"To the Tables Down at Mory’s": 
Equality as Membership and Leadership in Places of Public Accommodations

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I. INTRODUCTION

I get to walk out of [a Mory’s board meeting] and they think two things about me: They think that I will stand up for issues that are important to me, and they think that I am a regular guy .... On this board, a woman is allowed ... to be a person and not a woman, and there is probably some very interesting social capital in that.¹

The Mory’s Club is emblematic of all that is old Yale. The walls are lined with framed black and white photos of clean-cut athletes and the tables have been etched by singing groups that made the club legendary in verse.² The memories enshrined at Mory’s, however, reveal the social barriers to gender integration. When a group of Yale graduates incorporated the Mory’s Association in September 1912 with the purpose of “promot[ing] ... social intercourse and the culture of its members,”³ gender discrimination was not a legal claim but rather a part of daily life. Half a century later, Yale College opened its doors to female students, and members of the Yale community urged Mory’s to do the same. In the local movement that ultimately forced Mory’s to admit women, civic participation reshaped women’s equality in elite

¹ Sincere thanks to the Mory’s Association, Inc., for the integrity to confront its own past, for opening its doors and its archives to me, and for making this research possible. Thank you also to the original and current female board members who shared their time, thoughts, and memories with me; to Robin Soltesz, for providing me with the requisite membership and historical data; to Vicki Jackson and Judith Resnik for planting the question in the form of a ballot; to Eric Fleisig-Greene, Daniel Markovits, Larry Schwartztol, Reva Siegel, Sam Spital, and Kenji Yoshino for enlightening comments; and to Paige Herwig and Jennifer Peresie of the Yale Journal of Law and Feminism for excellent editorial assistance. This Article is dedicated to Henry “Sam” Chauncey, Jr. and Burke Marshall for their vision and commitment to providing women students with “full-fledged membership” in the Yale community.

1. Interview with Anonymous Female Mory’s Board Member, New Haven, Conn. (Apr. 10, 2002).
2. “To the tables down at Mory’s, to the place where Louis dwells,” goes the Yale “Whiffenpoof Song.” The Whiffenpoofs are Yale’s oldest all-male a cappella group and still congregate at the club every Monday evening.
institutions and pushed the boundaries of law, or at minimum, expanded its shadow.

This Article provides a piece of the history of legal change. Though descriptive in style, the enterprise is normative: Constitutional meaning is derived, in part, from the relationship between civic engagement and court doctrine. Thus, by tracing the history of a local social movement, this Article responds to the recent call to locate "the Constitution's meaning inside and outside the courts." This Article uncovers the history of gender integration in a small club in New Haven, but the story of Mory's is one that echoes throughout small university towns and large metropolitan cities alike, where formerly all-male clubs continue to provide an important piece of the social fabric. Princeton has its eating clubs, and Harvard has its finals clubs. Many cities have their private associations, like Pittsburgh's Duquesne Club, which only admitted women in 1980 and currently has only one woman on its fifteen-member board. The professional world, moreover, is mired with social opportunities and institutions that, by default or design, foster professional relationships. The Mory's narrative, therefore, provides a lens through which to refocus our understanding of the relationship between social exchange and how one experiences (in)equality.

Reflecting on Mory's gender integration, moreover, uncovers a tension in contemporary state public accommodations doctrine. Although Mory's admits female members today, its board of governors still has a seven-to-five male-female ratio perpetuated through ballots slated by gender. This gender ratio calls into question the present scope of public accommodations doctrine. While public accommodations laws now cover access to many nonprofit corporations and membership associations, several state courts have concluded that public accommodation protections do not reach the governance and leadership structures within these organizations. In Mory's board of governors, therefore, we are confronted with a type of gender disparity that the law has not yet addressed. Using the experience of Mory's as a jumping-off point, this Article argues that state public accommodations laws fail if they stop at access; principles of nondiscrimination in public accommodations must extend to leadership and governance.

4. Reva B. Siegel, Social Movements and Law Reform, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. PA. L. REV. 297, 303 (2001) (emphasis added); see also BRUCE ACKERMAN, I WE THE PEOPLE: FOUNDATIONS (1991) (arguing that the Constitution can be, and has been, informally amended through mass political engagement); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Siegel, supra, at 350 ("[T]here is much work to be done in describing the role that nonjuridical actors play in shaping constitutional meaning, whether citizens speak in the streets, in Congress, in the executive branch, or through lawyers in the courts.").

5. The Duquesne Club was "incorporated as 'a club for social enjoyment' in 1881." Today it is a member of the Distinguished Clubs of the World, an association whose member clubs must be "comprised of members recognized by their rank and integrity within their community . . . ." DUQUESNE CLUB, THE DUQUESNE CLUB PAMPHLET (n.d.) (on file with author).
Part II presents a narrative of legal change in the voice of "nonjuridicial speakers" at a turning point in our history: the gender integration of academic institutions. It traces the confluence of a local social movement and the broader state and national mobilization around women's rights. These movements changed Mory's and, in the process, redefined notions of "public" and "private" that dictate the reach of public accommodations laws. Throughout interviews with past and present Mory's board members, "Keeping Mory's Mory's" emerged as the refrain. In a club whose mantra invokes the sanctity of tradition, what inspired the change that let women in? And how did this change translate into slated ballots?

Part III traces the development of the public accommodations doctrine, which responded to the broader social movement of which Mory's protesters were a part. This Part takes an excursion into the contours of the legal doctrine. In this context, the Mory's story reveals how non-judicial actors helped shape the parameters of "public" and "private" as legal constructs. Moreover, this narrative marks a crossroads in the history of public accommodations doctrine, from a response to racial discrimination to a critical means of gender integration.

Part IV pushes the doctrine forward. It unpacks the current notion of places of public accommodation that extends to entry or membership, but stops at governance. This final Part places "nonjuridicial speakers" in dialogue with contemporary courts, using the experience of past and present female board members at Mory's to ask whether the public accommodations doctrine should reach leadership positions if the goal continues to be true equality or full-fledged membership.

II. KEEPING MORY'S MORY'S

Mory's has very different meanings. For faculty, it is the faculty club. For students, it has almost a fraternity life around the singing. For distant alumni, it is an emotional touch point. Broadway is redeveloped, the College may have been refurnished—but by God, Mory's never changes. For the outsider, it is a curiosity.

This Part uncovers the history of gender integration at Mory's, which is the story of a local social movement that tested the boundaries of local law and the

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6. Siegel, supra note 4, at 299. Robert Post and Reva Siegel posit the interconnectedness of civic participation and constitutional interpretation in contrast to the "juricentric" constitutionalism of the current Supreme Court, which "imagines the judiciary as the exclusive guardian of the Constitution." Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 IND. L.J. 1, 2 (2003); see also Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943 (2003).

7. Telephone Interview with Henry "Sami" Chauncey, Jr., former Secretary of Yale University (Apr. 12, 2002) [hereinafter Interview with Henry "Sami" Chauncey].
meaning of legal notions of equality. Embedded in the Mory’s story is the
tension between principles of equality and privacy, between expanding the
scope of legal regulation and preserving the ability of idiosyncratic social
institutions to function. The legal history of Mory’s is the story of local groups
struggling with conflicting visions of the role of law and of membership, in
social institutions with the capacity to create elements of educational or
professional caste. To explore these tensions, this Part begins with the historical
accident of a small club in a college town and traces its development into an
institution on which faculty and students came to depend. When the club
became a part of the community and the community became co-ed, members of
the club and the university had to decide whether to achieve social integration,
and at what costs. The questions, tensions, and strategic choices explored in
this Part constitute a historical piece of the first wave of gender integration in
social institutions.

Just over a century before Yale College admitted its first female students, a
group of Yale crew members stumbled upon a small taproom at 103 Wooster
Street owned by Frank and Jane Williams Moriarty. After the death of Frank
Moriarty, Jane Williams Moriarty relocated to Temple Street and opened what
became known as the “Temple Bar,” where she oversaw the preparation of
Welsh rarebits and grilled sardines until midnight when she would declare,
“Twelve o’clock, gentlemen,” and the evening would draw to an end. After
Jane Williams Moriarty’s death, the bar retained its popularity but lost its
financial stability. In 1912, afraid that redevelopment and the owner’s failing
health might mean an end to the establishment, a group of thirty-five Yale
alumni purchased the business and turned it into a club, establishing the Mory’s
Association, Inc., a corporation without stock. The group bought and
remodeled an old house at 306 York Street. Mory’s soon became the venue of
university gatherings, singing group initiations, and faculty meetings. Yale
undergraduates could pay a “single modest fee” for life membership.

In 1969, under the leadership of University President Kingman Brewster,
Yale College opened its doors to female undergraduates. To the Mory’s board
of governors, however, “Keeping Mory’s Mory’s” meant keeping women out.
The board sought to save Mory’s from itself: Afraid that some of its members
would push for gender integration at Mory’s, and that such a change would

8. In his brief history of Mory’s, George D. Vaill writes,
The thirsty oarsmen found themselves in an unpretentious alehouse whose hospitality and
dignity belied its dingy surroundings. Subsequent visits confirmed the original impression of
the place, and word of its atmosphere spread rapidly on the campus. The Moriartys soon had
all the business they could comfortably handle.
George D. Vaill, Mory’s: A Brief History 3 (1977) (unpublished manuscript) (on file at Sterling Mem’l
Library, Yale Univ.).
9. Id. at 4.
10. See Daley v. Liquor Control Comm’n, 347 A.2d 69, 70 (Conn. 1974); see also Vaill, supra note
8, at 9.
compromise the club, Mory's board of governors lobbied the State General Assembly to pass a Special Act by which Mory's articles of association were amended to divest the membership of its right to vote and transform the board of governors into a self-perpetuating body.12 One of the first actions of the now unaccountable and self-perpetuating board was to amend the by-laws to create male-only membership.13

Mory's was not only a place for undergraduates to come together; it also served as the university's de facto faculty club. If they did not start at Mory's, Yale Corporation, university, departmental, and professional school meetings often ended there. Professors lunched with students, visiting faculty, or university guests. Female student and faculty exclusion, therefore, exacerbated already tense gender relations in an institution that had just begun to admit women undergraduates. Assistant Dean of the Graduate School, Elga Ruth Wasserman, recalled that "much of the informal business of the Dean's meetings ran past the lunch hour, and my colleagues would adjourn to Mory's, and as a woman, I was not part of the lunch."14 Similarly, an English professor spoke of Mory's:

I started teaching . . . sections for freshmen and sophomores in the English Department, and every one of the faculty members who taught a section . . . met in a group weekly to discuss policy and problems of a technical, professional kind . . . and frequently after the meetings, the discussion would be adjourned for beer at Mory's. The other women and I were unable to join the rest of the discussion and . . . [t]hat is how Mory's began to affect me.15

A male professor described experiencing his wife's exclusion from the club:

A poet was visiting Yale and wanted to go to lunch at Mory's . . . . He was actually at Yale at the invitation of my wife, who was also a

12. Special Act No. 72, passed May 13, 1969, read as follows:
Members shall have such rights, privileges and benefits and shall be subject to such rules as the by-laws shall prescribe. They shall not be entitled to vote on any matter and this corporation shall operate under the management of its board of governors, which shall be self-perpetuating . . . . This act shall be valid as an amendment to the articles of said corporation if, within six months after its passage, it shall be accepted by a two-thirds vote of the members of its board of governors . . . .


