groups, the Unruh Act does not contain any exemptions. In O'Connor v. Village Green Owners Association, a nonprofit homeowners organization was held to be within the scope of the Act. Thus, all public and private associations determined to constitute business establishments are prohibited from arbitrarily discriminating under the Unruh Civil Rights Act.

In 1974, the California legislature specifically amended the provisions of the Unruh Act to cover gender-based discrimination. Prior to the amendment, the California Court of Appeals interpreted the statutory language as illustrative, rather than exhaustive, of dis-

119. Id. at 468, 370 P.2d at 316. See also Horowitz, supra note 110, at 287 (anticipating the term "establishments" to include "nonphysically located" enterprises).

120. Winchell v. English, 62 Cal. App. 3d 125, 128, 133 Cal. Rptr. 20, 21 (1976) (Unruh Act to be construed liberally to meet policy objectives; black plaintiffs discrimination claim against mobile homes operator held actionable); Marina Point Ltd. v. Wolfson, 30 Cal. 3d 721, 731, 640 P.2d 115, 123, 180 Cal. Rptr. 496, 505 (1982) (Unruh Act not reserved for restricted categories; no children policy at apartment complex violated Unruh Act).

121. CAL. GOV'T CODE §§ 12926(c) (West 1980) ("employer" under the Fair Employment and Housing Act does not include non-profit or religious associations), 12927(d) (exemption for housing accommodations of non-profit religious, fraternal, charitable associations).

122. 33 Cal. 3d 790, 662 P.2d 427, 191 Cal Rptr. 320 (1983).

123. Id. at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324. See also Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 712, 730, 195 Cal. Rptr. 325, 338 (1983) (insufficient business-like attributes for Boy Scouts to be covered by the Unruh Act); Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 81, 707 P.2d 212, 217, 219 Cal. Rptr. 150, 155 (1985) (recreational facilities of a public, non-selective organization, held to be within the Unruh provisions).

124. Isbister, 40 Cal. 3d at 84 n.14, 707 P.2d at 220 n.14, 219 Cal. Rptr. at 158 n.14 (Boys' Club is within the Unruh Act but the statute does not govern strictly private relationships which take place outside public view). The California Supreme Court did not decide whether all non-selective associations that may be open to the public are within the scope of the Unruh Act. Id. at 81 n.8, 707 P.2d at 217 n.8, 219 Cal. Rptr. at 155 n.8. Arbitrary discrimination probably does not include specialized facilities that serve unique needs as a matter of well-settled public policy, e.g., retirement homes. Id. at 88, 707 P.2d at 222-23, 219 Cal Rptr. at 160-61. (citing language from Marina Point Ltd. v. Wolfson, 30 Cal. 3d 721, 741, 640 P.2d 115, 128-29, 180 Cal. Rptr. 496, 509-10 (1982)).


126. In re Cox, 3 Cal. 3d 205, 212, 474 P.2d 992, 995, 90 Cal. Rptr. 24, 27 (1970) (Unruh
Discriminatory classifications. Courts note that the Unruh Act is, for California, the primary safeguard against arbitrary discrimination in places of public accommodation.\(^{127}\) In California, gender is considered an invidious classification within the scope of constitutional antidiscrimination law.\(^{128}\) Arguably, the 1974 amendment did not expand the reach of the statute, since discrimination based solely on gender may be considered arbitrary.\(^{129}\)

In *Isbister v. Boys' Club of Santa Cruz, Inc.*,\(^{130}\) the California Supreme Court confirmed the comprehensive antidiscrimination policy of the Unruh Civil Rights Act. The court observed that the Boys' Club members pay a nominal fee and exercise no control over membership and operating affairs.\(^{131}\) As a community recreation facility, the Boys' Club comprises a "classically" public place of amusement,\(^{132}\) for which members cannot claim a right of intimate association.\(^{133}\) Moreover, the application of the Unruh Act to the Boys' Club does not restrain protected expressive activities in any unconstitutionally intrusive fashion, because admitting girls does not affect the operations of the Club.\(^{134}\) The Unruh Civil Rights Act continues to be one which prohibits all arbitrary exclusions of entire classes that are based on sterotypical notions.\(^{135}\) In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the United States Supreme Court affirmed the California Supreme Court interpretation of the state public accommodation law.

