Current Topics in Law and Policy

Freedom of Association: The Attack on Single-Sex College Social Organizations

I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose — indeed destroy — values that mean much to some people . . . . I hope we do not lose all values that some think are worthwhile (and are not based on differences of race and religion) and relegate ourselves to needless conformity.

— Justice Harry A. Blackmun

Introduction

In 1979, a student at Princeton University named Sally Frank filed a complaint with the New Jersey Division on Civil Rights against three social and eating clubs that restricted their memberships to male students at Princeton University. The clubs — Ivy Club, Cottage Club, and Tiger Inn — are three of a group of eleven clubs that many students at Princeton University traditionally join to receive meals and use social facilities. Frank alleged, and the Division eventually ruled, that the all-male clubs violated the New Jersey Law Against Discrimination, which prohibits discrimination on the basis of sex in places of public accommodation. The Princeton case signals problems for single-sex social organizations at other colleges and universities in New Jersey and around the country. Forty states and the District of Columbia have public accommodation laws similar to the New Jersey statute, and many fraternities, sororities, and other social organizations have characteristics that make them vul-

1. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 734-35 (1981) (Blackmun, J., dissenting from a five to four holding that the State of Mississippi could not maintain a school of nursing exclusively for women).
2. The other eight clubs had coeducational memberships as of 1979. The Cottage Club changed its membership policy to admit women in 1986.
3. New Jersey law states, in relevant part, that "[a] place of public accommodation shall include, but not be limited to . . . any . . . place where food is sold for consumption on the premises." The law also includes an exception for private clubs. N.J. Stat. Ann. § 10:5-5(1) (West 1976).
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nerable to a ruling against their membership policies in light of the Princeton case.\(^5\)

The three all-male clubs are privately owned and operated, and the Division on Civil Rights originally ruled that the clubs were "by their nature distinctly private" and exempt from the Law Against Discrimination.\(^6\) After the Division reversed itself on remand from Frank's appeal to a New Jersey superior court,\(^7\) Ivy Club and Tiger Inn filed suit in federal district court to enjoin the Division from exercising jurisdiction over the clubs. The clubs argued that they were not places of public accommodation under the statute and that the Division's exercise of jurisdiction would abridge the club members' constitutional right of freedom of association under the first and fourteenth amendments.\(^8\)

The Princeton case raises three issues in connection with single-sex social organizations in university communities. First, it is unclear whether privately owned and operated social organizations should, by virtue of their association with a university, lose their private status and become "places of public accommodation." Second, state laws that, as applied, prohibit private single-sex college social organizations (CSOs) appear to infringe on members' constitutional rights of freedom of association. Third, given the ambiguous status of "private" single-sex college social organizations under state antidiscrimination laws, it may be appropriate for state legislatures to declare an explicit policy on those organizations in order to forestall litigation and to allow a democratic choice on the issue. The United States Congress, on several occasions, has passed legislation to ensure that federal law does not interfere with the selection of members in college social organizations.\(^9\) State legislatures should give

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5. Greek letter societies, which make up the vast majority of single-sex college social organizations, have over 9000 chapters around the country. Baird's Manual of American College Fraternities vii (J. Robson ed. 19th ed. 1977)


serious consideration to the adoption of a similar policy, even if courts do not accord constitutional protection to CSOs. The discussion below is limited to the legal status of college social organizations that limit their memberships to one sex;\textsuperscript{10} discrimination based on factors other than gender, such as race or religion, may raise additional legal and policy issues.

\section*{I. \textit{State Public Accommodation Laws}}

Public accommodation laws generally prohibit discrimination on the basis of race, religion, national origin, and sex in places of public accommodation.\textsuperscript{11} The major impetus for state public accommodation laws was the Supreme Court's holding in \textit{The Civil Rights Cases} in 1883.\textsuperscript{12} The Court struck down an act of Congress\textsuperscript{13} that prohibited discrimination in places of public accommodation and held that the fourteenth amendment empowered Congress to ensure only that no \textit{state} violated the equal protection clause. With the federal power to curtail discrimination by private citizens in public places restricted by the Court's decision, many states enacted their own anti-discrimination laws.\textsuperscript{14}

memberships has always been the right and responsibility of the organizations themselves.