13. Id.


Recognizing that women would not be complete members of the university community until they could be social equals, student and faculty activists began to agitate for women's inclusion in Mory's membership. Henry "Sam" Chauncey, Secretary of the University and Special Assistant to President Brewster, instructed that all University meetings take place at an alternative venue. Similarly, the Yale Co-op Executive Committee, individual faculty, and students boycotted the club. Student groups organized rallies and protests. The University discovered that Mory's was on the Yale steam line and hinted that it could turn off the club's heat.

The Yale Law School faculty voted to withdraw its business from Mory's until the club changed its membership policy. At the same time, the Yale Law Women's Association wrote a letter to Mory's board to impress upon the board that the time for gender integration at Mory's had come. Margaret M. Ayres, Mary Ellen Gale, and C.F. Muckenfuss wrote, "When all Yale undergraduates were men, naturally all the members of Mory's were men. Now that Yale [College] has admitted women, we think a just respect for tradition should encourage Mory's to do likewise." They emphasized that "in admitting women, Mory's would acknowledge what Yale has acknowledged—that American women are equal students, scholars, and citizens. It would by its action help make the constitutional guarantees of freedom and equality a reality for women at Yale."

Failing to sway the Mory's board with arguments of access and equality, those in favor of gender integration began to contemplate economic leverage and legal routes to entry. Yale Law School Dean Louis Pollak and thirteen others filed a remonstrance with the Connecticut Liquor Control Commission claiming that Mory's was not a private club because it did not permit its members to vote and that the establishment fostered "arbitrary, invidious and capricious discrimination" against women. Deputy Dean of the Law School

16. Id. at 213-15 (testimony of Michael Holahan).
17. Interview with Henry "Sam" Chauncey, supra note 7; see also Letter from Margaret M. Ayres, Yale Law Women's Association, Mary Ellen Gale, Yale Law Women's Association, & C.F. Muckenfuss III, Executive Secretary, Yale Seminars in Modern Journalism, to the Members of the Board of Governors, The Mory's Association, Inc. (May 5, 1971) (on file with author) [hereinafter Letter from Ayres, Gale & Muckenfuss].
18. See Letter from Ayres, Gale & Muckenfuss, supra note 17.
19. Interview with Donna Diers, former Mory's Board of Governors Member and former Dean of The Yale Nursing School, New Haven, Conn. (Mar. 17, 2002) [hereinafter Interview with Donna Diers].
22. Id.
23. Id.
Burke Marshall, who could not sign the remonstrance because he was not a New Haven resident, filed a letter in its support. 24

After a tense public hearing held on September 30, 1971, the Liquor Control Commission, by a two-to-one vote, revoked Mory's club liquor permit. 25 The Commission found that the Mory's Association was "not ... a club within the purview of the Liquor Control Act," 26 and that the Association "operate[d] a liquor club business in a discriminatory manner in that women [were] denied the use of the permit premises." 27 The Commission grounded its revocation of the liquor permit in several state statutes, which prohibited any state agency from "becom[ing] a party to any agreement, arrangement or plan which has the effect of sanctioning discriminatory practices," 28 and prescribed that each state agency "take such appropriate action in the exercise of its licensing or regulatory power as will assure equal treatment of all persons and eliminate discrimination." 29

Reaction to the Commission's ruling was mixed, underscoring the generational difference in perspectives on gender integration at the University, and specifically of including women at Mory's. The New Haven Journal-Courier reported one young man's comments: "What do you mean they won't serve women? They've been serving minors for years." Mory's elder patrons were slower to comment.

One rather portly gentleman made a surprisingly quick run for the door when he realized his opinion was being sought. Others gazed with pained expressions and said they just didn't want to talk about it. The wives had absolutely nothing to say. 30

One New Haven Register editorial chastised the opposition to Mory's men-only policy, analogizing the movement to the island of Laputa in Swift's Gulliver's Travels:

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25. In re Daley, Decision of the Liquor Control Comm'n of Conn. 3a (Jan. 27, 1972); see also Mory's 'Poor Little Sheep' Face Dry Future Over Sex Bias Charge, N.Y. TIMES, Feb. 1, 1972, at 33; Shenker, supra note 20; Venoit, supra note 20.

26. In re Daley, Decision of the Liquor Control Comm'n of Conn. 3a. In support of the former violation, the Commission identified evidence that Mory's members did not have the right to vote or to hold elective office on the board of governors, in violation of Connecticut General Statutes, section 30-1(7), and section 30-6-B40 of the Liquor Control Commission Regulations, and that Mory's failed to restrict the service of alcohol to its members and their guests, in violation of section 30-23 of the Connecticut General Statutes. Id. at 5a-7a.

27. Id. at 3a.

28. Id. at 4a.

29. Id. at 4a-5a. Despite these statutes' prohibition of discrimination, the Commission's sole dissenter argued that while "[d]iscrimination in any form is most regrettable[,] nowhere in [the Code of Fair Practice] can I find an affirmative duty and responsibility to utilize the authority of the Liquor Control Commission to revoke or suspend the liquor permit of any private club that practices discrimination." Id. at 10a (Montano, J., dissenting).

30. Venoit, supra note 25, at 17.
The absurdity of the Laputans' behavior results from the application of abstract principles where they do not apply. The Laputans are theory-ridden, and have left all common sense far behind—a fact that Swift symbolizes with their island itself, which flies through the air. And certain unmistakably Laputan features are now beginning to emerge in the life of the Ivy League.

Gulliver himself would be astonished at the behavior of the New Haven Laputans. Mory's after all, celebrated in the famous Whiffenpoof song, is a particular sort of place, and its value lies in its particularity. The application of egalitarian standards would not, surely, destroy it altogether, but would, certainly, eliminate all reason for going there rather than somewhere else.31

To many, gender segregation was part of what made Mory's Mory's, and New Haven's Laputans were threatening to sacrifice the essence of the club for the abstract ideal of gender equality. It is this image of Laputa that stood—or floated—at the heart of the debate over gender integration: What would be lost if women gained entry? Even as women's right to vote, learn, and work was mainstreamed, the notion that women could infiltrate social spaces that had been "uniquely male" was resisted. Even the Liquor Control Commission could not sway Mory's resistance.

This movement for and against gender integration in social spaces coincided with the drive to ratify the Equal Rights Amendment ("ERA").32 Proponents of the ERA took to the streets in Connecticut and elsewhere. In New York, 10,000 gathered in 1970 to celebrate the first Women's Rights Day, commemorating the fiftieth anniversary of women's suffrage and calling for an amendment to the Constitution that would recognize women's equality.33

In 1973, the United States Supreme Court considered the question of equal protection with respect to gender.34 The socio-political climate of intense debate about the constitutional meaning of gender equality was reflected in the ambivalence of the Court. Unable to muster a majority, Justice Brennan's plurality emphasized that

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of

33. Laurie Johnson, 3,000 Heed Call to "Join Us, Sisters!" in March and Rally Here for Equality, N.Y. TIMES, Aug. 26, 1972, at 54 (reporting on the annual rally that drew 3000 in 1972, 6000 in 1971, and 10,000 in 1970).
their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."  

Justice Powell’s concurrence preached restraint in light of the pending ratification of the Equal Rights Amendment.

Introduced at the Seneca Falls convention in 1923, the Equal Rights Amendment passed Congress in 1972, and its grassroots proponents turned to state ratification. In 1972, the Connecticut House refused to ratify the Amendment, promising instead a state ERA to be voted on in 1974. But in response to "heavy lobbying done by women's liberation groups," Connecticut reversed course and the state senate ratified the Amendment by a 27 to 9 vote on March 15, 1973. Reva Siegel writes of social mobilization around the ERA: "During periods of constitutional mobilization, citizens make claims about the Constitution's meaning in a wide variety of social settings. . . . [E]ven when no formal act of lawmaking occurs, constitutional contestation nonetheless plays an important role in transforming understandings about the Constitution's meaning inside and outside the courts." Indeed, in the same year that the Connecticut legislature ratified the ERA, it also created a Permanent Commission on the Status of Women, and added a gender classification to its public accommodations statute.

Two months before the state legislature ratified the ERA, Mory's appealed the Liquor Control Commission ruling to the court of common pleas, which upheld the Commission's finding that Mory's was not operating as a private club, but dismissed its finding of discrimination. Recognizing the tension between principles of equal protection and of private association that continue to complicate constitutional analysis of public accommodations, the court rejected the Liquor Control Commission's equal protection claims under the

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35. Id. at 686.
36. Id. at 692 (Powell, J., concurring) ("The Equal Rights Amendment . . . has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment."); see also Siegel, supra note 4, at 311 ("Frontiero v. Richardson acknowledges that constitutional interpretation is taking place amidst such tumult.").
39. Siegel, supra note 4, at 303.
Fourteenth Amendment and upheld the privacy claims of the Mory's Association, stating that "it is the constitutional right of every person to demand his privacy and whatever private association he desires." In affirming Mory's right to privacy, the court relied on the Supreme Court's then-recent decision in *Moose Lodge No. 107 v. Irvis*, which held that a state liquor permit does not implicate the licensee in "state action." Thus, the court's decision turned on its understanding of the public-private distinction: Mory's was both a drinking establishment facilitated by state license and a "private" club.