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Act discrimination categories are indicia of prohibited conduct rather than restrictive classifications. See also *Isbister*, 40 Cal. 3d 72, 86-87, 707 P. 2d 212, 221-22, 219 Cal. Rptr. 150, 159-60 (1985).\(^{127}\)


*Sailer Inn v. Kirby*, 5 Cal. 3d. 1, 17, 485 P.2d 529, 540-41, 95 Cal. Rptr. 329, 340-41 (1971) (sex is a suspect class because of immutability; court recognized stigma which underlies all suspect classes).\(^{129}\)

*See Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 86-87, 707 P.2d 212, 221-22, 219 Cal. Rptr. 150, 159-60 (1985) (discussion of amendment history, suggesting "sex" only illustrates one more irrational basis for arbitrary discrimination).\(^{130}\)

*Id.* at 76, 707 P.2d at 215, 219 Cal. Rptr. at 152.\(^{131}\)

*Id.* at 81, 707 P.2d at 217, 219 Cal. Rptr. at 155.\(^{132}\)

*Id.* at 84, 707 P.2d at 220, 219 Cal. Rptr. at 158.\(^{133}\)

*Id.* at 85-86, 707 P.2d at 220-21, 219 Cal. Rptr. at 158-59. The primary purpose of the Boys' Club was to combat juvenile delinquency in boys. *Id.* at 88, 707 P.2d at 223, 219 Cal. Rptr. at 161. The court declined to find that the Club's advantages and privileges were unsuitable for girls or that participation by girls would "dilute" the Club's efforts. *Id.* at 89, 707 P.2d at 223, 219 Cal. Rptr. at 161. The Boys' Club, therefore, did not meet the exception, based on public policies, set forth in *Marina Point*. See discussion *supra* note 124.\(^{134}\)

*But cf.* 42 U.S.C. § 2000a (1983) (Title II of the federal public accommodation law limits its prohibitions to the classifications specified in the statute and does not cover sex discrimination).\(^{135}\)

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A. The Facts and Procedural Background

Rotary International was founded in 1905 to develop an "ideal of service." The membership of Rotary International is comprised of Rotary Clubs worldwide. Through the local affiliates, Rotary International encourages fellowship, high ethical business standards, and strives to advance international understanding and goodwill. Individuals hold membership through the local Rotary Clubs. Each rotarian is obliged to apply the Rotary ideal of service to his personal, business and community life.

The standard Rotary Club constitution declares that only men may become members. Each member shares the responsibility of seeking eligible new members in the area served by his club. Admission procedures involve a "classification system" based on occupational categories. A classification committee for each club compiles a list of filled and unfilled categories from an annual survey of the community in which the club is operating. A proposed active member is reviewed by the classification committee for eligibility and by a membership committee to ensure strength of character. Each business or professional classification is represented by one active member, who becomes the holder of the classification. The system generally ensures broad representation from reputable businesses, professions, and institutions active in the community. Each club may adopt individual admission procedures, subject only to the classification system.

In 1977, the Rotary Club of Duarte admitted three women in defiance of the prohibition in the Rotary Constitution. As a result,
Rotary International revoked the charter of the Duarte club. After an unsuccessful internal appeal, Duarte filed suit to enjoin Rotary International from enforcing the gender-discriminatory policies.145 The Duarte club also sought declaratory relief under the Unruh Civil Rights Act, contending that Rotary International and the local clubs are business establishments prohibited from engaging in sex discrimination.146