\textsuperscript{10} The analysis is based on the Princeton case, but it can be generalized to other college social organizations. Generalizations, however, must take into account varying state laws and differing relationships between CSOs and their related institutions. Two aspects of the Princeton case are particularly important. First, Princeton University, a private university, is a place of public accommodation under New Jersey law. Thus, this analysis is most applicable to private institutions that are construed as places of public accommodation and, to some extent, state universities. A case involving a private university not covered by state law would be less likely to implicate an affiliated social organization for sex discrimination. Second, the all-male clubs at Princeton own their property and buildings and receive no direct funding from the university. A social organization that receives tangible aid from a college or university will have more difficulty dissociating itself from the institution. In general, however, the analysis is transferable to other states and social organizations. (Certain social organizations that provide housing for members may receive special treatment in order to allow private living accommodations for members of a single sex. In this day and age of coeducational dormitories and coeducational bathrooms at colleges, however, it seems unlikely that these "privacy" requirements would deter aggressive enforcement of state civil rights laws.)

\textsuperscript{11} Comment, \textit{supra} note 4, at 445 n.15. Each state law includes different elements in its definition of public accommodation. All of the laws, however, explicitly or implicitly include places that offer eating and/or sleeping accommodations. \textit{Id.} at 447-48.

\textsuperscript{12} \textit{The Civil Rights Act of 1875}, 18 Stat. 335 (1873-75) (invalidated by \textit{The Civil Rights Cases}, 109 U.S. 3 (1883).

\textsuperscript{13} The \textit{Civil Rights Act of 1875}, 18 Stat. 335 (1873-75) (invalidated by \textit{The Civil Rights Cases}, 109 U.S. 3 (1883).

\textsuperscript{14} New Jersey passed its first such law in 1884, providing in part that "all persons within the jurisdiction of the state of New Jersey shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public
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State laws may regulate private activity unless they confront a constitutional barrier, such as freedom of association, that overrides the state interest in the regulation. No state's public accommodation law, however, expressly includes private clubs in its ban on discrimination, and twenty-three states, including New Jersey, exclude from the scope of their public accommodation laws private clubs or any other place that is by its nature distinctly private. The Princeton case appears to be the first state attack on a college social organization.

Federal courts have developed criteria to aid in determining whether a club is private or a state actor, and state courts have done the same to define the line between private clubs and places of public accommodation. Organizations that have procedures for choosing selective memberships, fund their activities from private sources, restrict the use of their facilities to members and bona fide guests, govern themselves according to membership preferences, and can demonstrate that they were not founded with the purpose of circumventing civil rights laws have been declared private. See Gunther, Constitutional Law 860-903 (11th ed. 1985). Federal anti-discrimination law prohibits discrimination in any place of public accommodation that affects interstate commerce or is supported by state action. The law excludes private clubs that are not open to the public. 42 U.S.C. § 2000a (1982). State anti-discrimination laws can be more inclusive than federal law, because they do not require state action on behalf of the discriminatory actor in order to ban discrimination. Compare Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1977) (fourteenth amendment did not prohibit racial discrimination at a private club) with Commonwealth Human Relations Comm'n v. Loyal Order of Moose, Lodge No. 107, 448 Pa. 451, 294 A.2d 594 (1972), appeal dismissed, 409 U.S. 1052 (1972) (private club becomes a place of public accommodation under Pennsylvania law when it operates an unrestricted guest policy).

15. Comment, supra note 4, at 459-460 n.87.


18. College social organizations that receive direct aid from universities lose an element of their private character. The Princeton clubs do not receive direct university aid.

19. Cornelius, 382 F. Supp. at 1203, suggested that a club's history is pertinent to determining its private status. On characteristics of private clubs, see generally Solomon v. Miami Woman's Club, 359 F. Supp. 41 (S.D. Fla. 1973) (private women's club may discriminate); Moose Lodge, 407 U.S. 163; Wright, 315 F. Supp. 1143 (club was not private because, in part, it was not selective, operated for a profit, regularly served non-members who were not bona fide guests, and advertised to increase patronage); Clover
Some apparently private organizations have been declared state actors or places of public accommodation, however, if they have given up their private status by virtue of a close association or "symbiotic relationship" with the state or another place of public accommodation.20

The New Jersey Division on Civil Rights applied this analysis of "symbiotic relationship" to the Princeton social clubs. The Division found that the Princeton clubs and the University had developed a mutually beneficial and interdependent relationship. The clubs would not exist without the University's student community, and the University relies on the clubs to provide meals for upperclass students.21 University publications cite the clubs as an upperclass dining option, and some clubs advertise in The Daily Princetonian, the student newspaper, to notify potential members of the dates and times of open houses or membership interview sessions. Students may apply financial aid money to meal contracts at private clubs, and the University and the clubs have instigated a cooperative "meal exchange" program.22 The Division concluded that this relationship with the University altered the status of the clubs, and it classified them as places of public accommodation despite their otherwise private character.

