

COMMENT

**NO DOGS ALLOWED:¹ FREEDOM OF
ASSOCIATION v. FORCED INCLUSION ANTI-
DISCRIMINATION STATUTES AND THEIR
APPLICABILITY TO PRIVATE ORGANIZATIONS**

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I. INTRODUCTION

In the beginning the people created the Constitution, and the states the First Amendment.² And the First Amendment was without “freedom of association” as a right;³ and darkness was upon the face of the Amendment; and the spirit of *NAACP v. Alabama, ex rel. Patterson*⁴ moved upon the face of the Amendment.⁵ And the Supreme Court said let there be a right and there was a right.⁶ And the Supreme Court saw the right, that it was good: and the Supreme Court divided the right and called one part intimate and the other part expressive.⁷

Discrimination is not an *ipso facto*⁸ evil. We, in the course of our daily lives, discriminate. We discriminate in our choice of restaurants. We discriminate in the style of clothes we wear. We discriminate in who we choose to have as friends. It is this last kind of discrimination that leads to this Comment. How far does the Constitution and the laws of this country go to protect our right to choose with whom we

1. See *SNOOPY, COME HOME* (Lee Mendelson Film Productions, Inc. and Sopwith Productions, Inc. 1972). This title was chosen because of the secondary story line “No Dogs Allowed.” Snoopy was denied admission to a beach, library, bus, train, hospital, yard, and the apartment building of his old owner because he is a dog.

2. See U.S. CONST. preamble; see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

3. See *id.*

4. 357 U.S. 449 (1958).

5. *Id.*

6. See *id.*

7. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

8. See *BLACK’S LAW DICTIONARY* 339 (Pocket ed. 1996) (defining *ipso facto* as “by the fact itself”).

associate? On the other side of the question, how far do these laws go to protect us from invidious discrimination?

This Comment will focus on fraternal, social, and business-related types of organizations. The types of discrimination most commonly found to be institutionalized by these organizations are based on sex, the belief in a God or a supreme being,⁹ and sexual orientation.¹⁰ This Comment will not discuss the right of free association of religious organizations or country clubs.¹¹

The specific right to be analyzed is not the freedom *to* associate but the freedom *not to* associate.¹² The U.S. Supreme Court in *Roberts v. United States Jaycees*,¹³ stated that the freedom not to associate is plainly presupposed from the freedom of association.¹⁴ Currently, the law is not settled in this area because the courts have been inconsistent in both their holdings and analyses of these cases.¹⁵ The main failure is in the definition of “public accommodation” and the “private club exemption.”¹⁶ The Supreme Court has declined to set a bright-line rule.¹⁷ The best solution is to adopt Justice O’Connor’s test from her concurring opinion in *Roberts*.¹⁸

9. See BOY SCOUTS OF AMERICA, BOY SCOUT HANDBOOK 9 (11th ed. 1998); Masonic Information Center., MASONIC SERVICE ASSOCIATION, WHAT’S A MASON? 8 (John W. Boettjer ed., n.d.).

10. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1202 (N.J. 1999).

11. See Nancy Kamp, Comment, *Gender Discrimination at Private Golf Clubs*, 5 SPORTS LAW. J. 89 (1998) (providing more information on country clubs); Sharon Swaim, Note, *Forcing Open the Doors of Private Clubs: Warfield v. Peninsula Golf & Country Club—Did the Court Go Too Far?*, 30 U.C. DAVIS L. REV. 909, 909-10 (1997) (providing more information on country clubs).

12. See *Roberts*, 468 U.S. at 623.

13. 468 U.S. 609 (1984).

14. See *id.* at 623.

15. Compare *Dale*, 734 A.2d at 1202, with *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993).

16. *Roberts*, 468 U.S. at 632 (O’Connor, J., concurring).

17. See *id.*

18. See *id.* at 635-36.

II. BACKGROUND

A. Four Major United States Supreme Court Cases

1. *NAACP v. Alabama, ex rel. Patterson*¹⁹

In *Patterson*, the circuit court granted an injunction prohibiting the NAACP from conducting further activities within the state.²⁰ Alabama sought to compel the NAACP to produce a list of all its members in the state.²¹ The NAACP refused and was found in civil contempt, with the fine set at one hundred thousand dollars if compliance was not forthcoming.²²

The U.S. Supreme Court, in finding freedom to engage in association,²³ said that “whatever interest the state may have in obtaining names of ordinary members has not been shown to be sufficient to overcome petitioner’s constitutional objections to the production order.”²⁴

2. *Roberts v. United States Jaycees*²⁵

In *Roberts*, the United States Jaycees’ national organization threatened to revoke the charters of the Minneapolis and St. Paul chapters for violating the national bylaws by admitting women as regular members.²⁶ After receiving notification, the members of the two chapters filed charges of discrimination with the Minnesota Department of Human Rights.²⁷ The Minnesota Supreme Court held that the Jaycees met the definition of a place of public accommodation.²⁸ The U.S. Supreme Court analyzed the Jaycees’ freedom of association under two theories: intimate and expressive association.²⁹ The Court held, under the intimate association theory, that the “Jaycees [sic] chapters lack the distinctive characteristics that might afford constitutional protection to

19. 357 U.S. 449 (1958).

20. *See id.* at 452-53.

21. *See id.*

22. *See id.* at 451, 453-54.

23. *See id.* at 466.

24. *Id.* at 465.

25. 468 U.S. 609 (1984).

26. *See id.* at 614.

27. *See id.*

28. *See id.* at 616.

29. *See id.* at 618.

the decision of its members to exclude women.”³⁰ Under the expressive association theory, the Court found that the state’s interest in eliminating invidious discrimination outweighed the Jaycees’ interest in freedom of association.³¹

3. *Board of Directors of Rotary International v. Rotary Club*³²

In *Board of Directors of Rotary International*, Rotary International revoked the charter of the Duarte club for admitting three women into “active” membership in violation of the national constitution.³³ The Duarte Club and two of the female members brought suit in the California Superior Court for the County of Los Angeles. Rotary International prevailed at the trial level, but the decision was reversed in the California Court of Appeals.³⁴ The United States Supreme Court affirmed the decision of the California Court of Appeals.³⁵ The Court, using the analysis set forth in *Roberts*, said, “the relationship among Rotary Club members [was] not the kind of intimate or private relation that warrants constitutional protection,” and held that the “application of the Unruh Act to local Rotary Clubs [did] not interfere unduly with the members’ freedom of private association.”³⁶

In its expressive association analysis, the Court said that the “evidence fail[ed] to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members’ ability to carry out their various purposes.”³⁷ Additionally, the Court held that the “application of the Unruh Act to California Rotary Clubs does not violate the right of expressive association afforded by the First Amendment.”³⁸

4. *New York State Club Association v. City of New York*³⁹

In *New York State Club Association*, the City of New York amended a local ordinance to “prohibit discrimination in certain private clubs that [were] determined to be sufficiently ‘public’ in nature that they [did] not fit properly within the exemption for ‘any institution, club or place of

30. *Id.* at 621.

31. *See id.* at 621, 628-29.

32. 481 U.S. 537 (1987).

33. *See id.* at 541.

34. *See id.*

35. *See id.* at 543-44.

36. *Id.* at 546-47.

37. *Id.* at 548.

38. *Id.* at 549.

39. 487 U.S. 1 (1988).

accommodation which is in its nature distinctly private.”⁴⁰ Specifically, the amendment extended the anti-discrimination provisions of the ordinance to any “institution, club or place of accommodation [that] has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.”⁴¹ The New York State Club Association (NYSCA) filed suit, and the trial court upheld the ordinance.⁴² On appeal, the intermediate state appellate court affirmed the trial court’s judgment.⁴³

The NYSCA then appealed the decision to the New York Court of Appeals, which affirmed in a unanimous opinion.⁴⁴ The NYSCA then appealed to the United States Supreme Court, which affirmed the judgment.⁴⁵ The Court stated that the characteristics of being “where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed,” are “significant in defining the nonprivate nature of these associations.”⁴⁶ In conclusion, the Court reasoned that the fact that a “considerable amount of private or intimate association occurs in a setting,” alone, “does not afford the entity as a whole any constitutional immunity to practice discrimination when the government has barred it from doing so.”⁴⁷

B. Federal Protection

Federal protection of both the right of freedom from discrimination and the right of freedom of association is present in two forms: constitutional and statutory.

1. Constitutional

The right to be free from discrimination is guaranteed in the Constitution by the Fourteenth Amendment.⁴⁸ However, this right is limited to state action and does not preclude discrimination by private

40. *Id.* at 5.

41. *Id.* at 6 (citations omitted).

42. *See id.* at 7.

43. *See id.*

44. *See id.*

45. *See id.* at 8.

46. *Id.* at 12 (quoting NEW YORK, N.Y. CODE 63 § 1, App. 15 (1986)).

47. *Id.*

48. *See* U.S. CONST. amend. XIV, § 1.

persons or entities.⁴⁹

As alluded to in the tongue-in-cheek first paragraph of this Comment's introduction, the right to freely associate is not a delineated right in the Constitution.⁵⁰ The United States Supreme Court first identified this right in *Patterson* when it stated:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.⁵¹

To find federal protection against discrimination from private entities and persons and the corresponding exemption for private associations, we must move into the realm of federal statutes.

2. Federal Anti-Discrimination Statute

The Civil Rights Act of 1964⁵² both giveth and taketh-away, so to speak. The Act protects the right to be free from discrimination in places of public accommodation.⁵³ According to the Act, "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."⁵⁴ The Act defines the following as places of public accommodation if their operation affects commerce or if the discrimination is supported by state action:

- (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
- (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the

49. See Daniel L. Schwartz, Comment, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 CAL. L. REV. 2117, 2150 (1987).

50. See *supra* Part I.

51. NAACP v. Alabama, *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (citations omitted).

52. 42 U.S.C.A. § 2000a (West 1994).

53. See *id.*

54. *Id.* 42 U.S.C.A. § 2000a(a).

premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.⁵⁵

The Act protects freedom of association for private organization by expressly excluding them from the Act in subsection (e):

The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.⁵⁶

Since the Act is restricted to entities connected to interstate commerce or state action,⁵⁷ most private organizations would not be affected by it.⁵⁸

The Act also does not proscribe discrimination based on sex or sexual orientation.⁵⁹

C. State Protection State "Anti-Discrimination" Statutes

1. Protected Classes

State anti-discrimination statutes are often broader than the Civil Rights Act of 1964.⁶⁰ A review of the state anti-discrimination acts shows that forty-six states, the District of Columbia and the City of New York currently have "anti-discrimination" statutes⁶¹ identifying thirty-

55. *Id.* 42 U.S.C.A. § 2000a(b).

56. *Id.* 42 U.S.C.A. § 2000a(e).

57. *See id.* 42 U.S.C.A. § 2000a(b).

58. *See id.* 42 U.S.C.A. § 2000a(e).

59. *See id.* 42 U.S.C.A. § 2000a(a).

60. *See* Schwartz, *supra* note 49, at 2124.

61. *See* ALASKA STAT. § 18.80.230 (Michie 1998); ARIZ. REV. STAT. ANN. §§ 41-1441, -1442 (West 1999); ARK. CODE ANN. §§ 16-123-102, -107 (Michie Supp. 1999); CAL. CIV. CODE § 51 (West 1999); COLO. REV. STAT. ANN. § 24-34-601 (West Supp. 1999); CONN. GEN. STAT. ANN. §§ 46a-63, -64, -81d (West 1995); DEL. CODE ANN. tit. 6 §§ 4501, 4502 (1999); D.C. CODE ANN. §§ 1-2502, -2519 (1999); FLA. STAT. ANN. §§ 760.01, .60 (West 1997); HAW. REV. STAT. ANN. §§ 368-1, 489-2, -3 (1999); IDAHO CODE §§ 67-5902, -5909, -5910 (1995); 775 ILL. COMP. STAT. ANN. 5/1-102, -103, 5/5-101 to -103 (West 1993 & Supp. 1999); IND.

one protected classes: age;⁶² ancestry;⁶³ changes in marital status;⁶⁴ childbirth;⁶⁵ birth-related medical conditions;⁶⁶ citizenship status;⁶⁷ class;⁶⁸ color;⁶⁹ creed;⁷⁰ disability;⁷¹ familial status;⁷² family

CODE ANN. § 22-9-1-3 (West Supp. 1999); IOWA CODE ANN. §§ 216.2, 216.7 (West 1994 & Supp. 1999); KAN. STAT. ANN. §§ 44-1002, 1009 (Supp. 1999); KY. REV. STAT. ANN. §§ 344.020, 130 (Michie 1997); LA. REV. STAT. ANN. §§ 49:146, 51.2232 (West Supp. 1999); ME. REV. STAT. ANN. tit. 5 §§ 4553, 4591-4592 (West Supp. 1999); MD. CODE ANN. art. 49B § 5 (Supp. 1999); MASS. GEN. LAWS ANN. ch. 272 §§ 92A, 98 (West 1990 & Supp. 1999); MICH. COMP. LAWS ANN. §§ 37.2102, 2301, 2302a, 2303 (West Supp. 1999); MINN. STAT. ANN. §§ 363.01, 03 (West Supp. 1999); MO. ANN. STAT. §§ 213.010, 065 (West 1996 & Supp. 1999); MONT. CODE ANN. 49-2-101, 304 (1999); NEB. REV. STAT. §§ 20-132, 133 (1997); NEV. REV. STAT. ANN. § 233.010 (Michie 1996); NEV. REV. STAT. ANN. § 651.050, 060, 070 (Michie 1997); N.H. REV. STAT. ANN. § 354-A:2, A:17 (1995 & Supp. 1999); N.J. STAT. ANN. §§ 10:5-3, 5-5 (West Supp. 1999); N.M. STAT. ANN. § 28-1-7 (Michie 2000); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992); NEW YORK, N.Y. CODE § 8-101 (1999); N.C. GEN. STAT. § 99D1 (1992); N.D. CENT. CODE §§ 14-02, 4-01-02 (1997); OHIO REV. CODE ANN. §§ 4112.02-02 (Anderson Supp. 1999); OKLA. STAT. ANN. tit. 25 §§ 1401-1402 (West 1987); OR. REV. STAT. § 30.670, 675 (1987); 43 PA. CONS. STAT. ANN. §§ 953, 954, 955 (West Supp. 1999); R.I. GEN. LAWS §§ 11-24-2, 3 (1994 & Supp. 1999); S.C. CODE ANN. §§ 45-9-10, 20 (Law. Co-op. Supp. 1999); S.D. CODIFIED LAWS § 20-13-1 (Michie 1995); TENN. CODE ANN. §§ 4.21-102, 501 (1998); UTAH CODE ANN. §§ 13-7-2, 3 (1999); VT. STAT. ANN. tit. 9, §§ 4501-4502 (1993); VA. CODE ANN. §§ 2.1-715-716 (Michie Supp. 1999); WASH. REV. CODE ANN. §§ 49.060.030, 040, 9.91.010 (West 1998 & Supp. 1999); W.VA. CODE §§ 5-11-3, 9 (1999); WIS. STAT. ANN. § 106.04 (West Supp. 1999); WYO. STAT. ANN. § 6-9-101 (Michie 1999).

62. See CONN. GEN. STAT. ANN. § 46a-64; DEL. CODE ANN. tit. 6 § 4501; D.C. CODE ANN. § 1-2519; FLA. STAT. ANN. § 760.01; 775 ILL. COMP. STAT. ANN. 5/1-102; IND. CODE ANN. § 22-9-1-3; KY. REV. STAT. ANN. § 344.020; LA. REV. STAT. ANN. § 51.2232; MD. CODE ANN. art. 49B § 5; MICH. COMP. LAWS ANN. § 37.2102; MO. ANN. STAT. § 213.010; MONT. CODE ANN. § 49-2-304; NEV. REV. STAT. ANN. § 233.010; N.H. REV. STAT. ANN. § 354-A:17; NEW YORK, N.Y. CODE § 8-101; N.D. CENT. CODE §§ 14-02, 4-01; OHIO REV. CODE ANN. § 4112.02; OKLA. STAT. ANN. tit. 25 § 1402; 43 PA. CONS. STAT. ANN. § 953; R.I. GEN. LAWS § 11-24-2; TENN. CODE ANN. § 4-21-102; VA. CODE ANN. § 2.1-715; W.VA. CODE § 5-11-3; WIS. STAT. ANN. § 106.04.

63. See ARIZ. REV. STAT. ANN. § 41-1442; CAL. CIV. CODE § 51; COLO. REV. STAT. ANN. § 24-34-601; CONN. GEN. STAT. ANN. § 46a-64; HAW. REV. STAT. ANN. § 368-1; 775 ILL. COMP. STAT. ANN. 5/1-102; IND. CODE ANN. § 22-9-1-3; KAN. STAT. ANN. § 44-1002; ME. REV. STAT. ANN. tit. 5 § 4591; MONT. CODE ANN. § 49-2-304; NEB. REV. STAT. § 20-132; NEV. REV. STAT. ANN. § 233.010; N.J. STAT. ANN. § 10:5-3; N.M. STAT. ANN. § 28-1-7; OHIO REV. CODE ANN. § 4112.02; 43 PA. CONS. STAT. ANN. § 953; R.I. GEN. LAWS § 11-24-2; S.D. CODIFIED LAWS § 20-13-1; UTAH CODE ANN. § 13-7-3; W.VA. CODE § 5-11-3; WIS. STAT. ANN. § 106.04.