The state trial court determined that neither Rotary International nor the Duarte Club is a business establishment for purposes of the Unruh Act.147 Considering the legislative history of the Unruh Act, the business attributes of Rotary International, and the public characteristics of Duarte, the California Court of Appeals reversed.148 The appellate court first observed that non-profit organizations and Boy Scouts are considered business establishments under the Unruh Act.149 The court then reviewed the complex organizational structure of Rotary International. The central office in Evanston, Illinois publishes magazines and audiovisual programs, coordinates public relations, supervises worldwide fiscal operations, and performs other administrative services.150 The local clubs sell items produced by Rotary International, such as directories and emblems, collect dues, and offer commercial services and leadership training.151 Because services and goods constitute business advantages for the purposes of the Unruh Act, the California Court of Appeals held that Rotary International and the local clubs are business establishments.152 The court further held that rotarian membership does not give rise to a private relationship protected by the first amendment.153 The appellate court relied on Roberts to conclude that application of the Unruh Act does not significantly interfere with the members' expressive rights.154

146. Id.
149. Rotary Club of Duarte, 178 Cal. App. 3d at 1055, 1058, 224 Cal. Rptr. at 224.
150. Id. at 1052-55, 224 Cal. Rptr. at 222-23.
151. Id. at 1054, 224 Cal. Rptr. at 223.
152. Id. at 1059, 224 Cal. Rptr. at 227. The rotary name came from the rotation of meetings from one member's place of business to the next, a system designed to share vocational interests and promote the business of individual members. Id. at 1055, 224 Cal. Rptr. at 224.
153. Id. at 1065, 224 Cal. Rptr. at 231.
154. Id.
The California Supreme Court denied petition for review, and Rotary International appealed to the United States Supreme Court. First, Rotary International argued that the men-only membership policy is protected by the first amendment. Second, Rotary International asserted that the Unruh Act is unconstitutionally vague and overbroad. The United States Supreme Court limited review to the issue of whether the Unruh Act, as applied to Rotary International and the member clubs, violated the first amendment freedom of association.

B. The Opinion

Rotary International claimed that the fellowship enjoyed by male members is protected by a constitutional right of association. In addition, Rotary International asserted that the men-only policies permitted foreign affiliates to function effectively. Duarte and two female members of the Duarte Club contended that Duarte is entitled to admit women to membership under the Unruh Civil Rights Act. The United States Supreme Court had appellate jurisdiction over the constitutional validity of the Unruh Act as applied. The Supreme Court proceeded to review the freedom of association claims of Rotary International, adopting the approach used in Roberts v. United States Jaycees.

1. Freedom of Private Association

In Rotary International, Justice Powell employed the term “private association” to embrace the constitutional right of intimate association previously enunciated in Roberts. The freedom of private

156. Id. at 1948. The Court did not review the contentions of vagueness and overbreadth because Rotary International had failed to assert those issues in the California courts. Id.
157. Id. at 1943.
158. Id. Presumably, Rotary International perceives its operations in foreign countries to be dependent on male-only policies for their effectiveness. See Rotary Club of Duarte v. Board of Directors of Rotary Int'l, 178 Cal. App. 3d 1035, 1046, 224 Cal. Rptr. 213, 231-32 (1986) (appellate court reversed trial court holding that to preclude the enforcement of Rotary International’s policies would materially affect Rotary operations in foreign countries), aff’d Rotary Int'l, 107 S. Ct. 1940 (1987).
160. Id. at 1943 n.3.
161. Id. at 1945.
162. Id.
association protects certain intimate or private relationships against undue governmental interference. The Supreme Court considers objective characteristics in deciding whether the state can restrict rights of private association. 

In *Rotary International*, the Supreme Court limited review of private associational rights to those of the Duarte Club, as asserted by the international parent organization. Rotary International, the Supreme Court noted, is a worldwide corporation comprised of over 19,000 Rotary clubs. The Court unequivocally concluded that Rotary International had no claim to constitutional protection under a right of private association.