Although the Division's findings do indicate that college social organizations may be prominent entities in a university community, it is not clear that the findings justify the reclassification of privately

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20. The notion of a "symbiotic relationship" developed in federal law when civil rights authorities attempted to reach "private" establishments that had close ties to a state. The existence of a symbiotic relationship with a state can deprive an organization of its private status and subject it to federal laws that prohibit discrimination by states or state actors. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Supreme Court held that a restaurant, which leased property from a state-owned and operated parking facility that financed all upkeep and maintenance of the building, should be considered a state actor and not "purely private." Courts have used a similar analysis to include "private" organizations within the scope of state public accommodation laws if they have a symbiotic relationship with another place of public accommodation. Franklin v. Order of United Commercial Travelers, 590 F. Supp. 255 (D. Mass. 1984) (fraternal benefit organization closely affiliated with city police department is not private organization); Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977) (supper clubs using facilities at city firehouses may not refuse membership to blacks).

21. Similarly, CSOs that provide sleeping accommodations allow the university to budget a smaller amount of dormitory space.

22. Under the meal exchange program, a member of an eating club and a student who eats at a university facility can eat meals together at either facility. Rather than charging the guest, the facilities exchange information on meal transfers and withhold charges from the guest if he or she has foregone a meal at his or her own facility.
owned and operated organizations as places of public accommodation for the purposes of state law. The Princeton clubs and similar college social organizations meet all of the criteria that courts have suggested for private status, and many of the CSOs' relationships with associated universities are like those maintained by private businesses, which would never be considered part of a university. Such student organizations receive little or no tangible assistance from universities and are not under university control. Unlike businesses or other private clubs, however, CSOs serve exclusively students and have administrative arrangements with universities. These facts place CSOs somewhere on a continuum between official university organizations and independent private enterprises.

The New Jersey Division's interpretation of the state law, which requires little or no tangible university support or control to impute public character to a social organization, allows students only a narrow scope of private activity. As applied, the New Jersey public accommodation law effectively outlaws single-sex social organizations at colleges and universities. The Division's statutory interpretation raises the important question of whether the ruling violates the club members' constitutional right of freedom of association.

II. Freedom of Association

The right to associate freely is not enumerated in the Constitution. The Supreme Court first recognized a constitutionally pro-

23. Private businesses in university communities exhibit many of the characteristics of CSOs. They advertise in school newspapers and rely on students for business. In many cases, new businesses open in college areas because the students create a demand for their products. University publications often list local businesses for the information of students. Universities rely on area businesses to serve their students and faculty and to provide employment for spouses of faculty members. Universities often take active roles in developing local economies in order that the university may benefit from a prosperous surrounding. Students may apply financial aid money to meal purchases wherever they like (there are no administrative connections between Princeton University and the clubs for purposes of meal contract payments), and rules defining disciplinary procedures for improper conduct by students at private clubs are the same that apply to other off-campus private facilities.

24. Indeed, Princeton University maintains that it would prefer that the clubs admit women, but that the clubs are entirely separate and private organizations over which the University has no control. Princeton Notebook, PRINCETON ALUMNI WEEKLY, Mar. 12, 1986, at 12.

25. Another objection to the New Jersey public accommodation law, which is not discussed herein, is that the law as interpreted by the Division on Civil Rights is unconstitutionally vague and overbroad. This analysis will presume the Division's interpretation to be valid under the void for vagueness doctrine, in order to discuss the implications of a law banning single-sex college social organizations. The vagueness issue is, however, a legitimate point of contention, and it will be litigated in the Princeton case.
tected right of association in 1958 in *NAACP v. Alabama ex rel. Patterson.* In *NAACP*, the Court held that the requirement that the NAACP reveal its membership lists to the state violated the group’s right to associate freely. In explicating this right, Justice Harlan wrote:

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.27

Despite the Court’s statement that the right of association extended to groups interested in extra-political matters, it remained unclear whether the Constitution would protect apolitical associations, including social organizations.28 Some commentators recognized that the right of association would afford some constitutional protection to personal associations,29 and dicta from the Supreme Court’s holding in *Griswold v. Connecticut* validated that notion. Justice Douglas wrote:

The right of “association,” like the right of belief, is more than the right to attend a meeting; it includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantee fully meaningful.30

*Griswold* was the first of a series of decisions that specifically recognized a right of freedom of “intimate association” as opposed to the “expressive association” suggested by *NAACP.*31 While the marital
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and family relationships are at the center of the development of a right of intimate association, close friendships also should receive constitutional protection. The Supreme Court first explicitly recognized the dual character of the right of association in 1984 in *Roberts v. United States Jaycees*, which held that an all-male Jaycees chapter in Minnesota was not an association that qualified for constitutional protection. An analysis of that decision helps to understand what constitutional protection will be afforded single-sex college social organizations.