The court also rejected the Liquor Control Commission's statutory findings by concluding that the antidiscrimination provisions applied only to the license-issuing state agencies, and not to the licensees. The court noted that while "in many civil rights cases, there is something sinister about the formation of private clubs," there was nothing menacing in the segregation of the Mory's Association because it was the product of history and tradition, rather than contemporary animus:

[*Id.* at 10.]

In 1912, when the plaintiff corporation was organized, it was natural to decide that only males should be members and that these members should have some affiliation with Yale. Since this club has been built and grown around the camaraderie and conviviality of its male members and since the purpose of its formation in 1912 was social intercourse and culture of its members, the State does not have and should not have any involvement with the club activities.... Members... should have the right to associate with, socialize with and reminisce with persons of their choice without the interference of state agencies under the guise of licensing where there is no state involvement.

The court's decision rested on the premise that segregation was once natural and although it had recently fallen into the realm of unnatural, current discrimination that was the mere product of history was untainted by animus and therefore permissible. The decision reflected a legal notion of discrimination on the cusp of transformation, and yet, still clinging to separatism in "private," social spaces. How could harmless male bonding be illegal? The court's decision, therefore, echoed the anti-rationalist norms enunciated in *The New Haven Register* editorial on the New Haven Laputans.

Both parties appealed to the Connecticut Supreme Court: Mory's on its position as a private club and the Liquor Control Commission, joined by the

42. Id. at 10.
44. Id. at 171-77, noted in, Mem. of Decision at 10-11, Daley (No. 88653).
45. Id. at 12.
46. Id. at 13.
remonstrants, on the court’s reversal of the commission’s finding of discrimination. The Connecticut Supreme Court found the revocation of Mory’s liquor license appropriate, and deemed it “unnecessary to consider the cross appeal,” thereby evading the question of discrimination.\(^{47}\)

Mory’s board of governors refused to accept that the local, state, and national movement for gender equality encompassed co-ed private clubs. Following the Connecticut Supreme Court’s decision, Mory’s amended its by-laws to reinstate board elections by the membership and re-applied for a new liquor permit for the club.\(^{48}\) During this time, Mory’s inability to serve liquor resulted in an operating loss of $385 per day, as well as lost revenues from faculty and student boycotts and rising legal costs. Faced with a financial crisis, the board of governors voted to assess its 19,000 members, who were informed that failure to pay the assessments would result in the loss of all membership privileges. The board of governors, however, had lost the pulse of its membership. And Mory’s members had begun to consider their membership not only as a means to fraternity and collegiality, but also as a medium for equal rights advocacy.

Yale Law School Deputy-Dean Burke Marshall, a member of Mory’s, decided that if Mory’s board of governors refused to support women’s inclusion, and if the courts were ambivalent as to the relationship between gender equality and the “private” club, he would speak to the Mory’s board in a language it understood: money. Marshall and Yale Professor Thomas Emerson brought a class action lawsuit against the Association—Emerson on behalf of the 15,000 members who lost their membership rights and privileges “because of their failure to pay one or more assessments imposed without authority by [Mory’s Association] on its membership,” and Marshall on behalf of the sub-class of approximately 4000 members who had paid one or more of the unlawful assessments under the threat of loss of membership.\(^{49}\)

Confronted with the class action lawsuit, the threat of another remonstrance to protest the Association’s re-application for a club liquor permit, and increasing monetary losses, the board of governors adopted the following resolution on March 22, 1974:

RESOLVED: That the counsel for the Association be authorized to offer to the plaintiffs, Professor Burke Marshall and Professor Thomas Emerson, through their attorney, Ms. Kathryn Emmett, an agreement to the effect that this Board will forthwith submit a referendum to all the members of The Mory’s Association, Inc., whether now in good

\(^{47}\) Daley v. Liquor Control Comm’n, 347 A.2d 69, 71 (Conn. 1974).

\(^{48}\) Letter from Herbert L. Emanuelson, Jr., to the Board of Governors, The Mory’s Association, Inc. (Mar. 1, 1974) (on file with author).

standing or not, as to whether or not they wish to have women become eligible for membership in Mory’s, and that, if a majority of those responding indicate that they so wish, this Board will take appropriate action to provide for such membership.\textsuperscript{50}

Herbert L. Emanuelson, Mory’s counsel, presented the resolution to Ms. Emmett, Professor Emerson, and Secretary of the University Henry Chauncey, Jr. at a meeting in Mr. Chauncey’s office and then wrote to the board:

It is fair to state that the offer was quickly rejected. We were advised by Ms. Emmett and her associate counsel that their concern was not at all the continued existence of Mory’s, but rather the issue of discrimination and they felt that to gain membership privileges through these means, assuming a favorable vote on the admission of women, would not be consistent with their objective, which is to compel the Club to admit them through the courts.

There are many considerations which come to mind and I am sure that there are many which will come to yours as we discuss this issue, which is perhaps the most important judgment that any Board of Mory’s has ever been called upon to make. . . . I think it is also safe to say that at some date, whether it be through the adoption by several states of the Equal Rights Amendment to the United States Constitution or by the enactment of a new state statute, clubs will be compelled to admit women regardless of the desires of the membership.\textsuperscript{51}

This exchange is in many ways peculiar. Why would Mory’s members want to force integration through the courts as opposed to a vote of the membership? What does this say about what it means to be a member? Given the lifetime membership policy then in place, it is possible that these members believed a vote would not result in a decision to admit women or that a vote could easily be reversed. It seems these activists wanted the law to prescribe access. Thus, the dispute was as much about the reach of law as about the inclusion of women. The members advocating for women’s inclusion seemed to view their responsibility as members to include bringing in external—legal—order rather than creating inclusive rules from within the organization. Mory’s board, moreover, capitulated in the shadow of a shifting local and national legal order that included the possibility of judicial action, sanctions by the liquor commission, and the ERA ratification process. The Mory’s board

\textsuperscript{50} Memorandum from Herbert L. Emanuelson, to the Board of Governors, The Mory’s Association Inc. 1 ( March 28, 1974) (on file with author) [hereinafter Memorandum from Emanuelson to the Board].

\textsuperscript{51} Id. at 2-4.
elected to, among other things, (1) amend its by-laws to delete the word "male" from the requirements of membership; (2) refund all members who had paid their assessments and reinstate all members to good standing; and (3) "develop a structure which would provide for representation on the Board with members who more closely reflect the views of those who [had] espoused membership for women." The percentage of women board members ultimately arrived at during a two-hour meeting, at the suggestion of Mr. Chauncey, was the percentage of female undergraduates at the College at the time: thirty percent. In return, no remonstrance would be filed regarding the pending liquor application and Professors Emerson and Marshall would withdraw their class action lawsuit. In communicating the proposed settlement to the Mory’s board, Mr. Emanuelson stressed that a failure to comply with its terms would result in the class action litigation, another remonstrance, a public hearing, possible delays in the liquor permit application, and that combined with the current losses of operating without a liquor permit, this would “[q]uite obviously . . . mean the end of the Club.”

Professor Donna Diers, then-Dean of the Yale School of Nursing, recalls sitting in her office one day and getting a phone call from Sam Chauncey “asking me to write a check for thirty dollars to become a member of Mory’s—and would I be on the board?” The three other women to receive that same call were the Honorable Ellen Ash Peters, who had become the first tenured woman professor at the Yale Law School in 1964, and was subsequently the first woman to be appointed Chief Justice of the Connecticut Supreme Court; Josephine Broude, then-Administrative Assistant to the Provost; and Lisa Getman, a member of the first class of women to graduate from Yale College. The four women had never met.

On February 28, 1975, Mory’s and the remonstrants submitted a stipulation of withdrawal to the superior court in Fairfield County. The terms of the withdrawal included the amendment of the by-laws to allow for female membership and the election to the Mory’s Association board of governors of Donna Diers, Lisa Getman, Ellen Ash Peters, and Josephine Broude. The document was silent on the implications of the settlement agreement for future board elections. Mr. Chauncey recalls, however, that the parties agreed on the ratio as an indefinite measure to protect the women’s seats on the board.

On March 30, 1974, the front page of *The New York Times* reported the following:

52. Id. at 2-3.
53. Id. at 3; Interview with Henry “Sam” Chauncey, supra note 7.
54. Memorandum from Emanuelson to the Board, supra note 50, at 3
55. Id. at 4.
56. Interview with Donna Diers, supra note 19.
57. Id.
59. Interview with Henry “Sam” Chauncey, supra note 7.
In a carefully negotiated agreement marking the end of one of the best-known and most-dogged fights to preserve a masculine enclave, advocates of women's rights who had succeeded in getting the restaurant-club's liquor license revoked agreed to call off renewed legal action in return for a promise by the restaurant to admit women to "full-fledged membership."\(^{60}\)

Thus, Mory's was a site of contest between the competing norms of privacy and equality. Its locus on the public-private continuum was determined by interactions between legislatures, courts, and civic participants, against the backdrop of a broader social movement and the changing views of some of its own members. These myriad actors forged the "pathways of meaning\(^{61}\) informing—and informed by—emergent notions of gender equality. But hindsight focuses our lens: The movement for gender integration at Mory's marked a crossroads for state public accommodations laws. The next Part locates the Mory's story in the broader history of public accommodations doctrine and employs the lessons of the New Haven Laputans to reveal how local contest redefined public and private as legal constructs.