64. See ALASKA STAT. § 18.80.230.

65. See VA. CODE ANN. § 2.1-715.

66. See *id.*

67. See NEW YORK, N.Y. CODE § 8-101.

68. See MASS. GEN. LAWS ANN. ch. 272 § 98A.

69. See ALASKA STAT. § 18.80.230 (Michie 1998); ARIZ. REV. STAT. ANN. § 41-1442

responsibilities;⁷³ height/weight;⁷⁴ lawful source of income;⁷⁵ liability

(West 1999); CAL. CIV. CODE § 51 (West 1999); COLO. REV. STAT. ANN. § 24-34-601 (West Supp. 1999); CONN. GEN. STAT. ANN. § 46a-64 (West 1995); DEL. CODE ANN. tit. 6 § 4501 (1998); D.C. CODE ANN. § 1-2519 (1999); FLA. STAT. ANN. § 760.01 (West 1997); HAW. REV. STAT. ANN. § 368-1 (1999); IDAHO CODE § 67-5909 (1995); 775 ILL. COMP. STAT. ANN. 5/1-102 (West Supp. 1999); IND. CODE ANN. § 22-9-1-3 (West Supp. 1999); IOWA CODE ANN. § 216.7 (West 1994); KAN. STAT. ANN. § 44-1002 (Supp. 1999); KY. REV. STAT. ANN. §344.020 (Michie 1997); LA. REV. STAT. ANN. § 51.2232 (West Supp. 1999); ME. REV. STAT. ANN. tit. 5 § 459 (West Supp. 1999); MD. CODE ANN. art. 49B § 5 (Supp. 1999); MASS. GEN. LAWS ANN. ch. 272 § 98 (West 1990); MICH. COMP. LAWS ANN. § 37.2102 (West Supp. 1999); MINN. STAT. ANN. § 363.03 (West 1999); MO. ANN. STAT. § 213.010 (West Supp. 1999); MONT. CODE ANN. § 49-2-304 (1999); NEB. REV. STAT. § 20-132 (1997); NEV. REV. STAT. ANN. § 233.010 (Michie 1996); N.H. REV. STAT. ANN. § 354-A:17 (Supp. 1999); N.J. STAT. ANN. § 10:5-3 (West Supp. 1999); N.M. STAT. ANN. § 28-1-7 (Michie 2000); NEW YORK, N.Y. CODE § 8-101; N.D. CENT. CODE § 14-02.4-01 (1997); OHIO REV. CODE ANN. § 4112.02 (Anderson Supp. 1999); OKLA. STAT. ANN. tit. 25 § 1402 (West 1987); OR. REV. STAT. § 30.670 (1987); 43 PA. CONS. STAT. ANN. § 953 (West Supp. 1999); R.I. GEN. LAWS § 11-24-2 (Supp. 1999); S.D. CODIFIED LAWS § 20-13-1 (Michie 1995); TENN. CODE ANN. § 4-21-102 (1998); UTAH CODE ANN. § 13-7-3 (1999); VT. STAT. ANN. tit. 9, § 4502 (1993); VA. CODE ANN. § 2.1-715 (Michie Supp. 1999); WASH. REV. CODE ANN. § 49.060.030 (West Supp. 1999); W.VA. CODE § 5-11-3 (1999); WIS. STAT. ANN. § 106.04 (West Supp. 1999); WYO. STAT. ANN. § 6-9-101 (Michie 1999).

70. See ARIZ. REV. STAT. ANN. § 41-1442; COLO. REV. STAT. ANN. § 24-34-601; CONN. GEN. STAT. ANN. § 46a-64; DEL. CODE ANN. tit. 6 § 4501; IOWA CODE ANN. § 216.7; LA. REV. STAT. ANN. § 51.2232; MD. CODE ANN. art. 49B § 5; MASS. GEN. LAWS ANN. ch. 272 § 98; MINN. STAT. ANN. § 363.03; MONT. CODE ANN. § 49-2-304; NEV. REV. STAT. ANN. § 233.010; N.H. REV. STAT. ANN. § 354-A:17; N.J. STAT. ANN. § 10:5-3; NEW YORK, N.Y. CODE § 8-101; 43 PA. CONS. STAT. ANN. § 953; S.D. CODIFIED LAWS § 20-13-1; TENN. CODE ANN. § 4.21-102; VT. STAT. ANN. tit. 9, § 4502; WASH. REV. CODE ANN. § 49.060.030.

71. See ALASKA STAT. § 18.80.230; ARK. CODE ANN. § 16-123-107 (Michie Supp. 1999); CAL. CIV. CODE § 51; COLO. REV. STAT. ANN. § 24-34-601; CONN. GEN. STAT. ANN. § 46a-64; DEL. CODE ANN. tit. 6 § 4501; D.C. CODE ANN. § 1-2519; FLA. STAT. ANN. § 760.01; HAW. REV. STAT. ANN. § 368-1; 775 ILL. COMP. STAT. ANN. 5/1-102; IND. CODE ANN. § 22-9-1-3; IOWA CODE ANN. § 216.7; KAN. STAT. ANN. § 44-1002; KY. REV. STAT. ANN. § 344.020; LA. REV. STAT. ANN. § 51.2232; ME. REV. STAT. ANN. tit. 5 § 459; MD. CODE ANN. art. 49B § 5; MASS. GEN. LAWS ANN. ch. 272 § 98; MINN. STAT. ANN. § 363.03; MO. ANN. STAT. § 213.010; MONT. CODE ANN. § 49-2-304; NEV. REV. STAT. ANN. § 233.010; N.H. REV. STAT. ANN. § 354-A:17; N.M. STAT. ANN. § 28-1-7; NEW YORK, N.Y. CODE § 8-101; N.D. CENT. CODE § 14-02. 4-01; OHIO REV. CODE ANN. § 4112.02; OKLA. STAT. ANN. tit. 25 § 1402; 43 PA. CONS. STAT. ANN. § 953; R.I. GEN. LAWS § 11-24-2; S.D. CODIFIED LAWS § 20-13-1; VA. CODE ANN. § 2.1-715; WASH. REV. CODE ANN. § 49.060.030; W.VA. CODE § 5-11-3; WIS. STAT. ANN. § 106.04.

72. See D.C. CODE ANN. § 1-2519; KY. REV. STAT. ANN. § 344.020; MICH. COMP. LAWS ANN. § 37.2102; MO. ANN. STAT. § 213.010; 43 PA. CONS. STAT. ANN. § 953; W.VA. CODE § 5-11-3; WIS. STAT. ANN. § 106.04.

73. See D.C. CODE ANN. § 1-2519.

74. See MICH. COMP. LAWS ANN. § 37.2102.

75. See CONN. GEN. STAT. ANN. § 46a-64; D.C. CODE ANN. § 1-2519; N.D. CENT. CODE § 14-02.4-01; WIS. STAT. ANN. § 106.04.

for service in the armed forces of the United States;⁷⁶ marital status;⁷⁷ matriculation;⁷⁸ military status;⁷⁹ national origin;⁸⁰ parenthood;⁸¹ personal appearance;⁸² place of business;⁸³ place of residence;⁸⁴ political affiliation;⁸⁵ pregnancy;⁸⁶ race;⁸⁷ religion;⁸⁸ serious medical condition;⁸⁹

76. See N.J. STAT. ANN. § 10:5-3 (West Supp. 1999).

77. See ALASKA STAT. § 18.80.230 (Michie 1998); COLO. REV. STAT. ANN. § 24-34-601 (West Supp. 1999); CONN. GEN. STAT. ANN. § 46a-64; DEL. CODE ANN. tit. 6 § 4501 (1999); D.C. CODE ANN. § 1-2519 (1999); FLA. STAT. ANN. § 760.01 (West 1997); 775 ILL. COMP. STAT. ANN. 5/1-102 (West Supp. 1999); MD. CODE ANN. art. 49B § 5 (Supp. 1999); MICH. COMP. LAWS ANN. § 37.2102; MINN. STAT. ANN. § 363.03 (West 1999); MONT. CODE ANN. § 49-2-304 (1999); N.H. REV. STAT. ANN. § 354-A:17; N.J. STAT. ANN. § 10:5-3 (West Supp. 1999); NEW YORK, N.Y. CODE § 8-101; N.D. CENT. CODE § 14-02.4-01; OR. REV. STAT. § 30.670 (1987); VT. STAT. ANN. tit. 9, § 4502 (1993); VA. CODE ANN. § 2.1-715 (Michie Supp. 1999); WIS. STAT. ANN. § 106.04.

78. See D.C. CODE ANN. § 1-2519.

79. See 755 ILL. COMP. STAT. ANN. 5/1-102.

80. See ALASKA STAT. § 18.80.230; ARIZ. REV. STAT. ANN. § 41-1442 (West 1999); ARK. CODE ANN. § 16-123-107 (Michie Supp. 1999); CAL. CIV. CODE § 51 (West 1999); COLO. REV. STAT. ANN. § 24-34-601; CONN. GEN. STAT. ANN. § 46a-64; DEL. CODE ANN. tit. 6 § 4501; D.C. CODE ANN. § 1-2519; FLA. STAT. ANN. § 760.01; IDAHO CODE § 67-5909 (1995); 775 ILL. COMP. STAT. ANN. 5/1-102; IND. CODE ANN. § 22-9-1-3 (West Supp. 1999); IOWA CODE ANN. § 216.7 (West 1994 and Supp 1999); KAN. STAT. ANN. § 44-1002 (Supp. 1999); KY. REV. STAT. ANN. § 344.020 (Michie 1997); LA. REV. STAT. ANN. § 51.2232 (West Supp. 1999); ME. REV. STAT. ANN. tit. 5 § 4591 (West Supp. 1999); MD. CODE ANN. art. 49B § 5; MASS. GEN. LAWS ANN. ch. 272 § 98 (West 1990); MICH. COMP. LAWS ANN. § 37.2102; MINN. STAT. ANN. § 363.03; MO. ANN. STAT. § 213.010 (West Supp. 1999); MONT. CODE ANN. § 49-2-304; NEB. REV. STAT. § 20-132 (1997); NEV. REV. STAT. ANN. § 233.010 (Michie 1996); N.H. REV. STAT. ANN. § 354-A:17; N.J. STAT. ANN. § 10:5-3 (West Supp. 1999); N.M. STAT. ANN. § 28-1-7 (Michie 2000); NEW YORK, N.Y. CODE § 8-101; N.C. GEN. STAT. § 99D1 (1992); N.D. CENT. CODE § 14-02.4-01; OHIO REV. CODE ANN. § 4112.02 (Anderson 1998 & Supp. 1999); OKLA. STAT. ANN. tit. 25 § 1402 (West 1987); OR. REV. STAT. § 30.670; 43 PA. CONS. STAT. ANN. § 953 (West Supp. 1999); S.C. CODE ANN. § 45-9-10 (Supp. 1999); S.D. CODIFIED LAWS § 20-13-1 (Michie 1995); TENN. CODE ANN. § 4-21-102 (1998); UTAH CODE ANN. § 13-7-3 (1999); VT. STAT. ANN. tit. 9, § 4502; VA. CODE ANN. § 2.1-715; WASH. REV. CODE ANN. § 49.060.030 (West Supp. 1999); W.VA. CODE § 5-11-3 (1999); WIS. STAT. ANN. § 106.04; WYO. STAT. ANN. § 6-9-101 (Michie 1999).

81. See ALASKA STAT. § 18.80.230.

82. See D.C. CODE ANN. § 1-2519.

83. See *id.*

84. See *id.*

85. See *id.*

86. See ALASKA STAT. § 18.80.230; VA. CODE ANN. § 2.1-715 (Michie Supp. 1999).

87. See ALASKA STAT. § 18.80.230; ARIZ. REV. STAT. ANN. § 41-1442 (West 1999); ARK. CODE ANN. § 16-123-107 (Michie 1999); CAL. CIV. CODE § 51 (West 1999); COLO. REV. STAT. ANN. § 24-34-601 (West Supp. 1999); CONN. GEN. STAT. ANN. § 46a-64 (West 1995); DEL. CODE ANN. tit. 6 § 4501 (1998); D.C. CODE ANN. § 1-2519; FLA. STAT. ANN. § 760.60 (West 1997); HAW. REV. STAT. ANN. § 368-1 (1999); IDAHO CODE § 67-5909 (1995); 775 ILL. COMP.

sex;⁹⁰ sexual orientation;⁹¹ and unfavorable discharge from military

STAT. ANN. 5/1-102 (West 1993); IND. CODE ANN. § 22-9-1-3 (West Supp. 1999); IOWA CODE ANN. § 216.7 (West 1994); KAN. STAT. ANN. § 44-1002 (Supp. 1999); KY. REV. STAT. ANN. § 344.020 (Michie 1997); LA. REV. STAT. ANN. § 51.2232 (West Supp. 1999); ME. REV. STAT. ANN. tit. 5 § 4591 (West Supp. 1999); MD. CODE ANN. art. 49B § 5 (Supp. 1999); MASS. GEN. LAWS ANN. ch. 272 § 98 (West 1990); MICH. COMP. LAWS ANN. § 37.2102 (West Supp. 1999); MINN. STAT. ANN. § 363.03 (West 1999); MO. ANN. STAT. § 213.010 (West Supp. 1999); MONT. CODE ANN. § 49-2-304 (1999); NEB. REV. STAT. § 20-132 (1997); NEV. REV. STAT. ANN. § 233.010 (Michie 1996); N.H. REV. STAT. ANN. § 354-A:17 (Supp. 1999); N.J. STAT. ANN. § 10:5-3 (West Supp. 1999); N.M. STAT. ANN. § 28-1-7 (Michie 2000); NEW YORK, N.Y. CODE § 8-101 (1999); N.C. GEN. STAT. § 99D1 (1992); N.D. CENT. CODE § 14-02.4-01 (1997); OHIO REV. CODE ANN. § 4112.02 (Anderson Supp. 1999); OKLA. STAT. ANN. tit. 25 § 1402 (West 1987); OR. REV. STAT. § 30.670 (1987); 43 PA. CONS. STAT. ANN. § 953 (West Supp. 1999); R.I. GEN. LAWS § 11-24-2 (Supp. 1999); S.C. CODE ANN. § 45-9-10 (Law. Co-op. Supp. 1999); S.D. CODIFIED LAWS § 20-13-1 (Michie 1995); TENN. CODE ANN. § 4-21-102 (1998); UTAH CODE ANN. § 13-7-3 (1999); VT. STAT. ANN. tit. 9, § 4502 (1993); VA. CODE ANN. § 2.1-715 (Michie 1999); WASH. REV. CODE ANN. § 49.060.030 (West Supp. 1999); W.VA. CODE § 5-11-3 (1999); WIS. STAT. ANN. § 106.04 (West Supp. 1999); WYO. STAT. ANN. § 6-9-101 (Michie 1999).

88. See ALASKA STAT. § 18.80.230; ARK. CODE ANN. § 16-123-107; CAL. CIV. CODE § 51; D.C. CODE ANN. § 1-2519; FLA. STAT. ANN. § 760.60; HAW. REV. STAT. ANN. § 368-1; IDAHO CODE § 67-5909; 775 ILL. COMP. STAT. ANN. 5/1-102; IND. CODE ANN. § 22-9-1.3; IOWA CODE ANN. § 216.7; KAN. STAT. ANN. § 44-1002; KY. REV. STAT. ANN. § 344.020; LA. REV. STAT. ANN. § 51.2232; ME. REV. STAT. ANN. tit. 5 § 4591; MASS. GEN. LAWS ANN. ch. 272 § 98; MICH. COMP. LAWS ANN. § 37.2102; MINN. STAT. ANN. § 363.03; MO. ANN. STAT. § 213.010; MONT. CODE ANN. § 49-2-304; NEB. REV. STAT. § 20-132; N.M. STAT. ANN. § 28-1-7; N.C. GEN. STAT. § 99D1; N.D. CENT. CODE § 14-02.4-01; OHIO REV. CODE ANN. § 4112.02; OKLA. STAT. ANN. tit. 25 § 1402; OR. REV. STAT. § 30.670; R.I. GEN. LAWS § 11-24-2; S.C. CODE ANN. § 45-9-10; S.D. CODIFIED LAWS § 20-13-1; TENN. CODE ANN. § 4-21-102; UTAH CODE ANN. § 13-7-3; VA. CODE ANN. § 2.1-715; W.VA. CODE § 5-11-3; WIS. STAT. ANN. § 106.04; WYO. STAT. ANN. § 6-9-101.

89. See N.M. STAT. ANN. § 28-1-7.

90. See ALASKA STAT. § 18.80.230; ARK. CODE ANN. § 16-123-107; CAL. CIV. CODE § 51; COLO. REV. STAT. ANN. § 24-34-601; CONN. GEN. STAT. ANN. § 46a-81d; DEL. CODE ANN. tit. 6 § 4501; D.C. CODE ANN. § 1-2519; FLA. STAT. ANN. § 760.60; HAW. REV. STAT. ANN. § 368-1; IDAHO CODE § 67-5909; 775 ILL. COMP. STAT. ANN. 5/1-102; IND. CODE ANN. § 22-9-1-3; IOWA CODE ANN. § 216.7; KAN. STAT. ANN. § 44-1002; KY. REV. STAT. ANN. § 344.020; LA. REV. STAT. ANN. § 51.2232; ME. REV. STAT. ANN. tit. 5 § 459; MD. CODE ANN. art. 49B § 5; MASS. GEN. LAWS ANN. ch. 272 § 98; MICH. COMP. LAWS ANN. § 37.2102; MINN. STAT. ANN. § 363.03; MO. ANN. STAT. § 213.010; MONT. CODE ANN. § 49-2-304; NEB. REV. STAT. § 20-132; NEV. REV. STAT. ANN. § 233.010; N.H. REV. STAT. ANN. § 354-A:17; N.J. STAT. ANN. § 10:5-3; N.M. STAT. ANN. § 28-1-7; NEW YORK, N.Y. CODE § 8-101; N.C. GEN. STAT. § 99D1; N.D. CENT. CODE § 14-02.4-01; OHIO REV. CODE ANN. § 4112.02; OKLA. STAT. ANN. tit. 25 § 1402; OR. REV. STAT. § 30.670; 43 PA. CONS. STAT. ANN. § 953; R.I. GEN. LAWS § 11-24-2; S.D. CODIFIED LAWS § 20-13-1; TENN. CODE ANN. § 4-21-102; UTAH CODE ANN. § 13-7-3; VT. STAT. ANN. tit. 9, § 4502; VA. CODE ANN. § 2.1-715; WASH. REV. CODE ANN. § 49.060.030; W.VA. CODE § 5-11-3; WIS. STAT. ANN. § 106.04; WYO. STAT. ANN. § 6-9-101.