Justice Brennan, writing for the Court in *Roberts*, identified two distinct areas of protected association. The first, expressive association, ensures the “right 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.” The second, intimate association, ensures that “choices to enter into and maintain certain intimate human relationships must be 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.”

A. Expressive Association

College social organizations are protected by the right of expressive association only to a small degree. Because the organizations are designed for interaction among members, social organizations’ only claim to protection of an expressive association is through those values that they express by their mere existence. Although values of tradition and camaraderie may be important, the expression of those values is too removed from the CSOs’ central social purposes to merit strong constitutional protection. A state legislature’s desire to create a fully coeducational college environment probably would outweigh a college social organization’s interests in expressive association.

B. Intimate Association

College social organizations receive stronger protection from the right of freedom of intimate association. In *Roberts*, the Court outlined a continuum of associations ranging from the most protected

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34. Id. at 3249.
35. Id.
(the family) to the least protected (a large corporation such as General Motors). Protected associations, the Court said, "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life." The Court listed several characteristics — relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, seclusion from others in critical aspects of the relationship, and congeniality — that the Court would use to identify protected associations falling on the "family" end of the Roberts continuum. College social organizations exhibit each of these characteristics, and they appear to merit strong protection under the constitutional principle articulated in Roberts.

1. Characteristics of an Intimate Association

a) Smallness

The active memberships of most college social organizations are much smaller than the 400-person Jaycee chapters that the Roberts Court considered "large." The average mens' fraternity chapter in 1984-85 included fifty members. The memberships at Princeton's all-male clubs are approximately seventy persons.

Most college social organizations also have graduate members who participate in some group functions. For the purposes of a constitutional analysis of intimacy, however, it would be inappropriate to include alumni members in a calculation of the size of the organizations. The active memberships are the groups that form the day-to-day intimate relationships; alumni participate only peripherally through alumni dinners, fundraising, and graduate board governance.

36. Id. at 3250.
38. Roberts, 104 S. Ct. at 3251.
39. Rumsey, supra note 37, at 467 (citing studies by the National Interfraternity Conference).
40. The New Jersey Division on Civil Rights concluded that the Princeton clubs did not deserve constitutional protection, in part because their total memberships, including alumni, numbered in the thousands.
41. The fallacy of including graduates in a calculation of size is evident when we consider a social organization that maintains the identical undergraduate size and character each school year but loses its qualification as an intimate association after two years of existence when alumni members accumulate.
b) Selectivity

Most college social organizations unquestionably are selective. At Princeton, between one-half and two-thirds of those students applying for membership in the all-male clubs are not accepted. Club members spend three days acquainting themselves with potential members through a formal process, and they deliberate for a total of over twenty-four hours in selecting a new group of members. Fraternity and sorority rush procedures often involve even more in-depth consideration of prospective members and produce similarly selective results. Within these organizations, the methods for choosing officers and alumni graduate board members are selective as well.

c) Seclusion in Critical Aspects

The choice of new members — the function most critical to the perpetuation of the social organization's intimate association — is performed in total seclusion from non-members. The lengthy membership selection process is private and confidential. Other functions, such as club meetings and periodic club dinners, are open to members only. Meals are open to a limited number of guests of members, and guests may attend social functions only with an official invitation or guest pass.

d) Congeniality

The Roberts court used the imprecise characteristic of congeniality to fill out its vision of an intimate association. Although the Court declined to define the elements of a protected association exactly, it indicated that the purpose behind an association and the atmosphere within the group may be pertinent to the constitutional analysis of freedom of association. College social organizations exhibit characteristics that correspond with the Court's vision of a protected association. CSOs choose memberships with friendships in mind, and many members of single-sex social organizations feel that camaraderie is enhanced by limiting membership to one sex. For some students, the social pressures that emanate from relations with the opposite sex during college years can impede the development of an open and collegial atmosphere. One purpose of single-sex CSOs is

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43. These characteristics refer to the Princeton clubs. They may also apply to other CSOs.
to foster a congenial and intimate environment that provides a small community for college students. 44

2. The Roberts Continuum

An analysis of college social organizations in light of the Roberts criteria for identifying protected associations shows that CSOs fall much closer to the "family" end of Justice Brennan's spectrum than to the "General Motors" end. For many college students, the social organization is their family life. In 1923, Musgrave made an observation that remains true today:

The vast majority of students at colleges have no family life. They are far from their homes, and a fraternity properly organized has, in more than one case, supplied perhaps the best substitute possible for the family relation. 45

The model of a college social organization as a surrogate family continues to have merit in the society of the 1980s, which contains more fragmented families and more students who travel away from their hometowns for college than did the society of the 1920s. 46

The social organization often is not only an extension of a member's home, 47 but it is his or her home. Even in those cases where the club or society does not serve the full function of a home, 48 the provision of meals, reading material, television, stereo, and other recreational facilities is a substantial surrogate.