III. LOCATING THE NEW HAVEN LAPUTANS IN MODERN PUBLIC ACCOMMODATIONS DOCTRINE

The local movement to transform Mory's reveals the shifting border between notions of private and public. The development of legal doctrine necessitates an on-going balancing of rights in a mesh of myriad interests. Change, like that of Mory's membership, happened because of social mobilization in the shadow of legal rights. But change, like that of Mory's membership, also redefined those rights. The Mory's story marks a crossroad in the doctrine of public accommodations. In order to understand its re-defining of public and private in the context of equal protection, this Part locates the New Haven Laputans in a broader analysis of public accommodations laws. First, it briefly looks back to the origins of state public accommodations statutes, which emerged in the context of race, and explores the relationship between social access, status, and citizenship. Next, it plants the New Haven Laputans in the broader context of local, state, and national advocacy for women's access. In the 1970s, such advocacy for gender integration advanced through economic, legislative, and judicial action. This Part explores how legal meaning changed

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\(^{60}\) Michael Knight, *Women Make Strides: On Bases and Into Mory's*, N.Y. TIMES, Mar. 30, 1974, at 1 (reporting a State Superior Court ruling that "girls must be permitted to play Little League baseball along with boys in New Jersey").

\(^{61}\) In *Text in Contest*, Siegel explains that "[t]hrough pathways of meaning, law can structure social life, even when there are no legal officials present to enforce the law." Siegel, *supra* note 4, at 317-18.
to accommodate honed intuitions about inclusion, and how legal change shifted local boundaries between public and private spaces of social exchange.

Public accommodations doctrine defines the boundary between the right to access and the right to exclude by non-governmental actors. In determining the statutory safeguards against discrimination at Mory's, therefore, we must first consider what constitutes a place of public accommodation. As Nan Hunter has noted, "The question of whether a particular space [i]s deemed a public accommodation ... determine[s] the venues in which integration occur[s]."62 Public accommodations laws were originally defined and refined in the context of discrimination on the basis of race.63 Both legislatures and courts advance the work of public accommodations laws in "eradicat[ing] ... the cancer of discrimination."64 As many state legislatures have amended public accommodations statutes to extend the applicability of these laws to particular groups (for example, women, or gays and lesbians), state courts have read public accommodations statutes dynamically to expand the scope of "places of public accommodations" to myriad establishments.65

Public accommodations laws are predicated on the ability to categorize institutions as "public" or "private." Nan Hunter has noted, however, that "the law has never developed a theory of public accommodations."66 For this reason, there is no bright line between what is and is not a place of public accommodation.67 Chief Justice Rehnquist has recently explained that "[s]tate public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains."68 Indeed,

63. Today there is still no federal public accommodations statute proscribing discrimination on the basis of sex. Although Congress has proscribed gender discrimination in the employment context, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000), and in connection to its spending power, e.g., Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, the two federal public accommodations statutes prohibit discrimination on the basis of race, color, religion, or national origin, see 42 U.S.C. § 2000a (originally Title II of the 1964 Civil Rights Act), and on the basis disabilities, see Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189.
65. This interaction between the legislature and courts is sometimes explicit. In New Jersey, for example, the state courts concluded that "places of public accommodation were not limited to those enumerated in the statute" because the statute, at the time, had employed the word "include" to introduce its list of places of public accommodation. The state legislature subsequently amended the language of the statute to explain "a place of public accommodation" shall include, but not be limited to" in order to emphasize that the enumerated list of places was not comprehensive. Id. at 1208.
66. Nan Hunter quoted a 1968 law review article which stated, "There is no underlying rationale which distinguishes private businesses from public businesses. Legislatures and courts have chosen to lump together whatever businesses they think ought to serve [a given group], without developing any clear-cut theory to justify such inclusions or exclusions." Hunter, supra note 62, at 1614 (quoting Alfred Avins, What is a Place of "Public" Accommodation?, 52 MARQ. L. REV. 1, 68 (1968)).
67. Id. at 1614.
68. Dale, 530 U.S. at 656; see also Hunter, supra note 62, at 1613-14 ("Chief Justice Rehnquist suggests strongly in his opinion for the Court ... that public accommodations laws should stick to their traditional focus on inns, common carriers, and merchants.").
the "generally prevailing view" is that, historically, the common law limited the reach of public accommodations doctrine to innkeepers and others with local monopolies.

Joseph Singer rattled this settled conception of the common law, however, in his sweeping history of eighteenth- and nineteenth-century public accommodations doctrine. Singer delved into the history of the public accommodations doctrine to suggest that the common law doctrine initially imposed a duty to serve on all businesses, but the White supremacist agenda during and after the Civil War redefined a narrowed scope for public accommodations. Singer tracked the evolution of public accommodations


70. In 1904, Bruce Wyman provided a four-part theory for the vision of public accommodations that extends only to innkeepers and common carriers: (1) these were the predominant local monopolies; (2) they operated under license from the state and, therefore, were most akin to state action; (3) they implicated the right to travel; and (4) they provided a necessary service. See Singer, supra note 69, at 1292-93 (discussing Bruce Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 HARV. L. REV. 156 (1904)). The 1964 Federal Public Accommodations Act essentially incorporated this understanding of the common law when it prohibited discrimination on the basis of race by innkeepers and common carriers, as well as gas stations, restaurants, and places of entertainment. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000(a) (2000); see also Singer, supra note 69, at 1291 (stating that the Federal Public Accommodations Law "simply ratified the common-law rule requiring public service by innkeepers and common carriers").

71. Singer, supra note 69. Singer expounded on the "deep flaws" in Wyman's thesis, discussed supra,

(1) The monopoly justification. - First, Wyman provides no historical evidence of any kind that smiths and surgeons were more likely to be local monopolists than were carpenters or local stores, especially outside of urban areas. Small towns are likely to have a lack of competition in a variety of areas. Nor does he explain why innkeepers and common carriers retain duties to serve the public even when competition exists.

(2) The franchise theory. - Second, Wyman does not take cognizance of the fact that in the antebellum era, most trades operated under license from the state. If the franchise or permit from the government is the crucial fact, this does not differentiate common carriers and innkeepers from other actors in either Britain or the United States. Many different actors were required to obtain permits from the state in both countries. Moreover, it is not historically accurate to say that licenses created a duty to serve when they granted franchises or monopolies. Inns had a duty to serve even though Boston, for example, had dozens of inns. The franchise theory therefore cannot differentiate common callings from private business.

(3) The public function theory. - Third, the notion of the public sphere and what businesses operated in the public interest was quite different in the antebellum era than in the classical era. Wyman read back into history the views of the public-private distinction prevalent in his time, therefore misreading the older law. Businesses other than innkeepers and common carriers were conceptualized as engaged in public functions in the antebellum period.

(4) The necessity theory. - Fourth, many stores that do not fit into the classical category of "public service companies" provide necessities. Yet even if they were local monopolies, they were exempt from the duty to serve under Wyman's theory and under prevailing law at the time he wrote.

Id. at 1408 (citation omitted).

72. As Singer wrote, the narrow range of businesses with duties to serve the public under both current common law and the 1964 federal statute do not reflect the common law as it has existed from time immemorial. Before the Civil War, it was not at all clear that only innkeepers and common carriers had a duty to serve the public; the extent and character of the duty to serve the public was not fixed in stone. Although the law was ambiguous, there is a substantial argument that the duty to serve the public extended to all businesses that held themselves out as open to the public. Only around the time of the Civil War did this rule begin formally to narrow, and only after the Civil War, when civil rights were extended to African-Americans for the first
doctrine from a "general right to access" to a "general right to exclude," which developed in response to fear of racial equality. By broadening and narrowing the scope of public accommodations laws, state legislatures and courts controlled the status of racial minorities in civil society.\textsuperscript{73} The federal government and judiciary also employed public accommodations doctrine to extend and limit the reach of equal protection under the U.S. Constitution. Congress passed the first public accommodations statute in 1875; the United States Supreme Court held the statute unconstitutional in \textit{The Civil Rights Cases} in 1883.\textsuperscript{74} In these cases, the Supreme Court bifurcated notions of liberty into "civil" and "social" rights, and concluded that only the former were protected under the Constitution.\textsuperscript{75} The Court parsed "fundamental rights which are the essence of civil freedom" from "the social rights of men and races in the community" and concluded that while infringing on the former violated the Constitution, breaches of the latter were merely "ordinary civil injur[ies]."\textsuperscript{76}

After \textit{The Civil Rights Cases}, eighteen states adopted state public accommodations statues and "most copied verbatim from the text of the 1875 Act."\textsuperscript{77} Thus, Hunter has noted that "this core set of state public accommodations statutes literally grew out of debates over the scope of an individual's civil rights as a citizen. There is a very particular and direct relationship between prohibitions on discrimination in public accommodations..."

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Singer, supra note 69, at 1294-95.

\textsuperscript{73} Id. at 1295 ("The courts did not do this in order to free property owners from government regulation; on the contrary, Jim Crow laws represented both an expansive and an expensive regulatory system. Rather, the replacement of a general right of access with a general right to exclude redistributed property rights in order to promote a racial caste system.") (footnote omitted).

\textsuperscript{74} 109 U.S. 3 (1883); see also Singer, supra note 69, at 1299. The 1875 Act was passed under the Thirteenth and Fourteenth Amendments. In \textit{The Civil Rights Cases}, the Court explicitly refused to reach the question of whether a federal public accommodations statute would be constitutional if passed under the Commerce Clause. 109 U.S. at 19 ("[W]hether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view."). For this reason, Title II of the Civil Rights Act of 1964 was passed under the Commerce Clause, and the Court held the statute constitutional in \textit{Heart of Atlanta Motel, Inc. v. United States}, 379 U.S. 241 (1964). See Singer, supra note 69, at 1399-1400.

\textsuperscript{75} See Hunter, supra note 62, at 1619 ("In its Thirteenth Amendment analysis, the Court in the Civil Rights Cases staked out the boundaries of the political and the social realms."); Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 STAN. L. REV. 1111 (1997).

\textsuperscript{76} \textit{The Civil Rights Cases}, 109 U.S. 3, 22-24 (1883). Reva Siegel has explained that "grant[ing] the newly emancipated slaves 'civil' rights, yet den[y]ing them 'social' rights, rationaliz[ed] miscegenation laws and segregation as preserving associational liberty, rather than racial hierarchy." Siegel, supra note 75, at 1111; see also Hunter, supra note 62, at 1619-20 (discussing this language in \textit{The Civil Rights Cases}).

