The Hunkiest Little Whorehouse in Town is Looking for a Few Good Men, but Only to Work: The Constitutional Implications of Heidi Fleiss's Female Brothel

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“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”

I. Introduction

For almost two decades, Heidi Fleiss caused Hollywood both pleasure and pain. During her reign as the Hollywood Madam, she allegedly possessed a little black book containing the names and sexual preferences of prominent entertainment industry leaders. Public disclosure of the book’s contents threatened to destroy careers and reputations if names became public, but no such book ever materialized. Heidi Fleiss’s prostitution empire ultimately dissolved after her conviction for money laundering, pandering, and tax evasion.

The adult entertainment industry, however, has not heard the last of Heidi Fleiss. She has re-emerged to create the country’s first

3. See Steve Friess, Betting on the Studs, NEWSWEEK, Dec. 12, 2005, at 44 (referring to Heidi Fleiss as “former Hollywood Madam Heidi Fleiss”). Hollywood buzzed with rumors of who comprised Fleiss’s client list; the most high-profiled star exposed as a client was Charlie Sheen. See Then & Now: Heidi Fleiss, supra note 2 (mentioning most famous person named as client of Fleiss’s call girl service); see also Rotten.com, Biographies: Heidi Fleiss, http://www.rottentomatoes.com/library/bio/misc/heidi-fleiss/ (last visited Oct. 28, 2006) (referring to rumors of book containing names of studio heads, actors, and other prominent entertainment figures). Fleiss’s clients also included “individuals who ran countries or whose actions could easily alter global economies.” Id. The little black book purportedly contained the names, contact information, sexual preferences, and the amount of money paid to Fleiss. See id. Fleiss later “admitted there was no little black book.” See id.
4. See Rotten.com, Biographies: Heidi Fleiss, supra note 3 (clarifying that little black book was unfounded rumor).
5. See Hubler, supra note 2 (listing charges for which Fleiss was convicted). Fleiss served twenty-one months in prison and was released in 1999. See id.
brothel for female customers. Known as Heidi's Stud Farm, the brothel was originally scheduled to open by April 2006 in Crystal, Nevada. Fleiss hopes to create "an exotic, unique experience: perfect for bachelorette parties or for women wanting uncomplicated, STD-free hookups."

One of the Stud Farm's initial policies, however, threatens to expose the business to legal challenges before its doors open for business. The Stud Farm will offer only female-to-male sexual ser-

6. See Friess, supra note 3 (highlighting that Fleiss's brothel will be first legal brothel offering services for female customers). It is estimated to be a "$1.5 million sexual fantasyland." Id. Moreover, the Stud Farm will provide further entertainment to Home Box Office ("HBO") viewers; Heidi Fleiss signed a deal with HBO for the filming of a documentary about the brothel's birth. See Heidi Fleiss 'Stud Farm' Documentary to Air on HBO, http://www.starpulse.com/news/index.php/2005/12/01/heidifleiss_stud_farm_documentary_to_ai (Dec. 1, 2005, 11:00:21). The film will focus on everything Fleiss encounters, from the construction of the brothel to the hiring of the men. See id.

7. See Hubler, supra note 2 (stating Heidi Fleiss's plans for brothel will be first in state to serve only female customers). Heidi Fleiss's business partner notified Nye County licensing officials of the pair's intentions, adding that the fee for one of Fleiss's studs will be $250 per hour. See id. Fleiss noted several predictors of the Farm's success included that "'[w]omen are more independent these days; they make more money and it's hard to meet people' ...." Id. In a letter to the county licensing board, Fleiss's business partner claimed that the brothel would "address an ever-increasing fact of life," because 'society is witnessing a unique evolution of the female gender reaching out for the same service we now offer male clients.'" Id.; see also Friess, supra note 3 (pointing out name for Heidi Fleiss's new enterprise); Heidi's Stud Farm, http://www.heidifleiss.com/phpform/use/studemployment/form1.html (last visited Oct. 16, 2006) (estimating date of opening). As of October 16, 2006, Fleiss's website proclaimed that the Stud Farm is in its beginning phase of development and will continue to post updates of its progress online. See Heidi's Stud Farm, supra.

8. Friess, supra note 3 (citing Fleiss) (stating goal of brothel). Erotic entertainment options such as sex toy parties and strip clubs aside, some claim that a large market exists for male prostitutes. See Mireya Navarro, The West Gets Wilder, N.Y. TIMES, Jan. 8, 2006, § 9, at 1. "'We get offered all the time,' said Dan Remington, an owner of 'Hollywood Men,' a show of male strippers in Hollywood." Id. The Stud Farm expects to employ twenty men with ten more on stand-by. See Heidi's Stud Farm, supra note 7 (describing staffing plans at brothel). The $250 per hour fee will be split fifty-fifty with the brothel, but the studs will keep all tips. See Heidi's Stud Farm, supra note 7. In addition, the men will be charged a weekly fee which will cover the cost of a housekeeper, lodging, and food. See Heidi's Stud Farm, supra note 7 (providing Stud Farm employment details). Finally, Fleiss will require the studs to submit to weekly tests for sexually transmitted diseases, including HIV. See Heidi's Stud Farm, supra note 7 (explaining requirements for working at brothel).

9. See Friess, supra note 3 (introducing potential legal hurdle Fleiss could face). Nevada Assemblyman David R. Parks, also a homosexual man, plans to ask for a legal opinion as to whether Fleiss's plan to prohibit male customers from hiring her studs violates a Nevada anti-bias law. See id. Parks, a Democrat, represents Clark County, Nevada. See Nevada Legislature, http://leg.state.nv.us/73rd/laws/legislators/Assembly/PARKS.cfm (last visited Oct. 16, 2006). He has been an Assemblyman for eight years, the Democratic Assistant Majority Whip in 1999, the
Heidi Fleiss’s web site proclaims: “This establishment will hire men to service women. There will be no male-to-male sexual services offered.” This policy does not bar homosexual men from working at the Stud Farm, but it does prohibit them from patronizing the Stud Farm. Therefore, Heidi Fleiss’s Stud Farm policy prohibiting male-to-male homosexual acts discriminates against homosexual men as patrons.

This Comment examines the potential legal challenges Heidi Fleiss may face as a result of her discriminatory policy excluding homosexual men as customers of her brothel, as well as the possible defenses she can raise. Part II offers an overview of the legalized brothel industry, the economic impact that industry has on Nevada, and Heidi Fleiss’s rise to infamy. Part III dissects the legal claims at issue, including: homosexuals as a protected class, the public accommodation requirement of the Civil Rights Act of 1964 versus the private club exemption, and the doctrine of state action. Part IV concludes by offering the most pragmatic view of the counterattack against legal challenges Heidi Fleiss’s Stud Farm may face.

Democratic Assistant Majority Floor Leader in 2001, and he has held numerous other leadership positions. See id. (listing credentials of legislator).

See Heidi’s Stud Farm, supra note 7 (describing to potential employees what it would be like to work at Stud Farm). In the United States, male escorts “overwhelmingly cater to gay clients . . . .” Navarro, supra note 8 (recognizing that market for gay social and sexual services already exists).

Heidi’s Stud Farm, supra note 7 (quoting Stud Farm policy prohibiting sexual services for male customers).

See id. (making inference from post on Fleiss’s stud application form). In 1994, John Reese, former president of Nevadans Against Prostitution, announced plans to open Nevada’s first gay brothel. See ALEXA ALBERT, BROTHEL: MUSTANG RANCH AND ITS WOMEN 174 (2001) (introducing first mention of gay brothel as business venture). His reasoning was that “brothels are a good place for gays to go to have safe sex.” Id. He sees Nevada’s potential as the “gay prostitution capital of the nation.” Id. Further, Reese predicted that Nevada would have as many as ten gay brothels by 1999 because the Nevada state government repealed statutes criminalizing homosexual conduct in 1993. See id. Moreover, the brothel industry could not openly oppose a gay brothel without being viewed as discriminatory. See id. When Nye County commissioners turned down Reese’s application for lacking certain information, Reese withdrew his proposal. See id. at 175.

See Friess, supra note 5 (deducing that brothel policy of prohibiting male-to-male services may be discriminatory toward homosexual men). However, Fleiss indicated that “she may target the gay market next.” Id.

For a further discussion of the rise of the legalized brothel industry in Nevada, see infra notes 17-77. For a further discussion of Heidi Fleiss’s background, see infra notes 92-115 and accompanying text.

For a further discussion of the three constitutional issues addressed in this Comment, see infra notes 116-353 and accompanying text.

For a further discussion, see infra notes 352-53 and accompanying text.
II. BACKGROUND
   A. Nevada Brothel Industry

1. The Rise of the Brothel Industry

Originally, Nevada did not embrace the brothel industry; rather, it tolerated the industry for nearly a century before its legalization.17 Brothels in the Wild West have operated since the gold and silver rush days of the mid-to-late 1800s.18 As miners headed west, prostitutes followed and remained welcome in towns where men far outnumbered women.19 In fact, Nevada residents consider several prominent frontier prostitutes to be important founding citizens.20

When families started migrating west, Nevada lawmakers recognized that controlling prostitution required regulating it.21 Legislators passed the first prostitution control legislation in 1881, giving county commissioners the power to license, tax, and regulate brothels.22 In 1937, the Nevada state government itself became involved in brothel oversight for the first time by launching an aggressive program to curtail sexually transmitted diseases.23

Limited regions of Reno and Las Vegas remained hubs of legalized prostitution until 1942, when President Franklin D.

17. See Albert, supra note 12, at 36 (announcing state's view of brothel industry before legalizing it). In Elko, Nevada, Mona's II, a legalized brothel, has operated since 1902. See id.
18. See id. (noting era when brothels came into existence in Nevada). California, Arizona, and Colorado also tolerated brothels during mining days. See id.
19. See id. (describing one reason why legalized prostitution took hold in Nevada). Brothels flourished, with over one hundred and fifty operating at one time in Virginia City, Nevada. See id.
20. See id. at 37 (reporting that some Nevadans consider founding prostitutes as legends). For example, Julia Bulette gained popularity in her community for her civic contributions. See id. She became an honorary firefighter and a railroad car was named after her. See id.
21. See id. (indicating point when Nevada legislators realized they needed to regulate prostitution in brothels).
22. See Albert, supra note 12, at 37-38 (announcing first Nevada law passed to control legalized prostitution). At the urging of community groups, legislators passed laws barring brothels from main business routes and within four hundred yards of schools and churches. See id. at 38. Guy Louis Rocha, State Archivist for the Nevada State Library and Archives, reports that the first attempt at legalizing prostitution was in 1871. See Guy Louis Rocha, Brothels of Nevada, http://www.nvbrothels.net/infoHistory.shtml (last visited Oct. 16, 2006). The regulation required a monthly license for brothels and health certificates for prostitutes. See id.
23. See Rocha, supra note 22 (announcing launch of Nevada program to control sexually transmitted diseases). At the time, prostitutes were required to have weekly medical exams. See id. The exams also checked for gonorrhea while monthly exams checked for syphilis. See id.
Roosevelt forced states to prohibit prostitution near military bases.\textsuperscript{24} Brothel regulation returned to Nevada's counties at the end of World War II.\textsuperscript{25} Since then, Nevada has consistently regulated the health of the state's prostitutes.\textsuperscript{26}

At the time the federal government withdrew its regulation of Nevada's brothels, casinos in Reno and Las Vegas thrived.\textsuperscript{27} Las Vegas and Reno city officials attempted to improve the cities' images by separating themselves from organized crime and prostitution.\textsuperscript{28} To this end, county commissioners closed Mae Cunningham's well-known Reno brothel with the support of a judge who ruled that brothels were public nuisances.\textsuperscript{29} In response, rural lawmakers who favored brothels quickly signed a bill that gave counties local discretion to legalize brothels.\textsuperscript{30} The governor of Nevada, however, vetoed the bill under pressure from casino owners.\textsuperscript{31} Citing \textit{Mae Cunningham v. Washoe County}, Reno and Las Vegas officials permanently closed their red-light districts in 1951.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{24} See \textit{Albert}, supra note 12, at 38 (listing Nevada cities where legalized prostitution was most popular). Block 16 became Las Vegas' red-light district and Stockade became Reno's. \textit{See id.} Roosevelt feared that syphilis and other sexually transmitted diseases would incapacitate the troops. \textit{See id.} at 38-39.
\item \textsuperscript{25} See \textit{Albert}, supra note 12, at 39 (pointing to end of federal suppression of brothels in Nevada).
\item \textsuperscript{26} See \textit{Rocha}, supra note 22 (recognizing long history of state oversight of prostitutes' health).
\item \textsuperscript{27} See \textit{id.} (introducing start of outlawing legalized prostitution in Reno and Las Vegas).
\item \textsuperscript{28} See \textit{id.} (continuing discussion about why prostitution is illegal in Reno and Las Vegas). Officials wanted to avoid a federal investigation of gambling operations. \textit{See id.} Today, some critics argue that legal brothels are not good for Nevada's image. \textit{See id.} Steve Wynn, former owner of the Golden Nugget, Treasure Island, Mirage, and Belagio casinos, said brothels pose a risk to the tourism and gaming revenues. \textit{See Albert}, supra note 12, at 180.
\item \textsuperscript{29} See \textit{Rocha}, supra note 22 (announcing first legal battle over closure of brothel as public nuisance). In \textit{Mae Cunningham v. Washoe County}, the judge explained that county commissioners and district attorneys had the power to close brothels as public nuisances, even though Nevada had no statute expressly forbidding prostitution. \textit{See id.} (citing Cunningham v. Washoe County, 203 P.2d 611, 613-14 (Nev. 1949)). However, in \textit{Nye County v. Plankinton}, the Nevada Supreme Court held that in "counties having a statutory licensing scheme" for brothels, brothels were not public nuisances \textit{per se}. \textit{See id.} (citing Nye County v. Plankinton, 587 P.2d 421, 423 (Nev. 1978)).
\item \textsuperscript{30} See \textit{Albert}, supra note 12, at 39 (expressing reaction of lawmakers to closure of Reno brothel as public nuisance).
\item \textsuperscript{31} See \textit{id.} (asserting end of initial effort to make legalization of brothels county-by-county decision).
\item \textsuperscript{32} See \textit{id.} (mentioning final closure of brothels in Reno and Las Vegas). City officials relied on the rationale of the court in the \textit{Mae Cunningham} case to maintain that brothels were public nuisances. \textit{See id.}
In 1955, Joe Conforte revived the Nevada brothel industry when he moved from California to Nevada with plans to exploit the state's porous prostitution laws. Initially, Conforte encountered resistance when he tried to establish a brothel in Reno. He relocated to Storey County, outside of Reno's Washoe County, and opened the Triangle River Ranch. Five months later, Conforte joined forces with Sally Burgess, a former brothel operator, and together they bought three more brothels.