91. See CONN. GEN. STAT. ANN. § 46a-81d; D.C. CODE ANN. § 1-2519; HAW. REV. STAT.

service.⁹² Most state anti-discrimination statutes affecting private organizations would fall under the heading of public accommodation statutes.⁹³ These public accommodation statutes can generally be categorized into two types: illustrative and descriptive.⁹⁴

2. Illustrative List Statutes

Illustrative list statutes are generally in the form similar to Colorado's statute, which uses an illustrative list of entities to be considered places of public accommodation.⁹⁵

(1) . . . "place of public accommodation" means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theatre, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor.⁹⁶

3. Descriptive Phrase Statutes

Descriptive phrase statutes are generally in a form similar to California's Unruh Civil Rights Act, which uses broader, descriptive phrases such as "[a]ll persons . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."⁹⁷

Like the Civil Rights Act of 1964, twenty-eight state statutes, the District of Columbia, and New York City expressly exempt private

ANN. § 368-1; MASS. GEN. LAWS ANN. ch. 272 § 98; MINN. STAT. ANN. § 363.03; N.J. STAT. ANN. § 10:5-3; NEW YORK, N.Y. CODE § 8-101; R.I. GEN. LAWS § 11-24-2; VT. STAT. ANN. tit. 9, § 4502; WIS. STAT. ANN. § 106.04.

92. See 755 ILL. COMP. STAT. ANN. 5/1-102.

93. See Schwartz, *supra* note 49, at 2124.

94. See *id.* at 2125-26.

95. See COLO. REV. STAT. ANN. § 24-34-601 (West 1999).

96. *Id.*

97. CAL. CIV. CODE § 51 (West 1999).

organizations.⁹⁸ Even in states that do not expressly exempt private organizations, courts may be inclined to find that the exemption is implied.⁹⁹

D. Public Accommodations and Private Club Exemption

Is it a public accommodation? That is the threshold question in a freedom of association case. If an organization is not a public accommodation, then it does not fall within the scope of the “public accommodation” statutes¹⁰⁰ and there is little reason to continue the analysis. The definition of private, therefore, has some importance. Private is defined as “[a]ffecting or belonging to private individuals, as distinct from the public generally.”¹⁰¹ This definition offers little to the courts deciding the cases, the potential plaintiffs trying to determine if they have a case, or the organization trying to determine if it is in violation of the law.

We can move from the dictionary to the statutes for a definition, but the legislators have done us no favors. For example, the Civil Rights Act of 1964 excludes “a private club or other establishment not in fact open to the public,” but provides no further

98. See ARIZ. REV. STAT. ANN. §§ 41-1441, -1442 (West 1999); ARK. CODE ANN. §§ 16-123-102, -107 (Michie Supp. 1999); D.C. CODE ANN. §§ 1-2502, -2519 (1999); FLA. STAT. ANN. §§ 760.01, -60 (West 1997); IDAHO CODE §§ 67-5902, -5909, -5910 (1995); 775 ILL. COMP. STAT. ANN. 5/1-102, -103, 5/5-101 to -103 (West 1993 & Supp. 1999); IOWA CODE ANN. §§ 216.2, 216.7 (West 1994 & Supp. 1999); KAN. STAT. ANN. §§ 44-1002, 1009 (1999 & 1990); KY. REV. STAT. ANN. §§ 344.020, 130 (Michie 1997); LA. REV. STAT. ANN. §§ 49:146, 51.2232 (West Supp. 1999); MICH. COMP. LAWS ANN. §§ 37.2102, 2301, 2302a, 2303 (West Supp. 1999); MONT. CODE ANN. 49-2-101, 304 (1999); NEB. REV. STAT. §§ 20-132, 133 (1997); NEV. REV. STAT. ANN. § 233.010 (Michie 1996); NEV. REV. STAT. ANN. § 651.050, 060, 070 (Michie 1997); N.H. REV. STAT. ANN. § 354-A:2, A:17 (1995 & Supp. 1999); N.J. STAT. ANN. §§ 10:5-3, 5-5 (West Supp. 1999); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992); NEW YORK, N.Y. CODE § 8-101 (1999); N.D. CENT. CODE §§ 14-02, 4-01-02 (1997); OKLA. STAT. ANN. tit. 25 §§ 1401-1402 (West 1987); OR. REV. STAT. § 30.670, 675 (1987); 43 PA. CONS. STAT. ANN. §§ 953, 954, 955 (West 1991 & Supp. 1999); R.I. GEN. LAWS §§ 11-24-2, 3 (1994 & Supp. 1999); S.C. CODE ANN. §§ 45-9-10, 20 (Law. Co-op. Supp. 1999); S.D. CODIFIED LAWS § 20-13-1 (Michie 1995); TENN. CODE ANN. §§ 4.21-102, 501 (1998); UTAH CODE ANN. §§ 13-7-2, 3 (1999); VT. STAT. ANN. tit. 9, §§ 4501-4502 (1993); VA. CODE ANN. §§ 2.1-715-716 (Michie Supp. 1999); WASH. REV. CODE ANN. §§ 49.060.030, 040, 9.91.010 (West 1998 & Supp. 1999); W.VA. CODE §§ 5-11-3, 9 (1999); WIS. STAT. ANN. § 106.04 (West Supp. 1999).

99. See William Buss, *Discrimination by Private Clubs*, 67 WASH. U. L.Q. 815, 839 (1989).

100. See *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 F.2d 468, 471-72 (3d Cir. 1986); see also *Wayne v. MasterShield, Inc.*, 597 N.W.2d 917, 922 (Minn. Ct. App. 1999).

101. BLACK'S LAW DICTIONARY 1195 (6th ed. 1990).

definition.¹⁰² The state legislators have been just as kind.¹⁰³ Therefore, we turn to the common law for the definition of “private.” In *Board of Directors of Rotary International*, the Court set out four factors as an example of what it considers “[i]n determining whether a particular association is sufficiently personal or private to warrant constitutional protection.”¹⁰⁴ The factors are “size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.”¹⁰⁵

If an organization is found to be a public accommodation, it may still be exempt from the statute under the public club exemption. The Seventh Circuit Court of Appeals, using a lower court’s opinion, identified seven factors to use in the private club exception.¹⁰⁶ “The seven factors are: (1) the genuine selectivity of the group; (2) the membership’s control over the operations of the establishment; (3) the history of the organization; (4) the use of facilities by nonmembers; (5) the club’s purpose; (6) whether the club advertises for members; and, (7) whether the club is nonprofit or for profit.”¹⁰⁷

E. Intimate and Expressive Associations

1. Intimate Association

In *Roberts*, the Court separately considered the extent of constitutional protection for intimate and expressive association.¹⁰⁸ The Court described intimate associations as “those that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one’s relatives.”¹⁰⁹ The Court went further to liken it to a family relationship, which “involve[s] deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”¹¹⁰ The Court then identified three types of attributes by

102. 42 U.S.C.A. § 2000a(e) (West 1999).

103. See *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 258 (Cal. 1998) (Werdegar, J., concurring).

104. *Board of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 546 (1987).

105. *Id.*

106. See *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1276 (7th Cir. 1993); see also *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 796-97 (E.D. Pa. 1989).

107. *Welsh*, 993 F.2d at 1276.

108. See *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

109. *Id.* at 619 (citations omitted).

110. *Id.* at 619-20.

which an intimate association can be distinguished.¹¹¹ These attributes are “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.”¹¹²

The level of constitutional protection afforded to intimate associations is substantial.¹¹³ According to the Court,

[(1)] the Bill of Rights is designed to secure individual liberty[;] . . . [(2)] certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; . . . thereby foster[ing] diversity and act[ing] as critical buffers between the individual and the power of the State[; (3)] . . . the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others[; and (4)] p[ro]tecting these relationships from unwarranted state interference . . . safeguards the ability independently to define one’s identity that is central to any concept of liberty.¹¹⁴

Therefore, the Court reasoned that the Bill of Rights “must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.”¹¹⁵

2. Expressive Association

Expressive associations could be described as a part of the First Amendment.¹¹⁶ The *Roberts* Court found “implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”¹¹⁷

The level of constitutional protection afforded to expressive associations is not absolute and is subject to compelling state interests, as long as the regulations adopted are “unrelated to the suppression of ideas, [and] . . . cannot be achieved through means significantly less restrictive of associational freedoms.”¹¹⁸ The Court identified a number of forms of “[g]overnment actions that may unconstitutionally infringe

111. *See id.* at 620.

112. *Id.*

113. *See id.* at 618.

114. *Id.* at 618-19.

115. *Id.* at 618.

116. *See id.* at 622.

117. *Id.*

118. *Id.* at 623.

upon” the freedom of expressive association.¹¹⁹ For example:

[the] government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group, it may attempt to require disclosure of the fact of membership in a group seeking anonymity, and it may try to interfere with the internal organization or affairs of the group.¹²⁰

F. Organizations

1. Boy Scouts of America

The Boy Scouts are not an American invention.¹²¹ The original Boy Scouts were formed in England in 1907 in an attempt by General Robert Baden-Powell “to help boys become better men and to have fun while they were doing it.”¹²² The Boy Scouts of America were founded in 1910 by William Boyce, along with a group of educators, businessmen, and political leaders.¹²³ It was incorporated in 1916 by an act of Congress.¹²⁴ Congress stated the Boy Scouts’ purpose as follows:

to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which were in common use by Boy Scouts on June 15, 1916.¹²⁵

The Boy Scouts of America:

endeavor[] to develop American citizens who are physically, mentally, and emotionally fit; have a high degree of self-reliance as evidenced in such qualities as initiative, courage, and resourcefulness; have personal values based on religious concepts; have the desire and skills to help others; understand the principles of the American social, economic, and governmental systems; are knowledgeable about and take pride in their American heritage and understand our nation’s role in the world; have a keen respect for the basic rights of all people; and are prepared to participate in and give leadership to American society.¹²⁶

119. *Id.* at 622.

120. *Id.* at 622-23 (citations omitted).

121. *See* BOY SCOUTS OF AMERICA, *supra* note 9, at 431.

122. *Id.* at 432.

123. *See id.* at 431.

124. *See* 36 U.S.C.A. § 21 (West 1999).

125. *Id.* 36 U.S.C.A. § 23.

126. *What is Boy Scouting* <<http://www.scouting.org/factsheets/02-503.html>> (last modified Feb. 25, 1999).

The Boy Scouts teach these values through the study of nature, camping, hiking, and the service of others.¹²⁷ The Boy Scout Law identifies twelve things a Scout should be:¹²⁸

[(1) Trustworthy.] A scout tells the truth. He is honest, and he keeps his promises. People can depend on him.

[(2) Loyal.] A Scout is true to his family, friends, Scout leaders, school, and nation.

[(3) Helpful.] A Scout cares about other people. He willingly volunteers to help others without expecting payment or reward.

[(4) Friendly.] A Scout is a friend to all. He is a brother to other Scouts. He offers his friendship to people of all races and nations, and respects them even if their beliefs and customs are different from his own.

[(5) Courteous.] A Scout is polite to everyone regardless of age or position. He knows that using good manners makes it easier for people to get along.

[(6) Kind.] A Scout knows there is strength in being gentle. He treats others as he wants to be treated. Without good reason, he does not harm or kill any living thing.

[(7) Obedient.] A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobeying them.

[(8) Cheerful.] A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy.

[(9) Thrifty.] A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property.

[(10) Brave.] A Scout can face danger although he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.

[(11) Clean.] A Scout keeps his body and mind fit. He chooses the

127. See BOY SCOUTS OF AMERICA, *supra* note 9, at 433.

128. See *id.* at 47-54.

company of those who live by high standards. He helps keep his home and community clean. . . . He knows there is no kindness or honor in . . . tasteless behavior. He avoids it in his own words and deeds.

[(12) Reverent.] A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.¹²⁹

To be eligible for membership as a Boy Scout, a candidate must be male, meet the minimum and maximum age requirements (older than eleven or have completed the fifth grade and younger than eighteen), and repeat the Pledge of Allegiance.¹³⁰ A candidate must also understand and agree to live by the Scout Oath or Promise, Law, Motto, Slogan, and the Outdoor Code.¹³¹ In addition, the Scouts do not allow homosexuals to be members.¹³²

To be eligible as an adult volunteer, a candidate must (1) be a citizen of the United States,¹³³ (2) meet the minimum age requirement¹³⁴ of being at least eighteen years old for several assistant positions,¹³⁵ and twenty-one years old or older for the other adult positions;¹³⁶ (3) “possess the moral, educational, and emotional qualities that the Boy Scouts of America deems necessary to afford positive leadership to

129. *Id.* at 47-54.

130. *See id.* at 4-6. The Pledge of Allegiance is “I pledge allegiance to the flag of the United States of America, and to the republic for which it stands, one nation under God indivisible with liberty and justice for all.”

131. *See id.* at 4. The Scout Oath or Promise is “On my honor I will do my best To do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight.” *Id.* at 9. The Scout Law is “A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent.” *Id.* The Scout Motto is “Be Prepared.” *Id.* The Scout Slogan is “Do a Good Turn Daily.” *Id.* The Outdoor Code is “As an American, I will do my best to Be clean in my outdoor manners, Be careful with fire, Be considerate in the outdoors, and Be conservation-minded.” *Id.*

132. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1202 (N.J. 1999).

133. *See* THE BOY SCOUTS OF AMERICA, ADULT REGISTRATION APPLICATION, PUB. NO. 28-501P.

134. *See id.* Some local councils have approved alternatives. *See id.*

135. *See id.* (listing these positions: Assistant Scoutmaster, Assistant Den Leader, Assistant Cubmaster, and Assistant Webelos Den Leader).

136. *See id.* (listing these positions: Chartered Organization Representative, Committee Chairman, Committee Member, Scoutmaster, Crew Adviser, Crew Associate Advisor, Skipper, Mate, Varsity Scout Coach, Assistant Varsity Scout Coach, Cubmaster, Webelos Den Leader Coach, Webelos Den Leader, Den Leader Coach, Den Leader, Tiger Cub Coach, Lone Cub Scout Friend and Counselor, Lone Scout Friend and Counselor).

youth;”¹³⁷ (4) subscribe to the Declaration of Religious Principle;¹³⁸ (5) subscribe to the Scout Oath or Promise;¹³⁹ and (6) subscribe to the Scout Law.¹⁴⁰ Like the requirements for members, the Scouts do not allow homosexuals to be adult volunteers.¹⁴¹ The process of joining as either a Boy Scout or as an Adult Volunteer is as easy as filling out an application and paying the required fees.¹⁴² There were approximately five million Scouts as of 1998.¹⁴³

2. Freemasonry¹⁴⁴

“[Freemasonry] is the oldest fraternity in the world.”¹⁴⁵ Since the actual origins have been lost in time, the actual age of the Freemasons is uncertain.¹⁴⁶ Freemasonry may have gotten its start from the stonemason guilds that built the grand stone structures of the Middle Ages.¹⁴⁷ “Possibly, they were influenced by the Knights Templar, a group of Christian warrior monks formed in 1118 to help protect pilgrims making trips to the Holy Land.”¹⁴⁸ One of the earliest written documents concerning Freemasonry is dated around 1356.¹⁴⁹ In 1717, Masonry showed itself publicly by creating the first Grand Lodge in

137. *Id.*

138. *See id.* This is the Declaration of Religious principle:

The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God and, therefore, recognizes the religious element in the training of the member, but is absolutely nonsectarian in its attitude toward that religious training. The Boy Scouts of America’s policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

Id.

139. *See* BOY SCOUTS OF AMERICA, *supra* note 9, at 9.

140. *See id.*

141. *See* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1202 (N.J. 1999).

142. *See* THE BOY SCOUTS OF AMERICA, ADULT REGISTRATION APPLICATION, PUB NO. 28-501P. The required fee for Boy Scouts and adult volunteers is seven dollars annually. *See id.*

143. *See* 1998 Year in Review <<http://www.bsa.scouting.org/excomm/98annual/yir1998.html>> (last visited Nov. 29, 1999) (explaining that in 1998, 4,757,184 youths participated in scouting).

144. For the purposes of this paper, references to Freemasonry only refer to the sixty-seven Grand Lodges located in the United States that are recognized as regular by the United Grand Lodge of England.

145. MASONIC INFORMATION CENTER., *supra* note 8, at 2.

146. *See id.*

147. *See id.*

148. *Id.*

149. *See* ALLEN E. ROBERTS, MASONIC TRIVIA AND FACTS I (1994) (explaining that the document was the Code of Mason Regulations).

England.¹⁵⁰ “In the United States, there is a Grand Lodge in each state. Local organizations of Masons are called lodges. There are lodges in most towns, and large cities usually have several Every lodge has an altar holding a ‘Volume of the Sacred Law.’”¹⁵¹

Freemasonry teaches a system of morality and values through the use of allegory.¹⁵² In general terms Masonry teaches that:

Since God is the Creator, all men and women are the children of God. Because of that, all men and women are brothers and sisters, entitled to dignity, respect for their opinions, and consideration of their feelings.

Each person must take responsibility for his/her own life and actions. Neither wealth nor poverty, education nor ignorance, health nor sickness excuses any person from doing the best he or she can do or being the best person possible under the circumstances.

No one has the right to tell another person what he or she must think or believe. Each man and woman has an absolute right to intellectual, spiritual, economic, and political freedom. This is a right given by God, not by man. All tyranny, in every form, is illegitimate.

Each person must learn and practice self-control. Each person must make sure his spiritual nature triumphs over his animal nature. Another way to say the same thing is that even when we are tempted to anger, we must not be violent.

Even when we are tempted to selfishness, we must be charitable. Even when we want to “write someone off,” we must remember that he or she is a human and entitled to our respect. Even when we want to give up, we must go on. Even when we are hated, we must return love, or, at a minimum, we must not hate back. It isn't easy!

Faith must be in the center of our lives. We find that faith in our houses of worship, not in Freemasonry, but Masonry constantly teaches that a person's faith, whatever it may be, is central to a good life.

Each person has a responsibility to be a good citizen, obeying the law. That doesn't mean we can't try to change things, but change must take place in legal ways.

It is important to work to make this world better for all who live in it. Masonry teaches the importance of doing good, not because it assures a person's entrance into heaven—that's a question for a religion, not a fraternity—but because we have a duty to all other men and women

150. See MASONIC INFORMATION CENTER, *supra* note 8, at 3 (“A Grand Lodge is the administrative body in charge of Masonry in [a particular] geographical area.”).

151. *Id.* at 3-5 (“In the United States and Canada, [the Volume of the Sacred Law] is almost always a Bible.”).

152. See ALBERT G. MACKAY, M.D., AN ENCYCLOPEDIA OF FREEMASONRY 46-47 (Edward L. Hawkins ed., The Masonic History Co. 1927) (1873).

to make their lives as fulfilling as they can be.