\textsuperscript{77} Hunter, supra note 62, at 1620.
Moreover, the civil-social dichotomy articulated in *The Civil Rights Cases* limited the reach of the 1964 Federal Public Accommodations Act. Because the statute was passed under the Commerce Clause rather than the Thirteenth or Fourteenth Amendments, it could implicate only those establishments that affected interstate commerce. For this reason, Hunter identified the 1964 Act as a "doctrinal hangover from the civil versus social rights ideology that Congress could not cure because of the Civil Rights Cases and that the Supreme Court has never repudiated."79

Because state public accommodations laws need not relate to commerce (and indeed, cannot regulate interstate commerce), achievement of social equality—such as that advanced by gender integration at Mory's—is open to the states. Thus, when Congress failed to legislate against sex discrimination in public accommodations, women's rights activists in the early 1970s turned their lobbying efforts to state legislatures.80 In Connecticut, these activists, some of whom were likely connected to Yale, succeeded in 1973 in lobbying the Connecticut General Assembly to prohibit discrimination on the basis of sex in public accommodations.81 At the time, however, it was not clear whether Mory's would fall under the statute. Was Mory's a private space or a place of public accommodation? Into this battle over the construct of public and private entered the New Haven Laputans.

The mobilization for women's access to Mory's recast the terms of the local debate on how the reach of social rights could perpetuate status hierarchy or advance true equality. Recall the words of Assistant Dean Elga Ruth Wasserman: "[M]y colleagues would adjourn to Mory's, and as a woman, I was not part of the lunch,"82 or those of Professor Susan Holahan: "[F]requently after the [faculty] meetings, the discussion would be adjourned for beer at Mory's. The other women and I were unable to join the rest of the discussion and .... [t]hat is how Mory's began to affect me."83 These women's testimonies revealed that sex discrimination by the private club prevented women's access to professional discourse. Moreover, they identified a "public" quality to this discourse and social networking. At stake was a social exchange that translated to economic capital in the form of professional capabilities and networks. As Nan Hunter wrote,

78. Id.
79. Id. at 1624.
80. See id. ("Because sex discrimination was not included as part of the federal public accommodations law, women's rights advocates turned to state legislatures for a remedy. By the late 1970s, twenty-six of the existing thirty-nine state public accommodations statutes had been amended to add sex as a prohibited basis for discrimination."). Today, forty-two states and the District of Columbia have public accommodations statutes that proscribe discrimination on the basis of sex. Id. at 1615.
82. Hearing Before the Liquor Control Comm'n, supra note 14, 110-11 (testimony of Elga Ruth Wasserman).
83. Id. at 214-15 (testimony of Susan R.L. Holahan).
Women as a group were not excluded from, or segregated in, their participation in American life as consumers the way that African-Americans had been. Indeed, if anything, they were celebrated for consumption. In cases brought by women, the targets shifted from nominally public businesses with racialized practices to nominally private entities that functioned as sites for the informal exchange of social and economic capital.84

The New Haven Laputans understood that equality was predicated on access to spaces that were central to social exchange. As the Yale Law Women wrote in their letter to Mory's board of governors, "in admitting women, Mory's would acknowledge what Yale has acknowledged—that American women are equal students, scholars, and citizens. It would by its action help make the constitutional guarantees of freedom and equality a reality for women at Yale."85 These students of law employed legal notions of freedom and equality, but changed the meaning of these words by deeming them salient with respect to gender discrimination by the private club. Mory's governors ultimately capitulated, not because they personally believed that Mory's status as a private space had changed, but because they feared that the law would evolve to eviscerate their understanding of associational privacy. On the eve of the board's decision to settle the dispute, Mory's attorney wrote the following: "I think it is . . . safe to say that at some date, whether it be through the adoption by several states of the Equal Rights Amendment to the United States Constitution or by the enactment of a new state statute, clubs will be compelled to admit women regardless of the desires of the membership."86 The decision to admit women was made in the context of shifting legal meaning and social mobilization to redefine nominally private spaces that created public capital.

The Mory's story, therefore, illustrates a turning point in state public accommodations doctrine, or a second generation of the right to access. Local social movements changed expectations regarding access, and courts began to read these expectations into legal notions of equality. But women's rights activists pushed the right to access further and implicated associational freedoms in an entirely new way. This struggle between equal rights and associational rights was at the heart of Mory's legal battle. Because this challenge pitted states' rights and interests to eradicate discrimination against individuals' associational rights, the United States Supreme Court ultimately stepped in to consider the competing constitutional claims.

In 1984, the Supreme Court confronted the tension between state nondiscrimination initiatives and associational freedom in Roberts v. United
The Court held that Minnesota's statutory prohibition of discrimination in public accommodations, under which the State compelled the Jaycees to accept women as regular members, did not abridge the male members' rights to intimate association and to expressive association. At issue in Jaycees was not access to Jaycees functions but rather the very meaning of membership. Women had been permitted to participate in the Jaycees, but only as "associate members" who could neither vote nor hold local or national office. Jaycees, therefore, calls into question a policy that limits one's representative capacity by gender. Under the state law, withholding even partial membership rights on the basis of gender was proscribed. Thus, as will become significant below, embedded in Jaycees was the notion that representation is integral to true membership.

Jaycees transformed America's legal understanding of the "private club." The Court identified two types of associational freedoms that chafed against the state's power to mandate nondiscrimination: the right to intimate association and the right to expressive association. The Supreme Court found that the freedom of intimate association inferred from the constitutional protection of personal liberty extended only to a limited type of relationships, "those that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives." The Court distinguished these relationships from other private entities on the grounds that, "Among other things, . . . they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." Jaycees reflected recognition of rights in tension and freedoms as limited rather than absolute. The Court identified a spectrum of relationships with filial ties at one end and employment at the other. Between these extremes, among the "broad range of human relationships that may make greater or lesser claims on constitutional protection from particular incursions by the State," fall the Jaycees and the Mory's Association. Because the Court found the local chapters of the Jaycees to be large and largely unselective, it held that the organization lacked the distinctive traits to raise constitutional claims of private association. The minimal requirements of membership to Mory's are comparable to those of Jaycees membership. There are often more guests than members involved in Mory's dining and drinking, and the club boasts membership in the thousands. Both Jaycees and Mory's, therefore, presented a space for social interaction that challenged conceptions of the private club.

88. Id. at 613.
89. Id. at 619 (internal citations omitted).
90. Id. at 620.
91. Id. at 620.
92. Id. at 621.
While the movement that changed Jaycees resulted in constitutional doctrine sanctioning state nondiscrimination initiatives, that which integrated Mory’s created "constitutional culture" that laid the groundwork for further change in state law.

Responding to the expressive association challenge, the Jaycees Court held that Minnesota’s compelling interest to combat sex discrimination justified the minimal impact forced desegregation might have on the group’s freedom of expressive association. The Court emphasized the expansive definition that had become associated with places of public accommodation and contextualized this understanding in “a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political social integration that have historically plagued certain disadvantaged groups, including women.” The Court identified notions of leadership skills as “goods,” and of business contacts as “privileges” and “advantages.”

Further expanding the scope of the public accommodations doctrine in Board of Directors of Rotary International v. Rotary Club of Duarte, the Supreme Court held that California’s Unruh Act did not violate constitutional protections of associational freedoms in subjecting the Rotary Club to its regulation. California could determine that Rotary had violated the Unruh Act, which prohibited discrimination based on sex in all business establishments, by proscribing women’s membership. Finding the analytical framework of Jaycees dispositive, the Supreme Court held that Rotary Clubs lacked the enumerated qualities that would justify protection of private association to the detriment of the state’s interest in eradicating gender discrimination: Local club memberships ranged from twenty to 900, typical club affiliation fluctuated throughout the year and clubs were encouraged to recruit new members regularly. Rotary’s purpose included the establishment of professional and personal contacts. This networking infrastructure thus presented a public good to which persons had a right irrespective of sex. The Court emphasized, moreover, that inclusion of women would not significantly affect the members’ right to expressive association, and that any minimal infringement resulting

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93. Robert C. Post, The Supreme Court, 2002 Term: Forward: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 HARV. L. REV. 4, 8 (2003) (“We can identify, for example, a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution. I shall call this subset constitutional culture.”) (emphasis added); see also Reva Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV. L. REV. 947, 997 (2002).
95. Id. at 626.
96. Id.
98. Id.
99. Id. at 546.
100. Id. at 546-47.
101. Id. at 549.
from application of the Unrah Act to the Rotary Club was "justified because it serve[d] the State's compelling interest in eliminating discrimination against women." As in Jaycees, and particularly significant in contextualizing the story of Mory's, the Court underscored the type of goods and privileges at stake in Rotary Club membership and reaffirmed the state's interest in making "the acquisition of leadership skills and business contacts as well as tangible goods and services" equally accessible to all.

Most recently, however, the U.S. Supreme Court limited the reach of state public accommodations laws in Boy Scouts of America v. Dale by re-visiting the expressive association prong and concluding that the Boy Scouts of America were exempt from state public accommodations laws because the organization "engages in 'expressive association.'" The five Justice majority concluded that

[A] state requirement that the Boy Scouts retain Dale [a homosexual] as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodation law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodation law.

The Dale Court was careful, however, to distinguish the Boy Scouts from Rotary and Jaycees, recognizing that "States have a compelling interest in eliminating discrimination against women in public accommodation." The majority explained that in Rotary and Jaycees, the organization's expressive purpose was not to oppose gender integration or to disfavor women. Thus, while state public accommodations statutes dictated a change in the composition of these organizations, they did "not materially interfere with the ideas that the organization sought to express."