Meanwhile, Conforte's intentional mockery of Washoe County's law prohibiting prostitution enraged Washoe County District Attorney William Raggio. Raggio persuaded Storey County officials to use the Cunningham precedent to close the Triangle River Ranch as a public nuisance. Incredibly, Raggio then set fire to the brothel, claiming he had a right to burn it down because it was a public nuisance. In response, Conforte consolidated his brothel business into one trailer and located it at the corner of Washoe, Storey, and Lyon Counties; when officials from one county threatened to close the brothel, Conforte simply moved the trailer across the county line into a neighboring county.

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33. See id. at 40 (introducing Joe Conforte to legalized prostitution scene in Nevada). Conforte was a Sicilian immigrant who had been a cabdriver and pimp in Oakland, California. See id. (providing Conforte's background).

34. See id. (claiming Conforte's Reno brothel struggled for acceptance).

35. See ALBERT, supra note 12, at 40 (explaining Conforte's next step in establishing brothel).

36. See id. (tracing rise of Conforte's brothel empire). Sally Burgess would later become Conforte's wife. See id.


38. See ALBERT, supra note 12, at 41 (detailing ongoing fight between Conforte and Raggio).

39. See id. (offering more details of dispute between Conforte and Raggio). Raggio set fire to the Conforte brothel with both the Storey County District Attorney and local fire department chief present. See id. Ironically, the brothel sat outside of Raggio's jurisdiction. See id.

40. See id. at 41-42 (recognizing solution Conforte created).
Later, while Conforte served a three year prison sentence for tax evasion, newcomer Richard Bennett persuaded Storey County commissioners to permit him to open the Mustang Bridge Ranch brothel.\footnote{41} Angered by Bennett’s recent success in the brothel business, and hoping to force Bennett to sell, Conforte launched a comeback which included several fires at Bennett’s brothel, and the detonation of a bridge near the Mustang Bridge Ranch.\footnote{42} His plan worked; in 1967 Conforte purchased the Mustang Bridge Ranch.\footnote{43}

Even though Conforte possessed economic power, he wanted political power as well. In an effort to create more sympathetic county officials, Conforte increased the size of a nearby housing development.\footnote{44} Conforte expected tenants to vote in his favor in local elections in exchange for lower rent.\footnote{45} Regular political contributions further cemented Conforte’s local political power.\footnote{46} He drew upon this political power to strongly advocate for Storey County’s passage of the United States’ first brothel-licensing ordinance.\footnote{47} To help officials defend the ordinance, Conforte proposed exorbitant licensing fees so as to create a financial hardship for the county if it did not legalize prostitution.\footnote{48} Subsequently, prostitution became legal in Storey County on January 1, 1971.\footnote{49}

\footnote{41. See id. at 42 (showing attempt by outsider to enter Storey County brothel scene).}

\footnote{42. See id. (detailing Conforte’s self-proclaimed comeback).}

\footnote{43. See ALBERT, supra note 12, at 42 (announcing how Conforte gained control of competitor’s brothel). Conforte changed the brothel’s name to the Mustang Ranch. See Mustang Ranch Chronology, supra note 37 (describing name change). In April 1977, federal agents arrested and charged Conforte with income tax evasion. See id. He faced a five year minimum sentence, and appealed. See id. After the United States Supreme Court rejected a review of his tax evasion conviction, Conforte fled the United States. See id. Conforte returned to the country in 1985, bargained for a reduced sentence, and testified against a judge in a bribery and tax evasion case. See id. In 1990, the Internal Revenue Service seized the Mustang Ranch and ran the business in an effort to recover back taxes. See id. Those plans failed and federal agents closed the Ranch’s doors permanently. See id. (telling end of Mustang Ranch).}

\footnote{44. See ALBERT, supra note 12, at 42-43 (noting one way Conforte increased his political power).}

\footnote{45. See id. at 43 (detailing arrangement as implicit).}

\footnote{46. See id. (concluding that Conforte succeeded in achieving political strength in Storey County).}

\footnote{47. See id. (introducing Conforte’s efforts to get local officials to legalize brothel operations).}

\footnote{48. See id. (stating Conforte’s introduction of legalized brothel ordinances and licensing fees). He recommended an annual fee of $18,000, which eventually increased to $25,000. See id. As of 2000, the annual fee increased to $100,000. See id. For a further discussion of brothel regulations, licensing, and fees, see infra notes 54-77 and accompanying text).}

\footnote{49. See ALBERT, supra note 12, at 43 (stating date when prostitution became legal). The Nevada Supreme Court upheld Storey County’s right to legalize prosti-
Fiery reactions ensued throughout Nevada after Storey County legalized prostitution. When Las Vegas casino owners learned that Conforte wanted to establish a brothel on the outskirts of Las Vegas, they successfully lobbied Nevada lawmakers to pass emergency legislation prohibiting brothel prostitution in counties with a population of more than 200,000 people. Rural counties, in contrast, rejoiced because brothels became a new source of revenue.

Today, Nevada hosts between twenty-five and thirty brothels, located in ten of its seventeen counties. Generally, residents support, accept, or ignore brothels; those few efforts made at closing brothels have encountered sharp community criticism.

See Mustang Ranch Chronology, supra note 37 (noting date of legalization of prostitution). In the late 1970s, Churchill, Mineral, and Nye Counties also legalized prostitution. See id. Lander and Esmeralda Counties followed. See id.

See id. at 43-44 (describing reaction of casino owners to ordinance legalizing prostitution). At the time of the proposal, that limit applied only to Las Vegas's Clark County. See id. at 44. Today, the population parameter has increased to 400,000. See id.

See id. (noting opposite reaction to licensing of brothels in rural counties).


For a further discussion of Nevada's communities' acceptance of brothels, see infra notes 62 and 64. Some critics argue that legal brothels tarnish Nevada's image. See Prostitution in Nevada, supra note 52 (announcing concern that brothels negatively impact Nevada's image). Steve Wynn, former owner of the Golden Nugget, Treasure Island, Mirage, and Belagio casinos, said brothels were a risk to the tourism and gaming revenues; gaming revenues produced monthly taxable revenues of $632 million in 1997. See Albert, supra note 12, at 181 (referencing Wynn's fear of brothels' impacts on gaming industry); see also CourtTV, Nevada Brothels Still Going Strong Outside Major Cities, http://www.courttv.com/archive/people/2001/0716/nevbrothels_ap.html (last visited Oct. 16, 2006) (noting view of brothels as beneficial members of community). The Angel's Ladies brothel hosts a community-wide barbeque every year. See CourtTV, Nevada Brothels Still Going Strong Outside Major Cities, supra. Also, the town of Crystal, Nevada can thank three brothels for purchasing a new ambulance for the community. See id. When Ely City Councilman Stuart Tracy attempted to shut down the town's only brothel, the town voted him out of office. See id. Tracy attempted to have the Stardust Ranch shut down as an immoral place. See id. Although residents rarely attended council meetings, the meeting was full when Tracy proposed the closure. See id. The council voted to close the brothel, but the mayor, himself a frequent customer of the Stardust's bar, vetoed the bill. See id.
Constitutional Implications of Fleiss’s Brothel

2. Current Regulatory Structure of Legalized Brothels

Presently, control of the brothels remains at the county level, where counties act as agents of the state. Under Nevada law, any county with a population of fewer than 400,000 people can license brothels. County regulations require that brothels obtain a permit and license to operate. County commissioners possess sole authority to grant and revoke licenses. After receiving a permit application, the sheriff and commissioners investigate: the applicant, anyone associated with the brothel’s management, the proposed location, and other matters that are “necessary to the protection of the public good, welfare and safety of the inhabitants of the county.” After a complete and satisfactory investigation, the sheriff presents a written report to the county commissioners.

54. For a further discussion of county-based regulation of brothels, see infra notes 55-77 and accompanying text.

55. See Nev. Rev. Stat. § 244.345 (2001) (permitting counties to license and regulate brothels); see also supra note 50.

56. See Storey County, Nev., Ordinance 39A, ch. 5.16.060, § 2 (1971); Nye County, Nev., Ordinance 129, ch. 9.20.030 (1988); Lyon County, Nev., Ordinance 336.06 (1990) (establishing license and permit requirements for brothels); see also Storey County, Nev., Ordinance 39A, ch. 5.16.100, § 5(A) (1971) (stating license requirement). For a list of information required to be submitted on the permit, see, e.g., id. at 5.16.080.

57. See Storey County, Nev., Ordinance 39, ch. 5.16.070, §§ (A) & (B) (1971); see also Nye County, Nev., Ordinance 129, ch. 9.20.050(2), 9.20.060 (1988) (describing conditions for permit issuance).

58. Storey County, Nev., Ordinance 39, ch. 5.16.090 (1971); see also Nye County, Nev., Ordinance 129, ch. 9.20.100 (1) (1988); Lyon County, Nev., Ordinance 336.07 (B) (1990) (detailing investigation procedures). Brothels also provide employment opportunities. The Mustang Ranch was Storey County’s third largest employer with an annual payroll of $1.3 million and regularly employing seventy five people. See Albert, supra note 12, at 181-82 (observing brothel’s impact on local employment). At any one time, a brothel employs roughly three hundred prostitutes. See Prostitution in Nevada, supra note 52 (asserting number of prostitutes on payroll of brothel at any one time). Local and traveling suppliers also benefit financially because they provide goods and services to brothels. See Albert, supra note 12, at 209-10 (offering another positive economic impact of brothels on communities). For example, prostitutes spend approximately $350,000 annually on vendors’ merchandise, like clothing. See id. Further, if a customer arrives at a brothel by cab, the driver typically receives twenty percent of whatever the customer spends. See Prostitution in Nevada, supra note 52. Some brothel proponents also cite incidental financial impacts. See Albert, supra note 12, at 182 (noting decreased number of police officers needed in counties with legalized brothels). For example, tourist services increase because of brothels. See Helen Reynolds, The Economics of Prostitution 110 (Charles C. Thomas 1986). From that, a multiplier effect results whereby other businesses like gas stations, restaurants, bars, and retail stores also benefit. See id.

The commissioners then meet with the applicant and determine final license eligibility.\(^6\)

Of course, permit fees also play a significant role in the approval process. Applicants in Storey County are required to submit $9,000 with their application to cover investigative and first quarter licensing fees.\(^6\) Nye County requires a $1,000 permit fee.\(^6\) Lyon County demands a $2,000 application fee.\(^6\) Brothels must also pay licensing fees which vary depending on the county.\(^6\) Fees range greatly; Storey County requires $25,000 per fiscal quarter while

60. See NYE COUNTY, NEV., ORDINANCE 129, ch. 9.20.100 (3)(b) (1988) (noting licensing eligibility); see also LYON COUNTY, NEV., ORDINANCE 336.07 (D) (1990).

61. See STOREY COUNTY, NEV., ORDINANCE 39, ch. 5.16.160 (C) (1971) (signaling license fees). Industry proponents argue that brothels bring money to financially depressed areas of Nevada and offer safe sex to lonely men. See CourtTV, Nevada Brothels Still Going Strong Outside Major Cities, supra note 53 (stating argument in support of brothels). Brothel owners also want to contribute more money to their communities. See Nevada Brothels Want to be Good Neighbor; Legal Businesses Seek to Pay Taxes, May 10, 2005, http://msnbc.msn.com/id/7805733 (describing desire of brothel owners to contribute more to communities). Brothel owners desperately want the state of Nevada to tax their operations. See id. Owners hope that the extra revenue “will endear them further to the public and give them more political security.” Id. Nevada politicians refused. See id. In particular, the governor considers it “a local government issue.” Id. Additionally, the governor worries that support of this type of legislation will be perceived as support of the entire industry. See id. Other government officials are less concerned with perception. In 2005, Assemblywoman Sheila Leslie, a prostitution opponent, proposed a tax of two dollars per brothel customer. See id. Leslie expected the tax to bring the state approximately $3.2 million over two years. See id.

62. See NYE COUNTY, NEV., ORDINANCE 129, ch. 9.20.230 (1) (1988) (indicating permit fees). Nye County regulations also include a provision allowing the commissioners to charge additional investigative fees. See id. Some counties attribute as much as twenty-five percent of their business fees to brothels. See Nevada Brothels Want to be Good Neighbor; Legal Businesses Seek to Pay Taxes, supra note 61. Geoff Arnold, President of the Nevada Brothel Association, asserts that many brothel owners eagerly anticipate paying more in fees. See id. The Nevada’s brothels generate anywhere between $20 million and $50 million per year. See id.