Honor and integrity are essential to life. Life, without honor and integrity, is without meaning.¹⁵³

As an example of Masonic principles, the Grand Lodge of Michigan's published principles state:

Freemasonry is a charitable, benevolent, educational and religious society, adhering to its own customs and landmarks. Its principles are proclaimed as widely as men will hear. Its only secrets are in its methods of recognition and of symbolic instruction.

It is charitable in that it is not organized for profit and none of its income inures to the benefit of any individual, but all is devoted to the promotion of the welfare and happiness of mankind.

It is benevolent in that it teaches and exemplifies altruism as a duty.

It is educational in that it teaches by prescribed ceremonials a system of morality and brotherhood based upon the Sacred Law.

It is religious in that it teaches monotheism, the Volume of the Sacred Law is open upon its altars whenever a lodge is in session, reverence for God is ever present in its ceremonial, and to its brethren are constantly addressed lessons of morality; yet it is not sectarian or theological.

It is a social organization only so far as it furnishes additional inducement that men may foregather in numbers, thereby providing more material for its primary work of education, or worship, and of charity.

Through the improvement and strengthening of the character of the individual man, Freemasonry seeks to improve the community. Thus it impresses upon its members the principles of personal righteousness and personal responsibility, enlightens them as to those things which make for human welfare, and inspires them with that feeling of charity, or good will, toward all mankind which will move them to translate principle and conviction into action.

To that end, it teaches and stands for the worship of God; for truth and justice; for fraternity and philanthropy; for enlightenment and orderly civil, religious, and intellectual liberty. It charges each of its members to be true and loyal to the lawful government of the country to which he owes allegiance and to be obedient to the law of any state in which he may be.

It believes that the attainment of these objectives is best accomplished by laying a broad basis of principle upon which men of every race, country, sect and opinion may unite rather than by setting up a restricted platform upon which only those of certain races, creeds and opinions can assemble.

153. MASONIC INFO. CTR., *supra* note 9, at 12-13.

Believing these things, this Grand Lodge affirms its continued adherence to that ancient and approved rule of Freemasonry which forbids the discussion in Masonic meetings of creeds, politics, or other topics likely to excite personal animosities.

It further affirms its conviction that it is not only contrary to the fundamental principles of Freemasonry, but exceedingly dangerous to its unity, strength, usefulness and welfare for Masonic Bodies to take formal action or attempt to exercise pressure or influence for or against any particular legislative project or proposal, or in any way to attempt to procure the election or appointment of governmental officials, or to influence them whether or not members of the Fraternity, in the performance of their official duties. The true Freemason will act in civil life according to his individual judgment and the dictates of his conscience.¹⁵⁴

To be eligible to join Freemasonry a candidate must be male, be sound in body and mind, believe in a supreme being, be at least the minimum age required by Freemasonry in the jurisdiction in which he wishes to join, and have a good reputation.¹⁵⁵ Freemasons are forbidden to ask others to join the fraternity.¹⁵⁶ A Mason can talk about Masonry and tell people why he enjoys it.¹⁵⁷ However, a Mason cannot ask or pressure someone else to join.¹⁵⁸ As the Freemasons explain:

It isn't that we're trying to be exclusive. But becoming a Mason is a very serious thing. Joining Masonry is making a permanent life commitment to live in certain ways. . . . [T]o live with honor and integrity, to be willing to share and care about others, to trust each other, and to place ultimate trust in God. No one should be "talked into" making such a decision.¹⁵⁹

The process of becoming a Freemason is simple.¹⁶⁰ "[After] a man decides he wants to be a Mason, he asks a Mason for a petition or application."¹⁶¹ He fills it out and must have two members of the lodge

154. THE GRAND LODGE OF FREE AND ACCEPTED MASONS OF THE STATE OF MICHIGAN, BLUE BOOK OF THE COMPILED LAWS OF 1988 OF THE GRAND LODGE OF FREE AND ACCEPTED MASONS OF THE STATE OF MICHIGAN A-1 to A-2 (1998) [hereinafter THE GRAND LODGE].

155. See MASONIC INFORMATION CENTER, *supra* note 9, at 13 ("Incidentally, the 'sound in body' requirement—which comes from the stonemasons of the Middle Ages—doesn't mean that a physically challenged man cannot be a Mason; many are.").

156. *See id.*

157. *See id.* at 13-14.

158. *See id.* at 14.

159. *Id.*

160. *See id.*

161. *Id.* (indicating that a petition is a membership application).

that he is petitioning sign it, vouching for him.¹⁶² He then gives it to one of the Masons who takes it to the lodge.¹⁶³

The Master of the lodge will appoint a committee to visit with the man and his family, find out a little about him and why he wants to be a Mason, tell him and his family about Masonry, and answer their questions. The committee reports to the lodge, and the lodge votes on the petition. If the vote is affirmative . . . the lodge will contact the man to set the date for the Entered Apprentice Degree. When the person has completed all three degrees, he is a Master Mason and a full member of the fraternity.¹⁶⁴

There are about two million Masons¹⁶⁵ and approximately thirteen thousand lodges in the United States.¹⁶⁶

3. United States Jaycees

The United States Jaycees were founded in 1920 as the Junior Chamber of Commerce, by a group of twenty-nine organizations from across the country.¹⁶⁷ The history of the Jaycees however starts in 1915 with the formation of the Young Men's Progressive Civic Association by Henry "Hy" Giessenbier, Jr.¹⁶⁸ "In 1916, the [Young Men's Progressive Civic Association] changed its name to Junior Citizens. In 1990, the name of the organization was officially changed back to 'The

162. See THE GRAND LODGE, *supra* note 154, at F-34.

163. See MASONIC INFORMATION CENTER, *supra* note 9, at 14.

164. *Id.* The term worshipful Master is a carryover from the old origins of freemasonry. See *id.* at 5. "'Worshipful' is an English term of respect which means the same thing as 'Honorable.' He is called the Master of the Lodge for the same reason that the leader of an orchestra is called the 'Concert Master.' It's simply an older term for 'Leader.'" *Id.*

A degree is a stage or level of membership. It's also the ceremony by which a man attains that level of membership. There are three, called Entered Apprentice, Fellowcraft, and Master Mason. As you can see, the names are taken from the craft guilds. In the Middle Ages, when a person wanted to join a craft, such as the gold smiths or the carpenters or the stonemasons, he was first apprenticed. As an apprentice, he learned the tools and skills of the trade. When he had proved his skills, he became a "Fellow of the Craft" (today we would say "Journeyman"), and when he had exceptional ability, he was known as a Master of the Craft. *Id.* at 7.

165. See Email Interview with Dave Bedwell, Right Worshipful Junior Grand Decon of The Grand Lodge of Free and Accepted Masons of the State of Michigan (quoting the Masonic Service Association packet sent to Grand Lodges).

166. See MASONIC INFORMATION CENTER, *supra* note 9, at 3.

167. See William Bishop, *The U.S. Junior Chamber of Commerce History* <<http://www.usjaycees.org/history/history.html>> (last modified June 1, 1999).

168. See *id.*

U.S. Junior Chamber of Commerce.”¹⁶⁹

According to their bylaws, the Jaycees’ objective is:

to pursue such educational and charitable purposes as will promote and foster the growth and development of young men’s civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.¹⁷⁰

In 1984 the Jaycees expanded “their membership requirements by admitting women, ages [eighteen through thirty-five] as full voting members.”¹⁷¹ In 1987, they revised the age limits to twenty-one through thirty-nine.¹⁷²

III. ANALYSIS

First, this Comment briefly identifies the protected class(es) against whom the organization discriminates. Then it looks to see if the organization is a public accommodation, and, if so, whether it will fit into the private club exemptions where available. Lastly, it determines if the organization would meet the requirements to be considered an intimate association, or alternatively, if the organization would fit within the requirements to be protected as an expressive association.

The three protected classes considered are sex, religion, and sexual orientation. Sex is a protected class in forty-two states, the District of Columbia, and New York City.¹⁷³ Religion or creed is a protected class in the Federal Civil Rights Act of 1964,¹⁷⁴ forty-six states, the District of Columbia, and New York City.¹⁷⁵ Sexual orientation is a protected class in nine states, the District of Columbia, and New York City.¹⁷⁶

169. *Id.*

170. *Roberts v. United States Jaycees*, 468 U.S. 609, 612-13 (1984).

171. Bishop, *supra* note 167.

172. *See id.*

173. *See* sources cited *supra* note 90.

174. *See* 42 U.S.C.A. § 2000a-1 (West 1994).

175. *See* sources cited *supra* note 88.

176. *See* sources cited *supra* note 91.

A. Federal–Constitutional Analysis

While both the right to be free from discrimination and the right to association can be found indirectly, these rights are only enforceable against the state and are limited to state action.¹⁷⁷

B. Federal–Statutory Analysis

For the Civil Rights Act of 1964 to apply, there must be a state actor or the organization must affect interstate commerce.¹⁷⁸ The Seventh Circuit Court of Appeals interpreted Congress’s intent in the act to be the regulation of facilities and not gatherings of people and stated that:

[w]hile the statute repeatedly refers to physical facilities it fails to refer to, much less delineate, anything resembling a membership organization or an association. The phrase “other place of exhibition or entertainment” does include facilities such as bowling alleys, golf courses, tennis courts, gymnasiums, swimming pools and parks, but even a broad reading of the statute . . . fails to encompass membership organizations whose purpose is not closely connected to a particular facility.¹⁷⁹

C. State Law Analysis

It is not necessary to use every state’s statute to get a representative picture regarding this issue. Most states fall fairly close to one another as it relates to the three protected classes examined.¹⁸⁰

D. Public Accommodation Analysis

The Supreme Court applied the four factors of “size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship” in its analysis of whether or not an organization was a public accommodation.¹⁸¹ In *Board of Directors of Rotary International*, the Court used size of local clubs in finding that the “relationship among Rotary Club members [was] not the kind of intimate or private relation that warrants constitutional protection.”¹⁸² The local Rotary clubs ranged in size from “fewer than [twenty] to more

177. See Schwartz, *supra* note 49, at 2150.

178. See 42 U.S.C.A. § 2000a (West 1994).

179. See *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1269 (7th Cir. 1993) (citations omitted).

180. See sources cited *supra* note 61.

181. *Board of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 546 (1987).

182. *Id.* at 546.

than [nine hundred].”¹⁸³ Size matters because courts will imply that large organizations are not private.¹⁸⁴

The analysis of the organization’s purpose, as it relates to it being a public accommodation, is closely linked to the intimate association analysis.¹⁸⁵ The types of relationships necessary to fall under the constitutional protection of an intimate association flow from the purposes of the organization.¹⁸⁶ They are analogous to “relationships, including family relationships, that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’”¹⁸⁷

“[T]he hallmark of the ‘distinctly private’ club is its selectivity in determining whom to admit as members.”¹⁸⁸ Selectivity in membership relates to the purpose of exclusiveness found in the private club exemption analysis¹⁸⁹ because a more selective organization tends to be more intimate.¹⁹⁰

In *Board of Directors of Rotary International*, the Court reasoned that “[m]any of the Rotary Clubs’ central activities are carried on in the presence of strangers.”¹⁹¹ Thus, if an organization carries on its activities in front of strangers, it is hard to argue that it is a private organization.¹⁹²

E. Private Club Exception Analysis

The Seventh Circuit set out seven factors to use in the public accommodation exemption analysis: “(1) the genuine selectivity of the group; (2) the membership’s control over the operations of the establishment; (3) the history of the organization; (4) the use of facilities by nonmembers; (5) the club’s purpose; (6) whether the club advertises for members; and, (7) whether the club is nonprofit or for profit.”¹⁹³

183. *Id.*

184. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1216 (N.J. 1999).

185. *See Board of Dirs. of Rotary Int’l*, 481 U.S. at 545-46.

186. *See id.* at 545-47.

187. *Id.* at 545.

188. *Kiwanis Int’l v. Ridgewood Kiwanis Club*, 806 F.2d 468, 476 n.14 (3d Cir. 1986).

189. *See Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984); *Dale*, 734 A.2d at 1214.

190. *See Buss, supra* note 99, at 841.

191. *Board of Dirs. of Rotary Int’l*, 481 U.S. at 537.

192. *See Dale*, 734 A.2d at 1221.

193. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1276 (7th Cir. 1993).

The selectivity analysis is not focused on who is admitted, but whether there is a “plan or purpose of exclusiveness.”¹⁹⁴ The U.S. Supreme Court requires that there be a plan or purpose and not just a subterfuge for discrimination.¹⁹⁵ In other words, the organization must actually have a reason for excluding a protected class, and actually practice selectivity beyond just naked discrimination.¹⁹⁶

The control over the operations of the establishment by members is relevant to whether the organization is actually a business and whether the members are merely customers.¹⁹⁷ “The history of an organization ordinarily is relevant to show whether it was created to avoid the effect of civil rights legislation.”¹⁹⁸ The Seventh Circuit Court of Appeals stated that “[t]he very purpose of the private club exception is to preserve the right of truly private organizations to maintain their unique existence.”¹⁹⁹

The regular use of the organization’s facilities by nonmembers contradicts the organization’s claim of being private.²⁰⁰ The purpose for this factor is different than for the public accommodation factors. When analyzing the use of the facilities by nonmembers, look to see if the purpose is related to the exclusion.²⁰¹ Some courts have held that advertising for members contradicts an organization’s claim of being private.²⁰² The nonprofit or profit status of an organization is relevant to whether it is operating as a business. The status is more likely to influence the court when the organization’s status is “for profit” rather than nonprofit.²⁰³

F. Intimate Association Analysis

The intimate association analysis is closely linked to the analysis that is followed to determine if an organization is a public accommodation.²⁰⁴ While the Court has not attempted to identify the precise boundaries of the constitutional protection of intimate

194. *Id.* (citation omitted).

195. *See id.*

196. *See id.*

197. *See* United States v. Jordan, 302 F. Supp. 370, 378 (E.D. La. 1969).

198. United States v. Lansdowne Swim Club, 713 F. Supp. 785, 802 (E.D. Pa. 1989).

199. *Welsh*, 993 F.2d at 1277.

200. *See Lansdowne Swim Club*, 713 F. Supp. at 804.

201. *See Welsh*, 993 F.2d at 1277.

202. *See, e.g.,* Wright v. Salisbury Club, Ltd., 632 F.2d 309, 313 (4th Cir. 1980).

203. *See* Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 231-34 (Cal. 1998).

204. *See* Buss, *supra* note 99, at 839.

association, it made it clear that it “ha[s] not held that constitutional protection is restricted to relationships among family members.”²⁰⁵ However, the Court “emphasized that the First Amendment protects those relationships, including family relationships, that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’”²⁰⁶ The Court in *Roberts* identified three factors to consider: “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.”²⁰⁷

In *Roberts*, the fact that the local Jaycees chapter had approximately 400 members was detrimental to their intimate association claim.²⁰⁸ Likewise, in *Board of Directors of Rotary International*, the Court pointed out that the local Rotary clubs numbered in size from “fewer than 20 to more than 900.”²⁰⁹ While the Court made note of the lower end of membership in *Rotary*, their size analysis did not find that an organization of only twenty members was not relatively small.²¹⁰ In *Kiwanis International*, the local Kiwanis were exempted by the court because of, among other things, its size.²¹¹ The smaller the organization, the more intimate it likely will be.²¹²

In analyzing the selectivity factor, the standard is whether there is a *high degree* of selectiveness.²¹³ When an organization has a high degree of selectiveness, it is more likely to be intimate and less likely to be involved in the making of contracts or conducting business.²¹⁴

The selectivity factor, like the factor in the public accommodation analysis, looks at whether the organization has a claim to being intimate.²¹⁵

It is difficult to argue that an organization is intimate if it carries on its activities in front of strangers.²¹⁶

205. *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987).

206. *Id.*

207. *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984).

208. *See id.* at 621.

209. *Board of Dirs. of Rotary Int'l*, 481 U.S. at 546.

210. *See id.*

211. *See Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 F.2d 468, 475-76 (3d Cir. 1986).

212. *See* Andrew M. Perlman, *Public Accommodation Laws and the Dual Nature of the Freedom of Ass'n*, 8 GEO. MASON U. CIV. RTS. L.J. 111, 121 (1998).

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

214. *See Buss, supra* note 99, at 842.

215. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1221 (N.J. 1999).

216. *See id.*

G. Expressive Association Analysis

The Constitution guarantees freedom of expressive association “as an indispensable means of preserving other individual liberties.”²¹⁷ The freedom to associate is balanced against the states’ interest in eliminating discrimination.²¹⁸ Courts resolve freedom of expressive association matters by exploring an organization’s purposes, and then predicting whether the anti-discrimination statute would significantly affect the ability to carry out these purposes.²¹⁹ The difference between the intimate and expressive association analysis is that the intimate association analysis is based on what the organization is, while the expressive association analysis is based on what the organization does.²²⁰

When analyzing an organization’s purposes, it is important to determine if it is connected with a business or commercial activity.²²¹ The state has a compelling interest in “assuring its citizens [an] equal access to publicly available goods and services.”²²² One court has held that not having a connection to a business activity is enough to exempt an organization from public accommodation statutes.²²³ Other factors to be considered are the actual views expressed or positions taken by the organization, and whether the person would be deprived of his or her individual dignity by being invited into a public accommodation and then being denied admission.²²⁴

In *Roberts*, the Court relied on the Minnesota court’s finding that the Jaycees provided its members with “various commercial programs and . . . business contacts.”²²⁵ In *New York State Club Association*, the Court upheld a city ordinance that basically made expressive association rights subordinate to anti-discrimination rights where business and trade

217. *Roberts*, 468 U.S. at 618.

218. *See id.* at 623; *see also* Board of Dirs. of Rotary Int’l v. Rotary Club, 481 U.S. 537, 549 (1987).

219. *See Board of Dirs. of Rotary Int’l*, 481 U.S. at 548.

220. *See id.* at 544-47.

221. *See* Julie A. Moegenburg, *Freedom of Ass’n and the Private Club: The Installation of a “Threshold” Test to Legitimize Private Club Status in the Public Eye*, 72 MARQ. L. REV. 403, 426; Buss, *supra* note 99, at 842.

222. *Roberts*, 468 U.S. at 624.

223. *See* Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385, 406 (Kan. 1995).

224. *See Roberts*, 468 U.S. at 625-27.