102. Id.
103. Id.
105. Id. at 648.
106. Id. at 659.
107. Id. at 657.
108. Id. Justice Stevens, writing for the dissent, questioned the salience of this distinction and the legitimacy of the Boy Scouts' anti-homosexuality position as a basis for expressive association. Dale, 530 U.S. at 663 (Stevens, J., dissenting). Justice Stevens emphasized that the Boy Scouts "took no steps prior to Dale's expulsion to clarify how its exclusivity was connected to its expression." Id. at 677. Relying on Rotary and Jaycees, Justice Stevens further distinguished the impact of state antidiscrimination statutes on one of a group's myriad expressive activities, such as "moral straightness" in Dale, from "serious burdens" on the organization's "collective effort on behalf of [its] shared goals." Id. at 683 (alteration in original) (emphasis added) (citing Roberts v. United States Jaycees, 468 U.S. [Vol. 16:241
In defining discrimination as a form of expression, Dale reflects the intuitions of those who opposed integration at Mory's. Recall the editorial equating gender integration at Mory's with changing the island of Laputa:

Mory's, after all, ... [was] a particular sort of place, and its value [lay] in its particularity. The application of egalitarian standards would not, surely, destroy it altogether, but would, certainly, eliminate all reason for going there rather than somewhere else.\(^{109}\)

The author of this editorial expressed concern over sacrificing to equality the unique purchase of the all-male social club. And yet, as the testimonials of women students and professors revealed, exclusion from Mory's prevented women's full-fledged membership in the broader Yale community. To identify male bonding as the expressive purpose of Mory's, therefore, raises the question whether male bonding is an acceptable use of public accommodations where this bonding produces indirect channels to social capital. Rotary and Jaycees held that states could determine that it was not.

Thus, Mory's is a piece of the history of empowerment through access. The Mory's narrative reveals that conceptualizing discrimination as a form of expression changes the way underrepresented groups experience community in elite institutions. And it calls into question the manner in which Dale recast the boundaries between political speech and discriminatory public accommodations. But a closer look at the Mory's story also complicates the doctrine by uncovering discrimination within organizational structures of leadership and governance.

IV. LEADERSHIP AS A PLACE OF PUBLIC ACCOMMODATION

This Part tells the story of social empowerment at Mory's through the eyes of its first women board members, appointed to the board of governors as part of the 1974 settlement, and its current female board members who continue to be elected under a fixed board gender ratio of five women to seven men. The lesson that Mory's first female board members share with the organization's current female board members is that social capital is often derived from collaborative power relationships. A position on the governing board is not only about the opportunity to serve; it is also about the chance to lead, which creates opportunities to earn trust, respect, and a sense of collegiality from others who have risen to positions of power. Thus, if Mory's history taught us

609 (1984)). In Rotary, for example, Stevens noted that "aspect[s] of fellowship" unique to an all male club were not enough to defend the organization's discrimination against women. Id. at 682-83 (internal quotation marks omitted).

that access to informal social clubs translates into a broader sense of citizenship, then the residual board gender quota challenges us to rethink the reach of state public accommodations doctrine.

When we left the story of Mory's, the New Haven Laputans had won women access to the club. Ultimately, it was not the membership of Mory's that prevented gender integration, but the club's board of governors. For this reason, the settlement agreement included a provision that four women would sit on the Mory's board. The first time Professor Donna Diers entered Mory's was to attend her first board meeting. Diers recalled,

It became painfully obvious that this was so painful for some of the men. For some of them, this was the first time they had ever had a business relationship with a woman.... I was on the board for eight years, and there was one board member who at every single board meeting over those eight years would ask me "Now Donna, what does your father do?"110

Similarly, as Judge Ellen Ash Peters noted, "People who did not want us to be there on the surface acted perfectly politely. If you were just looking at the meetings from the outside, you would think this was a perfectly congenial group."111

Unsure of how to navigate their new positions as equals on a board in which they felt like somewhat uncomfortable outsiders, the women decided to meet to discuss their role. Their first task was to uncover the past. Searching through past board meeting minutes, they discovered that the question of women at Mory's had been delegated to a committee: the Committee on Pulchritude.112 Peters remembers her discovery of the Committee as a catalyst to re-conceiving her role on the board:

There was work to be done. On some level, they really didn't understand why women cared so much. The basic question of access, which everyone understands today, was really mystifying to them. Suspension of the liquor license was intolerable; lawsuits about women, they would have fought those to the end.113

No written document dictated the board election format. Diers recalled her own surprise when the first ballots went out slated by gender. Almost thirty years later, like much about Mory's, little has changed in the election procedure: Members continue to receive ballots slated by gender, with instructions to elect a specific number of candidates in each gender category so

110. Interview with Donna Diers, supra note 19.
111. Telephone Interview with the Honorable Ellen Ash Peters (Apr. 15, 2002).
112. Interview with Donna Diers, supra note 19; Telephone Interview with the Honorable Ellen Ash Peters, supra note 111.
113. Telephone Interview with the Honorable Ellen Ash Peters, supra note 111.
as to maintain the set ratio. The fixed gender ratio has gone unchallenged, if not unnoticed.

One female board member recalled a discussion approximately five years ago about whether gender quotas remained a necessary protective measure in board elections: "By the end of the conversation, I was absolutely convinced that [they] did."\footnote{114}{Interview with Anonymous Female Mory's Board Member, supra note 1.} In part, this is because of changes in Mory's membership policy. Until 1972, Yale students and graduates could pay $15 plus tax and become members for life. This meant that life membership was a cheap and easy way to stay connected to Mory's. Yale graduates purchased life memberships as they would other Yale paraphernalia. Today, a life membership costs $2000 plus $200 Connecticut excise tax. Life membership is, thus, an investment, and it is much less appealing for most who frequent Mory's during their time at Yale. Thus, of Mory's current 14,475 members, the vast majority are men whose life membership predates women at Mory's. Life members, all of whom are male, make up 11,052 of the 14,475 members. Of the 11,052 life members, only fifteen purchased this membership after 1972. 11,037 of Mory's 14,475 members joined before women were eligible to become members. For this reason, women today make up only 0.06% of the current membership.\footnote{115}{These figures are based on July 2002 membership information from the Mory's Association, Inc. I am indebted to Robin Soltesz, Controller of the Mory's Association, Inc., for providing me with these data.}

There is no documentation of what initiated this change in the membership policy. The club may have been facing new competition and therefore needed a different revenue stream. Or, when the board of governors realized that it would have to admit women, it may have decided to implement this policy in order to subordinate women's presence in the club. In this way, economic tools served both to open Mory's to women—the threatened loss of its liquor license and the boycott led the club to capitulate—and to keep women an underrepresented minority. Regardless of the catalyst, the result is clear: Mory's remains fixed in an extended state of transition. Within a generation, demographic shifts necessarily will undo the tremendous overrepresentation of men at Mory's. For the time being, however, the membership policy—neutral on its face—continues to undermine the capacity of women to become a significant presence in the club.

Over the years, little has changed with respect to the composition of the board, though there are now five instead of four women board members.\footnote{116}{The board of governors never discussed the changed gender ratio; it just happened. An anonymous current board member explained the modified gender ratio as follows: Although there are no term limits for the board members, board members must be re-elected every three years. Unelected board officers, appointed by the board president, serve along with elected board members. In the late 1990s, one board member was appointed to the office of treasurer. When she became an officer, the board appointed a woman to fill the vacant board governorship. In the following election, however, this seat was included among the seats up for election. Thus, the vacant elected post was twice filled, once
Board members are prominent members of the New Haven business and legal community, past and present leaders of the University, and established members of the management and professional staff of the University. Of the current board officers and elected board members, seven have served since the 1980s or earlier and eight have served since the early 1990s. Board officers are appointed, and past board presidents are invited to sit at board meetings for life. There has never been a female board president or vice president, but the treasurer is a woman.

Women on today's board note that while the election procedure for slated ballots has gone unchanged, the tenor of the board has changed and today's women board members feel they are a part of the governing body, rather than begrudged outsiders. Leadership in Mory's is a responsibility, but it is also a privilege; it is a means by which to earn trust, respect, and a common bond in a small community that takes great pride in its informal traditions and unspoken language of allegiance. Although the board at Mory's may not feed into an overt networking infrastructure, the informal relationships created by board membership translate into intangible advantages at an institution still steeped in tradition. In this sense, the derivatives of leadership might also be classified as "goods," similar to those goods identified in Jaycees and Rotary.

Thus, Mory's presents an important question: How do state public accommodations statutes, like Connecticut's, conceptualize leadership positions? Several state courts, including the Connecticut Supreme Court, have constrained the reach of the public accommodations doctrine by drawing a distinction between receiving goods (through entry) and providing services (through leadership). The first case to distinguish between entry and governance was *Quinnipiac Council, Boy Scouts of America v. Commission on Human Rights and Opportunities*.

In that case, Catherine Pollard applied for the position of scoutmaster for a Boy Scout troop, but was rejected because of her sex. Pollard claimed that the refusal was discrimination in violation of Connecticut's public accommodations law. The Connecticut Supreme Court rejected this claim, however, interpreting the denial of a leadership position as the refusal to receive the service of leadership, rather than a refusal to provide the benefits of leadership. The court stated,

by appointment, and then again by election. The anonymous board member concludes that the seat was "filled twice and none of us noticed, [and I believe] there are only two interpretations of this: either it happened by accident or the then-President knew exactly what he was doing when he slipped an extra [woman onto the board]." While Mory's board meeting minutes and legal papers fail to document the transition from four to five women board members, five women's seats have been preserved at every election since the "accidental" modification of the gender ratio. E-mail from Anonymous Female Member of Mory's Board of Governors to the Author (June 13, 2002) (on file with author). The current five-seat gender quota, however, continues to reserve seven seats for male board members, therefore keeping women board members in the minority.

117. 528 A.2d 352, 360-61 (Conn. 1987).
118. Id..
[A] statute that addresses a discriminatory denial of access to goods and services does not, on its face, incorporate an allegedly discriminatory refusal by an enterprise to avail itself of a claimant's desire to offer services.