The United States Supreme Court used the factors in *Roberts* to assess whether the personal association among local Rotary members warranted constitutional protection. The factors adopted from *Roberts* include the size, purposes, selectivity and exclusivity of the association. Rotary club membership procedures emphasize full representation of the business and professional community. Although admission is limited to one active member per class, “senior active” and “past service” memberships are not limited, and certain classifications have no limit on active members. Rotary Club members are instructed to encourage all eligible prospective members to join. The Supreme Court stated that the Rotary service activities benefit the businesses of individual members, but the activities attend public purposes rather than private relationships. Moreover, Rotary Clubs seek publicity and participate jointly in activities with other organizations. The Supreme Court, therefore, concluded that application of the Unruh Act to Rotary Clubs did not unduly infringe upon the members’ freedom of private association.

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166. *Rotary Int'l*, 107 S. Ct. at 1945 n.4. See also note 32, supra and accompanying text.
168. Id. at 1945 n.4.
171. STANDARD ROTARY CLUB CONSTITUTION, art. V, § 3 (no limitations on number of active members to represent religion, news media, and diplomatic services); By-laws of Rotary International, art. III, §§ 4, 5 (any number of senior active and past service members may qualify into membership and do not represent particular classifications).
172. *Rotary Int'l*, 107 S. Ct. at 1946 (citing 1 Rotary Basic Library, Focus on Rotary 60-61, App. 84).
173. Id.
174. Id. at 1947.
2. Freedom of Expressive Association

Recognizing an implicit expressive association as a means of preserving other individual liberties, the Supreme Court reviewed the second aspect of the right of association claimed by Rotary International for its members. Freedom of association is not an absolute right; rather, the court will weigh against a claim of expressive associational rights the interests which the State chooses to assert. State regulations may limit the right of association when the regulations are unrelated to the suppression of ideas.

The United States Supreme Court first observed that the nature of rotarian activities circumscribes the extent of Rotary International's expressive associational rights. The Supreme Court noted that the "foreign effectiveness" argument of Rotary International is inapplicable, because the legal effect of the appellate court decision was limited to California. Furthermore, Rotary Clubs do not promote or endorse controversial public issues or political topics, traditional first amendment speech areas. Therefore, the United States Supreme Court focused on rotarian community service activities, which are protected by the first amendment.

The Unruh Act is applied without regard to the particular viewpoints of the business establishment being regulated. The United States Supreme Court found that admitting women pursuant to the Unruh Act did not require alterations in the activities or membership system of the Rotary clubs. Women already attend various Rotary activities, and the Court pointed out that in accepting women community leaders as members, Rotary clubs would further the representational purposes of the classification system. The Supreme Court found that the state interest in eliminating discrimination against women extended to equal access of leadership skills, business

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178. Id.
180. Id. at 1943. See supra note 158 and accompanying text.
181. Id. at 1940.
182. STANDARD ROTARY CLUB CONSTITUTION, art. IX.
183. Id. at 1948.
184. Id. at 1947.
185. Id.
opportunities, and tangible goods and services.\textsuperscript{186} Furthermore, public accommodation laws are an appropriate means with which to serve antidiscrimination policies.\textsuperscript{187} The Supreme Court concluded that the compelling interest of the state outweighed any insignificant infringement upon the Rotary Clubs' rights of expressive association.\textsuperscript{188}

**Legal Ramifications**

In contrast to tried and failed constitutional approaches, state statutory schemes offer apparently successful theories in eradicating sex discrimination. In *Rotary International*, the United States Supreme Court tested the public accommodation law of California against the conflicting constitutional freedom of association asserted by a non-profit service organization. The *Rotary International* decision potentially affects two areas of law. First, the constitutional analysis of the right of association is likely to continue to require separate review of private and expressive aspects of the right. In *Rotary International*, the Supreme Court affirmed the utility of the private-expressive dichotomy of associational rights but did not establish new law in the area. Second, the authority of states to eliminate sex discrimination through public accommodation law, though burdening first amendment rights, is confirmed. The Supreme Court did not consider the extent to which the right of association exists as an independent right for clubs in the absence of public accommodation regulation.\textsuperscript{189} Therefore, the holding of *Rotary International* is limited to the effect on the associational activities regulated by the challenged antidiscrimination law.