Although the constitutional right of association of college social organization members is implicated seriously by the application of a law that bars the existence of single-sex CSOs, the right of association is not absolute. 49 Thus, we must examine the state's interest in banning single-sex CSOs to determine whether the interest is sufficiently compelling to override the students' constitutional right.

44. The "congeniality test" does not imply that coeducational organizations cannot exhibit the same sociable quality. The Roberts factors require simply that the association that seeks to be protected exhibit these characteristics, regardless of whether other organizations do so as well.

45. Musgrave, supra note 9, at 137.

46. For example, the divorce rate per 1000 women has risen from 8.0 in 1920 to 22.6 in 1980. The percent of high school graduates aged 18-24 enrolled in college has risen from 4.7 percent in 1920 to over 30 percent in 1980. Bureau of the Census, U.S. Dept of Commerce, Statistical Abstract of the United States 57149 (105th ed. 1985).

47. Cornelius, 382 F. Supp. at 1204, suggested the question of whether a club served as an extension of members' homes rather than their businesses as a means of determining the club's private character.

48. The Princeton clubs only provide sleeping accommodations for a fraction of their memberships.

49. NAACP, 357 U.S. at 463; Roberts, 104 S.Ct. at 3252.
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C. Countervailing State Interests

1. State Power over College Students

The state's power over the affairs of its own educational institutions and their students traditionally has been broad. Students' rights often have been assessed in terms of contractual relationships. By enrolling at a university, the student is deemed to have agreed to abide by the school's regulations.\textsuperscript{50} Courts recently have recognized, however, that students retain, to some extent, the important constitutional rights of freedom of speech and expression,\textsuperscript{51} privacy,\textsuperscript{52} and due process\textsuperscript{53} when those rights are restricted by institutional regulations.

The Supreme Court also recognized the expressive branch of a right of association for college students in \textit{Healy v. James}.\textsuperscript{54} In that case, the Court held that a state college could not withhold official recognition from a student organization of whose views it disapproved. The Court stated in dicta that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."\textsuperscript{55}

Few past cases have involved college social organizations and freedom of association. In 1915, the Supreme Court held that a state legislature could require students wishing to attend a state university to sign a pledge that they were not and would not become members of a fraternity.\textsuperscript{56} This case, \textit{Waugh v. Board of Trustees of University of Mississippi}, was decided forty-three years before the Court identified a right of association; it held that the interest of a state in pursuing a desired educational policy outweighed the rights of the individual students. A federal district court followed the reasoning of \textit{Waugh} in \textit{Webb v. State University of New York}.\textsuperscript{57} The \textit{Webb} court held that SUNY could forbid social organizations to have a direct or indirect affiliation with any national organization or other organization outside the university.

In the only major case concerning a college social organization decided after the Court's recognition of the right of freedom of as-

\textsuperscript{52} American Future Systems v. Pennsylvania State Univ., 688 F.2d 907, 915 (3rd Cir. 1982).
\textsuperscript{54} 408 U.S. 169 (1972).
\textsuperscript{55} \textit{Id.} at 180 (citing Shelton v. Tucker, 364 U.S. 479, 487 (1960)).
\textsuperscript{56} Waugh v. Board of Trustees of Univ. of Miss., 237 U.S. 589 (1915).
\textsuperscript{57} 125 F. Supp. 910 (N.D.N.Y. 1954).
sociation in *NAACP v. Alabama*, a federal district court declined to determine whether members of a social fraternity had a right of association.\(^{58}\) In that case, *Sigma Chi Fraternity v. Regents of University of Colorado*, the court ruled that if the members did have such a right, it would be a relative right that should be weighed against a competing state interest.\(^{59}\)