63. See LYON COUNTY, NEV., ORDINANCE 336.07 (A) (1990) (pointing out one county’s application fee).

64. See ALBERT, supra note 12, at 45 (referring to schedule of license fees based on number of customers one brothel serves). About 325,000 men visited the Mustang Ranch’s two brothels per year and this amounted to half of Nevada’s brothel business. See id. at 96. “In 1998 Nevada, local governments received over $500,000 from brothel business licenses, liquor licenses, and work cards.” Id. at 181. This was in addition to the revenue communities received from property taxes, investigation fees tied to brothel applications, and licensing fees. See id. That same year, Storey County received $182,500 in revenue from its brothels,” totaling almost four percent of the county’s total general fund. Id. Also, Nye County’s licensing fees add approximately $168,000 to the county’s ambulance and health fund annually. See CourtTV, Nevada Brothels Still Going Strong Outside Major Cities, supra note 53 (providing another example of civic contributions of brothels). Gene Etchverry, Nye County’s budget and fiscal director, credits the brothels with helping the ambulance operation avoid “financial peril.” See id.
Lander County demands fifty dollars per quarter. In Lyon County, commissioners base the license fee on the number of rooms the brothel offers, with the highest fee set at $8,400 per quarter.

Each prostitute must also undergo an investigation; they are required to submit a photo, be fingerprinted, and have the proper health status verifications. Further, prostitutes must disclose any prior arrests or convictions. Finally, prostitutes must meet a minimum age requirement, usually eighteen or twenty-one years old.

Health regulations also command much of the commissioners' attention. If any brothel owner knowingly exposes a patron to a prostitute with a sexually transmitted disease, the owner risks license revocation. Further, owners must agree "to use all possible care to prevent such occurrences and abide by any state and county health regulations that may be imposed." Prostitutes must submit to a medical exam at least once a week where the county tests them for gonorrhea and Chlamydia. Prostitutes must also undergo an HIV/AIDS test once a month. Lyon County further requires annual screenings for Herpes Simplex II. Additional health requirements mandate the cleanliness of facilities, appliances, and

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65. See ALBERT, supra note 12, at 45 (listing licensing fees for brothels in different counties). Nye County charges a fifty dollar quarterly registration fee in addition to the licensing fee of one thousand dollars per quarter. See NYE COUNTY, NEV., ORDINANCE 129, ch. 9.20.230 (2), (3) (1988).

66. See LYON COUNTY, NEV., ORDINANCE 336.13 (B)(3) (1990) (indicating basis of license fees). Brothels with twenty or fewer rooms pay $6,400 per quarter. See id. Brothels with twenty-one to forty rooms pay $7,400 per quarter. See id. Brothels with forty-one or more rooms pay $8,400 per quarter. See id.

67. See NYE COUNTY, NEV., ORDINANCE 129, ch. 9.20.140 (1) (1988); see also LYON COUNTY, NEV., ORDINANCE 336.14 (A) (1990) (describing brothel regulations regarding prostitutes' employment criteria).

68. See, e.g., NYE COUNTY, NEV., ORDINANCE 129, ch. 9.20.140 (1)(f) (1988) (noting regulatory and licensing scheme of brothels, particularly the prostitutes' criminal history).

69. See, e.g., id. at ch. 9.20.140 (3)(c) (setting age requirement at twenty-one). Lyon County regulations require a minimum age of eighteen. See LYON COUNTY, NEV., ORDINANCE 336.16 (A)(8)(h) (1990).

70. See STOREY COUNTY, NEV., ORDINANCE 39, ch. 5.16.180(A) (1971) (describing health regulations of Storey County designed to protect brothel patrons).

71. Id.

72. See, e.g., STOREY COUNTY, NEV., ORDINANCE 39, ch. 5.16.180(B); see also NYE COUNTY, NEV., ORDINANCE 129, ch. 9.20.150(1)(a), (c) (1988). Prostitutes must also be tested pre-employment for syphilis. See STOREY COUNTY, NEV., ORDINANCE 39, ch. 5.16.180(B)(4) (1971).

73. See STOREY COUNTY, NEV., ORDINANCE 39, ch. 5.16.180(B)(4) (1971) (announcing additional protection for health of brothel patrons).

74. See LYON COUNTY, NEV., ORDINANCE 336.15(B)(5) (1990) (naming additional disease for which county tests).
personnel; demand that brothels provide clean sheets and towels for each patron; dictate that the facility be cleaned daily; and require signs that necessitate the use of condoms.\(^{75}\)

Finally, the county commissioners determine the suitable county locations in which to situate brothels.\(^{76}\) In Storey County, unsuitable locations include: "the immediate vicinity of churches, hospitals, schools, military [bases]," playgrounds, residential areas, areas remote from police patrol, historic districts, and areas adjacent to hotels, motels, or casinos.\(^{77}\) County control of the brothel industry, therefore, reaches into nearly every aspect of brothel operations, from issuing initial permits and licenses, to who can work, how clean the facility has to be, and where to locate the building.

3. **Brothels' Entertainment Aspect**

"I shall not today attempt further to define the kinds of material I understand to be embraced within [this] shorthand description; ... but I know it when I see it . . . ."\(^{78}\)

Brothels are portrayed as escapes to paradise. Websites of various Nevada brothels depict what appears to be an adult amusement park or island retreat-like atmosphere at the brothels. For example, brothels offer swimming pools, billiards tables, bars, spas, Jacuzzis, and volleyball courts - all outfitted with beautiful women

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76. See Storey County, Nev., Ordinance 39, ch. 5.16.190 (1971). Nye County brothels cannot operate within three hundred yards of any public street or any other business establishment. See Nye County, Nev., Ordinance 129, ch. 9.20.130(1)(c), (e) (1988). One reason residents do not object to having brothels in their communities is that legalized prostitution usually exists out of sight, tucked away on the outskirts of town. See CourtTV, Nevada Brothels Still Going Strong Outside Major Cities, supra note 53 (positing one reason why brothels are accepted neighbors). Brothel patrons are rarely local residents, as they are more often truckers or out-of-town businessmen in Nevada for conventions. See id. (suggesting types of brothel customers). Moreover, brothel owners tend to avoid publicity and prefer to maintain their operations out of the public eye. See id. Regulations determine what type and size sign a brothel can display. See Nye County, Nev., Ordinance 129, ch. 9.20.130(5)(a); Lyon County, Nev., Ordinance 336.08(B) (1990).

77. See Storey County, Nev., Ordinance 39, ch. 5.16.190(A)-(D) (1971). Similarly, Lyon County regulations restrict brothels to outside the geographical limits of any city or town in the county and not within three miles of a city or town boundary. See Lyon County, Nev., Ordinance 336.08(A)(1)-(2) (1990). Further, some county regulations call for a high fence with a gated entrance to prevent access to the brothel unless opened from the inside. See id. at Ordinance 336.08(C).

wearing skimpy bikinis. Additionally, research has shown that brothel patrons see prostitutes as individuals willing "to fulfill some sense of fantasy and adventure . . . ." For example, convention-goers often arrive in Las Vegas looking for a good time. Instead of risking embarrassment or harassment by going to a sidewalk prostitute, convention-goers often patronize brothels. Also, the sexual activities that occur at brothels demonstrate that brothels serve as places of entertainment.

Moreover, Nevada state legislators consider brothels to be places of entertainment. Although brothels are not presently subject to a statewide tax, a 2005 state proposal considered levying a ten percent live entertainment tax on brothels. Previously, the state only imposed this tax on casinos, circuses, and nightclubs. By adding brothels to this list, members of the Nevada legislature have effectively categorized brothels as entertainment without having to formally support the industry.


80. REYNOLDS, supra note 58, at 6 (citing patrons’ views of prostitutes).

81. See id. (noting how customers choose brothels for fun versus sidewalk prostitutes). Similarly, a study published in the Archives of Sexual Behavior addressed the reasons why men patronize strip clubs, which are similar to brothels in many ways. See Katherine Frank, Exploring the Motivations and Fantasies of Strip Club Customers in Relation to Legal Regulations, 34 Archives of Sexual Behav. 487, 487 (2005) (noting that strip clubs were "a very popular form of entertainment in the United States"). Further, regular customers claimed that the strip clubs helped them relax and offered both pleasure and excitement. See id. at 492. Strip clubs also gave men an ego boost and created fantasies. See id. at 492-93. Also, men considered being able to talk to a beautiful (and often nude) woman to be a luxury. See id. at 492.

82. See REYNOLDS, supra note 58, at 6 (further discussing choice of brothel over sidewalk prostitute).

83. For a further discussion on the entertainment aspects of brothels, see infra notes 192-96 and accompanying text.

84. For a further discussion on how Nevada legislators classify brothels as businesses, see supra notes 79-82 and accompanying text and infra notes 85, 87 and accompanying text.


86. See id. (listing forms of entertainment currently subject to entertainment tax).

Even portions of the media categorize brothel prostitution as entertainment. For example, popular celebrity gossip website, www.entertainment.iafrica.com, carried news of Fleiss’s Stud Farm plans. Further, The New York Times published a story of Fleiss’s Stud Farm in its Style section. An online Google search of “brothels and entertainment” returns thousands of hits, most of which list brothels as adult entertainment. In particular, some blogs purport to be “men’s entertainment guide[s],” listing brothels among other forms of entertainment.

B. Heidi Fleiss

Nothing in Heidi Fleiss’s family background suggests the direction in which her ambitions have steered her. She hails from a wealthy family, as the daughter of a California pediatrician. When she was nineteen years old, Fleiss met Bernie Cornfeld, owner of a


89. See Navarro, supra note 8 (announcing newspaper placement of brothel article in entertainment section).


92. According to Fleiss, her parents were “intellectual hippies.” Vicky Allan, Heidi Fleiss: Hollywood Madam, SUNDAY HERALD, June 29, 2003. The family camped all around the United States, and the children attended a school based on the principles of A.S. Neil. See id. One central theme of such a method of schooling encourages natural childhood development that:

allow[s] for children to be in the classroom and engage in independent activity that is not tied to any timetable. The principle of the timetable is to allow the students to make informed choices within the context of a structured day. This leads to a strong sense of personal agency and maturity concerning life choices. The children know what is available and can then decide how to personally use their own time.


93. See Hubler, supra note 2 (explaining Fleiss’s family background); see also Then & Now: Heidi Fleiss, supra note 2 (describing Fleiss’s family background). Ironically, a grand jury later indicted Dr. Paul Fleiss, Heidi Fleiss’s father, for helping her hide her madam business’s profits. See Rotten.com, Biographies: Heidi Fleiss, supra note 3 (remarking on irony of Fleiss’s father being indicted also). Her father later testified against her in exchange for a reduction of his money laundering charges. See Then & Now: Heidi Fleiss, supra note 2. In the end, Dr. Fleiss received one day in prison, a fine, three years of probation, and several hundred hours of community service. See id.
now defunct mutual fund sales company. Fleiss credits that relationship with giving her much of her business savvy.

Three years later, Fleiss met well-known brothel owner, Madame Alex. Shortly thereafter, with Fleiss managing Madame Alex’s business, profits increased six-fold in the first month. After parting ways with Madame Alex, Fleiss started her own call girl business. Fleiss used her prominent connections to attract rich and famous male clientele before matching them with carefully selected women.

Fleiss’s legal troubles began in June 1993 when she was arrested in an undercover sting operation. Initially, Fleiss faced charges of pandering and selling cocaine. A federal grand jury added charges of conspiracy, tax evasion, and money laundering. Ultimately, Fleiss received a three-year prison sentence. Pursuant to this conviction, Fleiss served 36 months in prison. She was released in 1996.

94. See Bernard Cornfeld, Wikipedia, http://en.wikipedia.org/wiki/Bernard_Cornfeld (last visited Oct. 25, 2006) (listing career highlights of Fleiss’s former boyfriend). Bernie Cornfeld formed a mutual fund sales company, Investors Overseas Services (IOS), based in Geneva, Switzerland. See id. He hired thousands of salespeople who targeted United States expatriates and servicemen trying to avoid federal income taxes. See id. (noting company collected nearly $2.5 billion over ten years). IOS launched a new fund comprised of investment in shares of other IOS offerings. See id. The offerings were very popular in the strong market, but when the market suffered a down-turn, dividends were paid out of IOS’s capital. See id. IOS stock further decreased as the market continued its decline. See id.

95. See Then & Now: Heidi Fleiss, supra note 2 (crediting former lover with beginning of Fleiss’s business knowledge).

96. See id. (stating Fleiss’s first contact with experienced madam).

97. See id. (detailing financial impact of Fleiss’s business savvy on Madame Alex’s brothel business). Before Fleiss ran Madame Alex’s organization, the business grossed approximately $50,000 per month, but once Fleiss took over, business increased to approximately $300,000 per month. See id. Fleiss explained the mistakes Madame Alex made: “She was using the same girls she’d used for years. . . . She needed a whole restructuring, revamping.” Id.

98. See id. (announcing creation of Fleiss’s call girl dynasty).

99. See id. (mentioning Fleiss’s method of matchmaking). In addition, Fleiss would also make all the financial and travel arrangements for the women and their customers. See id. Fleiss then collected a forty percent fee for herself. See id.

100. See Then & Now: Heidi Fleiss, supra note 2 (stating beginning of legal troubles Fleiss faced).

101. See Rotten.com, Biographies: Heidi Fleiss, supra note 2 (recounting charges Fleiss faced).

102. See Then & Now: Heidi Fleiss, supra note 2; see also Rotten.com, Biographies: Heidi Fleiss, supra note 3 (announcing further charges levied by federal grand jury).