**A. Freedom of Association**

Not all government interference with internal policies of a service organization will violate the first amendment. The opinion of the United States Supreme Court in *Rotary International* suggests that the vitality of the right of private association depends on the nature of the organization.\textsuperscript{190} The Supreme Court indicates that a right to

\textsuperscript{186} Id. at 1948. See also Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984) (leadership skills are "goods," business contacts are advantages and job promotions are privileges for purposes of public accommodation law).

\textsuperscript{187} *Rotary Int'l*, 107 S. Ct. at 1948.

\textsuperscript{188} Id.

\textsuperscript{189} Id. at 1947 n.6.

\textsuperscript{190} Id. at 1945-46.
private association cannot be asserted except in highly personal relations. Significantly, Justice Powell abandons the use of the term "intimate association" and specifically states that the right of private association is not limited to family relations. The Court recognizes a spectrum of personal attachments, rather than a threshold to which the freedom of association may apply. The worldwide Rotary International organization exemplifies the most attenuated of personal relations and is, therefore, not afforded constitutional protection under the right of private association.

Individual decisions to enter relationships within the Duarte Club were not entitled to constitutional protection when the United States Supreme Court reviewed the inclusive membership policies and public activities of the Duarte Club. Using the factors set forth in Roberts, both Rotary International and Duarte were considered by the California Court of Appeals to be business establishments under the Unruh Civil Rights Act. In assessing the private or public status of the Rotary associations, however, the United States Supreme Court used objective characteristics which may not be applicable for first amendment purposes beyond the scope of public accommodation laws. State governments may restrict expressive associational rights to further compelling interests of the state, provided the regulations are unrelated to the suppression of ideas. Indicating that the expressive associational rights of Rotary International were only slightly infringed upon, the United States Supreme Court made clear that the burden is on the association to demonstrate significant interference with expressive activities when the challenged law is applied. In contrast to previous freedom of association cases, the Supreme

191. Id.
192. Compare Roberts v. United States Jaycees, 468 U.S. 609, 619 (1983) (Justice Brennan implies that constitutional protection is limited to those personal affiliations that attend the creation and sustenance of a family) with Rotary Int'l, 107 S. Ct. 1940, 1946 (1987) (the Court states it has not yet limited the right of private association to family relations).
194. Roberts, 468 U.S. at 620 (factors for determining right to private association include size, organizational purposes, and membership selectivity and exclusivity).
196. See infra note 214 and accompanying text (legislation pending in California legislature would bar state tax deductions for business expenses at discriminatory clubs).
Court did not discuss whether the application of the Unruh Act to Rotary clubs was the least restrictive means of advancing the interest of the state. The Supreme Court did hold that eradication of gender discrimination is a compelling state interest. Therefore, the Court may be acknowledging that indirect or less restrictive means insufficiently advance state antidiscrimination policy. Stronger first amendment claims than presented in *Rotary International*, however, may outweigh a government interest in eliminating gender discrimination.

The holding of *Rotary International* is consistent with previous cases that decline to affirmatively protect expressive activities which are based on irrational stereotypes. In *Roberts v. U.S. Jaycees*, a case similar to *Rotary International* in many respects, the Jaycees argued that women view public issues differently than men and that, therefore, the philosophy of the organization would change if women were allowed to become voting members. Justice Brennan, writing for the Court in *Roberts*, reitered previous condemnations of cases based on unsupported generalizations of entire classes of people. Since the expressive activities of Rotary International are more limited than the Jaycees, *Rotary International* was imprudent in relying on the "sense of fellowship" for its right of association claim.