These cases concerning college social organizations involve problems distinct from those presented by the Princeton case. *Sigma Chi* concerned official recognition of a group by a university. Such recognition is irrelevant to CSOs threatened by state public accommodation laws and is undesirable because the social group's claims to private status and freedom of association are enhanced by autonomy from the university. *Waugh* relates more closely to *Frank v. Ivy Club* because it involves a state legislature's control over students and their associations. There is a great difference, however, between a legislature ordering that a student may not affiliate with any social group outside university control, as in *Waugh*, and a legislature setting the membership policies of private organizations that students may join, as in *Frank v. Ivy Club*.\(^{60}\) As the *Roberts* Court noted:

> There can be 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. . . . *Freedom of association therefore plainly presupposes a freedom not to associate.*\(^{61}\)

*Roberts*, the Supreme Court’s most recent statement on the right of association, makes it clear that expressive and intimate groups have a constitutional right to exclude persons from membership, and that government's ability to dictate membership policies is limited.\(^{62}\)

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59. *Id.* at 525. The University of Colorado placed its Beta Mu chapter on probation because of an unwritten policy of the national Sigma Chi fraternity not to admit blacks. The court held that the University's interest in revoking official recognition to discourage racial discrimination outweighed any claim the fraternity may have had to freedom of association.

60. Despite this distinction, the logic of *Waugh*, which allows a state to prohibit students from joining "secret orders, chapters, fraternities, sororities, societies, and organizations of whatever name, or without a name," 237 U.S. at 591, might also be subject to reversal in light of the Court's development of the right of association since 1915. See *Rumsey, supra* note 37 at 478-79.

61. *Roberts*, 104 S. Ct. at 3252 (emphasis added). Although Justice Brennan was referring to expressive association in this passage, the force of the argument applies as strongly to intimate association.

62. In fact, a ruling that state governments may dictate membership policies of CSOs threatens the right of those organizations to maintain any selective membership policy.
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2. State Interests Related to College Social Organizations

How, then, does the state support its apparently unprecedented regulation of student life? Clearly, the Division on Civil Rights in New Jersey considers the Princeton clubs part of the University and contends that all of the advantages, privileges and facilities of the University should be made available to all students on a non-discriminatory basis. The state has an interest, it follows, in eradicating sex discrimination in any organization that serves students exclusively, regardless of the extent of the organization's legal or financial ties to a college or university.

The state has an interest in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." This interest certainly applies to programs operated by the university itself. Education is central to economic and social advancement, and the state has a compelling interest in prohibiting discrimination in education against any group of persons. The state's interest wanes, however, as its regulation recedes from the central academic and extracurricular functions of the university to the private associations of students.

The fact that persons are enrolled as students at a college or university cannot prevent them from exercising their constitutional rights. A student may spend an extended period of time within university-controlled facilities, especially if many of the student's needs — living accommodations, eating facilities, and social functions — are met by the school. A student retains a sphere of privacy rights, however, that allow him or her to leave the university to live in a private environment.

The university, as an institution, properly is subject to state regulation requiring it to provide privileges and services in a non-discriminatory manner. Academic functions, dormitories and cafeterias provided by the school, and extracurricular groups funded and operated by the university are elements of the university's core. A student, on the other hand, cannot be required to relinquish his or her rights in a context not controlled by the university. As Justice Goldberg wrote in 1964, "it is the constitutional right of every person to close his home or his club to any person or to choose his social intimates . . . on the basis of personal prejudices . . . . These and other rights pertaining to privacy and private association

63. Roberts, 104 S. Ct. at 3254.
65. See supra notes 51 through 55 and accompanying text.
are themselves constitutionally protected liberties." Students must have the opportunity to leave the university context to exercise that right of privacy, including the right to associate freely with their peers. Simply by virtue of their enrollment in a university, a group of men or women should not forfeit rights of association that they would otherwise enjoy. When the state moves outside of matters controlled by a university to regulate students' lives in a way that it could not regulate non-students' lives, its interest becomes far less compelling.

The Supreme Court's clarification of the right of association in *Roberts v. Jaycees* provides relevant factors with which to evaluate the constitutional claims of single-sex college social organizations. The fact that these associations are relatively small, highly selective, congenial, and secluded from others in critical aspects of their relationships indicates that they deserve constitutional protection. The state's interest in reducing sex discrimination decreases in areas of student life removed from university control and tangible university support. A state law that, as applied, effectively outlaws private single-sex college social organizations is unconstitutional.

67. Another theory on which the state might rely to establish a compelling interest in eliminating sex discrimination in CSOs is the "essential" or "public function" analysis. Under this view, a private entity that provides a public function can lose its private character. Marsh v. Alabama, 326 U.S. 501 (1946). Because CSOs provide food and/or accommodations to students at universities that are places of public accommodation, the state could argue that CSOs perform a public function. The state might use this argument to show that CSOs are places of public accommodation under state law and to establish a compelling interest that would justify a denial of students' claims to a constitutional right of association.