225. *Id.* at 626.

activity is prevalent in the organization.²²⁶

This portion of the analysis on actual views expressed or positions taken is similar to the analysis in the private club exemption of purpose. However, here the view or position must be related to the discrimination.²²⁷

The last factor and toughest to define is the amount of “stigmatizing injury” that would be suffered.²²⁸

Neither the Supreme Court, nor any other court, however, has addressed the issue of whether there is a compelling state interest in preventing discrimination which deprives a person of his or her individual dignity, but not of any publicly available goods, services, or opportunities for commercial or professional advancement. At least one commentator has expressed the view that . . . the state interest in eliminating the insult, hate, and divisiveness that accompany invidious discrimination is not properly considered “compelling.”²²⁹

The courts assume that people who are discriminated against suffer from it.²³⁰ The question is: Does the suffering outweigh the rights of the organization and its members, or more specifically, does it outweigh the state’s interest in ending such discrimination? The court in *South Boston Allied War Veterans Council* assumed that ending discrimination, which deprives a person of his or her individual dignity, was a compelling state interest.²³¹ However, the court still found that the indignity suffered from the discrimination was not sufficient to overcome the right not to associate.²³² The court held that “[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”²³³

H. *Boy Scouts of America*

The Boy Scouts of America discriminate against the protected classes of sex, religion, and sexual orientation.²³⁴ They discriminate

226. See *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 12-13 (1988).

227. See *Roberts*, 468 U.S. at 626-27.

228. *Id.* at 625.

229. *South Boston Allied War Veterans Council v. City of Boston*, 875 F. Supp. 891, 916 (D. Mass. 1995) (citations omitted).

230. See *Roberts*, 468 U.S. at 626.

231. See *South Boston Allied War Veterans Council*, 875 F. Supp. at 916-17.

232. See *id.*

233. *Id.* (alterations in original) (citations omitted).

234. See *BOY SCOUTS OF AM.*, *supra* note 9, at 4, 9; see also *Dale v. Boy Scouts of Am.*,

with regards to sex by limiting membership to boys.²³⁵ They discriminate with regards to religion by requiring a belief in God.²³⁶ Finally, they discriminate with regards to sexual orientation by excluding homosexuals from membership.²³⁷

1. Public Accommodation Analysis

The Scouts should meet the definition of a public accommodation. The Scouts report a membership of over four million.²³⁸ The Boy Scouts reported in *Dale* “that a typical Boy Scout troop consists of between fifteen and thirty boys and several adult leaders.”²³⁹ While the Boy Scouts’ total members are in the millions, the Court should look, as it did in *Board of Directors of Rotary International*, to the local membership numbers.²⁴⁰

The purpose of the Boy Scouts of America is to make young boys into good citizens.²⁴¹ The Scouts do this through a system of local troops chartered by the Boy Scouts and operated by local community organizations.²⁴² The Scouts’ purpose of making better citizens and the relationships that would need to be formed to achieve the purpose are not analogous to relationships deserving constitutional protection.²⁴³

The Boy Scouts maintain that the Scout Oath and Scout Law are selective criteria.²⁴⁴ In *Welsh*, the Seventh Circuit Court of Appeals held “that the Scouts organization not only is selective, but that its very [c]onstitution, [b]y-laws and doctrine dictate that it remain selective.”²⁴⁵

The Boy Scouts fail the public accommodation test on at least two, if not three, of the factors: purpose, exclusion, and selectivity. For the purpose factor, the Boy Scouts’ purpose is not the kind to fall within the type found worthy for constitutional protection.²⁴⁶ For the exclusion factor, the Boy Scouts invite and encourage non-Scouts to attend the

734 A.2d 1196, 1205 (N.J. 1999).

235. See BOY SCOUTS OF AM., *supra* note 9, at 4.

236. See *id.* at 9.

237. See *Dale*, 734 A.2d at 1205.

238. See *id.* at 1200.

239. *Id.* at 1221.

240. See *Board of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 546 (1987).

241. See 36 U.S.C.A. § 23 (West 1988); *What is Boy Scouting*, *supra* note 126.

242. See BOY SCOUTS OF AM., *supra* note 9, at 24-27.

243. See *Board of Dirs. of Rotary Int’l*, 481 U.S. at 545; *Dale*, 734 A.2d at 1221.

244. See *Dale*, 734 A.2d at 1216.

245. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1277 (7th Cir. 1993). *But see Dale*, 734 A.2d at 1222.

246. *Cf. Board of Dirs. of Rotary Int’l*, 481 U.S. at 546.

meetings.²⁴⁷ This is contrary to any argument that they exclude others from critical aspects of the relationship.²⁴⁸ Finally, for the selectivity factor, the selectivity of the Scout Oath and Law is arguably insufficient because it is rarely enforced or used as a true factor in membership.²⁴⁹

2. Private Club Exception Analysis

The Scouts should meet the public accommodation exception. While the Boy Scouts admit members of a diverse background, the selectivity analysis is not focused on who is admitted, but whether there is a “plan or purpose of exclusiveness.”²⁵⁰ The Scout Oath and Law is a plan of exclusiveness.²⁵¹

While the Scouts may not be exclusive as to race or other protected classes, they are selective as to sex, religion, and sexual orientation.²⁵²

The Boy Scouts have maintained the same basic principles since their formation²⁵³ and have a history of almost 90 years.²⁵⁴ There is no assertion that the Boy Scouts were formed for the purpose of avoiding any anti-discrimination laws.²⁵⁵ The Boy Scouts have a unique history.

“[T]he Boy Scouts is an organization whose primary function is the inculcation of a specific set of values in its youth members.”²⁵⁶ The exclusion of females is related to the desirability of male role models.²⁵⁷

The exclusion of atheist and agnostics is related to the belief in a supreme being and the Scout Oath.²⁵⁸ The exclusion of homosexuals has been found to reach the “required nexus between the basis for the exclusion and the belief system which defines the organization.”²⁵⁹

The Boy Scouts have a substantial advertisement plan; in 1989, they spent over one million dollars for television ads alone.²⁶⁰ The Boy

247. See *Dale*, 734 A.2d at 1222.

248. See *Board of Dirs. of Rotary Int’l*, 481 U.S. at 547.

249. See *Dale*, 734 A.2d at 1234-35.

250. *Welsh*, 993 F.2d at 1276.

251. See *id.*

252. See *supra* text accompanying notes 130, 132.

253. See *Welsh*, 993 F.2d at 1276.

254. See *supra* text accompanying note 123.

255. See *Welsh*, 993 F.2d at 1276.

256. *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 236 (Cal. 1998).

257. See *Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352, 360 (Conn. 1987).

258. See *Welsh*, 993 F.2d at 1277.

259. *Curran*, 952 P.2d at 226.

260. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1211 (N.J. 1999).

Scouts are a federally chartered non-profit corporation.²⁶¹ The Boy Scouts meet four of the five factors that apply to them. They have a genuine selectivity of membership in that their selectivity is not a subterfuge to discriminate unlawfully.²⁶² They have a long history showing that their requirements were not established to circumvent anti-discrimination statutes.²⁶³ Their purposes and reasons to discriminate are related.²⁶⁴ Additionally, they are a non-profit corporation.²⁶⁵ Because of these reasons, the Boy Scouts should be excluded from public accommodation statutes.

3. Intimate Association Analysis

The Boy Scouts have a large national membership,²⁶⁶ but the local troops are relatively small.²⁶⁷ The Boy Scouts claim a local membership of between fifteen and thirty boys.²⁶⁸ The number of local troop memberships should fall within the relative smallness requirement.

As discussed above, the Boy Scouts are selective.²⁶⁹ With the number of boys who apply and the number who are turned away, the courts will probably find that the selectivity is not of a high degree.²⁷⁰ The Boy Scouts encourage non-member attendance at their meetings.²⁷¹ Therefore, they do not exclude others from the critical aspects of the relationship. The Boy Scouts fail the intimate association test for many of the same reasons they are a public accommodation. They do not have a high degree of selectivity or exclude others from the critical aspects of the relationship.

4. Expressive Association Analysis

The Supreme Court of Kansas found that the Boy Scouts were not engaged in a business and, therefore, were not within the scope of

261. *See supra* text accompanying note 124.

262. *See supra* text accompanying notes 130-32.

263. *See supra* text accompanying notes 130-32.

264. *See supra* text accompanying notes 257-59.

265. *See supra* text accompanying note 124.

266. *See supra* text accompanying note 238.

267. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1221 (N.J. 1999).

268. *See id.*

269. *See supra* text accompanying notes 128, 130, 249.

270. *Cf. Rogers v. International Ass'n of Lions Clubs*, 636 F. Supp. 1476, 1479-80 (E.D. Mich. 1986).

271. *See Dale*, 734 A.2d. at 1222.

the Kansas anti-discrimination statute.²⁷²

The Boy Scouts have maintained that the belief in God is necessary to be a scout.²⁷³ The Scouts have also maintained that homosexuality is immoral and incompatible with scouting.²⁷⁴

With these views, the forced inclusion of those they wish to exclude would change the message or make it impossible to express.

The Boy Scouts should find protection as an expressive association. They are not conducting business or involved in the furtherance of business contacts.²⁷⁵ They hold a viewpoint that would be suppressed if forced to accept atheists or homosexuals.²⁷⁶ The indignity that would be suffered from the discrimination does not outweigh the freedom to associate.²⁷⁷

I. FREEMASONRY

The Freemasons discriminate against the protected classes of sex and religion. They discriminate with regards to sex by limiting membership to males.²⁷⁸ They discriminate with regards to religion by requiring a belief in a supreme being.²⁷⁹

1. Public Accommodation Analysis

The Masons do not meet the definition of public accommodation. Nationally, the number of Freemasons is approximately two million with about thirteen thousand lodges.²⁸⁰ Therefore, the average membership is approximately 150 members per lodge. This number is not accurate however, because, unlike the other organizations discussed in this Comment, Freemasonry is not a national organization.²⁸¹ Each state has a Grand Lodge that is completely and

272. See *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385, 406 (Kan. 1995).

273. See *supra* text accompanying note 258.

274. See *supra* text accompanying note 259.

275. See *supra* text accompanying notes 125-29.

276. See *supra* text accompanying note 259.

277. See *South Boston Allied War Veterans Council v. City of Boston*, 875 F. Supp. 891, 917 (D. Mass. 1995).

278. See *supra* text accompanying note 155.

279. See *supra* text accompanying note 155.

280. See *supra* text accompanying notes 165-66.

281. See *What is Freemasonry* <<http://www.gl-mi.org/lodges/genesee-174/whatisfm.html>> (last visited Nov. 30, 1999).

totally independent and separate from the other states.²⁸² The Grand Lodges are connected only through a system of recognition based on the acknowledgment of common practices and traditions.²⁸³ The actual size of each Masonic Lodge can range from as few as eight to an unlimited number of members.²⁸⁴

The purpose of Freemasonry is to teach a system of morals and values that brings the brotherhood of man under the fatherhood of God.²⁸⁵ The purpose is analogous to “relationships, including family relationships, that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’”²⁸⁶ The relationship in other organizations can be distinguished from the Masons, as in organizations like Rotary where the emphasis is on being open to the community at large.²⁸⁷

The Masons are highly selective.²⁸⁸ For a person to become a Mason he must have two current members of the lodge he petitions sign his petition, thereby vouching for him as a suitable candidate for Masonry; he must undergo a personal interview into his background; and he must receive an affirmative vote from the lodge.²⁸⁹ A candidate must profess a belief in a supreme being.²⁹⁰ Additionally, he must swear not to aid in the initiation of women or atheists into Freemasonry.²⁹¹ The court in *Kiwanis International* found that the local Kiwanis club was selective enough to not fall within the scope of the New Jersey public accommodation statute,²⁹² and the Masons are more selective than the Kiwanis.²⁹³

The Freemasons do not allow any non-Mason to attend a regular

282. *See id.*

283. *See id.*

284. *See* THE GRAND LODGE, *supra* note 154, at F-1.

285. *See supra* text accompanying notes 152-54.

286. Board of Dirs. of Rotary Int’l v. Rotary Club, 481 U.S. 537, 545 (1987) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984)).

287. *Cf. id.* at 546-48 (explaining that the spiritual and esoteric purposes would be analogous while the community service purposes would not).

288. *See supra* text accompanying notes 155, 161-63.

289. *See supra* text accompanying notes 162-64.

290. *See supra* text accompanying note 155.

291. This information is based on the author’s personal knowledge as a member of the Freemasons.

292. *See* *Kiwanis Int’l v. Ridgewood Kiwanis Club*, 806 F.2d 468, 476 (3d Cir. 1986).

293. *Compare id.*, with *infra* text accompanying note 295.

meeting²⁹⁴ and only allow attendance of nonmembers under two circumstances for special meetings.²⁹⁵ Freemasonry has a process contained within its rituals to eliminate any non-Masons from the lodge room before the meeting and a lodge officer who is dedicated to securing the meeting from non-Masons.²⁹⁶

The Freemasons pass the public accommodation test in two, if not three, factors: selectivity, exclusion, and purpose.²⁹⁷ The Masons, as discussed above, are highly selective. For the exclusion factor, the Masons not only do not invite non-Masons to their meeting but have taken the additional steps of purging the lodge before such meetings and having a Lodge officer assigned to secure the meeting from non-Masons. For the purpose factor, some of the purposes, or more especially the relationship necessary to carry out the purposes of the Masons, should fall within the scope of the kind found worthy of constitutional protection.

2. Private Club Exception Analysis

Even if the Freemasons were considered a public accommodation falling within the scope of a public accommodation statute, they should be exempt as a private club. As discussed above, Masonry is highly selective. While they do not distinguish between religions, they do mandate a belief in a supreme being.²⁹⁸ They require that a potential member be endorsed by two members of the lodge before even being considered for membership.²⁹⁹ The Masons also require an affirmative vote for membership.³⁰⁰

The Freemasons were established prior to the formation of the thirteen colonies and certainly prior to the enactment of any state or federal anti-discrimination law.³⁰¹ The Masons have also maintained the exclusion of women and atheists or agnostics at least since its recorded

294. See THE GRAND LODGE, *supra* note 154, at F-66.

295. According to the author's personal knowledge as a member of the Freemasons, the Masons have a funeral memorial for a deceased member that is technically considered a "special meeting" but is attended by family and friends of the deceased, and some lodges have public installations of officers that allow family and friends to watch the officers be installed for the incoming year.

296. See THE GRAND LODGE, *supra* note 154, at G-8.

297. See Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 546 (1987).

298. See MASONIC INFO. CTR., *supra* note 9.

299. See THE GRAND LODGE, *supra* note 154, at F-34.

300. See *supra* text accompanying note 164.

301. See *supra* text accompanying note 149. Compare the year 1356 with 1492, which is when Columbus discovered America.

formation.³⁰² The Freemasons have a unique history and, as the Seventh Circuit Court of Appeals stated, “The very purpose of the private club exception is to preserve the right of truly private organizations to maintain their unique existence.”³⁰³

The Masons are unique in many ways. Unlike other social organizations, they do not operate bars or social quarters.³⁰⁴ Also, with the exception of a few Masonic appendant organizations, other organizations are not allowed to use the lodge room.³⁰⁵ The exclusion based on religion is overwhelmingly related to the purposes of Freemasonry.³⁰⁶ Freemasons do not advertise for members; they are prohibited from soliciting in all but the simplest means.³⁰⁷ Grand Lodges are incorporated as non-profit corporations.³⁰⁸

The Freemasons meet five, if not six, of the six applicable factors. They have a “genuine selectivity” of membership in that their selectivity is not a subterfuge to discriminate unlawfully.³⁰⁹ They have a long history showing that their requirements were not established to circumvent anti-discrimination statutes and were, in fact, established before any of the anti-discrimination statutes were enacted.³¹⁰ They do not allow use of the lodge facilities except for Masonic-related organizations.³¹¹ They do not solicit or advertise for membership.³¹² They are a nonprofit corporation.³¹³ Religion, which is at least one of the protected classes subject to discrimination, is related to the purpose of the organization.³¹⁴

3. Intimate Association Analysis

The size characteristics of the Masonic Lodges are more similar

302. See MASONIC INFO. CTR., *supra* note 9.

303. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1277 (7th Cir. 1993).

304. See THE GRAND LODGE, *supra* note 154, at F-6.

305. See *id.* at F-63 (explaining that the following groups can use the lodge: Order of the Eastern Star, Order of DeMolay, White Shrine of Jerusalem, Order of Amaranth, Order of the Rainbow for Girls, and Job's Daughters).

306. See *supra* text accompanying note 9.

307. See MASONIC INFO. CTR., *supra* note 9, at 13.

308. See THE GRAND LODGE, *supra* note 154, at A-1.

309. See MASONIC INFO. CTR., *supra* note 9, at 13-14.

310. See *supra* text accompanying note 301.

311. See *supra* notes 301-02 and accompanying text.

312. See MASONIC INFO. CTR., *supra* note 9, at 13.

313. See THE GRAND LODGE, *supra* note 154, at A-1.

314. See *supra* text accompanying note 9.

to Rotary Clubs than Boy Scout Troops.³¹⁵ As a result of this range in size, the Freemasons will probably not qualify under this factor as an intimate association. As discussed above, the Masons are highly selective,³¹⁶ and they exclude others from the critical aspects of the relationship to the point that members cannot even discuss the “secrets” of Masonry with nonmembers, family members, or spouses.³¹⁷

The Freemasons may pass the intimate association test for basically the same reason that they should not be considered a public accommodation. They are highly selective in their membership and exclude all but proven members from the meetings, but the size of some lodges is detrimental to the claim of being an intimate association.

4. Expressive Association Analysis

In *New York State Club Association*, “[t]he City Council explained that it limited the Law’s coverage to large clubs and excluded . . . benevolent orders . . . because the latter associations ‘have not been identified in testimony before the Council as places where business activity is prevalent.’”³¹⁸ In his concurring opinion, Justice Scalia stated that “all the organizations that have been listed—or at least all I am familiar with—share the characteristic of being what might be called lodges or fraternal organizations . . . includ[ing], for example, . . . the . . . Masons.”³¹⁹

The Masons have maintained that a belief in a supreme being is necessary to be a Mason.³²⁰ They have also maintained that women cannot be Freemasons.³²¹ To force the Masons to accept women, atheists, or agnostics would change the organization and result in the particular Grand Lodge being unrecognized by the others, which would make every Mason belonging to that Grand Lodge no longer a Mason.³²²

The Freemasons should find protection as an expressive association. They are not conducting business or involved in the furtherance of business contacts. They hold a viewpoint that would be suppressed if forced to accept atheists, agnostics, or women. The

315. See 1997 LIST OF LODGES MASONIC (Pantagraph Printing & Stationery Co. 1997).

316. See *supra* notes 155, 161-64 and accompanying text.

317. See THE GRAND LODGE, *supra* note 154, at J-2.

318. *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 16 (1988).