103. See Rotten.com, Biographies: Heidi Fleiss, supra note 3 (mentioning prison sentence, three hundred hours of community service and fine imposed on Fleiss).
ant to a plea bargain, Fleiss served a concurrent sentence of eighteen months for state charges of attempted pandering.104

In an effort to capitalize on her infamy as a madam, Fleiss entertained the idea of opening a legitimate brothel in Nevada.105 At first, a rising real estate market deterred Fleiss from purchasing an existing brothel.106 Instead, Fleiss considered constructing her own facility on sixty acres of land she purchased near Pahrump, Nevada; she ultimately dismissed this idea as well.107 She then entered into a deal with Joe Richards, an owner of three Nevada brothels.108 The pair decided to remodel one of Richards' current brothels.109 In the end, Richards backed out of the deal, leaving Fleiss to proceed with her plans alone.110

From the start, the Stud Farm sent waves of apprehension through the legalized prostitution community. George Flint, a lobbyist for the Nevada Brothel Association, worried that because the legalized brothel industry is not a firmly established fixture in Nevada, negative publicity from Fleiss could cause industry-wide fall-

104. See Then & Now: Heidi Fleiss, supra note 2 (adding further charges levied on Fleiss). She pled guilty to attempted pandering in 1997. See id. When asked how she is currently earning an income, Fleiss responded “I have my publishing. I have my own radio show. I have a store on Hollywood Boulevard being opened called The Hollywood Madam.” Allan, supra note 92. Prior to conceiving her plans for a Nevada brothel, Fleiss launched a clothing line, known as Heidi Wear, wrote several books, and made numerous television appearances. See Then & Now: Heidi Fleiss, supra note 2.

105. See Hubler, supra note 2 (noting Fleiss’s initial plans to get back into prostitution business as madam). After completion of her prison sentence in 1999, Fleiss began capitalizing on her name. See Then & Now: Heidi Fleiss, supra note 2 (mentioning how Fleiss made her post-prison sentence money).

106. See Hubler, supra note 2 (tracing origin of Fleiss’s plans to open brothel in Nevada).

107. See id. (stating plans to build brothel rather than purchase already-existing one). Fleiss later determined that the land would be more profitable if used for a housing development. See id. Heidi’s Stud Farm will be located in Crystal, Nevada. See Navarro, supra note 8.

108. See Hubler, supra note 2 (introducing Fleiss’s business partner). Two key reasons why Fleiss was interested in Joe Richards as a partner were: (1) “to prove [Fleiss] would run a clean business” and (2) because Nevada state law permits counties to refuse to issue licenses to convicted felons. See id. Further, Fleiss’s name will not be included on the license; she will serve more of a promotional role. See id. (noting her potential title was ‘hostess/madam’).

109. See Hubler, supra note 2 (discussing more definite plans for Fleiss’s brothel). Fleiss and Richards intended to remodel the Cherry Patch, a bar and collection of trailers Richards currently owns. See id. In her plans, Fleiss sees a “more Hollywood look, with waterfalls and palm trees.” Id. In addition, she envisions a “pleasure palace” including “a marble-floored great room, a spa, a sex-toy shop and secluded bungalows” where customers and studs can get better acquainted. See Friess, supra note 3.

110. See Friess, supra note 3 (announcing Fleiss’s partner abandoned pair’s plans).
out. Likewise, one main concern remains that the county statutes regulating brothels refer to the workers as “she;” making those statutes applicable to brothels with male prostitutes would require rewording of the laws. In short, “[s]he may bring enough publicity to cause a problem for the industry.”

If Heidi Fleiss faces any resistance from Nevada lawmakers, she awaits battle. For those lawmakers who attempt to maneuver Fleiss out of Nevada, she plans to challenge the opposition on the grounds that Nevada laws discriminate against homosexual men.

III. CONSTITUTIONAL IMPLICATIONS OF THE STUD FARM
A. Protected Class v. Not Protected Class

1. Homosexuals Are a Protected Class If Homosexual Acts Are Protected Conduct

Should anyone mount a legal battle against Fleiss’s policy prohibiting male-to-male services at her Stud Farm, the debate will center on whether homosexuals are eligible for protected class status. Fleiss’s opponents who argue that the policy discriminates against homosexuals can find support using various aspects of society. After all, homosexuals are consistently treated differently in both the social and legal arenas.
In *Bowers v. Hardwick*, the Supreme Court held that the United States Constitution does not guarantee a fundamental right to engage in sodomy.\(^{118}\) The *Bowers* decision suffered a significant blow in 1996 with *Romer v. Evans*.\(^{119}\) In *Romer*, the Supreme Court invalidated an amendment to the Colorado Constitution that prohibited any locality or state government from offering special protections to people on the basis of sexual orientation.\(^{120}\) *Bowers* received a final blow in the 2003 *Lawrence v. Texas* decision.\(^{121}\) In *Lawrence*, the Supreme Court held a Texas statute unconstitutional because it criminalized certain sexual conduct between two consenting same-sex adults.\(^{122}\)

Although the *Romer* decision does not expressly establish homosexuals as a protected class, the opinion does suggest that homosexuals cannot receive lesser protections than those inherent in our free society.\(^{123}\) Specifically, the decision invalidated the removal of legal protections based on a person’s homosexuality.\(^{124}\) The Supreme Court explained that the amendment to the Colorado Constitution “imposes a special disability” solely on homosexuals.\(^{125}\) Further, the amendment prohibited homosexuals from enjoying the same safeguards that other citizens enjoy without com-

539 U.S. 558, 573 (2003) (stating that thirteen states prohibit sodomy and four states enforce those laws against homosexual conduct only). One author claims that by criminalizing homosexual sex, the laws act as a foundation for the denial of equal treatment of homosexuals. *See* Filippi, *supra* note 116, at 273 (describing effects of criminalizing certain behavior).


120. *See* Romer, 517 U.S. at 626 (providing Court’s decision).

121. 539 U.S. at 558, 578 (2003) (“Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

122. *See id.* (asserting state statutes criminalizing homosexual conduct are unconstitutional). “[*Bowers’s*] continuance as precedent demeans the lives of homosexual persons.” *Id.* at 575.

123. *See* Romer, 517 U.S. at 631 (establishing that homosexuals have earned protected class status by inference).

124. *See id.* at 635 (identifying that laws must have rational relationship to legitimate government purpose).

125. *See id.* at 631 (relaying how proposed amendment saddles homosexuals with additional burden).
The Court held that the amendment withdrew from homosexuals the protections against discrimination that are integral to a free society. The Court concluded, however, that the classification of homosexuals as a group worthy of less protection was a classification for its own sake, and one the United States Constitution did not permit. Therefore, arguably, the Supreme Court has moved toward recognizing homosexuals as a protected class by not denying them basic societal and legal protections.

Lawrence came on the heels of the Romer decision and can be interpreted as establishing homosexuals as a protected class. Although earlier cases indicate that homosexuals are not a protected class, the Lawrence analysis took a different approach, albeit one that is complementary to the Romer decision. Lawrence focused on the conduct, namely intimate homosexual acts, rather than the individuals' status. The Court explained: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." The Court reasoned that intimate, personal choices, like those related to sexual intimacy, are central to an individual's dignity, autonomy, and liberty.

126. See id. (stating Court's conclusion that amendment deprived homosexuals of safeguards).

127. See id. ("These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.").

128. See Romer, 517 U.S. at 635 (announcing invalidity of classification of homosexuals as less protected).

129. For a further discussion of the Supreme Court's possible move toward characterizing homosexuals as a protected class, see supra notes 119-28 and accompanying text.

130. For a further discussion of Romer, see supra notes 119-20, 123-28 and accompanying text.

131. For a further discussion of the progression in the Supreme Court's view of homosexuals as a protected class, compare supra notes 119-28 and accompanying text with infra notes 132-35 and accompanying text.

132. For a further discussion of the consideration of homosexual conduct rather than status, see Lawrence v. Texas, 539 U.S. 558, 566-70 (2003) (demonstrating case where Court focused on conduct rather than status of party).

133. Id. at 567.

134. See id. at 573-74 (referencing decisions in other countries and domestic decisions that hold that choice of engaging in homosexual acts is one of choices that is central to personal liberty).
to control a personal relationship that lies within the liberty of an individual to choose, without fear of being punished.\textsuperscript{135}

Therefore, the Supreme Court appears correct in viewing the issue as one of conduct rather than sexual orientation. If the conduct is not criminal, then the characteristic that prompts such conduct cannot be criminal. Further, a history of unequal treatment, violence, and discrimination suggests that homosexuals as a group are worthy of protected class status.\textsuperscript{136} Therefore, homosexuals as a protected class deserve equal protection and treatment, and cannot be discriminated against at will.

2. \textit{No Court Has Established That Homosexuals Are a Protected Class, So No Special Treatment Should Exist}

Although courts have addressed discrimination against homosexuals, no court has expressly held that homosexuals warrant protected class status.\textsuperscript{137} Instead, courts have invalidated state statutes criminalizing homosexual conduct and state constitutional amendments that prevent privileged status to homosexuals.\textsuperscript{138} If Fleiss hopes to maintain her policy prohibiting male-to-male sexual activities at her Stud Farm, she must argue against cases like \textit{Lawrence} and \textit{Romer} that appear to establish a level of protection for homosexuals.\textsuperscript{139}

First, to counter, Fleiss can cite \textit{Padula v. Webster}.\textsuperscript{140} In \textit{Padula}, the court listed several criteria for identifying a suspect class: (1) one that is "saddled with . . . disabilities;" (2) subject to "a history of purposeful unequal treatment;" (3) in a "position of political powerlessness;" and (4) in possession of an immutable characteristic.\textsuperscript{141} Based on these criteria, the \textit{Padula} court held that homosexual

\textsuperscript{135.} See \textit{id.} at 567 (characterizing Court's interpretation of statute's aim).

\textsuperscript{136.} See, e.g., Filippi, supra note 116, at 272-82 (positing disparate treatment of homosexuals).

\textsuperscript{137.} See, e.g., \textit{Lawrence}, 539 U.S. at 578 (observing that Court invalidated statute that criminalized homosexual conduct but stopped short of affording homosexuals protected class status).

\textsuperscript{138.} See \textit{id.} (overturning state ban on sodomy); \textit{Romer v. Evans}, 517 U.S. 620, 635 (1996) (invalidating state constitutional amendment). For a further discussion of these cases, see supra notes 119-35 and accompanying text.

\textsuperscript{139.} See \textit{Lawrence}, 539 U.S. at 578; \textit{Romer}, 517 U.S. at 635 (naming two modern Supreme Court cases that could help defeat Fleiss's ban on male-to-male services at her brothel).

\textsuperscript{140.} See 822 F.2d 97, 102-04 (D.C. Cir. 1987) (holding that rejected homosexual FBI special agent applicant was not subject to equal protection violation because homosexuality is not suspect class).

\textsuperscript{141.} See \textit{id.} at 102 (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Frontiero v. Richardson, 411 U.S. 677, 686 (1973). The Supreme Court has only recognized three suspect classes: race, alienage, and na-
uals were not a protected class and thus could suffer rationally justified discrimination.\textsuperscript{142}

Second, Fleiss can support her argument using \textit{Woodward v. United States}, where the United States Court of Appeals for the Federal Circuit held that homosexuals are not a protected class.\textsuperscript{143} The court explained that homosexuality as a trait differs from traits of any of the recognized suspect classes.\textsuperscript{144} Recognized suspect classes possess immutable characteristics, but homosexuality is distinguished as mainly "behavioral in nature."\textsuperscript{145} Further, the conduct of those in a suspect or protected class bears no relevance to the identification of that group as protected.\textsuperscript{146}

Third, in \textit{Ben-Shalom v. Marsh}, the United States Court of Appeals for the Seventh Circuit intentionally departed from the district court's finding that homosexuals were a protected class.\textsuperscript{147} Although the circuit court recognized that homosexuals have suffered a history of discrimination, it noted that today, such discrimination occurs to a lesser degree.\textsuperscript{148} Moreover, the court determined that homosexuals possess growing political power.\textsuperscript{149}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{142} See \textit{Padula}, 822 F.2d at 102 (holding homosexuals are not protected class). The court agreed with the FBI that during counterintelligence activities, homosexuals risk the threat of possible blackmail to protect their partners or themselves. See id. at 104. Therefore, the FBI could rationally justify considering job applicants' sexuality. See id.
  \item \textsuperscript{143} See \textit{871 F.2d 1068, 1076 (Fed. Cir. 1989)} (holding that homosexuals are not protected class worthy of higher level of scrutiny).
  \item \textsuperscript{144} See id. (announcing lack of traits that define suspect classes).
  \item \textsuperscript{145} Id.
  \item \textsuperscript{146} See id. (arguing irrelevance of conduct of group in determining status as protected class).
  \item \textsuperscript{147} See \textit{881 F.2d 454, 464 (7th Cir. 1989)} (holding that rational basis review, rather than heightened strict scrutiny, was applicable to evaluate regulation because homosexuals are not protected class).
  \item \textsuperscript{148} See id. at 465 (reporting court's belief that homosexuals face less discrimination today than in past).
  \item \textsuperscript{149} See id. at 466 (suggesting that homosexuals have more political power today). "It cannot be said 'they have no ability to attract the attention of lawmakers.'" Id. (quoting \textit{City of Cleburne v. Cleburne Living Ctr.}, 473 U.S. 432, 445 (1985)).
\end{itemize}
\end{footnotesize}
The three cases demonstrate that courts have unabashedly held that homosexuals are not a protected class. Fleiss can solidly base her argument on these holdings. Fleiss can also combine the requirements for a protected class set out in Padula, along with the reasoning in Ben-Shalom, as further support for her claim that homosexuals, as a group, are not a protected class. In particular, Fleiss can cite the Ben-Shalom court’s finding that homosexuals suffer less discrimination today than in the past. Additionally, Fleiss can rely on Ben-Shalom’s determination that homosexuals possess increased political power. She may refer to homosexual Nevada Assemblyman David Parks, an openly gay Nevada legislator who publically questioned the Stud Farm’s policy, as an example. Overall, courts have established the well-recognized position that homosexuals are not a protected class.