Our public accommodation statute... gives no indication that it was intended to encompass the proffer of services within its definition of discriminatory accommodation practices. We therefore conclude that, in denying Catherine Pollard the opportunity to serve as scoutmaster of Boy Scout troop 13, the plaintiff did not deprive her of an "accommodation" as that term is used in our public accommodation statute.119

The view that denying a leadership position is a refusal to accept services was again advanced by a Connecticut court in Ott v. Commission on Human Rights and Opportunities.120 Lynne Ott, who suffered from mental and physical disabilities, applied to serve on the board of directors of the East Central Mental Health Services, Inc. (ECMHS) and was refused. The court relied on the services provided-received dichotomy in rejecting Ms. Ott's complaint: she had failed to claim "that ECMHS ever denied her any services. Rather, the plaintiff claim[ed] that ECMHS denied her the opportunity to be of service to the corporation."121 Connecticut case law, therefore, regards discrimination in leadership as distinct from discrimination in admissions, and finds only the latter proscribed by the state public accommodations law. Connecticut courts are not alone. This view has been adopted and cited with approval in other jurisdictions as well.122

Other courts have evaded the question whether public accommodations laws reach places of leadership. For example, the New Jersey Supreme Court (whose ruling the U.S. Supreme Court overturned in Boy Scouts of America v. Dale) chose to define the question presented in terms of membership rather

119. Id.
121. Id. at *2.
122. See, e.g., Welsh v. Boy Scouts of Am., 787 F. Supp. 1511, 1528 n.26 (N.D. Ill. 1992) (citing Quinnipiac Council for the proposition that "in seeking to become an adult leader, the plaintiff was attempting not to receive goods or services from the Boy Scouts, but to offer her own services to the organization); Curran v. Mount Diablo Council of the Boy Scouts of Am., 29 Cal. Rptr. 2d 580, 599 n.20 (Cal. Ct. App. 1994) ("Actually, what Curran sought was the opportunity to offer his services to the Boy Scouts in the Mt. Diablo Council, another circumstance not covered by the Act. The Unruh Act applies to discrimination by a business establishment made in the course of furnishing goods, services or facilities to its clients, patrons or customers. The denial of an opportunity to offer the volunteer services of a prospective scoutmaster is not a denial of a public accommodation.") (internal citations omitted) (emphasis added), aff'd, 992 P.2d 218 (Cal. 1998). Cf. Barry v. Maple Bluff Country Club, 586 N.W.2d 182, 185-86 (Wis. 1997) (holding that club member had no claim, under public accommodations law, against country club based on allegedly discriminatory make-up of board of directors).
than leadership. At the New Jersey Superior Court, however, one judge dissented from this characterization of the issue. Judge Landau bifurcated the question into "restriction of membership and restriction of leadership." He concluded that while the Boy Scouts was a place of public accommodation that could not restrict membership on the basis of sexual orientation (per the New Jersey statute), the Association could restrict leadership in order to preserve its message as an expressive association. Thus, Judge Landau wrote,

We are told that as many as ninety million boys and men have enjoyed membership in the Boy Scouts since 1910. Surely the Boy Scouts are aware that, statistically, a number of these must have been gay. . . . If [the Boy Scouts'] perception of the immorality of homosexuality is in fact an important part of the Boy Scouts' institutional message to young Scouts, what Jim Dale openly professes and exemplifies clearly flies in the face of that view. When we force the Boy Scouts to permit him to serve as a volunteer leader, we force them equally to endorse his symbolic, if not openly articulated, message.

It is not clear from Judge Landau's brief opinion, however, whether he believed that public accommodations protections extended to the scout leader but that discrimination against this leader was necessary to preserve expressive associational freedom, or whether he believed that the protections stopped at membership.

By phrasing the question in terms of membership rather than leadership, the New Jersey Supreme Court conveniently collapsed leadership into membership. The Connecticut courts' intuition that we should assess leadership differently from membership, however, is certainly correct. Groups are more scrutinizing of and selective in their leaders than in their members, and this is appropriate. The qualities that make a good leader are very different from those that justify participation. And yet, the benefit-received/service-rendered dichotomy is short-sighted. Overlooking the relationship of leadership opportunities to public accommodations undermines the efficacy of the public accommodations doctrine in two ways: It compromises the meaning of membership, and it fails to comprehend that leadership posts not only give services but also provide assets.

First, the capacity not only to be represented but also to represent affects the very meaning of membership. In self-governing institutions—which

123. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1200 (N.J. 1999) ("This case requires us to decide whether [the state public accommodations statute] prohibits Boy Scouts of America from expelling a member solely because he is an avowed homosexual.") (emphasis added).
125. Id. at 294. But see Hunter, supra note 62 (discussing the court's conflation of the messenger and the message).
constitute many of today’s public accommodations—discriminatory access to leadership undermines equal access, for underrepresented groups lack full-fledged membership when they are denied the possibility to participate in defining governance principles, whether in a social club or a corporate board. In Jaycees, the state court ruled that the Jaycees violated the public accommodations statute when the organization refused to allow women as voting members. Even prior to the court ruling, women had been able to participate in Jaycees functions, but they could not enjoy the privileges of full membership. Similarly, women are denied full-fledged membership when their representative capacity is subordinated to that of their male peers. The gender ceiling that maintains fewer women than men on Mory’s board of governors, for example, stymies women’s representative capacity as members of the organization. Extending the protection of state public accommodations statutes to leadership capacities by prohibiting ceilings, therefore, advances a more complete understanding of membership.

Second, the determination whether leadership posts constitute places of public accommodations is both shaped by and constitutive of how we understand the relationship between leadership and public accommodations. In Quinnipiac Council and the other cases that addressed whether positions of leadership are places of public accommodation, the courts interpreted leadership as a service rendered rather than a benefit received. The courts failed to recognize, however, that leadership is also a “good.” Not only is power itself a source of capital, but the social capital derived from participation in a governing body is an intangible asset that flows directly from that capacity. This “accommodation” lies at the heart of Rotary and Jaycees, where the public accommodation denied in exclusionary membership was the intangible: “leadership skills are ‘goods,’ [and] business contacts and employment promotions are ‘privileges’ and ‘advantages’…. Assuring women equal access to such goods, privileges and advantages clearly furthers compelling state interests.” In mischaracterizing leadership as limited to the proffering of services, the state court decisions overlooked the unique advantage that participation on a governing board provides.

126. Democracy Works, a Connecticut public interest organization that seeks to enhance democratic processes by focusing on voting rights and representative government, is currently engaged in two diversity initiatives for governing boards, one focused on state boards and commissions and the other for non-profit boards. See Democracy Works, Diversity Initiatives, at http://www.democracyworkset.org/ (last visited Oct. 19, 2004). Under-representation of women and minorities in positions of power and governance plagues the for-profit sector as well. Catalyst, a nonprofit research and advisory organization for corporate women, published the Census of Women Board Directors of the Fortune 500 in 2003. This Census found that only 13.6% of Fortune 500 board seats were held by women, and only 2.4% were held by women of color. CATALYST, 2003 CENSUS OF WOMEN BOARD DIRECTORS, available at http://www.catalystwomen.org/bookstore/files/fact/WBD03factsheetfinal.pdf (last visited Oct. 19, 2004).

127. Jaycees, 468 U.S. at 626 (alterations in original) (citations omitted); see also Rotary, 481 U.S. at 549.
The advantage of membership to the Mory's board of governors, for example, includes an active role in the informal power structures and social networks of an institution whose rules of engagement remain largely unwritten. As one of Mory's first female board members, Donna Diers, noted,

In some sense Mory's is a silly board; it is not a whole lot more than a restaurant, except that it is in ways that only old universities can concoct. Being on the Mory's board turned out to be an incredibly valuable experience. Sitting with those people and dealing with the trivial issues that we dealt with, but seeing how they thought and what values they came to it with, was incredibly educational. In those days, as a dean, I had to do so many boundary crossings. Mory's was like a graduate education in Yale. Yale is not an easy place to understand and much is not written down. There is something else about the privilege of not only being a Mory's member but also being on the board: you can always get a good table.  

Current board members share this insight into what leadership in Mory's provides. Although women today have access to a broader range of leadership capacities at Yale University and in the broader New Haven community, Donna Diers suggested, "[i]n an interesting way a social club board holds higher potential than other boards for a woman to allow herself as a person to come through." The informality itself fosters relationships of mutual respect and trust, which indirectly and perhaps subconsciously impacts interactions between Mory's board members both inside and outside the boardroom. Recall the confession of a current female board member: "being on the board enables others to see me 'as a regular guy.'"  

Thus, although leadership has been regarded as a service rendered, it is also an asset. Leadership empowers. While some of the goods derived from leadership are tangible, many are not. It is often these assets—trust-building, control-sharing, and acquisition of management skills—that define one's experience in institutions of governance. For this reason, maintaining the distinction between rendering services through governance and receiving services through membership misconceives the nature of both leadership and the practice of governance. That said, leaders rise from the membership. It may be that greater access to membership for women, or even proactive measures such as recruiting women, would foster opportunities for female recognition, development of leadership skills, and voting blocs that could advance women to positions of leadership. This intuition would suggest that if state public accommodations laws remove discriminatory barriers to access, more

128. Interview with Donna Diers, supra note 19.
129. Id.
130. Interview with Anonymous Female Mory's Board Member, supra note 1.
representative leadership would follow. Mory’s, then, presents an anomaly because women will comprise an infinitesimal part of the membership (.06 percent) as long as the membership includes the generation of men who purchased life membership prior to 1972 for only fifteen dollars. This demographic peculiarity, however, provides an opportunity to rethink the public accommodations doctrine in two ways.

First, to the extent that places of public accommodations actively foreclose the capacity of women to sit on governing boards, state public accommodations laws should intervene. As discussed above, the site of leadership constitutes an intangible “place” of public accommodation; or, put differently, leadership constitutes a “good” or “accommodation” within the meaning of these statutes. Extending state public accommodations laws to leadership positions, therefore, better captures both the meaning of membership and the experience of leading or governing. Moreover, it better serves the principles underlying public accommodations laws. Thus, to the extent that Mory’s board’s gender ratio functions as a ceiling on women’s participation on the governing board, the ceiling should be unlawful under these state statutes. Ceilings are unacceptable because they cut against the basic teachings of antidiscrimination norms and cap the possibilities of both women and men. Ceilings also stagnate what otherwise might be an organic rise of female leaders from the membership. If Mory’s election policy mandates that women’s participation on the board remains permanently unequal, the policy is inconsistent with fundamental antidiscrimination principles. Thus, where slated ballots serve as a mandatory ceiling on women’s representation in boards of governance, state public accommodations statutes that proscribe discrimination on the basis of gender should intervene.