*Rotary International* establishes no new law in the freedom of association area. For challenges under the Unruh Civil Rights Act, however, *Rotary International* effectively removes organizations with business-like attributes from the spectrum of associational rights for which constitutional protection is afforded. California courts are likely to continue using the dual approach of *Rotary International* in analyzing freedom of association issues.

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201. *Isbister v. Boys Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 84 n.14, 707 P.2d 212, 220 n.14, 219 Cal. Rptr. 150, 158 n.14 (1985) (specialized facilities that serve unique needs as a matter of well-settled public policy, e.g., retirement homes, may fall outside scope of public accommodation law). See *Goodwin*, supra note 69 (lengthy discussion of what constitutes a truly private club).
204. *Id.* at 628 (1984) (declining to accept Jaycees' stereotype about women's attitudes regarding federal budget, voting rights, and foreign relations as basis for decision).
205. *Id.*
206. *See supra* text accompanying notes 179-88.
B. Gender-based Antidiscrimination Legislation

*Rotary International* firmly establishes the use of public accommodation laws to combat gender-based discrimination in private organizations.\(^{208}\) The Unruh Civil Rights Act prohibits arbitrary discrimination in "business establishments of every kind whatsoever," and is therefore unique among public accommodation laws.\(^{209}\) The United States Supreme Court in *Rotary International* specifically held that application of the Unruh Act to a nonprofit service organization does not violate the first amendment.\(^{210}\) Therefore, the expansive phrase utilized by the California legislature is a legitimate and functional definition of a place in which antidiscrimination policy may operate.

The holding of *Rotary International* demonstrates a judicial awareness and sensitivity to the changing role of women in our society.\(^{211}\) *Rotary International* is part of a growing list of cases in which the courts recognize that associational discrimination is often arbitrary or based on criteria unrelated to the organizational purposes of private groups.\(^{212}\) The quasi-public nature of organizations such as the Jaycees and Rotary clubs will continue to be scrutinized for factors that do not justify constitutional protection for exclusionary policies. For example, in *Rotary International* the purposes of the membership selection and occupation classification system were found not impaired but furthered by the inclusion of women leaders.\(^{213}\)

The United States Supreme Court emphasized the appropriateness of public accommodation law for restricting discrimination. Critical to the authority of the state, by analogy to federal public accommodation law based on the commerce clause, is the public nature of

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303, 705 P.2d 876 (1987) (residents suing to overturn a mobile home park age limitation relied on *Rotary Int'l* for factors supportive of their private associational rights).

208. *Rotary Int'l*, 107 S. Ct. at 1948 (public accommodation laws serve state interests of "the highest order").


211. There was no dissent to the 7-0 opinion of *Rotary International*. *Id.* at 1942. Justice Scalia filed a statement of concurrence. *Id.* Justice Blackmun and the husband of Justice O'Connor are honorary rotary club members; neither Justice Blackmun or Justice O'Connor participated in the opinion. *Wall St. J.*, May 5, 1987, at 2, col. 2.

212. See, e.g., *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973) (recreation club prevented from invoking private club exception when membership was based solely on race); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (law firm partner position considered a privilege of employment for which employer firms must consider men and women on an equal basis).

certain establishments. The State of California demonstrated a compelling interest in promoting the substantive right to equal opportunities in public accommodations. Nevertheless, the value of the case in other areas of regulation remains unclear because the Supreme Court declined to identify, beyond family relationships, the specific kinds of selectivity accorded constitutional protection. For example, the right to apply for a liquor license may be upheld for truly private clubs, because the interests of the state may be less compelling outside the area of public accommodations.\textsuperscript{214} Tax exemptions such as business deductions, on the other hand, constitute a public subsidy and thus may subject discriminatory clubs to antidiscrimination legislation.\textsuperscript{215} In \textit{Rotary International}, the Supreme Court establishes only the type of arguments that will \textit{not} advance a right of selectivity and does not indicate what kinds of interests \textit{will} protect exclusionary policies.