Fourth, the court in High Tech Gays v. Defense Industrial Security Clearance Office also maintained that homosexuals are not a suspect or protected class. In evaluating the requirements set forth in Padula, the court in High Tech Gays observed that homosexuals have suffered a history of discrimination; homosexuals as a class have not satisfied the other requirements. Homosexuality, according to the court, is not an immutable characteristic, but is instead a behav-

150. For a further discussion of court opinions that homosexuals are not a protected class, see supra notes 140-49 and accompanying text and infra notes 156-59 and accompanying text.

151. For a list of requirements for protected class status, see supra note 141 and accompanying text.

152. For a further discussion of decreased discrimination faced by homosexuals today, see supra note 148 and accompanying text and infra note 157 and accompanying text (touching on amount of discrimination toward homosexuals today and in past).

153. See Ben-Shalom, 881 F.2d at 466 n.9 (noting that Time magazine reported that at least one congressman is openly gay and at least five other top officials are known to be gay).

154. For a further discussion about the homosexual Nevada legislator, see supra note 9.

155. For a further discussion of case law establishing that homosexuals do not warrant protected class status, see supra notes 140-51 and accompanying text and infra notes 156-59 and accompanying text.

156. See 895 F.2d 563, 571 (9th Cir. 1990) (holding that rejecting homosexual applicants for secret clearances did not violate constitution because homosexuals are not protected class and therefore not entitled to heightened scrutiny).

157. See id. at 573 (finding that homosexuals lack other characteristics needed for protected class status). For a further discussion on characteristics of a protected class and the current state of discrimination against homosexuals, see supra notes 141 and 152 and accompanying text.
Further, according to the court, homosexuals are not without political clout.\footnote{158. See High Tech Gays, 895 F.2d at 573 (explaining how homosexuals fail to meet criteria of suspect class because as behavior and not trait, homosexuality is fundamentally different from traits like race or alienage).} Legislatures address discrimination against homosexuals by passing anti-discrimination laws.\footnote{159. See id. at 574 (announcing homosexuals possess "political power"). For a further discussion on homosexuals' increasing political power, see supra notes 149 and 153 and accompanying text.} From this, Fleiss can argue that if discrimination of homosexuals was of such a great concern, considering the political power the \textit{High Tech Gays} court held homosexuals possess, the Nevada legislature would have already passed anti-discrimination legislation.\footnote{160. See High Tech Gays, 895 F.2d at 574 (asserting there is no merit to argument that homosexuals are protected class because they lack political power).} Further, Fleiss can argue that homosexuals who feel her policy discriminates against them should instead use their political power to urge the Nevada legislature to pass anti-discrimination statutes.\footnote{161. For an example of an anti-discrimination statute, see, e.g., infra note 186.} Finally, even after \textit{Romer}, at least one court has held that homosexuals are not a protected class. In \textit{Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati}, the United States Court of Appeals for the Sixth Circuit upheld a city charter amendment that barred city government from enacting any regulation that would provide homosexuals with a claim for protected status, quota preference, or other preferential treatment.\footnote{162. For a further discussion of the political power available to homosexuals in Nevada, see, e.g., supra notes 149, 153, 159 and accompanying text.} The court carefully clarified that \textit{Romer} did not stand to forbid citizens from authorizing their local governments to withhold special rights or protections from homosexuals.\footnote{163. See 128 F.3d 289, 301 (6th Cir. 1997) (holding that Cincinnati charter amendment survived rational basis review).} Instead, citizens can choose to remove protections from a group not constitutionally entitled to any special legal status.\footnote{164. See id. at 298-301 (distinguishing \textit{Romer} opinion). The court explained that "[s]uch a reading would disenfranchise the voters of their most fundamental right . . . to vote to override or preempt any policy or practice implemented . . . to bestow special rights, protections, and/or privileges upon a group of people who do not comprise a suspect . . . class . . . ." Id. at 298.} Fleiss can use this rationale to argue that the right to award or remove special protections against discrimination based on homosexuality rests with the people. Therefore, if Nevada's cit-
zens are interested in protecting homosexuals' access to the Stud Farm's services, they could petition their state and local governments for a regulatory solution. Moreover, Fleiss can argue that the lack of any such petitions to protect homosexuals from discrimination indicates a general acquiescence to her policy of no male-to-male services.

B. Public Accommodation Requirement vs. Private Club Exemption

1. Public Accommodation: How Homosexuals Can Challenge the Stud Farm's Policy and Establish a Brothel as a Place of Public Accommodation

Nevada's legal brothels offer their services to the public. In doing so, a brothel presents itself as a place of public accommodation. Therefore, homosexuals planning to challenge the Stud Farm's discriminatory policy may instead claim the brothel as a place of entertainment. This creates a possible challenge under the public accommodation provision of the Civil Rights Act of 1964 ("Act") and related state statutes.

The Civil Rights Act of 1964 provides that people shall be entitled to enjoy goods, services, and accommodations without discrimination premised on a series of distinguishing characteristics. The public accommodation requirement has prompted much constitutional rights litigation. In Daniel v. Paul, the Supreme Court stressed that the Act aimed "to remove the daily affront and humil-

166. See, e.g., Equality Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, 298 (6th Cir. 1997) (noting electorate’s ability to instruct their municipal officers through voting).


168. For a further discussion of brothels as places of public accommodation, see infra notes 181-87 and accompanying text (positing that brothels may be places of public accommodation).

169. For a further discussion of brothels as places of entertainment, see infra notes 188-212 and accompanying text (proposing that policy proponents may want to argue brothels are places of entertainment and therefore qualify as places of public accommodation).

170. See Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964) ("All persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . .").

171. See id. (indicating goal of Civil Rights Act of 1964 ("Act")).

iation involved in discriminatory denials of access to facilities ostensibly open to the general public." 173

In an effort to "eliminate the unfairness, humiliation, and insult" of discrimination in establishments, the public accommodation requirement prohibits discrimination in places that serve the public and affect interstate commerce. 174 Those places include any inn or other establishment that provides lodging, any restaurant, and any theater or other place of entertainment. 175

Additionally, an establishment must affect interstate commerce to qualify as a public accommodation. 176 The Act states that an establishment affects interstate commerce if it serves interstate travelers or if a substantial portion of its goods move in interstate commerce. 177 Also, if the establishment customarily shows films, exhibitions, or other entertainment performances that move in commerce, then the establishment satisfies the requirement. 178

In Daniel, the Supreme Court held that when a facility advertised in a local hotel magazine, a newspaper, and on the radio, the establishment sought "broad-based patronage from an audience

173. Id. at 307-08 (quoting purpose of public accommodation requirement of Act). Furthermore, other courts have proclaimed that the purpose was to "remove discrimination in places of public accommodation . . . with respect to all of the services rendered and operated within its physical confines . . . ." Pinkey v. Meloy, 241 F. Supp. 943, 947 (N.D. Fla. 1965).

174. See Rousseve v. Shape Spa for Health & Beauty, Inc., 516 F.2d 64, 67 (5th Cir. 1975) (quoting goal of public accommodations requirement of Act); see also 42 U.S.C. § 2000a (noting Act's non-exhaustive list of examples of places of public accommodation). With the requirement that either the public accommodation itself, or one of its incidental effects impacts interstate commerce, the court in United States v. Allen distinguished that "a 'place of exhibition or entertainment' 'moves in commerce' if it 'customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment.'" 341 F.3d 870, 877 (9th Cir. 2003) (quoting 42 U.S.C. § 2000a(c)(3)). For a further discussion on the impact of interstate commerce, see infra notes 176-80 and accompanying text.

175. See 42 U.S.C. § 2000a (designating what Act deems place of public accommodation). Reasoning behind this provision dates back to nineteenth century English jurisprudence:

[the innkeeper is not to select his guests[,] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 571 (1995) (quoting Rex v. Ivens, (1835) 173 Eng. Rep. 94, 96 (N.P.)).

176. See 42 U.S.C. § 2000a (offering additional requirement for establishment to come under coverage of Act).

177. See id. (defining requirement for affecting interstate commerce).

178. See id. (announcing other ways facility operates that affects interstate commerce). For a complete definition of "affecting commerce," see 42 U.S.C. § 2000a(c) (1964).
which they knew to include interstate travelers." Moreover, the Court explained that the facility certainly served out of state travelers, and consequently, it would be unrealistic to think that not one of the customers was an interstate traveler.

Similar to the advertising efforts in Daniel, with the vast reach of the Internet, Nevada brothels participate in national and international marketing efforts. Additionally, Nevada is the only state that offers legalized prostitution, and it would be unrealistic to think that notoriety itself does not serve as a form of advertising.

Further, Nevada has passed a statute to protect the enjoyment of places of public accommodation. The Nevada statute parallels the Act in that the statute defines a place of public accommodation as any establishment that provides lodging, any facility serving food or liquor, any place of public gathering, any service establishment, or any place of recreation. In addition, the state statute’s impact also mirrors that of the Act. The statute demands that all people are entitled to the enjoyment of services, facilities, and accommodations of any public place without discrimination.

To date, no court has directly addressed whether a brothel is a place of public accommodation under the Act. Nevertheless, a review of applicable case law helps to guide a determination of whether a brothel qualifies as a place of public accommodation. If

179. Daniel v. Paul, 395 U.S. 298, 304 (1969) (holding that advertising to interstate travelers proved facility was operating in interstate commerce and was public accommodation). In Daniel, the Court stated that a snack bar in a privately owned recreation facility, that served food to interstate travelers, and whose food moved through interstate commerce, was a public accommodation. See id. at 304.

180. See id. (remarking substantial amount of food was moved in interstate commerce served to interstate travelers).

181. See, e.g., Resort and Spa at Sheri’s Ranch, supra note 79. Many brothels have their own websites depicting services offered, amenities, prices, directions, and the women available. See id. Further, web blogs and message boards that advertise the brothels are also available on the web. See, e.g., Nevada Brothel Times, Legal Prostitution in Nevada, http://www.nevadabrotheltimes.com/phpBB2/ (last visited Nov. 5, 2006).


184. See id. at § 651.050 (2)(a), (b), (e), (g), (j) (defining place of public accommodation according to Nevada statute).

185. See id. (demonstrating Nevada statute mirrors federal Act).

186. See id. (showing state statute is very similar to federal Act). The Nevada statute protects against discrimination based on "race, color, religion, national origin, or disability." Id. at § 651.070. The statute does not mention protection against discrimination based on sexual orientation. See id.
First, federal courts have explained that the word "entertainment" carries only its ordinary meaning. Therefore, a place of entertainment "includes both establishments which present shows, performances and exhibitions to a passive audience and those establishments which provide . . . other activities for the amusement or enjoyment of its patrons." In *United States v. Johnson Lake*, for example, the court suggested that because spectators went to watch people play sports and enjoy themselves, the facility provided a "performance for the amusement or interest of a viewing public" and therefore, "constituted a 'place of entertainment' . . . ." The court elaborated saying that because many patrons came to the complex "to be entertained by watching others participate in the activities available," Johnson Lake was a place of entertainment.

Surprisingly, brothels offer entertainment services beyond sexual relations. For example, Sheri's Ranch, a brothel in Pahrump, Nevada, offers its customers billiards, swimming, and volleyball. Also, customers can observe women dancing. Many of the activities offered at numerous brothels are the same as, or similar to, those offered at Johnson Lake; the activities offered by both Johnson Lake and numerous brothels entertain spectators and participants. Moreover, at the Wild Horse Adult Resort and Spa, customers can relax and watch women "strut their stuff," in addition to other entertainment features provided at brothels.

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187. For a further discussion of whether a brothel qualifies for public accommodation, see infra notes 188–212 and accompanying text.


189. *Id.* (quoting *Miller v. Amusement Enterprises*, Inc., 394 F.2d 342, 350-51 (5th Cir. 1968) (en banc)) (positing that place of entertainment should be read broadly).

190. *Id.* (quoting *Miller*, 394 F.2d at 348). In *Johnson Lake*, the court held a recreational complex that included a swimming pool, picnic area, dancing area, snack bar, pool tables, and arcade games was a place of entertainment. *See id.* at 1378, 1380.

191. *See id.* at 1380 (discussing how recreational facility that allows customers to watch other people participate in activities qualifies as place of entertainment).

192. For a further discussion of brothels' other entertainment features, see infra notes 194, 196, 207, 209-10 and accompanying text.

193. *See Resort and Spa at Sheri's Ranch*, supra note 79 (illustrating additional entertainment services provided at brothel).