The Supreme Court, however, narrowed the applicability of the public function analysis in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and it is unlikely that CSOs are vulnerable to the amended legal doctrine. In *Jackson*, the Court held that a privately-owned utility, licensed and regulated by a state public utility commission, could not be deemed a state actor by virtue of the public function analysis, because the private entity had not exercised powers traditionally reserved exclusively to the state. The Court refused to convert into state action the conduct of businesses that provide arguably essential goods and services.

The Court's ruling in *Jackson* puts CSOs outside the class of private entities that can be deemed public as a result of their performance of public functions. Many universities and colleges do not provide food and/or accommodations for their students, and those functions are not "reserved exclusively" to universities. At Princeton, for example, many upperclass students do not have meal contracts with either a university facility or a private eating club and obtain their meals from another source. A majority of upperclass students receive meals from a source other than a facility owned or operated by the university.
III. Legislative Policy

Public accommodation laws in New Jersey and other states do not indicate clearly the status of college social organizations. In the absence of definitive direction from state legislatures, forty-one different appellate courts and administrators of civil rights divisions may determine the fate of the centuries-old tradition of single-sex CSOs. A court decision in Frank v. Ivy Club is likely to hinge on the unique facts of the case, and parties in other locales will have to relitigate similar issues in future cases in the absence of a statement of specific legislative policy.

Regardless of the constitutionality of state laws that effectively ban single-sex college social organizations, strong policy reasons justify exempting fraternities, sororities, and other single-sex CSOs from anti-discrimination laws. A legislative pronouncement on the issue of CSOs will ensure that this important choice of social policy is made by the branch of government most responsive to the popular will. A clear legislative statement establishing the status of CSOs under public accommodation laws also will give administrators an intelligible principle to guide their exercise of delegated discretion and will ensure that reviewing courts will be able to test administrative action against a clearly ascertainable definition of public accommodation.68 On three occasions, the United States Congress has exempted college social organizations from federal laws that otherwise would regulate their memberships. The reasons cited by Congress, together with other considerations, provide a strong foundation for exempting college social organizations from state laws against discrimination.

A. Policy Reasons for Exemption of Single-Sex CSOs

1. Freedom of Association

A 1964 amendment to the 1957 Civil Rights Act exempts membership practices of college social organizations from investigation by the Civil Rights Commission.69 In support of the amendment, which passed the House of Representatives on a voice vote, Representative Long of Louisiana proclaimed:

I can see no basis for real opposition to an amendment which simply verifies a common desire of the Congress to avoid the interference in areas which impinge on the most elemental part of man's nature, to

freely associate with people that share his common ideals . . . .
[A]llowing these investigations into our private sanctuaries could do irreparable harm to the whole fabric of our society.70

The Waggonner Amendment, passed by Congress in 1965, further modified the 1964 Civil Rights Act to preserve the right of college students to associate privately.71

Even if courts, in the future, do not recognize a constitutional right of association for college social organizations, state legislatures may advance broader views of freedom of association through legislation. Legislatures and citizens that favor a right of students to associate in single-sex social organizations may desire to express that position in legislation in order to avoid uncertain treatment of the issue by the judiciary.

2. Tradition

In 1974, Congress amended the Education Amendments of 1972 to exempt single-sex college social organizations from the requirements of Title IX of the Civil Rights Act that prohibit discrimination on the basis of sex in federally-funded institutions.72 The prime Senate sponsor of Title IX, Senator Birch Bayh of Indiana, introduced the amendment after the Department of Health, Education, and Welfare proposed regulations that would apply Title IX restrictions to single-sex CSOs.73 In support of the amendment, Bayh wrote, “Fraternities and sororities have been a tradition in the country for over 200 years. Greek organizations, much like the single-sex college, must not be destroyed in a misdirected effort to apply Title IX.”74

For many, single-sex social organizations represent a traditional source of stability and community in college life. They meet many of the social and cultural needs of students.75 They provide a surrogate family for students away from home and offer students an opportunity to grow with peers who share common values, problems, and goals. Many members of all-male and all-female CSOs feel that the single-sex nature of the groups is important to the cohesive atmosphere that the organizations provide.