319. *Id.* at 21 (Scalia, J., concurring).

320. See *supra* text accompanying note 9.

321. See THE GRAND LODGE, *supra* note 154, at B-1 (explaining that female Masonic Grand Lodges exist but are not recognized by “regular” Grand Lodges).

322. See *supra* text accompanying note 291.

indignity that would be suffered from the discrimination does not outweigh the freedom to associate.

J. United States Jaycees

The analysis of the Jaycees is for comparison. In 1984, the Jaycees expanded their membership requirements and began admitting women as full voting members.³²³ The following analysis will use the Jaycees' data as used in *Roberts v. United States Jaycees*.³²⁴

1. Public Accommodation Analysis

The Jaycees will meet the definition of public accommodation. In 1981, the Jaycees had a membership of approximately three hundred thousand and about seven thousand local chapters.³²⁵ This gives the Jaycees an average of forty members per chapter. The Jaycees chapters involved in *Roberts* had a membership of about 400.³²⁶ As in *Rotary*, the Jaycees will fail the size factor.³²⁷

The Jaycees' purpose is to promote civic mindedness, participation in the community, and friendship among men regardless of nationality.³²⁸ They do this through a system of local chapters defined as “[a]ny young men’s organization of good repute existing in any community within the United States, organized for purposes similar to and consistent with those of the national organization.”³²⁹ The Jaycees’ purpose of making better citizens and the relationships that would need to be formed to achieve that purpose are not analogous to relationships deserving constitutional protection.³³⁰

The Jaycees are not selective.³³¹ They recruit new members with no inquiry into their backgrounds and have not denied anyone membership on any basis other than age or sex.³³² The Jaycees include nonmembers in many of their meetings and activities.³³³ This is contrary to any argument that they exclude others from critical aspects

323. See Bishop, *supra* note 167.

324. 468 U.S. 609 (1984).

325. See *id.* at 613.

326. See *id.* at 621.

327. See Board of Dirs. of Rotary Int’l v. Rotary Club, 481 U.S. 537, 546 (1987).

328. See *Roberts*, 468 U.S. at 612-13.

329. *Id.* at 613 (alterations in original) (citation omitted).

330. See *id.* at 620.

331. See *id.* at 621.

332. See *id.*

333. See *id.*

of the relationship.³³⁴

The Jaycees fail the public accommodation test on all four of the factors. For the size factor, the chapters involved have around 400 members.³³⁵ For the purpose factor, the Jaycees' purpose is not the kind to fall within the type found worthy of constitutional protection.³³⁶ Selectivity of the Jaycees is insufficient because they openly recruit without inquiry into the background of the person.³³⁷ For exclusion of others from critical aspects of the relationship, the Jaycees invite and encourage nonmembers to attend the meetings.³³⁸

2. Private Club Exception Analysis

The Jaycees will not meet the private club exception. For the reasons discussed above, the Court in *Roberts* found that the Jaycees had "no plan or purpose of exclusiveness."³³⁹ The Jaycees have maintained the same basic principles since their formation and have a history of almost sixty-four years.³⁴⁰ There is no assertion that the Jaycees were formed for the purpose of avoiding anti-discrimination laws.³⁴¹

The Jaycees' purpose is to promote civic mindedness and friendship.³⁴² However, the exclusion of women is not related to any of the Jaycees' purposes.³⁴³ There is no assertion that the Jaycees advertise for members.³⁴⁴

The Jaycees are a nonprofit corporation.³⁴⁵ The Jaycees meet three of the five factors that are applicable to the private club exception analysis. They have a long history showing that their requirements were not established to circumvent anti-discrimination statutes.³⁴⁶ They do not advertise for members,³⁴⁷ and they are a non-

334. See *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 547 (1987).

335. See *Roberts*, 468 U.S. at 621.

336. Cf. *Board of Dirs. of Rotary Int'l*, 481 U.S. at 546.

337. See *Roberts*, 468 U.S. at 621.

338. See *id.*

339. *Id.* at 621.

340. See *id.* at 612-13 (indicating this history as of 1984).

341. See *id.*

342. See *id.*

343. See *id.* at 627.

344. See generally *id.* at 621 (containing nothing on the record regarding advertising).

345. See *id.* at 612.

346. See *id.*

347. See *supra* note 344 and accompanying text.

profit corporation.³⁴⁸ The most important factor is selectiveness,³⁴⁹ which the Jaycees fail. Because of these reasons, the Jaycees should not be excluded from public accommodation statutes.

3. Intimate Association Analysis

The Jaycees are not relatively small. Their chapters have around 400 members.³⁵⁰ Further, the Jaycees are anything but highly selective. According to the Court in *Roberts*, other than for sex or age, no one has been denied membership.³⁵¹ Members were also recruited and admitted without checking into their background.³⁵²

The Jaycees have “numerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another.”³⁵³

The Jaycees fail the intimate association test for many of the same reasons they are a public accommodation. They are not relatively small and they do not have a high degree of selectivity or exclude others from the critical aspects of the relationship.

4. Expressive Association Analysis

The Jaycees offer various commercial programs and benefits like business contacts and employment promotions.³⁵⁴ The Court in *Roberts* found:

There is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in . . . protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees’ creed of promoting the interests of young men, and it imposes no restrictions on the organization’s ability to exclude individuals with ideologies or philosophies different from those of its existing members.³⁵⁵

The indignity that would be suffered from the discrimination does not justify the burden placed on the right of free association.³⁵⁶

348. *See Roberts*, 468 U.S. at 612.

349. *See Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1276 (7th Cir. 1993).

350. *See Roberts*, 468 U.S. at 621.

351. *See id.*

352. *See id.*

353. *Id.*

354. *See id.* at 626.

355. *Id.* at 627.

356. *See South Boston Allied War Veterans Council v. City of Boston*, 875 F. Supp. 891,

The Jaycees should not find protection as an expressive association. They are either conducting business or involved in the furtherance of business contacts.³⁵⁷ They hold a viewpoint that would not be suppressed if forced to accept women.³⁵⁸ The indignity that would be suffered from the discrimination does not justify the burden placed on the right of free association.³⁵⁹

IV. CONCLUSION

The test that Justice O'Connor set out in her concurrence in *Roberts* is that:

[A]n association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment. [Reasoning that i]t is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard. An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.³⁶⁰

The test can be distilled down to "distinguish[ing] nonexpressive from expressive associations and . . . recogniz[ing] that the former lack the full constitutional protections possessed by the latter."³⁶¹ Justice O'Connor reasoned:

[The] Court has adopted a test that unadvisedly casts doubt on the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society. [And a]t the same time, . . . adopted . . . [one] that accords insufficient protection to expressive associations and places inappropriate burdens on groups claiming the protection of the First Amendment.³⁶²

The benefit of Justice O'Connor's test is that some of the guesswork will be taken out of the analysis. Courts, organizations, and

917 (D. Mass. 1995).

357. See *Roberts*, 468 U.S. at 626.

358. See *id.* at 627.

359. See *South Boston Allied War Veterans Council*, 875 F. Supp. at 917.

360. *Roberts*, 468 U.S. at 635-36 (O'Connor, J., concurring).

361. *Id.* at 638 (O'Connor, J., concurring).

362. *Id.* at 632 (O'Connor, J., concurring).

excluded protected class members will have a manageable test to apply. The constitutional protections will be maintained for both those who would lose their right to associate and those against whom there would be invidious discrimination.

After this paper was selected for publication, the United States Supreme Court granted certiorari³⁶³ for *Dale v. Boy Scouts of America*.³⁶⁴ The Court held that the application of New Jersey's public accommodation law requiring the Boy Scouts to accept Dale as an assistant scoutmaster would violate the Boy Scouts freedom of expressive association.

The Court first looked to see if the Boy Scouts engaged in expressive association, reasoning that "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."³⁶⁵

After finding that the Boy Scouts did engage in expressive activity the Court determined that "the forced inclusion of Dale . . . would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."³⁶⁶

In answering the challenge that the Boy Scouts were not formed for the purpose of expressing disfavor with homosexuality the Court stated that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."³⁶⁷

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363. See 120 S. Ct. 865 (2000) (becoming *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000)).

364. 734 A.2d 1196, 1202 (N.J. 1999).

365. *Dale*, 120 S. Ct. at 2455.

366. *Id.* at 2451.

367. *Id.* at 2454.

* The author is a member of the Freemasons and used to be a member of the Boy Scouts.

Protected Class	Age	Ancestry	Changes in Marital Status	Child Birth	Child Birth Related Medical Conditions	Citizenship Status	Class	Color	Creed	Disability	Familial Status	Family Responsibilities	Height / Weight	Lawful Source of Income	Liability for service in the Armed Forces	Marital Status	Matriculation	Military Status	National Origin	Paranthood	Personal Appearance	Place of Business	Place of Residence	Political Affiliation	Pregnancy	Race	Religion	Serious Medical Condition	Sex	Sexual Orientation	Unfavorable Discharge from Military Service	
Jurisdiction																																
Georgia																																
Hawaii		X								X																						
Idaho																																
Illinois	X	X								X						X			X	X						X	X	X	X			X
Indiana		X								X									X	X						X	X	X	X			
Iowa									X	X									X	X						X	X	X	X			
Kansas		X								X									X	X						X	X	X	X			
Kentucky	X									X									X	X						X	X	X	X			
Louisiana	X									X									X	X						X	X	X	X			
Maine		X								X									X	X						X	X	X	X			
Maryland	X									X									X	X						X	X	X	X			
Massachusetts							X			X									X	X						X	X	X	X			
Michigan	X									X									X	X						X	X	X	X			
Minnesota	X									X									X	X						X	X	X	X			

Appendix BFEDERAL "ANTI-DISCRIMINATION" STATUTES*Civil Rights Act of 1964*

42 U.S.C.A. § 2000a (West 1994).

(a) Equal access

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments.

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) Operations affecting commerce; criteria; “commerce” defined

The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, “commerce” means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Support by State action

Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political

subdivision thereof.

(e) Private establishments

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

Appendix C

STATE “ANTI-DISCRIMINATION” STATUTES

ALABAMA

No applicable “anti-discrimination” statute found.

ALASKA

ALASKA STAT. § 18.80.230 (Michie 1998).

It is unlawful for the owner, lessee, manager, agent, or employee of a public accommodation

(1) to refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, race, religion, color, or national origin

ARIZONA

ARIZ. REV. STAT. ANN. § 41-1441 (West 1999).

In this article, unless the context otherwise requires:

. . . .

2. “Places of public accommodation” means all public places of entertainment, amusement or recreation, all public places where food or beverages are sold for consumption on the premises, all public places which are conducted for the lodging of transients or for the benefit, use or accommodation of those seeking health or recreation and all establishments which cater or offer their services, facilities or goods to or solicit patronage from the members of the general public. Any dwelling as defined in section 41-1491, or any private club, or any place which is in its nature distinctly private is not a place of public accommodation.

ARIZ. REV. STAT. ANN. § 41-1442 (West 1999).

A. Discrimination in places of public accommodation against

any person because of race, color, creed, national origin or ancestry is contrary to the policy of this state and shall be deemed unlawful.

B. No person shall, directly or indirectly, refuse to, withhold from, or deny to any person, nor aid in or incite such refusal to deny or withhold, accommodations, advantages, facilities or privileges thereof because of race, color, creed, national origin, or ancestry, nor shall distinction be made with respect to any person based on race, color, creed, national origin, or ancestry in connection with the price or quality of any item, goods or services offered by or at any place of public accommodation.

ARKANSAS

Arkansas Civil Rights Act of 1993

ARK. CODE ANN. § 16-123-102 (Michie 1999).

For the purposes of this subchapter:

....

(7) “Place of public resort, accommodation, assemblage, or amusement” means any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds, but “place of public resort, accommodation, assemblage, or amusement” does not include:

....

(B) Any private club or other establishment not in fact open to the public

Arkansas Civil Rights Act of 1993

ARK. CODE ANN. § 16-123-101 (Michie 1999).

(a) The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

....

(2) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement

....

CALIFORNIA

Unruh Civil Rights Act
CAL. CIV. CODE § 51 (West 1999).

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

COLORADO

COLO. REV. STAT. ANN. § 24-34-601 (West Supp. 1999).

(1) . . . “place of public accommodation” means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theatre, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor.

(2) It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual

or a group, because of disability, race, creed, color, sex, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation

CONNECTICUT

CONN. GEN. STAT. ANN. § 46a-63 (West 1995).

(1) "Place of public accommodation, resort or amusement" means any establishment which caters or offers its services or facilities or goods to the general public, including, but not limited to, any commercial property or building lot, on which it is intended that a commercial building will be constructed or offered for sale or rent

CONN. GEN. STAT. ANN. § 46a-64 (West 1995).

(a) It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of race, creed, color, national origin, ancestry, sex, marital status, age, lawful source of income, mental retardation, mental disability or physical disability

CONN. GEN. STAT. ANN. § 46a-81d (West 1995).

(a) It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of such person's sexual orientation, subject only to the conditions and limitations established by law and applicable alike to all persons; or (2) to discriminate, segregate or separate on account of sexual orientation.

(b) Any person who violates any provision of this section shall be fined not less than twenty-five nor more than one hundred dollars or imprisoned not more than thirty days or both.

DELAWARE

DEL. CODE ANN. tit. 6, § 4501 (1999).

This chapter is intended to prevent, in places of public

accommodations, practices of discrimination against any person because of race, age, marital status, creed, color, sex, handicap or national origin. This chapter shall be liberally construed to the end that the rights herein provided for all people, without regard to race, age, marital status, creed, color, sex, handicap or national origin, may be effectively safeguarded.

DEL. CODE ANN. tit. 6, § 4502 (1999).

(1) A “place of public accommodation” means any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public. This definition shall apply to hotels and motels catering to the transient public, but it shall not apply to the sale or rental of houses, housing units, apartments, rooming houses or other dwellings, nor to tourist homes with less than 10 rental units catering to the transient public.

DISTRICT OF COLUMBIA

D.C. CODE ANN. § 1-2502 (1999).

(24) “Place of public accommodation” [sic] means all places included in the meaning of such terms as inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest; restaurants or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores, and establishments dealing with goods or services of any kind, including, but not limited to, the credit facilities thereof; banks, savings and loan associations, establishments of mortgage bankers and brokers, all other financial institutions, and credit information bureaus; insurance companies and establishments of insurance policy brokers; dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiards and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and

terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures, occupied by 2 or more tenants, or by the owner and 1 or more tenants. Such term shall not include any institution, club, or place of accommodation which is in its nature distinctly private except, that any such institution, club or place of accommodation shall be subject to the provisions of § 1-2531. A place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club:

- (A) Has 350 or more members;
- (B) Serves meals on a regular basis; and
- (C) Regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

D.C. CODE ANN. § 1-2519 (1999).

(a) *General.* – It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual:

(1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations

FLORIDA

Florida Civil Rights Act of 1992

FLA. STAT. ANN. § 760.60 (West 1997).

(1) It is unlawful for a person to discriminate against any individual because of race, color, religion, gender, national origin, handicap, age above the age of 21, or marital status in evaluating an application for membership in a club that has more than 400 members, that provides regular meal service, and that regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from nonmembers for business purposes.

Florida Civil Rights Act of 1992
FLA. STAT. ANN. § 760.01 (West 1997).

(2) The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.

GEORGIA

No applicable “anti-discrimination” statute found.

HAWAII

HAW. REV. STAT. ANN. § 368-1 (Michie 1999).

The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving State financial assistance is against public policy. It is the purpose of this chapter to provide a mechanism which provides for a uniform procedure for the enforcement of the State’s discrimination laws. It is the legislature’s intent to preserve all existing rights and remedies under such laws.

HAW. REV. STAT. ANN. § 489-2 (Michie 1998).

“Place of public accommodation” means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. By way of example, but not of limitation, place of public accommodation includes facilities of the following types:

- (1) A facility providing services relating to travel or transportation;
- (2) An inn, hotel, motel, or other establishment

that provides lodging to transient guests;

(3) A restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises of a retail establishment;

(4) A shopping center or any establishment that sells goods or services at retail;

....

(6) A motion picture theater, other theater, auditorium, convention center, lecture hall, concert hall, sports arena, stadium, or other place of exhibition or entertainment;

(7) A barber shop, beauty shop, bathhouse, swimming pool, gymnasium, reducing or massage salon, or other establishment conducted to serve the health, appearance, or physical condition of persons;

(8) A park, a campsite, or trailer facility, or other recreation facility;

(9) A comfort station; or a dispensary, clinic, hospital, convalescent home, or other institution for the infirm;

(10) A professional office of a health care provider, as defined in section 323D-2, or other similar service establishment;

(11) A mortuary or undertaking establishment; and

(12) An establishment that is physically located within the premises of an establishment otherwise covered by this definition, or within the premises of which is physically located a covered establishment, and which holds itself out as serving patrons of the covered establishment.

HAW. REV. STAT. ANN. § 489-3 (Michie 1998).

Unfair discriminatory practices which deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, color, religion, ancestry, or disability are prohibited.

IDAHO

IDAHO CODE § 67-5902 (1995).

(9) “Place of public accommodation” means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public

IDAHO CODE § 67-5909 (1995).

It shall be a prohibited act to discriminate against a person because of, or on a basis of, race, color, religion, sex or national origin

IDAHO CODE § 67-5910 (1995).

(3) This act does not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages or accommodations of the establishment are made available to the customers or patrons of another establishment that is a place of public accommodation.

ILLINOIS*Illinois Human Rights Act*

775 ILL. COMP. STAT. ANN. 5/1-102 (West Supp. 1999).

It is the public policy of this State:

(A) Freedom from Unlawful Discrimination. To secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, military status, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

Illinois Human Rights Act

775 ILL. COMP. STAT. ANN. 5/1-103 (West Supp. 1999).

(Q) Unlawful Discrimination. “Unlawful discrimination” means

discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap, military status, or unfavorable discharge from military service as those terms are defined in this Section.