194. *See id.* (telling other entertainment features brothel makes available to patrons). Such dances are similar to those found in strip clubs. *See id.*

195. For a further discussion of Johnson Lake and how the court held that establishment to be a place of entertainment, see supra notes 190-91 and accompanying text.
tion to enjoying the room service, the Jacuzzi, or the swimming pool.196

Second, the Act explicitly declines to create an exhaustive list of places of public accommodation.197 Congress expressly noted that any “other place of exhibition or entertainment” qualifies as a place of public accommodation, presuming that the place affects interstate commerce.198 Additionally, one court held that prostitution implicates more than simply private sexual relations between individuals.199 Specifically, the Iowa Supreme Court noted that prostitution affects the surrounding community.200 In support of this proposition, the court stated that “[t]he brothel . . . is much closer to [a] public accommodation setting . . . ” than a private bedroom.201

Most Congressional discussion surrounding the reach of the public accommodation requirement has focused on places of spectator entertainment. The Supreme Court, however, carefully noted that it “does not follow that the scope of [the Act] should be restricted to the primary objects of Congress’s concern when a natural reading of its text would call for broader coverage.”202 In Miller

196. See Wild Horse Adult Resort and Spa, supra note 79 (describing variety of entertainment options offered to brothel customers).

197. See Civil Rights Act of 1964, 42 U.S.C. § 2000a(b) (1964) (highlighting provision in Act designed to counter reading list of places of public accommodation as exclusive of other places).

198. See id. (pinpointing non-exclusive language for what constitutes place of public accommodation).

199. See State v. Price, 237 N.W.2d 813, 818 (Iowa 1976) (explaining that prostitution’s effects impact more than just those individuals involved). In Price, the court held that a defendant charged under a statute criminalizing prostitution had no standing to challenge the statute as unconstitutionally vague. See id. at 816-18.

200. See id. at 818 (positing that prostitution touches surrounding community). Most importantly, the negotiations between the prostitutes and the customers are usually done in public. See id.

201. Id. (maintaining that brothel resembles public accommodation). The court explained that a brothel, like the adult theaters in Paris Theater I v. Slanton, is a better example of a public accommodation than an area of seclusion and privacy. See id. (citing 413 U.S. 49, 65 (1973)). In Paris Adult Theater I, the Supreme Court held that the state of Georgia had a legitimate state interest in regulating the exhibition of obscene material in places of public accommodation like adult theaters. 413 U.S. 49, 69 (1973) (stating holding of case). For a further discussion of burlesque houses as public accommodations, see Knoob Enterprises, Inc. v. Village of Colp, 832 N.E.2d 887, 894-95 (Ill. App. Ct. 2005); City of Chicago v. Severini, 414 N.E.2d 67, 69-70 (Ill. App. Ct. 1980); Hendricks v. Commonwealth, 865 S.W.2d 332, 335 (Ky. 1993). For a further discussion of nude bath spas as places of public accommodation, see People v. Business or Businesses Located at 2896 West 64th Avenue, 989 P.2d 235, 237-39 (Colo. Ct. App. 1999).

v. Amusement Enterprises, the Fifth Circuit broadly construed the Act. In particular, the court stated that the public accommodations listed in the Act do not have to be places of entertainment that present exhibitions for people to observe. Although the types of establishments listed by the Act are the most common, the list is not exhaustive. The Miller court held that "any establishment which presents a performance for the amusement or interest of a viewing public would be included" as a place of public accommodation.

Similarly, a brothel offers patrons the opportunity to observe women in a social environment, rather than solely on an intimate basis. In Miller, the court's expanded definition of a place of entertainment included both facilities that presented performances for spectators, as well as those that offered recreational or other activities for customers. Similarly, brothels offer activities that allow customers to passively enjoy themselves. Further, brothels offer entertainment as form of public accommodation. In Allen, a local park qualified as a place of public accommodation so that defendants were properly convicted under 18 U.S.C. § 241, which prohibits two or more people from conspiring to injure or otherwise oppress anyone exercising any Constitutional right.

203. See 394 F.2d 342, 348 (5th Cir. 1968) (remarking that Fifth Circuit will not follow decisions of courts that prefer or demand narrow construction of Act). In its reasoning, the court established that it read the Act's provision on places of entertainment not "with narrowed eye but with open minds attuned to the clear and strong purpose of the Act . . . . That [the provision] is to be liberally construed and broadly read we find to be well established." Id. at 349.

204. See id. at 348 (suggesting broader interpretation of provision of Act that deals with places of entertainment). The court added that it declined to demand that the types of establishments named in the Act must be exhibitions that move in interstate commerce. See id.

205. See id. (stating that list of establishments that qualify as places of entertainment is neither complete, nor exhaustive).

206. Id. The court attributed this determination to consideration of the Act as well as legislative history. See id. From that, the court concluded that the general intent of the Act was to end discrimination in facilities open to the public. See id. Moreover, the Fifth Circuit elaborated, saying "we as Judges may take judicial knowledge of the common ordinary fact that human beings are 'people watchers' and derive much enjoyment from this pastime." Id. at 349.

207. See Wild Horse Adult Resort and Spa, supra note 79 (describing one aspect of brothel patronage as observing women); see also Resort and Spa at Sheri's Ranch, supra note 79 (announcing that brothel also offers sports bar and other relaxing areas where customers can "enjoy cocktails or partake in an exciting game of pool with your friends or any of our Ladies").

208. See Miller, 394 F.2d at 350 (exploring expanded definition of place of entertainment established by court).

209. For a further discussion on brothels as places of entertainment, see supra notes 187-208 and infra notes 210-11.
fer participatory activities that entertain customers. Therefore, brothels arguably fall within the broad definition of a place of entertainment covered by the Act. As a result of the Nevada state statute mirroring the Act, brothels also fall within the protection provided by that legislation, as well.

2. Private Club Exemption: How Heidi Fleiss Can Defend Her Stud Farm’s Policy by Forming a Private Club

Should Heidi Fleiss face a discrimination challenge on the ground that her Stud Farm policy prohibits male-to-male services, Fleiss may have a defense rooted in the Act. She may be able to establish the Stud Farm as a private club, rather than as a public accommodation, thereby escaping anti-discrimination laws. The Act provides that its provisions “shall not apply to a private club or other establishment not in fact open to the public . . . .” This exemption has caused numerous individuals and entities to transform their establishments into private clubs. A review of the legislative history of the Act shows that the legislators anticipated the possibility the exemption would be abused. Moreover, courts have embraced the concerns expressed in the legislative history. The court found language from United States v. Clarksdale, King & Anderson Co., particularly helpful: “it is clear that the only clubs which meet the ‘factual’ test of the statute are those whose ‘membership is genuinely selective on some reasonable basis.’ Specifi-

210. For a further discussion on brothels’ participatory and nonparticipatory activities, see supra notes 187-209.

211. For a further discussion supporting the conclusion that brothels are places of entertainment, see supra notes 187-210 and accompanying text.

212. For a further discussion suggesting that the Nevada State statute and the Act are similar, see supra notes 183-86 and accompanying text.


214. Id.

215. See, e.g., United States v. Richberg, 398 F.2d 523, 528-29 (5th Cir. 1968) (mentioning example of restaurant that attempted to become private club to avoid application of Act). The court noted that “[a]n establishment cannot, by drafting itself a set of by-laws, become an exempt club.” Id. at 527.

216. See id. at 528 (offering legislative history of Act’s private club exemption). “If a club were established as a way of by-passing or avoiding the effect of the law, and it was not really a club . . . that kind of a club would come under the language of the bill.” Id. (quoting S. Rep. No. 88-110, at 6008 (1964)). Further, there is “[n]o doubt attempts at subterfuge or camouflage may be made to give a place of public accommodation the appearance of a private organization . . . .” Id. (quoting S. Rep. No. 88-110, at 7407 (1964)).
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cally precluded from this exemption are 'sham establishments'..."217

Consequently, case law has created guidelines for determining if an establishment is a legitimate private club or one created specifically to evade anti-discrimination laws.218 Only a club created and operated as a private club qualifies for the private club exemption.219 Because establishments vary, the court must first make a factual inquiry.220 Courts must examine characteristics of the alleged private club to determine if it meets the requirements for the private club exemption.221


The formation of this "club" was far from a mere isolated instance of discrimination. Rather, it was the calculated expression of a continuing and persuasive policy of the owners and those white persons who became members of the "club" to deter and discourage the use of the restaurant by [blacks]. It was far more effective, and in some respects more harmful, than the denial of service to [blacks] in a number of isolated instances. Although it was not in itself an immediate and direct denial of service, the creation of the "club" was of broader scope, designed to curtail at the very inception any possible attempt by [blacks] to enjoy the facilities of the restaurant. The broad scope and continuous nature of this single act most surely constitutes a "pattern or practice" of discrimination. To hold otherwise would exempt the most effective acts of discrimination, and place a premium on the most pervasive policies of discrimination. Id. at 379.

218. See, e.g., Richberg, 398 F.2d at 527 (discussing several factors court examined to determine status of alleged club). The Richberg court held that the dinner club "ha[d] the birthmark of law evasion." Id. at 529. Its memberships cards were issued upon request with minimal or no investigation; one person could issue the cards despite a bylaw that required unanimous approval of the board of directors; one officer of the club insisted he was not a member, contrary to a bylaw that required officers to be members; and one man received the club's profits. See id. at 527.

219. See United States v. Jack Sabin's Private Club, 265 F. Supp. 90, 95 (E.D. La. 1967) (listing principal premise for private club status). In Jack Sabin's Private Club, the court found that incorporation of the restaurant as a private club still deprived black customers of full enjoyment of their rights under the Act. See id. at 94-95. Further, the defendants had the right to establish a private club, but it would have to be "formed and actually operated by them as a private club not in fact open to the public." Id. at 95. The club would then qualify as exempt from the public accommodation provision of the Act. See id.

220. See Richberg, 398 F.2d at 526 (indicating need to establish facts before status as private club can be addressed as question of law).

221. See Wright v. Cork Club, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970) (referring to Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969)). "The Supreme Court indicated that a private club is 'non-profit, member-owned and controlled, and selective as to membership and use of club facilities.'" Id.
In Nesmith v. Young Men's Christian Ass'n, the court explained: "[i]n determining whether an establishment is in fact a private club, there is no single test. A number of variables must be examined in the light of the Act’s clear purpose of protecting only 'the genuine privacy of private clubs . . . whose membership is genuinely selective.' Each factor tips the balance for or against an establishment’s qualification as a private club.

First, courts remain intensely focused on a club as a “pluralistic enterprise.” A club cannot be “one man’s principality or domain[;] [i]t cannot be his alter ego.” Courts will also investigate the commercial interests served by the alleged private club. Additionally, courts will examine the amount of effort the owner of the establishment exerts in increasing membership and profitability. When members determine how the establishment’s profits are used, the assumption is that private club status is legitimate. If members have little or no say, however, or if the profits are funneled directly to the owner of the establishment, courts will deny private club status.

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222. 397 F.2d 96, 101-02 (4th Cir. 1968) (referencing remarks of Senator Humphrey in legislative history of Act).

223. See Cork Club, 315 F. Supp. at 1150 (asserting that case law has not recreated definition for private club). In Wright, the court held that a club open to only white people, which solicited membership applications from large groups, did not limit the use of its facilities to members, had a president who benefited financially from the club, and advertised, did not qualify as an exempt private club. See id. at 1154-57 (announcing factors considered and holding of case).

224. See Richberg, 398 F.2d at 529 (naming one factor courts use to determine if entity is private club).

225. Id. (emphasizing that club must consist of multiple people rather than act as mask for individual’s business).

226. See Wright v. Salisbury Club, Ltd., 632 F.2d 309, 313 (4th Cir. 1980) (announcing additional factor courts weigh in determining if club qualifies as private establishment).

227. See id. (adding that courts will also consider efforts owner makes in increasing financial success of establishment). For example, in Salisbury Club, the president of the housing development’s corporation set aside memberships to ensure homebuyers became members; he served as president of the club as well as one of the initial incorporators; he took every opportunity to inform potential home buyers of benefits of the country club; the housing development used the club to entertain buyers; and potential buyers received membership materials as well. See id. The court explained “[t]he intimate, longstanding, and continuing relationship between the subdivision developer and the Salisbury Club completely undercuts the club’s contention that it is truly private.” Id.

228. See Richberg, 398 F.2d at 527 (demonstrating court’s examination of financial factors of alleged private club).

229. See id. (explaining members’ minimal control over the club or allocation of profits suggests club is not legitimately private); see also United States v. Johnson Lake, Inc., 312 F. Supp. 1376, 1379 (S.D. Ala. 1970) (pointing out that establishment’s profits were not shared with membership and thus did not indicate private club status); United States v. Jordan, 302 F. Supp. 370, 378 (E.D. La. 1969) (offer-
facility for that person's benefit, an establishment cannot claim private club status.\footnote{230} Likewise, courts examine the extent, if any, of the members' control over operations of the club.\footnote{231} Courts also ponder whether control or ownership changed hands when the establishment became a private, membership-based club.\footnote{232}

Second, courts consider the size of the organization in conjunction with the open-ended character of the membership list.\footnote{233} Where a large membership exists, or where the admissions policy requires no background investigation of applicants, one can presume membership is not limited.\footnote{234} Also, requiring an applicant to reside in the locality of the club suggests a private establishment.\footnote{235} Moreover, mandating that applicants fill out an application and undergo investigation by a membership committee indicates private club status.\footnote{236} If the group has a selective process for admitting and rejecting members, status as a private club is more easily proved.\footnote{237} Therefore, "[s]electivity is the essence of a private club."\footnote{238}

In conjunction with selectivity of membership, courts will often examine the degree of membership control over the establishment's internal governance.\footnote{239} In addition to having some basis for

\footnote{230. See Wright v. Cork Club, 315 F. Supp. 1143, 1152 (S.D. Tex. 1970) (recognizing that if club financially benefits only one person or small group of people, it is likely not private).