74. Id. at 39993.
75. Id. (letter from Secretary of Health, Education, and Welfare Caspar Weinberger to Senator Birch Bayh).
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Congress felt that college social organizations do little, if anything, to perpetuate discrimination against women — a charge that often is leveled against private clubs that serve exclusively businessmen and other professionals. Senator Bayh emphasized that his exemption "covers only social . . . organizations; it does not apply to professional fraternities or societies whose admissions practices might have a discriminatory effect upon the future career opportunities of a woman." 77

3. Pluralism and Diversity

Single-sex college social organizations also maintain an element of diversity in the pluralistic American system. Some fear that an overzealous expansion of anti-discrimination law might weaken society by leading to the destruction of community and needless conformity. 78 A legislature might agree with the 1974 Congress' evaluation that benefits from the maintenance of community and diverse social options at colleges are greater than the costs of sex discrimination by single-sex social organizations.

B. Opposition to Single-Sex Groups

Although the attitude of Congress toward single-sex CSOs and the continuing popularity of such organizations on college campuses indicate that state legislatures will best represent their constituents by allowing the continued existence of all-male and all-female social groups, some states may desire to eliminate single-sex social organizations. Some writers who espouse this view argue that sex discrimination in social organizations helps to perpetuate discrimination in the post-educational professional world. 80 Although the opportunities to develop valuable social and business contacts in a college club may be fewer than those in a professional club, these opportunities may not be negligible. The maintenance of tradi-

78. On the tension between the values of community and rights-oriented liberalism, see Linder, supra note 37, at 1882.
79. As of 1966, there were 5679 men's college social groups and 3916 women's college social groups in the United States. Baird's Manual of American College Fraternities, supra note 5, at vii; Rumsey, supra note 37, at 467 n.11. The most recent data reported in Baird's show that between 1967 and 1976, the number of men's organizations increased by 11 percent and the number of women's groups grew by 26 percent.
80. See Comment, supra note 76, 24 Hastings L.J. at 419.
tional sexual distinctions in the name of brotherhood and community could be seen as an invitation to prejudice. 81

Laws against discrimination that explicitly apply to private college social organizations may be unconstitutional due to the right of association outlined above. A policy statement against single-sex CSOs, however, would clarify the legislature's intent to classify CSOs as places of public accommodation to the extent permissible under the constitution, and states that favor this approach probably could eliminate any tangible college or university support for single-sex organizations.

The importance of the right to associate or not to associate, which has been recognized by the U.S. Congress and the U.S. Supreme Court, and the continued popularity of single-sex college social organizations, suggest that state legislatures should follow Congress' lead and exempt fraternities, sororities, and other single-sex CSOs from state laws against discrimination. This policy is supported by the fact that any discriminatory impact upon the opposite sex created by exclusion from a college social organization is less than that caused by exclusion from a college pre-professional organization, such as a group of engineering students, or a business-related single-sex organization that is used for career advancement. A legislature's decision to exempt single-sex CSOs from anti-discrimination laws, however, merely allows the possibility of their existence.

Members of a single-sex college social organization may have good reason to amend their membership policy. A coeducational social organization would be more diverse than a single-sex group and would reflect more accurately personal relations in society as a whole. Students also may feel that a coeducational environment is simply more enjoyable. On the other hand, the existence of over 9000 single-sex CSOs in the United States shows that many persons value the tradition, camaraderie, relaxed atmosphere, or other aspects of a single-sex environment. Legislatures need not and should not attempt to make a decision on associational preference for college students. They will support the best public policy if they allow continued freedom of choice.

**Conclusion**

The potential for future litigation surrounding college social organizations is significant. The New Jersey experience demonstrates

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that CSOs may be vulnerable to state regulation of places of public accommodation under vague statutes. State laws that effectively ban single-sex CSOs, however, infringe on students' constitutional right of association and should be ruled invalid. Furthermore, regardless of the resolution of the constitutional questions, state legislatures have sound policy reasons to exempt CSOs from anti-discrimination laws as Congress has done on multiple occasions.

The Supreme Court's 1984 decision in *Roberts* clarified the right of association, but its criteria have not yet been applied to college social organizations. The New Jersey law threatens to restrict the rights of a university student to choose his or her social intimates. Although single-sex social organizations have a long tradition at American colleges and universities and enjoy strong public support, they have encountered a challenge in the Princeton case and may face similar fights elsewhere. Those legislators and judges who hope to end by government mandate the tradition of single-sex college social organizations would do well to remember the words of Justice John Harlan, the first expositor of the constitutional right of association and a former undergraduate president of Princeton's Ivy Club:82

Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are entitled to a large measure of protection from governmental interference.83

— *Steven M. Colloton*

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82. Justice Harlan was a member of the section of 1920 at The Ivy Club.