Illinois Human Rights Act

775 ILL. COMP. STAT. ANN. 5/5-101 (West 1993).

(A) **Place of Public Accommodation.** (1) “Place of public accommodation” means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

(2) By way of example, but not of limitation, “place of public accommodation” includes facilities of the following types: inns, restaurants, eating houses, hotels, soda fountains, soft drink parlors, taverns, roadhouses, barber shops, department stores, clothing stores, hat stores, shoe stores, bathrooms, restrooms, theatres, skating rinks, public golf courses, public golf driving ranges, concerts, cafes, bicycle rinks, elevators, ice cream parlors or rooms, railroads, omnibuses, busses, stages, airplanes, street cars, boats, funeral hearses, crematories, cemeteries, and public conveyances on land, water, or air, public swimming pools and other places of public accommodation and amusement.

Illinois Human Rights Act

775 ILL. COMP. STAT. ANN. 5/5-102 (West 1993).

Civil Rights Violations: Public Accommodations. It is a civil rights violation for any person on the basis of unlawful discrimination to:

(A) **Enjoyment of Facilities.** Deny or refuse to another the full and equal enjoyment of the facilities and services of any public place of accommodation

Illinois Human Rights Act

775 ILL. COMP. STAT. ANN. 5/5-103 (West 1993).

Nothing in this Article shall apply to:

(A) **Private Club.** A private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the establishment are made available to the customers or patrons of another establishment that is a place of public accommodation.

INDIANA

IND. CODE ANN. § 22-9-1-3 (West Supp. 1999).

(l) “Discriminatory practice” means:

(1) the exclusion of a person from equal opportunities because of race, religion, color, sex, disability, national origin, or ancestry

....

(m) “Public accommodation” means any establishment that caters or offers its services or facilities or goods to the general public.

IOWA

Iowa Civil Rights Act of 1965

IOWA CODE ANN. § 216.2 (West Supp. 1999).

12. “Public accommodation” means each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods for a fee or charge to nonmembers of any organization or association utilizing the place, establishment, or facility, provided that any place, establishment, or facility that caters or offers services, facilities, or goods to the nonmembers gratuitously shall be deemed a public accommodation if the accommodation receives governmental support or subsidy. Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the nonmembers for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.

Iowa Civil Rights Act of 1965
IOWA CODE ANN. § 216.7 (West 1994).

1. It shall be an unfair or discriminatory practice for any owner, lessee, sublessee, proprietor, manager, or superintendent of any public accommodation or any agent or employee thereof:

a. To refuse or deny to any person because of race, creed, color, sex, national origin, religion or disability the accommodations, advantages, facilities, services, or privileges thereof, or otherwise to discriminate against any person because of race, creed, color, sex, national origin, religion or disability in the furnishing of such accommodations, advantages, facilities, services, or privileges.

b. To directly or indirectly advertise or in any other manner indicate or publicize that the patronage of persons of any particular race, creed, color, sex, national origin, religion or disability is unwelcome, objectionable, not acceptable, or not solicited.

KANSAS

KAN. STAT. ANN. § 44-1002 (Supp. 1999).

(h) "Public accommodations" means any person who caters or offers goods, services, facilities and accommodations to the public. Public accommodations include, but are not limited to, any lodging establishment or food service establishment, . . . any bar, tavern, barbershop, beauty parlor, theater, skating rink, bowling alley, billiard parlor, amusement park, recreation park, swimming pool, lake, gymnasium, mortuary or cemetery which is open to the public; or any public transportation facility. Public accommodations do not include a religious or nonprofit fraternal or social association or corporation.

(i) "Unlawful discriminatory practice" means: (1) Any discrimination against persons, by reason of their race, religion, color, sex, disability, national origin or ancestry:

(A) In any place of public accommodations

. . . .

(2) Any discrimination against persons in regard to membership in a nonprofit recreational or social association or corporation by reason of race, religion, sex, color, disability, national origin or ancestry if such association or corporation has 100 or more members and: (A) Provides

regular meal service; and (B) receives payment for dues, fees, use of space, use of facility, services, meals or beverages, directly or indirectly, from or on behalf of nonmembers.

This term shall not apply to a religious or private fraternal and benevolent association or corporation.

KAN. STAT. ANN. § 44-1009 (Supp. 1998).

(c) It shall be an unlawful discriminatory practice:

(1) For any person, as defined herein being the owner, operator, lessee, manager, agent or employee of any place of public accommodation to refuse, deny or make a distinction, directly or indirectly, in offering its goods, services, facilities, and accommodations to any person as covered by this act because of race, religion, color, sex, disability, national origin or ancestry, except where a distinction because of sex is necessary because of the intrinsic nature of such accommodation.

KENTUCKY

KY. REV. STAT. ANN. § 344.020 (Michie 1997).

(1) The general purposes of this chapter are:

. . . .

(b) To safeguard all individuals within the state from discrimination because of familial status, race, color, religion, national origin, sex, age forty (40) and over, or because of the person's status as a qualified individual with a disability

KY. REV. STAT. ANN. § 344.130 (Michie 1997).

As used in this chapter unless the context requires otherwise:

“Place of public accommodation, resort, or amusement” includes any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds: except that

(1) A private club is not a place of public accommodation, resort, or amusement if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests

. . . .

LOUISIANA

LA. REV. STAT. ANN. § 51.2232 (West Supp. 1999).

(3) “Discriminatory practice in connection with public accommodations” means any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons because of race, creed, color, religion, sex, age, disability, or national origin.

....

(10) “Place of public accommodation, resort, or amusement” means any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds. However, a bona fide private club is not a place of public accommodation, resort, or amusement if its policies are determined solely by its members and its facilities or services are available only to its members and their bona fide guests.

LA. REV. STAT. ANN. § 49:146 (West Supp. 1999).

A. (1) In access to public areas, public accommodations, and public facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical or mental disability.

(2) For purposes of this Section, a public facility is defined as any publicly or privately owned property to which the general public has access as invitees and shall include such facilities open to the public as hotels, motels, restaurants, cafes, barrooms, and places of entertainment or recreation but shall not include any private club.

(3) For purposes of this Section, to determine whether an organization is a private club, the factors to be considered are:

- (a) Selectiveness of the group in addition of members;
- (b) Existence of formal membership procedures;
- (c) Degree of membership control over internal

governance, particularly with regard to new members;

- (d) History of organization;
- (e) Use of club facilities by nonmembers;
- (f) Substantiality of dues;
- (g) Whether the organization advertises; and
- (h) Predominance of a profit motive.

MAINE

ME. REV. STAT. ANN. tit. 5, § 4591 (West Supp. 1999).

The opportunity for every individual to have equal access to places of public accommodation without discrimination because of race, color, sex, physical or mental disability, religion, ancestry or national origin is recognized as and declared to be a civil right.

ME. REV. STAT. ANN. tit. 5, § 4592 (West Supp. 1999).

It is unlawful public accommodations discrimination, in violation of this Act:

1. Denial of public accommodations. For any public accommodation or any person who is the owner, lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any place of public accommodation to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color, sex, physical or mental disability, religion, ancestry or national origin, any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.

ME. REV. STAT. ANN. tit. 5, § 4553 (West Supp. 1999).

As used in this Act, unless the context or subchapter otherwise indicates, the following words have the following meanings.

.....

8. Place of public accommodation. “Place of public accommodation” means a facility, operated by a public or private entity,

whose operations fall within at least one of the following categories:

- A. An inn, hotel, motel or other place of lodging, whether conducted for the entertainment or accommodation of transient guests or those seeking health, recreation or rest;
- B. A restaurant, eating house, bar, tavern, buffet, saloon, soda fountain, ice cream parlor or other establishment serving or selling food or drink;
- C. A motion picture house, theater, concert hall, stadium, roof garden, airdrome or other place of exhibition or entertainment;
- D. An auditorium, convention center, lecture hall or other place of public gathering;
- E. A bakery, grocery store, clothing store, hardware store, shopping center, garage, gasoline station or other sales or rental establishment;
- F. A laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, dispensary, clinic, bathhouse or other service establishment;
- G. All public conveyances operated on land or water or in the air as well as a terminal, depot or other station used for specified public transportation;
- H. A museum, library, gallery or other place of public display or collection;
- I. A park, zoo, amusement park, race course, skating rink, fair, bowling alley, golf course, golf club, country club, gymnasium, health spa, shooting gallery, billiard or pool parlor, swimming pool, seashore accommodation or boardwalk or other place of recreation, exercise or health;

J. A nursery, elementary, secondary, undergraduate or postgraduate school or other place of education;

K. A day-care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service center establishment;

L. Public elevators of buildings occupied by 2 or more tenants or by the owner and one or more tenants;

M. A municipal building, courthouse, town hall or other establishment of the State or a local government; and

N. Any establishment that in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public.

When a place of public accommodation is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this subchapter, but that portion used exclusively in the operation of the place of public accommodation or that portion used both for the place of public accommodation and for the residential purposes is covered by this subchapter. The covered portion of the residence extends to those elements used to enter the place of public accommodation, and those exterior and interior portions of the residence available to or used by customers or clients, including rest rooms.

.....

8-B. **Public accommodation.** “Public accommodation” means a public or private entity that owns, leases, leases to or operates a place of public accommodation.

MARYLAND

MD. ANN. CODE art. 49B, § 5 (Supp. 1999).

(a) *Prohibition.* – It is unlawful for an owner or operator of a place of public accommodation or an agent or employee of the owner or operator, because of the race, creed, sex, age, color, national origin, marital status, or disability of any person, to refuse, withhold from, or deny to such person any of the accommodations, advantages, facilities

and privileges of such place of public accommodation.

....

(c) *“Place of public accommodation” defined.* – For the purpose of this subtitle, a place of public accommodation means:

(1) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as the proprietor's residence;

(2) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food or alcoholic beverages for consumption on or off the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) Any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) Any establishment which:

(i) 1. Is physically located within the premises of any establishment otherwise covered by this section; or

2. Within the premises of which is physically located any establishment otherwise covered by this section; and

(ii) Which holds itself out as serving patrons of such covered establishment.

(d) *Additional definitions; “reasonable accommodations.”* – (1) For the purposes of this section, a “place of public accommodation” also means any establishment that:

(i) Is operated by a public or private entity;

(ii) Is not included in subsection (c) of this section; and

(iii) Is a retail establishment, whether offering goods, services, entertainment, recreation, or transportation.

....

(e) *Applicability to private club or establishment.* – The provisions of this section shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishments are made available to the customers or patrons of an establishment within the scope of this section.

MASSACHUSETTS

MASS. GEN. LAWS ANN. ch. 272, § 98 (West 1990).

Whoever makes any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, deafness, blindness or any physical or mental disability or ancestry relative to the admission of any person to, or his treatment in any place of public accommodation, resort or amusement, as defined in section ninety-two A . . . shall be punished by a fine of not more than twenty-five hundred dollars or by imprisonment for not more than one year, or both, and shall be liable to any person aggrieved thereby for such damages as are enumerated in section five of chapter one hundred and fifty-one B All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right.

MASS. GEN. LAWS ANN. ch. 272, § 92A (West Supp. 1999).

A place of public accommodation, resort or amusement within the meaning hereof shall be defined as and shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be (1) an inn, tavern, hotel, shelter, roadhouse, motel, trailer camp or resort for transient or permanent guests or patrons seeking housing or lodging, food, drink, entertainment, health, recreation or rest; (2) a carrier, conveyance or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto; (3) a gas station, garage, retail store or establishment, including those dispensing personal services; (4) a restaurant, bar or eating place, where food, beverages, confections or their derivatives are sold for consumption on or off the premises; (5) a rest room, barber shop, beauty parlor, bathhouse, seashore facilities or swimming pool, except such rest room, bathhouse or seashore facility as may be segregated on the basis of sex; (6) a boardwalk or other public highway; (7) an auditorium, theatre, music hall, meeting place or hall, including the common halls of buildings; (8) a place of public amusement, recreation, sport, exercise

or entertainment; (9) a public library, museum or planetarium; or (10) a hospital, dispensary or clinic operating for profit

MICHIGAN

Elliott-Larsen Civil Rights Act

MICH. COMP. LAWS ANN. § 37.2102 (West Supp. 1999).

(1) The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.

Elliott-Larsen Civil Rights Act

MICH. COMP. LAWS ANN. § 37.2301 (West Supp. 1999).

(a) “Place of public accommodation” means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. Place of public accommodation also includes the facilities of the following private clubs:

(i) A country club or golf club.

(ii) A boating or yachting club.

(iii) A sports or athletic club.

(iv) A dining club, except a dining club that in good faith limits its membership to the members of a particular religion for the purpose of furthering the teachings or principles of that religion, and not for the purpose of excluding individuals of a particular gender, race, or color.

Elliott-Larsen Civil Rights Act

MICH. COMP. LAWS ANN. § 37.2302a (West Supp. 1999).

(1) This section applies to a private club that is defined as a place of public accommodation pursuant to section 301(a).

(2) If a private club allows use of its facilities by 1 or more adults per membership, the use must be equally available to all adults entitled to use the facilities under the membership. All classes of membership shall be available without regard to race, color, gender, religion, marital status, or national origin. Memberships that permit use during restricted times may be allowed only if the restricted times apply to all adults using that membership.

(3) A private club that has food or beverage facilities or services shall allow equal access to those facilities and services for all adults in all membership categories at all times. This subsection shall not require service or access to facilities to persons that would violate any law or ordinance regarding sale, consumption, or regulation of alcoholic beverages.

Elliott-Larsen Civil Rights Act

MICH. COMP. LAWS ANN. § 37.2303 (West Supp. 1999).

This article shall not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment are made available to the customers or patrons of another establishment that is a place of public accommodation or is licensed by the state under Act No. 8 of the Public Acts of the extra session of 1933, being sections 436.1 through 436.58 of the Michigan Compiled Laws. This section shall not apply to a private club that is otherwise defined as a place of public accommodation in this article.

MINNESOTA

MINN. STAT. ANN. § 363.01 (West Supp. 1999).

Subd. 33. Public accommodations. “Place of public accommodation” means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

MINN. STAT. ANN. § 363.03 (West Supp. 1999).

Subd. 3. Public accommodations. (a) It is an unfair discriminatory practice:

(1) to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex, or for a taxicab company to discriminate in the access to, full utilization of, or benefit from service because of a person's disability

MISSISSIPPI

No applicable "anti-discrimination" statute found.

MISSOURI

MO. ANN. STAT. § 213.010 (West Supp. 1999).

(5) "Discrimination," any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing

. . . .

(15) "Places of public accommodation," all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general public or such public places providing food, shelter, recreation and amusement, including, but not limited to:

(a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment;

(c) Any gasoline station, including all facilities located on the premises of such gasoline station and made available to the patrons thereof;

(d) Any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment;

(e) Any public facility owned, operated, or managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation; and any such facility supported in whole or in part by public funds;

(f) Any establishment which is physically located within the premises of any establishment otherwise covered by this section or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment

MO. ANN. STAT. § 213.065 (West 1996).

1. All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation on the grounds of race, color, religion, national origin, sex, ancestry, or handicap.

2. It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, as defined in section 213.010 and this section, or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, sex, ancestry, or handicap.

3. The provisions of this section shall not apply to a private club, a place of accommodation owned by or operated on behalf of a religious corporation, association or society, or other establishment which is not in fact open to the public, unless the facilities of such establishments are made available to the customers or patrons of a place of public accommodation as defined in section 213.010 and this section.

MONTANA

MONT. CODE ANN. § 49-2-304 (1999).

(1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, agent, or employee of a public accommodation:

(a) to refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of sex, marital status, race, age, physical or mental disability, creed, religion, color, or national origin

MONT. CODE ANN. § 49-2-101 (1999).

(20) (a) “Public accommodation” means a place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons. It includes without limitation a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park, resort, campground, barbershop, beauty parlor, bathroom, resthouse, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, or hospital and all other public amusement and business establishments.

(b) Public accommodation does not include an institution, club, or place of accommodation that proves that it is by its nature distinctly private. An institution, club, or place of accommodation may not be considered by its nature distinctly private if it has more than 100 members, provides regular meal service, and regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages, directly or indirectly, from or on behalf of nonmembers, for the furtherance of trade or business. For the purposes of this subsection (20), any lodge of a recognized national fraternal organization is considered by its nature distinctly private.

NEBRASKA

NEB. REV. STAT. § 20-132 (1997).

All persons within this state shall be entitled to a full and equal enjoyment of any place of public accommodation, as defined in sections 20-132 to 20-143, without discrimination or segregation on the grounds

of race, color, sex, religion, national origin, or ancestry.

NEB. REV. STAT. § 20-133 (1997).

As used in sections 20-132 to 20-143, unless the context otherwise requires, places of public accommodation shall mean all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, and accommodations for the peace, comfort, health, welfare, and safety of the general public and such public places providing food, shelter, recreation, and amusement including, but not limited to:

(1) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including but not limited to any such facility located on the premises of any retail establishment;

(3) Any gasoline station, including all facilities located on the premises of such station and made available to the patrons thereof;

(4) Any motion picture house, theatre, concert hall, sports arena, stadium, or other place of exhibition or entertainment;

(5) Any public facility owned, operated, or managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation, and any such facility supported in whole or in part by public funds; and

(6) Any establishment which is physically located within the premises of any establishment otherwise covered by this section or within the premises of which is physically located any such covered establishment and which holds itself out as serving patrons of such covered establishment.

NEB. REV. STAT. § 20-138 (1997).

The provisions of sections 20-132 to 20-143 shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishments are made available to the customers or patrons of an establishment within the scope of section 20-133.

NEVADA

NEV. REV. STAT. ANN. § 233.010 (Michie 1996).

1. It is hereby declared to be the public policy of the State of Nevada to protect the welfare, prosperity, health and peace of all the people of the state, and to foster the right of all persons reasonably to seek, obtain and hold employment and housing accommodations, and reasonably to seek and be granted services in places of public accommodation without discrimination, distinction or restriction because of race, religious creed, color, age, sex, disability, national origin or ancestry.

NEV. REV. STAT. ANN. § 651.050 (Michie 1999).