231. See id. at 376 (noting that change in ownership system suggests private club).

232. See id. at 376 (noting that change in ownership system suggests private club).

233. See Nesmith v. Young Men's Christian Ass'n, 397 F.2d 96, 102 (4th Cir. 1968) (naming second factor courts consider). Most private clubs limit their membership lists and have clear admission requirements. See id. (citing Bradshaw v. Whigman, 11 Race Rel.L.Rep. 934, 934 (S.D. Fla. 1966)).

234. See id. (citing Note, 62 Nw. U. L. Rev. 244, 247 n.21 (1967)) (demonstrating that few limits on membership plus zero criteria for admissibility suggest private club).


236. See id. at 376 (indicating example of proof of private club selectively requirement); see also, e.g., Trustees of the Fraternal Order of Eagles, 472 F. Supp. at 1176 (offering example).

237. See, e.g., Wright v. Cork Club, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970) (stating that this and other courts have consistently held where facility is generally open to "broad range of public," it does not qualify for private club exemption).}

238. Id.

239. See Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1203 (D. Conn. 1974) (adding criterion courts consider in conjunction with second factor). If no criteria exist for choosing members, courts hesitate to allow the
selection of members, the facility must have in place a procedure which allows current members to screen membership applications.\textsuperscript{240} Most commonly, a membership committee, selected to represent the members, controls admissions.\textsuperscript{241} These committees have the power to reject an applicant despite being recommended by another member, to give notice of pending applications, and to notify individuals after their applications have been accepted; all of these characteristics provide evidence of a private club.\textsuperscript{242} Furthermore, many courts have observed that legitimate private clubs normally reject large numbers of applicants compared to the numbers they accept.\textsuperscript{243}

Third, courts evaluate whether the alleged club holds meetings with its members.\textsuperscript{244} "An organization 'can hardly be a private association where the members do not meet together.'"\textsuperscript{245} If the members have input in creating and enforcing the policies of the establishment, the establishment is more likely a private club.\textsuperscript{246} Moreover, courts also consider the observation of other formalities

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\item \textsuperscript{240} See Cork Club, 315 F. Supp. at 1151 (noting courts' hesitance when selection criteria are absent). If members ignore these standards, private club status is similarly not granted. See id. ("A private club must have some basis for its selectivity and must have machinery whereby applications for membership are screened by members."); see also, e.g., United States v. Jordan, 302 F. Supp. 370, 374 (E.D. La. 1969) (demonstrating lack of selectivity or control in choosing members of club). A person could come to the door of the club, fill out an application for membership, pay dues, and immediately receive a membership card. See Jordan, 302 F. Supp. at 374. The individual would then be free to use the establishment's amenities. See id. (illustrating instance of lack of selection of members). The establishment rejected zero applicants during approximately the first three weeks of operation. See id.
\item \textsuperscript{241} See Cork Club, 315 F. Supp. at 1151 (indicating private clubs have processes in place for members to evaluate membership applications).
\item \textsuperscript{242} See Jordan, 302 F. Supp. at 375 (suggesting key method private clubs use to exercise control over membership).
\item \textsuperscript{243} See id. (providing examples of control over membership in private club).
\item \textsuperscript{244} Further evidence of private club status includes whether the membership committee has control over revocation of memberships, if recommendations of existing members are needed for applicants, and whether any limits, other than the capacity of the facility, exist on the number of members. See id.
\item \textsuperscript{245} See, e.g., Nesmith v. Young Men's Christian Ass'n, 397 F.2d 96, 101-02 (4th Cir. 1968) (holding that ninety-nine percent of white applicants accepted, and one hundred percent of black applicants rejected strongly suggested not private club); see also Jordan, 302 F. Supp. at 377 (suggesting true private club would not accept 2,400 applicants and reject zero in one year).
\item \textsuperscript{246} See Nesmith, 397 F.2d at 102 (mentioning third factor courts consider).
\item Wright v. Cork Club, 315 F. Supp. 1143, 1152 (quoting Nesmith, 397 F.2d at 102).
\item \textsuperscript{247} See Nesmith, 397 F.2d at 102 (remarking that member participation in formulating club policies indicates private club status).
\end{itemize}
of private clubs.\textsuperscript{247} Courts examine whether there are bylaws, membership cards, an initiation ceremony, a roster of members, and a formal procedure for allowing guests of members to use the facilities.\textsuperscript{248}

Fourth, courts examine any financial contributions the alleged private club receives from the public.\textsuperscript{249} Receiving public funding takes an establishment out of the private club exemption.\textsuperscript{250}

Fifth, courts evaluate whether the alleged club has actively solicited potential members through advertising.\textsuperscript{251} Extensive advertisement negates a club’s attempt to characterize itself as private.\textsuperscript{252} Courts ask if the patrons of the establishment that preceded the club received a membership solicitation and if advertising to solicit members occurred at the club’s formation.\textsuperscript{253} Therefore, a peripheral question, for example, is under what heading in the telephone book does the establishment appear.\textsuperscript{254} More importantly, some courts inquire whether media stories and advertisements were published solely for the purpose of soliciting publicity and new members.\textsuperscript{255}

\textsuperscript{247} See Jordan, 302 F. Supp. at 376 (introducing club formalities as areas of focus for courts).

\textsuperscript{248} See id. (recognizing formalities of private clubs courts look for in determining status). Allowing nonmembers, those who are not bona fide guests of members, to access and use facilities defeats private club status. \textit{See Cork Club}, 315 F. Supp. at 1151-52 ("A genuine private club limits the use of club facilities or services to members and bona fide guests." (quoting Note, 30 MoNT.L.REv. 47, 52 (1968))).

\textsuperscript{249} See Nesmith, 397 F.2d at 102 (noting 20% of organization’s funding came public financing).

\textsuperscript{250} See id. (explaining reliance upon public funding suggests public facility, not private club).

\textsuperscript{251} See Wright v. Salisbury Club, Ltd., 632 F.2d 309, 312 (4th Cir. 1980) (noting advertising in local newsletter, property guide, and distribution of application forms). In \textit{Salisbury Club}, a black couple excluded from their housing development’s country club filed suit; the Fourth Circuit held that the club was not private, and, therefore, exclusion of the couple violated the Act. See \textit{id}. at 310.

\textsuperscript{252} See \textit{id}. at 313 (signaling considerable advertisements will persuade court that establishment is not private club). Courts have traditionally viewed advertising and publicity in the media as being “inconsistent with the claim of private club status.” \textit{See Cork Club}, 315 F. Supp. at 1152 (stating advertising injures claim of private club status especially when used to increase income).

\textsuperscript{253} See Jordan, 302 F. Supp. at 376 (offering questions courts ask to determine if club was created to be legitimate private club).

\textsuperscript{254} See id. (mentioning additional characteristic courts can use to determine if facility is private club). Brothels list their services under “massage” in the Yellow Pages. \textit{See Nevada Brothels Want to be Good Neighbor; Legal Businesses Seek to Pay Taxes, supra note 61 (pointing out where brothels are listed in telephone book).}

\textsuperscript{255} See Jordan, 302 F. Supp. at 376 (suggesting use of media for publicity inhibits private club status). On the other hand, other actions, such as civil contributions and other forms of notoriety, do not necessarily negate private status. \textit{See},
Sixth, courts examine the history of the establishment, focusing mainly on whether the establishment was a new endeavor or if its owners made inconsequential changes to an existing facility. In addition to the history of the establishment, courts also consider the club’s current purpose, and if any membership rights arise as a result of the change in the facility’s status. More importantly, courts look to see if any of the club’s purposes could be accomplished without using the membership scheme.

Finally, courts take interest in whether the alleged private club claimed a social exemption in filing its federal taxes. A club’s failure to claim such an exemption indicates a lack of private club

e.g., Solomon v. Miami Woman’s Club, 359 F. Supp. 41, 45 (S.D. Fla. 1973) (clarifying not all forms of advertising indicate public establishment). For example, in Solomon the court explained that the publicity the club earned was incidental to club’s mission of community involvement, but none of this indirect advertising aimed to increase membership. See id. (identifying example when publicity or advertising does not indicate public establishment). In Solomon, the court held that a private women’s club that did not accept a new member unless she had the endorsement of three people, which operated solely for the members’ benefit and received funds only from private sources, was not established to exclude black women. See id. at 44-45, 48.

See id. at 374-76 (adding miscellaneous considerations regarding purpose of club that courts consider). Further, courts examine if the club has a civic or other social purpose. See id. at 376.

258. See id. (indicating courts’ concerns about using private club status to accomplish establishment’s discriminatory purposes). In Jordan, the court specifically referred to the special purpose of “keeping undesirable characters out of the establishment” as one which would require further examination by the court. See id.

259. See Wright v. Cork Club, 315 F. Supp. 1143, 1152 (S.D. Tex. 1970) (offering final factor courts consider in determining private club status); see also Jordan, 302 F. Supp. at 376 (adding that taking advantage of alternate licensing and tax exemptions suggests private club status).
status.\textsuperscript{260} For example, in \textit{Bradshaw v. Whigam}, the court pointed out that the alleged private club paid sales tax on dues paid by members, despite a Florida tax provision that private club dues were not subject to sales tax.\textsuperscript{261}

While the applicability of several of these factors to the Stud Farm is premature at this time, two factors stand out as the largest hurdles the Stud Farm will face if Fleiss attempts to operate it as a private club. One problematic factor is the first listed: a club cannot be one person’s endeavor or alter ego.\textsuperscript{262} News reports have established that Fleiss formed this business enterprise with the express intent of making money.\textsuperscript{263} Fleiss wants to run a legal form of her former business, mainly because of her financial success in her previous attempt.\textsuperscript{264} It is unrealistic to think that Fleiss would share profits with members or relinquish control of the operations to the membership body.

The fifth factor listed, the extent of advertising an establishment uses, presents the other problem.\textsuperscript{265} Although Fleiss has not initiated any plans to advertise her brothel in the mass media, the issue of advertising still exists.\textsuperscript{266} To date, Fleiss hosts a personal website, complete with a link to the Stud Farm’s website.\textsuperscript{267} Thus, the website serves to advertise both Fleiss and her Stud Farm.\textsuperscript{268} In addition, Fleiss has given numerous interviews about her brothel.\textsuperscript{269}

\textsuperscript{260.} See \textit{Cork Club}, 315 F. Supp. at 1152 (concluding that failure to claim club exemption on tax return indicates public establishment).

\textsuperscript{261.} See 11 Race Rel.L.Rep. 934, 934 (S.D. Fla. 1966) (exemplifying that failure to utilize tax and licensing provisions favorable to private clubs will indicate public establishment).

\textsuperscript{262.} For a further discussion of one factor courts analyze to determine if an establishment qualifies for the private club exemption, see supra notes 224-30 and accompanying text.

\textsuperscript{263.} For a further discussion of Fleiss’s monetary motivations behind the Stud Farm, see supra notes 7, 99, 107 and accompanying text.

\textsuperscript{264.} For a further discussion of Fleiss’s motives in opening the Stud Farm, see supra note 7 and accompanying text.

\textsuperscript{265.} For a further discussion of another factor courts judge when determining if private club status exists, see supra notes 224-30 and accompanying text. Regulations prohibit brothels from advertising. See \textit{Albert}, supra note 12, at 181 (claiming ban on brothel advertising).

\textsuperscript{266.} For a further discussion of an establishment’s advertising efforts and their impact on private club status, see supra notes 251-55 and accompanying text.

\textsuperscript{267.} See Heidi’s Home Page, http://www.heidifleiss.com/ (last visited Nov. 5, 2006) (showing how to access Stud Farm website).

\textsuperscript{268.} See \textit{id.} (noting how website serves as online advertisement for Fleiss and her brothel).

\textsuperscript{269.} See Navarro, supra note 8 (offering example of interview Fleiss has given); see also Allan, supra note 92.
Fleiss herself comes with notoriety.\textsuperscript{270} She has been newsworthy for over a decade; first, she was the premier madam to Hollywood, and later, she fought criminal charges.\textsuperscript{271} Movies depicted her exploits, books were published, articles were written, and her former associates made the talk show circuit.\textsuperscript{272} Moreover, Fleiss created other business ventures that continue to increase her notoriety.\textsuperscript{273} Arguably, any of these forms of publicity operate as free advertising for Fleiss and her brothel. Finally, Fleiss may attempt to become a member of the Nevada Brothel Association.\textsuperscript{274} Membership would give her a voice in the legalized brothel legislation arena, as well as affiliate her brothel with other legitimate brothels.\textsuperscript{275} That voice and affiliation would bring more publicity to her Stud Farm, thus arguably constituting another form of advertising.

C. Brothels as State Actors

The state action doctrine arises when a private entity or individual exercises powers that are traditionally and exclusively reserved for the states.\textsuperscript{276} State action occurs in two ways. First, state participation in an otherwise private activity can result in a recharacterization of that activity as one of state action.\textsuperscript{277} Second, when private actors closely align themselves with a state’s action or state actors, the activity becomes one of state action.\textsuperscript{278} “[T]he question of whether particular discriminatory conduct is private . . . or amounts to 'state action,' . . . frequently admits no easy answer. ‘Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its

\textsuperscript{270} For a further discussion of Fleiss’s fame or infamy, see supra note 3 (regarding her as the Hollywood Madam and as key to men in entertainment).

\textsuperscript{271} For a further discussion on Fleiss’s widespread publicity, see supra notes 3, 100-04 and accompanying text.

\textsuperscript{272} See, e.g., Heidi’s Home Page, supra note 267.

\textsuperscript{273} For a list of other business opportunities Fleiss participates in, see Heidi’s Home Page, supra note 267 (pointing out Fleiss’s other business ventures).