\textbf{CONCLUSION}

This note first examined the constitutional source of the right of association and the various theories, including public accommodation laws, used in previous challenges to discriminatory membership policies of private organizations. In \textit{Board of Directors of Rotary International v. Rotary Club of Duarte}, the United States Supreme Court upheld the validity of the Unruh Civil Rights Act as applied to a non-profit service organization.\textsuperscript{216} The California public accommodation law did not impermissibly infringe the freedom of association rights of Rotary club members. Private men-only organizations affecting a public interest will need to restructure their policies to avoid allegations of sex discrimination. Conversely, a determination

\textsuperscript{214} In 1987, California Assembly Bill 2187 would have banned the renewal or use of liquor licenses in discriminatory clubs, and was held over from the 1987 session by the California assembly for review in 1988; efforts to pass similar bills in California have been unsuccessful since 1975. L.A. Daily Journal, \textit{Legal Groups Push For Bias Action On Bohemian Club}, July 2, 1987, at 1, col. 4 (California Assembly Bill 2187 was held over from the 1987 session by the California legislature for review in 1988). \textit{See also} L.A. Daily Journal, \textit{Exclusive Clubs Pushed to Change}, April 13, 1987, at 1, col. 2 (Franchise Tax Board deputy noting that while members may forego deductions and maintain memberships, losing liquor licenses strikes “right at the heart” of club functions).

\textsuperscript{215} \textit{See} 1987 Cal. Stat. ch. 1463, secs. 1-3, at ___ (amending CAL. BUS. \\& PROF. CODE § 23438 and CAL. REV. \\& TAX CODE §§ 17269, 24343.2) (new legislation that bars state tax deductions for business expenses at private clubs that discriminate against women and minorities); L.A. Daily Journal, \textit{Exclusive Clubs Pushed to Change}, April 13, 1987, at 1, col. 2 (noting that the very people excluded from discriminatory clubs must “turn around and pay for them”).

that an organization is distinctly private will preclude application of the California public accommodation law.

Part III of this note discussed the legal impact of *Rotary International* in prohibiting sex discrimination in quasi-public organizations. *Rotary International* specifically defined the reach of compelling state interests to include the opportunity for women to develop leadership skills and business contacts. Cities in California have passed or are considering local ordinances which deny benefits to large discriminatory clubs in order to serve the local interest in eradicating sex discrimination. The decision in *Rotary International* has also sparked voluntary abandonment of discriminatory membership policies of men-only service organizations. By rejecting the freedom of association claims of the Rotary International organization, the United States Supreme Court affirms the long standing interest of the State of California in eliminating arbitrary discrimination in places of public accommodation.

Lisa Tarin Pompa

217. *Id.* at 1948.

218. See, e.g., *Los Angeles, Cal.*, Ordinance 162426 (May 28, 1987) (prohibits discrimination by clubs or organizations "where business is frequently conducted" and which are "not distinctly private," i.e. "any organization, institution, club or place of public accommodation" which has 400 or more members, provides regular meal service under contract with another, and regularly accepts payment from non-members for expenses incurred at the club in furtherance of trade or business). A similar ordinance in New York City is currently scheduled for review by the United States Supreme Court. L.A. Daily Journal, October 6, 1987, at 1, col. 6. The Supreme Court may thus further distinguish the characteristics of clubs whose members cannot assert a right of private association, and may reaffirm the compelling interests of local governments in eliminating discrimination against women and minorities. In reviewing the New York City ordinance, the Court may also consider a commercial-expressive dichotomy of the right of association as advocated by Justice O'Connor, who participated in *Roberts v. United States Jaycees* but not *Rotary International*.

219. *Santa Barbara News Press*, July 5, 1987, at 5, col. 1 (Lions Club International lifts ban on female members); L.A. Times, June 2, 1987, § 2 at 1, col. 1 (California Club announces by-laws change to admit women as regular members; Jonathan Club approves similar change by four to one margin); *Progress Bulletin*, June 26, 1987, § B, at 1, col. 3 (Montclair Kiwanis Club debates admitting women).