2. "Place of public accommodation" means:

(a) Any inn, hotel, motel or other establishment which provides lodging to transient guests, except an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of the establishment as his residence;

(b) Any restaurant, bar, cafeteria, lunchroom, lunch counter, soda fountain, casino or any other facility where food or spirituous or malt liquors are sold, including any such facility located on the premises of any retail establishment;

(c) Any gasoline station;

(d) Any motion picture house, theater, concert hall, sports arena or other place of exhibition or entertainment;

(e) Any auditorium, convention center, lecture hall, stadium or other place of public gathering;

(f) Any bakery, grocery store, clothing store, hardware store, shopping center or other sales or rental establishment;

(g) Any laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, office of an accountant or lawyer, pharmacy, insurance office, office of a provider of health care, hospital or other service establishment;

(h) Any terminal, depot or other station used for

specified public transportation;

(i) Any museum, library, gallery or other place of public display or collection;

(j) Any park, zoo, amusement park or other place of recreation;

(k) Any nursery, private school or university or other place of education;

(l) Any day care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service establishment;

(m) Any gymnasium, health spa, bowling alley, golf course or other place of exercise or recreation;

(n) Any other establishment or place to which the public is invited or which is intended for public use; and

(o) Any establishment physically containing or contained within any of the establishments described in paragraphs (a) to (n), inclusive, which holds itself out as serving patrons of the described establishment.

NEV. REV. STAT. ANN. § 651.060 (Michie 1999).

The provisions of NRS 651.050 to 651.110, inclusive, do not apply to any private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of NRS 651.050.

NEV. REV. STAT. § 651.070 (1999).

All persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation, without discrimination or segregation on the ground of race, color, religion, national origin or disability.

NEW HAMPSHIRE

N.H. REV. STAT. ANN. § 354-A:2 (1995).

XIV. "Place of public accommodation" includes any inn, tavern or hotel, whether conducted for entertainment, the housing or lodging of transient guests, or for the benefit, use or accommodations of those

seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barbershop, theater, golf course, sports arena, health care provider, and music or other public hall, store or other establishment which caters or offers its services or facilities or goods to the general public. "Public accommodation" shall not include any institution or club which is in its nature distinctly private.

N.H. REV. STAT. ANN. § 354-A:17 (Supp. 1999).

It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, because of the age, sex, race, creed, color, marital status, physical or mental disability or national origin of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof

NEW JERSEY

Law Against Discrimination

N.J. STAT. ANN. § 10:5-3 (West Supp. 1999).

The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State.

. . . .

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

Law Against Discrimination

N.J. STAT. ANN. § 10:5-5 (West Supp. 1999).

1. "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private

NEW MEXICO

N.M. STAT. ANN. § 28-1-7 (Michie 1999). (Repealed effective July 1, 2000).

It is an unlawful discriminatory practice for:

. . . .

F. any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any individual because of race, religion, color, national origin, ancestry, sex or physical or mental handicap, provided that the physical or mental handicap is unrelated to an individual's ability to acquire or rent and maintain

particular real property or housing accommodation

NEW YORK

N.Y. CIV. RTS. LAW § 40 (McKinney 1992).

All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodations, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. No person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any such place shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof A place of public accommodation, resort or amusement within the meaning of this article, shall be deemed to include inns, taverns, road houses, hotels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectioneries [sic], soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; retail stores and establishments, dispensaries, clinics, hospitals, bath-houses, barber-shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors, public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; and any such public library, kindergarten, primary and secondary school, academy, college, university, professional school, extension course, or other educational facility, supported in whole or in part by public funds or by contributions solicited from the general public; garages, all public conveyances, operated on land or water, as well as the stations and terminals thereof; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants Nothing herein contained shall be construed to . . . include any institution, club, or place of accommodation which is in its

nature distinctly private, or to prohibit the mailing of a private communication in writing sent in response to a specific written inquiry.

NORTH CAROLINA

N.C. GEN. STAT. § 99D-1 (1992).

(a) It is a violation of this Chapter if:

(1) Two or more persons, motivated by race, religion, ethnicity, or gender, but whether or not acting under color of law, conspire to interfere with the exercise or enjoyment by any other person or persons of a right secured by the Constitutions of the United States or North Carolina, or of a right secured by a law of the United States or North Carolina that enforces, interprets, or impacts on a constitutional right

NORTH DAKOTA

N.D. CENT. CODE § 14-02.4-01 (1997).

It is the policy of this state to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer; to prevent and eliminate discrimination in . . . public accommodations

N.D. CENT. CODE § 14-02.4-02 (1997).

12. "Public accommodation" means every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuity. "Public accommodation" does not include a bona fide private club or other place, establishment, or facility which is by its nature distinctly private; provided, however, the distinctly private place, establishment, or facility is a "public accommodation" during the period it caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuity.

OHIO

OHIO REV. CODE ANN. § 4112.01 (Anderson 1998).

(9) “Place of public accommodation” means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public.

OHIO REV. CODE ANN. § 4112.02 (Anderson Supp. 1999).

It shall be an unlawful discriminatory practice:

. . . .

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

OKLAHOMA

OKLA. STAT. ANN. tit. 25, § 1401 (West 1987).

As used in this act unless the context requires otherwise:

(1) “place of public accommodation” includes any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds: except that

(i) a private club is not a place of public accommodation, if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests

OKLA. STAT. ANN. tit. 25, § 1402 (West 1987).

It is a discriminatory practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a “place of public accommodation” because of race, color, religion, sex, national origin, age, or handicap.

OREGON

OR. REV. STAT. § 30.670 (1987).

All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, religion, sex, marital status, color or national origin.

OR. REV. STAT. § 30.675 (1987).

(1) A place of public accommodation, subject to the exclusion in subsection (2) of this section, means any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise.

(2) However, a place of public accommodation does not include any institution, bona fide club or place of accommodation which is in its nature distinctly private.

PENNSYLVANIA

Pennsylvania Human Relations Act
43 PA. CONS. STAT. ANN. § 953 (West Supp. 1999).

The opportunity for an individual to obtain employment for which he is qualified, and to obtain all the accommodations, advantages, facilities and privileges of any public accommodation and of any housing accommodation and commercial property without discrimination because of race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin, the use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals is hereby recognized as and declared to be a civil right which shall be enforceable as set forth in this act.

Pennsylvania Human Relations Act
43 PA. CONS. STAT. ANN. § 954 (West Supp. 1999).

(l) The term “**public accommodation, resort or amusement**” means any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public, including but not limited to inns, taverns, roadhouses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants or eating houses, or any place where food is sold for consumption on the premises, buffets, saloons, barrooms or any store, park or enclosure where spirituous or malt liquors are sold, ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises, drug stores, dispensaries, clinics, hospitals, bathhouses, swimming pools, barber shops, beauty parlors, retail stores and establishments, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, gymnasiums, shooting galleries, billiard and pool parlors, public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions under the supervision of this Commonwealth, nonsectarian cemeteries, garages and all public conveyances operated on land or water or in the air as well as the stations, terminals and airports thereof, financial institutions and all Commonwealth facilities and services, including such facilities and services of all political subdivisions thereof, but shall not include any accommodations which are in their nature distinctly private.

Pennsylvania Human Relations Act
43 PA. CONS. STAT. ANN. § 955 (West Supp. 1999).

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

• • • •

(i) For any person being the owner, lessee, proprietor, manager,

superintendent, agent or employe [sic] of any public accommodation, resort or amusement to:

(1) Refuse, withhold from, or deny to any person because of his race, color, sex, religious creed, ancestry, national origin or handicap or disability, or to any person due to use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals, either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such public accommodation, resort or amusement.

RHODE ISLAND

R.I. GEN. LAWS § 11-24-2 (Supp. 1999).

No person, being the owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation, resort, or amusement shall directly or indirectly refuse, withhold from, or deny to any person on account of race or color, religion, country of ancestral origin, disability, age, sex, or sexual orientation any of the accommodations, advantages, facilities, or privileges of that public place

R.I. GEN. LAWS § 11-24-3 (1994).

A place of public accommodation, resort, or amusement within the meaning of §§ 11-24-1 – 11-24-3, inclusive, shall be deemed to include, but not be limited to, inns, taverns, roadhouses, hotels, whether conducted for the entertainment or accommodation of transient guests or of those seeking health, recreation or rest, restaurants, eating houses or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any stores, parks, or enclosures where spirituous or malt liquors are sold; ice cream parlors, confectioneries [sic], soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or beverages of any kind are retailed for consumption on the premises; retail stores and establishments, dispensaries, clinics, hospitals, rest rooms, bath houses, barber shops, beauty parlors, theaters, motion picture houses, music halls, airdromes, roof gardens, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors, swimming pools, seashore

accommodations and boardwalks, and public libraries; garages; all public conveyances operated on land, water or in the air as well as their stations and terminals; public halls and public elevators of buildings occupied by two or more tenants or by the owner and one or more tenants; and public housing projects. Nothing herein contained shall be construed to include any place of accommodation, resort, or amusement which is in its nature distinctly private.

SOUTH CAROLINA

S.C. CODE ANN. § 45-9-10 (Law. Co-op. Supp. 1999).

(A) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in Article 1 of this chapter, without discrimination or segregation on the ground of race, color, religion, or national origin.

(B) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this chapter if discrimination or segregation by it is supported by state action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station;

(3) any hospital, clinic, or other medical facility which provides overnight accommodations;

(4) any retail or wholesale establishment;

(5) any motion picture house, theater, concert hall, billiard parlor, saloon, barroom, golf course, sports arena, stadium, or other place of amusement, exhibition, recreation, or entertainment; and

(6) any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of

which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.

(C) "Supported by state action" means the licensing or permitting of any establishment or any agent of an establishment listed above, subject to the exclusion provided in Section 45-9-20, which has or must have a license or permit from the State, its agencies, or local governmental entities to lawfully operate.

S.C. CODE ANN. § 45-9-20 (Law. Co-op. Supp. 1999).

The provisions of this chapter do not apply to a private club or other establishment not in fact open to the general public. An institution, a club, an organization, or a place of accommodation, as defined in Section 45-9-10, which offers memberships for less than thirty days is not private within the meaning of this section.

SOUTH DAKOTA

S.D. CODIFIED LAWS § 20-13-1 (Michie 1995).

Terms used in this chapter mean:

....

(12) "Public accommodations," any place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuitously. Public accommodation does not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the general public for fee or charge or gratuitously, it shall be deemed a public accommodation during such period of use

....

(16) "Unfair or discriminatory practice," any act or attempted act which because of race, color, creed, religion, sex, ancestry, disability or national origin accords unequal treatment or separation or segregation of any person, or denies, prevents, limits, or otherwise adversely affects, or if accomplished would deny, prevent, limit or otherwise adversely affect, the benefit or enjoyment by any person of employment, labor union membership, housing accommodations, property rights,

education, public accommodations, and public services.

TENNESSEE

TENN. CODE ANN. § 4-21-102 (1998).

As used in this chapter, unless the context otherwise requires:

....

(3) “Discriminatory practices” means any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons because of race, creed, color, religion, sex, age or national origin;

....

(15) “Places of public accommodation, resort or amusement” includes any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds, except that:

(A) A bona fide private club is not a place of public accommodation, resort or amusement if its policies are determined solely by its members; and

(B) Its facilities or services are available only to its members and their bona fide guests

TENN. CODE ANN. § 4-21-501 (1998).

Except as otherwise provided in this chapter, it is a discriminatory practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation, resort or amusement, as defined in this chapter, on the grounds of race, creed, color, religion, sex, age or national origin.

TEXAS

No applicable “anti-discrimination” statute found.

UTAH

UTAH CODE ANN. § 13-7-2 (1999).

(1) The term “place of public accommodation” includes every place, establishment, or facility of whatever kind, nature, or class that caters or offers its services, facilities, or goods to the general public for a fee or charge, except, any establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; provided that any place, establishment, or facility that caters or offers its services, facilities, or goods to the general public gratuitously shall be within the definition of this term if it receives any substantial governmental subsidy or support; but the term shall not apply to any institution, church, any apartment house, club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public.

UTAH CODE ANN. § 13-7-3 (1999).

All persons within the jurisdiction of this state are free and equal and are entitled to full and equal accommodations, advantages, facilities, privileges, goods and services in all business establishments and in all places of public accommodation, and by all enterprises regulated by the state of every kind whatsoever, without discrimination on the basis of race, color, sex, religion, ancestry or national origin.

VERMONT

VT. STAT. ANN. tit. 9, § 4501 (1993).

As used in this chapter:

(1) “Place of public accommodation” means any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public.

....

(8) “Public accommodation” means an individual, organization, governmental or other entity that owns, leases, leases to or operates a place of public accommodation.

VT. STAT. ANN. tit. 9, § 4502 (1993).

(a) An owner or operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of the race, creed, color, national origin, marital status, sex or sexual orientation of any person, refuse, withhold from or deny to that person any of the accommodations, advantages, facilities and privileges of the place of public accommodation.

VIRGINIA

Virginia Human Rights Act

VA. CODE ANN. § 2.1-715 (Michie Supp. 1999).

It is the policy of the Commonwealth of Virginia:

1. To safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions; in employment; to preserve the public safety, health and general welfare; and to further the interests, rights and privileges of individuals within the Commonwealth

Virginia Human Rights Act

VA. CODE ANN. § 2.1-716 (Michie Supp. 1999).

Conduct which violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability shall be an “unlawful discriminatory practice” for the purposes of this chapter.

WASHINGTON

WASH. REV. CODE ANN. § 49.60.030 (West Supp. 1999).

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person is recognized as and declared to be a civil right. This right shall include, but not be limited to:

....

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement

WASH. REV. CODE ANN. § 49.60.040 (West Supp. 1999).

As used in this chapter:

....

(9) “Full enjoyment of” includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person, to be treated as not welcome, accepted, desired, or solicited;

(10) “Any place of public resort, accommodation, assemblage, or amusement” includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children’s camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of

accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution

WASH. REV. CODE ANN. § 9.91.010 (West 1998).

Terms used in this section shall have the following definitions:

(1) (a)

. . . .

(c) “Full enjoyment of” shall be construed to include the right to purchase any service, commodity or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement, without acts directly or indirectly causing persons of any particular race, creed or color, to be treated as not welcome, accepted, desired or solicited.

(d) “Any place of public resort, accommodation, assemblage or amusement” is hereby defined to include, but not to be limited to, any public place, licensed or unlicensed, kept for gain, hire or reward, or where charges are made for admission, service, occupancy or use of any property or facilities, whether conducted for the entertainment, housing or lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation or rest, or for the sale of goods and merchandise, or for the rendering of personal services, or for public conveyance or transportation on land, water or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation or public purposes, or public halls, public elevators and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or any educational institution wholly or

partially supported by public funds, or schools of special instruction, or nursery schools, or day care centers or children's camps; nothing herein contained shall be construed to include, or apply to, any institute, bona fide club, or place of accommodation, which is by its nature distinctly private provided that where public use is permitted that use shall be covered by this section; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution; and the right of a natural parent in *loco parentis* to direct the education and upbringing of a child under his control is hereby affirmed.

(2) Every person who denies to any other person because of race, creed, or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage, or amusement, shall be guilty of a misdemeanor.

WEST VIRGINIA

The West Virginia Human Rights Act
W. VA. CODE § 5-11-3 (1999).

When used in this article:

....

(h) The term "discriminate" or "discrimination" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate;

....

(j) The term "place of public accommodations" means any establishment or person, as defined herein, including the state, or any political or civil subdivision thereof, which offers its services, goods, facilities or accommodations to the general public, but shall not include any accommodations which are in their nature private.

The West Virginia Human Rights Act
W. VA. CODE § 5-11-9 (1999).

It shall be an unlawful discriminatory practice, unless based

upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions:

....

(6) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to:

(A) Refuse, withhold from or deny to any individual because of his or her race, religion, color, national origin, ancestry, sex, age, blindness or disability, either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of public accommodations

WISCONSIN

WIS. STAT. ANN. § 106.04 (West Supp. 1999).

(1m) Definitions. In this section:

....

(h) “Discriminate” means to segregate, separate, exclude or treat a person or class of persons unequally . . . because of sex, race, color, sexual orientation, disability, religion, national origin, marital status, family status, lawful source of income, age or ancestry.

....

(nm) “Member of a protected class” means a group of natural persons, or a natural person, who may be categorized based on one or more of the following characteristics: sex, race, color, disability, sexual orientation[,] . . . religion, national origin, marital status, family status, lawful source of income, age or ancestry.

....

(p) 1. “Public place of accommodation or amusement” shall be interpreted broadly to include, but not be limited to, places of business or recreation; lodging establishments; restaurants; taverns; barber or cosmetologist, aesthetician, electrologist or manicuring establishments; nursing homes; clinics; hospitals; cemeteries; and any place where accommodations, amusement, goods or services are available either free or for a consideration, subject to subd. 2.

2. "Public place of accommodation or amusement" does not include a place where a bona fide private, nonprofit organization or institution provides accommodations, amusement, goods or services during an event in which the organization or institution provides the accommodations, amusement, goods or services to the following individuals only:

- a. Members of the organization or institution.
- b. Guests named by members of the organization or institution.
- c. Guests named by the organization or institution.

....

(9) Public place of accommodation or amusement. (a) No person may do any of the following:

1. Deny to another or charge another a higher price than the regular rate for the full and equal enjoyment of any public place of accommodation or amusement because of sex, race, color, creed, disability, sexual orientation, national origin or ancestry.

WYOMING

WYO. STAT. ANN. § 6-9-101 (Michie 1999).

(a) All persons of good deportment are entitled to the full and equal enjoyment of all accommodations, advantages, facilities and privileges of all places or agencies which are public in nature, or which invite the patronage of the public, without any distinction, discrimination or restriction on account of race, religion, color, sex or national origin.

(b) A person who intentionally violates this section commits a misdemeanor punishable by imprisonment for not more than six (6) months, a fine of not more than seven hundred fifty dollars (\$750.00), or both.

Appendix D**CITY “ANTI-DISCRIMINATION” STATUTES****NEW YORK CITY**

NEW YORK, N.Y., CODE § 8-101 (1999).

In the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, creed, age, national origin, alienage or citizenship status, gender, sexual orientation, disability, marital status, whether children are, may be or would be residing with a person or conviction or arrest record. The council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination, bias-related violence or harassment and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state.

NEW YORK, N.Y., CODE § 8-102 (1999).

When used in this chapter:

....

9. The term “place or provider of public accommodation” shall include providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available. Such term shall not include any club which proves that it is in its nature distinctly private. A club shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business. For the purposes of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or

the religious corporation law shall be deemed to be in its nature distinctly private.