But Mory’s board gender ratio also ensures that five seats will be reserved for women on a board that, for the time being, might not have any women members at all. Unpacking this tension provides some insights that should

131. Several state courts have interpreted “places of public accommodations” broadly, to include intangible “locations.” The New Jersey Supreme Court has noted that “In New Jersey, ‘place’ has been more than a fixed location since 1974.” Dale v. Boy Scouts of Am., 734 A.2d at 1209. New York courts have concluded that a “place of public accommodation need not be a fixed location, it is the place where petitioners do what they do.” United States Power Squadrons v. State Human Rights Appeals Bd., 452 N.E. 2d 1199, 1204 (N.Y. 1983). And Minnesota courts have agreed that “a ‘place of public accommodation’ . . . is less a matter of whether the organization operates on a permanent site, and more a matter of whether the organization engages in activities in places to which an unselected public is given an open invitation.” United States Jaycees v. McClure, 305 N.W.2d 764, 773 (Minn. 1981), aff’d, 468 U.S. 609 (1984). Finally, the Connecticut Supreme Court has explained, “public accommodation statutes have repeatedly been amended to expand the categories of enterprises that are covered and the conduct that is deemed discriminatory.” Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm’n of Human Rights & Opportunities, 528 A.2d 352, 357 (Conn. 1987).

132. In this sense, we may see the board gender ratio as an example of a phenomenon that Professor Jack Balkin has labeled “ideological drift.” J. M. Balkin, Ideological Drift, in ACTION AND AGENCY 13 (Roberta Kevelson ed., 1991). Balkin defines “ideological drift” as the “process [by which ideas] are subtly transformed or social context surrounding them so greatly changes that they now serve.
guide us as we begin to navigate the contours of a third wave of state public accommodations laws, which also recognizes the locus of power as a part of the public accommodation at stake. If Mory’s gender ratio is construed as a temporary floor, it may serve the important function of ensuring women’s participation in the leadership of an organization trapped for a time in an artificially extended state of transition. As a temporary floor, the policy enables Mory’s to break its history of gender discrimination, much of which was orchestrated by the board of governors, and provides a temporary fix until demographic changes facilitate greater gender equality in the membership. Construing the board gender ratio as a voluntarily-adopted floor also is consistent with the settlement agreement between the Mory’s board and the remonstrants.

very different interests than they formerly did.” Id. Alternatively, what started out as a protective measure may now prevent increased female representation on the board. 133. Indeed, this is not the only tension that requires careful consideration if we are to embark on this third wave of state public accommodations laws. Extending the reach of public accommodations laws to boards of governors also may exacerbate tensions between non-discrimination and First Amendment principles of expressive association because permitting the law to regulate organizational leadership may prove more invasive than enabling the law to thwart discriminatory access. As the U.S. Supreme Court has recognized, the expressive association doctrine requires a degree of organizational autonomy. From its origins, the expressive association doctrine recognized that the right to associate necessarily includes the right to exclude. In Roberts v. United States Jaycees, the Court carefully scrutinized the fit between the message and those whom the association depicted as unfit messengers. 468 U.S. 609 (1984). The Court held that the association’s “creed of promoting the interests of young men” and participation in various lobbying, fundraising, and ideology-driven social functions did not permit the Jaycees to exclude women. Id. at 627. Women’s presence, the Court concluded, would not distort the group's message. Id. The Court’s analysis could be seen as an inquiry into the fit between exclusion and message.

For a discussion of the liberty-equality dichotomy in the context of the U.S. Supreme Court’s recent Dale decision, see William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 Mich. L. Rev. 2062, 2349 (2002). (“Supporters of the politics of preservation have assailed antidiscrimination laws as intrusions into their liberties, including their First Amendment rights . . . to form expressive associations excluding minority persons.”); Robert Post, Law and Cultural Conflict, 78 Chi.-Kent L. Rev. 485, 503 (2003) (“The logic of congruence, however, is in deep tension with First Amendment rights of expression.”); Madhavi Sunder, Cultural Dissent, 54 Stan. L. Rev. 495, 551 (2001) (“The liberty versus equality paradigm is premised on a thin theory of both liberty and equality.”).

It is worth noting, however, that deference to organizations inevitably means deferring to particular voices within that organization. Thus, the scope we give to the First Amendment protection of expressive association, though critical to enable the group speech act, employs law to privilege particular participants in the process by which the group defines its message. Madhavi Sunder has questioned this juridical allocation of cultural control: “However difficult, cultural boundaries are scalable; legal boundaries are much less so. ‘Law in the domains of culture’ threatens to freeze cultural groups in the status quo and dramatically shift the balance of power between members and leaders of cultural groups over the creation and control of cultural meaning.” Id. at 503 (2001); see also id. at 509 (“As cultural associations become more internally diverse, members and leaders will increasingly appeal to courts to determine a culture’s meaning—increasingly, it will be law, not culture, that regulates a community’s borders and determines how much information, autonomy, and equality individuals within a community will enjoy. . . . The combined regime of law and culture can either promote individual autonomy or retard it.”); Evelyn Brody, Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association, 35 U.C. Davis L. Rev. 821, 857 (2002) (“Needless to say, the Supreme Court has not asked whether organizations collect voices, amplify voices, multiply voices, soften the hard edges and work a compromise, or suppress voice—or all of these at different times or on different issues.”).
As a temporary and voluntary floor, Mory's election policy could present a local analogue to the global move towards "parity." In this sense, the governing board of a small town club provides an interesting space for thinking about gender equality as conceived globally and realized locally. Thus, the Mory's story may suggest that state public accommodations laws can do more than eliminate discriminatory ceilings in governing boards, by permitting associations to adopt temporary and voluntary floors. It is possible, therefore, that places of public accommodations, which constitute a distinct space on the public-private divide, provide a unique opportunity for voluntary experimentation with affirmative action. But the expectation here is that the floor requirement would lapse when the demographic barrier to women's equal membership fades. Thus, the Mory's story does not challenge the intuition that eliminating barriers to membership would lead to opportunities for leadership, absent active discrimination like gender ceilings in boards of governance. It does, however, point to a potential role for voluntarily adopted temporary floors in governing boards, as places of public accommodations ride the tides of transition from discrimination to access. It may be that once greater parity is achieved among the membership, we will discover that access to membership alone does not give rise to a more diverse leadership. Then, we would need to engage in thoughtful discourse on how to assess leadership as distinct from membership and, simultaneously, as a unique "good" or "benefit," consistent

134. Noelle Lenoir writes of the "growing tendency [in Europe] for political parties and even election laws to operate quota systems," which the French have labeled parite. Noelle Lenoir, The Representation of Women in Politics: From Quotas to Parity in Elections, 50 INT'L & COMP. L.Q. 217, 220 (Apr. 2001). As Lenoir has explained, parity "is an operational mechanism set up to ensure that equal access to political responsibility does not remain purely formal but becomes genuinely real." id. at 244-45. A fountainhead in the parity movement, France recently amended its constitution so as to authorize legislation that prescribes that fifty percent of all political party candidates be women; failure to comply results in loss of campaign funding. Charles S. Maier & Jyette Klausen, Introduction: New Perspectives on the Use of Parity Mandates and Quotas to Guarantee Equality Between Men and Women, in HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 8 (Jyette Klausen & Charles S. Maier eds., 2001). Similarly, Norway has a minimum forty percent-sixty gender quota requirement for all publicly-appointed boards, and some have proposed that the regulation extend to boards of all enterprises, public and private. Hege Skjeie, Quotas, Parity, and the Discursive Dangers of Difference, in HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 165-68 (Jyette Klausen & Charles S. Maier eds., 2001). While forty percent serves as a floor in these regulations, however, the quota is not a cap and either gender may exceed the forty percent marker, but not the sixty percent one.

135. There is a critical distinction, however, between state public accommodations laws that permit clubs and associations to adopt such floors, and state laws that would mandate them. The distinction is driven largely by the relationship between state action and federal equal protection jurisprudence, which raises complex questions that exceed the scope of this Article. Nevertheless, it is important to underscore that this Article proposes only that we consider whether state public accommodations statutes should be permissive of voluntary floors. The Mory's story, moreover, provides only one lens through which to look at the dangers and possibilities of this third wave of public accommodations doctrine. The intuitions that spring from the Mory's narrative should be tested in other contexts, and the legal doctrine must be able to accommodate the spectrum of spaces and places that state public accommodations statutes now cover: The more connected a place of public accommodations is to state action, the more that place is likely to fall under the ambit of the Fourteenth Amendment.
with the principles of public accommodations laws. It would be premature, however, to draw this conclusion from the Mory's narrative because the advantages of unhindered access to membership have not yet been achieved.

In the end, the Mory's story raises more questions than answers. It is clear, however, that the current doctrine understates the public good embedded in the opportunity to lead. It also stops short of the promise of full-fledged membership. This Article does not pretend to define the contours of a third generation of state public accommodations laws. Instead, it invites a conversation about the reach of notions of membership, place, and accommodation, with the awareness of how the current doctrine limits the legal meaning of each.

V. CONCLUSION

Mory's history illustrates the interplay between local civic activism, judicial norms, and legislative intervention. Drawing legal meaning from the Mory's narrative multiplies the voices that articulate local legal values. This endeavor is particularly salient in the context of the public accommodations law because such statutes are predominantly conceived of and interpreted at the local and state level.

Interactions like those in the Mory's story changed how women experienced equality and re-envisioned the boundaries of state public accommodations laws. And yet, Mory's board gender quota reveals the limits of public accommodations doctrine as currently conceived. Thus, excavating the history of Mory's uncovers a gap in contemporary public accommodations laws. This Article argued that we must reconceptualize the scope of these laws. To do so, we must recognize that true equality is not only about the right to participate, it is also about the right to lead.

136. Indeed, it hopes to invite future scholarship on the framework by which we should evaluate non-discrimination principles in places of public accommodation as recognized by state law. For example, although some elements of the Title VII framework may serve as helpful analogues, there may be salient reasons for state public accommodations laws to permit greater flexibility than Title VII in enabling clubs and associations to determine the most appropriate means for advancing their voluntary non-discrimination goals.