\textsuperscript{274} For a further discussion on how Fleiss may join the Nevada Brothel Association, see supra note 111 and accompanying text.

\textsuperscript{275} For a further discussion explaining the purpose of the Nevada Brothel Association, see supra note 111 and accompanying text.

\textsuperscript{276} See, e.g., Hennessey v. NCAA, 564 F.2d 1136, 1144-47 (5th Cir. 1977); Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 253-54 (1st Cir. 1996) (defining doctrine of state action).

\textsuperscript{277} See Hennessey, 564 F.2d at 1144 (describing when private action can become state action).

\textsuperscript{278} See Roche, 81 F.3d at 253-54 (offering second method for becoming state actor or state action).
true significance." The Supreme Court clarified that the discriminatory conduct need not originate with a state if the state enforces, encourages, or supports discrimination by private individuals. Therefore, the questionable status of brothels as state actors represents another potential legal battleground for Fleiss and those opposed to her policy that bars male-to-male services at her Stud Farm.

1. State Regulation and the Flow of Money Make Brothels State Actors

Fleiss's opponents can argue that Nevada county governments, as agents of the state, so intimately entangle themselves with the activities of brothels that the brothels are not private entities, but rather state actors. Two arguments offer support: first, the state and its municipalities encourage Fleiss's conduct; and second, the strict regulation limits Fleiss's freedom to act as a private entity.

In reviewing when discriminatory state action occurs, the Supreme Court has noted that state involvement arises where the state merely encourages, rather than commands, discrimination. One key example of encouragement of private conduct remains Reitman v. Mulkey. In Reitman, the United States Supreme Court affirmed the California Supreme Court's holding that an article of the state constitution highly implicated the state in private discrimination. The Court held that when a state takes affirmative action designed to make private discrimination valid, the private entity becomes a state actor. Further, the Court held that an article of the state

280. See Shelley v. Kraemer, 334 U.S. 1, 19 (1948) (emphasizing discriminatory conduct does not necessarily come from state but can come from private entity receiving support from state).
281. For a further discussion and examples of the community involvement of brothels, as well as the regulation of brothels, see supra notes 53-76.
284. See id. at 380-81 (indicating that state encouragement and support of private conduct reflects state action).
285. See id. at 378-79 (mentioning procedural history of case). The California Supreme Court examined an article of the state constitution forbidding the state from denying individuals the right to decline to sell, lease, or rent property to anyone that person wants. See id. at 371-73.
286. See id. at 375 (affirming state supreme court's decision that state action occurred).
constitution permitted, and even encouraged, discrimination.\textsuperscript{287} By encouraging and thereby authorizing discrimination, the state became the private entity's partner in the discriminatory conduct.\textsuperscript{288}

With the Stud Farm, Fleiss's opponents can argue that Nevada's counties, acting as state agents, have encouraged Fleiss's discriminatory policy. Most importantly, opponents can point to at least one Nevada legislator who publicly opposed the policy.\textsuperscript{289} Assemblyman Parks warned of his intention to seek a legal opinion on the discriminatory policy of the Stud Farm.\textsuperscript{290} Parks's position in Nevada government and his willingness to speak publicly about his opposition to the policy alert members of Nevada's government of the impending controversy.\textsuperscript{291} By refusing to address the Stud Farm's discriminatory policy, even after public opposition from a Nevada legislator, it arguably appears that the state and its counties have no problem with the policy. Fleiss's opponents can claim this lack of a state government response acts as proof that Fleiss's policy amounts to state action. Additionally, Fleiss's opponents can claim that the state of Nevada and its counties have encouraged or supported the Stud Farm's discriminatory policy by failing to pass appropriate anti-discrimination legislation.\textsuperscript{292}

Similarly, in \textit{Moose Lodge No. 107 v. Irvis}, state licensing of private clubs' alcohol distribution served as the foundation for bringing a state action claim.\textsuperscript{293} The plaintiff maintained that because the Pennsylvania Liquor Control Board issued the private club a liquor license, the club had become a state actor.\textsuperscript{294} In finding that the club was not a state actor, the Supreme Court noted that there was no "symbiotic relationship" between the Liquor Control Board

\textsuperscript{287} See id. (signaling case example of when state-encouraged conduct constituted state action).
\textsuperscript{288} See Reitman, 387 U.S. at 375 (announcing Court's holding).
\textsuperscript{289} For a further discussion on how Assemblyman Parks could challenge the brothel's policy, see \textit{supra} note 9 and accompanying text.
\textsuperscript{290} See id. (indicating forewarning from homosexual legislator about Fleiss's Stud Farm policy and potential violation of Nevada's anti-bias law).
\textsuperscript{291} See Nevada Legislature, \textit{supra} note 9 (directing individuals to openly gay legislator's online government profile).
\textsuperscript{292} For a further discussion on how sexual orientation is not included as a characteristic worthy of protection under Nevada's anti-discrimination statute, see \textit{supra} note 186 and accompanying text.
\textsuperscript{293} 407 U.S. 163, 163 (1972) (naming case where state participation in activities of private club resulted in state action claim).
\textsuperscript{294} See id. at 165 (stating plaintiff's general argument for considering private club as state actor).
and the Moose Lodge.\textsuperscript{295} However, Fleiss’s opponents can distinguish their position from the Court’s position in \textit{Moose Lodge} and use that decision to advocate their position.\textsuperscript{296} Opponents can expose the symbiotic relationship between Fleiss as a brothel owner and the county as a state agent.\textsuperscript{297} Brothel owners and prostitutes engage in a business that is illegal in every other state in the country.\textsuperscript{298} From that, money pours into the state and local communities and, in turn, benefits those economies.\textsuperscript{299} Therefore, the Stud Farm and local governments have a symbiotic relationship.

Finally, Fleiss’s opponents can rely upon \textit{Lugar v. Edmondson Oil Co., Inc.} to support their claim that the Stud Farm is a state actor.\textsuperscript{300} \textit{Lugar} announced a two-prong approach for determining if certain conduct can be attributable to the state: (1) the conduct, or deprivation of a right, must be caused by the exercise of some state-created right or by a rule imposed by the state or a state official, and (2) the actor must be a person who may fairly be said to be a state actor.\textsuperscript{301} The Supreme Court further clarified the second prong as involving a state official, a person who has acted together

\begin{itemize}
\item \textsuperscript{295} See \textit{id.} at 175 (pointing out no mutually beneficial relationship existed like that in \textit{Burton v. Wilmington Parking Authority}). In \textit{Burton}, the Supreme Court held that the exclusion of a black man from a privately operated restaurant in a city-owned parking facility constituted discriminatory state action. See 365 U.S. 715, 724-26 (1961). There, the restaurant owner received the benefit of location in a state-created parking facility, while the parking authority provided parking spaces by leasing parts of the building for commercial activity. See \textit{id.} (describing “peculiar relationship” between parking garage and restaurant).
\item \textsuperscript{296} For a further discussion of \textit{Moose Lodge}, see \textit{supra} notes 293-95 and accompanying text. Fleiss’s opponents may also be able to distinguish \textit{Moose Lodge} by pointing out that the Moose Lodge was a private club and the Stud Farm, at least to date, is a public accommodation. For a further discussion of public accommodations, see \textit{supra} notes 171-91 and accompanying text.
\item \textsuperscript{297} See \textit{Burton}, 365 U.S. at 724 (confirming “that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits”).
\item \textsuperscript{298} For a further discussion of Nevada as the only state with legalized prostitution, see \textit{supra} note 182.
\item \textsuperscript{299} For a further discussion of the financial benefits of legalized prostitution in Nevada, see \textit{supra} notes 58, 61-66 and accompanying text.
\item \textsuperscript{300} 457 U.S. 922, 942 (1982) (holding that state action deprived debtor of his property when subjected to prejudgment attachment procedure under state law).
\item \textsuperscript{301} See \textit{id.} at 937 (articulating test for state action Court gleaned from past cases). The \textit{Lugar} Court went on to explain \textit{Moose Lodge} as the primary case that demonstrates the first prong. See \textit{id.} at 937-38 (citing \textit{Moose Lodge}, 407 U.S. at 171-79). The \textit{Lugar} Court summarized \textit{Moose Lodge} by saying that the decision to discriminate could not be attributed to any governmental decisions and that any governmental decisions that affected the Moose Lodge were not related to its discriminatory conduct. See \textit{id.} at 938 (referring to \textit{Moose Lodge}, 407 U.S. at 177).
\end{itemize}
with the state, or a person who has received significant aid from the state.\footnote{302. See id. at 937 (clarifying instances in which entity’s or person’s conduct is fairly classified as state action). The \textit{Lugar} Court identified \textit{Flagg Brothers, Inc. v. Brooks} as an example of the second prong. See id. at 939 (citing 436 U.S. 149, 164-66 (1978)). The \textit{Flagg Brothers} Court determined that action by a private party pursuant to a state statute was not sufficient to justify characterizing the private party as a state actor without more. See id. at 938-39 (citing \textit{Flagg Brothers}, 436 U.S. at 157). Consequently, the \textit{Flagg Brothers} Court suggested the need for something more to convert a private party to a state actor. See id. at 939 (citing \textit{Flagg Brothers}, 436 U.S. at 157).}

Here, Fleiss’s opponents can embrace the first prong.\footnote{303. For a further discussion of the two-prong approach announced in \textit{Lugar}, see \textit{supra} note 301 and accompanying text.} In \textit{Lugar}, the Court held that the aid of state officials in state-created attachment procedures was sufficient to establish state action.\footnote{304. See \textit{Lugar}, 457 U.S. at 942 (offering that when state has created system where state officials attach property based on \textit{ex parte} application of one private party, there is state action).} With the Stud Farm, Fleiss’s opponents can argue that Nevada, and its counties as state agents, have created a set of rules that make the state responsible for Fleiss’s conduct.\footnote{305. For a further discussion of instances of conduct classified as state action, see \textit{supra} notes 277-78.} Opponents can claim that the counties allow brothels to establish their own rules regarding who can be a brothel patron.\footnote{306. For a further discussion of county-based brothel regulation, see \textit{supra} note 54 and accompanying text.} From that, opponents can argue that by significantly regulating brothels, yet failing to address any of the practices brothels employ for allowing or disallowing customers, the state has granted brothels the privilege to deny services to whomever they please. Therefore, by allowing Nevada and its counties to deny homosexuals the right to patronize the Stud Farm, the state legislature has authorized the practice of selective admittance to the brothel, thus creating state action.

\section*{2. Brothels and the State Are Only Tenuously Connected and Therefore There Is No State Action}

To respond to attacks that the Stud Farm is a state actor, Fleiss can cite past Supreme Court decisions where the Court failed to find that the state’s conduct was sufficient to constitute state action. Fleiss can wield the \textit{Moose Lodge} precedent as her strongest weapon against the claim that her brothel is a state actor.\footnote{307. See \textit{Moose Lodge No. 107 v. Irvis}, 407 U.S. 163, 163 (1972) (naming case Fleiss can use to support her position that her brothel is not state actor).} She can argue that county licensing with state approval does not create an interde-
pendent relationship between brothels and municipalities.\textsuperscript{308} Therefore, she should be free to refuse to provide male-to-male services at her brothel.

The possibility exists in licensed operations, that state involvement will be so great that the license holder becomes a state actor.\textsuperscript{309} In \textit{Moose Lodge}, a private club refused to serve a black man; he sued, claiming that the club’s refusal to serve him constituted state action because the Pennsylvania State Liquor Control Board had issued the club a license to sell alcohol.\textsuperscript{310} The Supreme Court held that the licensing scheme of the Liquor Control Board did not sufficiently implicate the state in the club’s discriminatory practices.\textsuperscript{311} The Court clarified that the mere receipt of services from the state did not make a private entity a state actor.\textsuperscript{312} In fact, the Court distinctly highlighted past precedent by declaring that its “holdings indicate that where the impetus for the discrimination is private, the State must have ‘significantly involved itself in invidious discriminations’ in order for the discriminatory action to fall within the ambit of the constitutional prohibition.”\textsuperscript{313} Finally, the Court noted that the Liquor Control Board had no influence on the operation of the Moose Lodge as a private club.\textsuperscript{314} With no role in the

\begin{footnotesize}
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\item See \textit{Burton v. Wilmington Parking Authority}, 365 U.S. 715, 724 (1961) (pointing to one characteristic that can be used to indicate state actor).
\item See, e.g., \textit{Moose Lodge}, 407 U.S. at 176 (standing for proposition that state licensing of private club may prompt legal challenge based on state action).
\item See \textit{id.} at 164-66 (stating facts of case).
\item See \textit{id.} at 177 (indicating Court’s holding). “[T]he operation of the regulatory scheme . . . does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter ‘state action’ within the ambit of the Equal Protection Clause of the Fourteenth Amendment.” \textit{Id.}
\item See \textit{id.} at 173 (detailing distinction between state actor and lesser degree of state involvement). The Court explained:

The Court has never held . . . that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct . . . .

\textit{Id.}
\item \textit{Id.} (quoting \textit{Reitman v. Mulkey}, 387 U.S. 369, 380 (1967)).
\item See \textit{Moose Lodge}, 407 U.S. at 175 (announcing that Liquor Control Board had no impact on establishing or enforcing membership or other policies of club to which it issued licenses). The district court pointed out the “‘pervasive’” oversight of the Liquor Control Board on private clubs, noting that the Board can require clubs to make physical alterations, file a list of members and employees, keep detailed financial records, and remain open to inspection at any time. \textit{See id.} at 176. The Supreme Court discounted these findings by saying that they do not amount to encouraging discrimination or making the state a partner of the club. \textit{See id.} at 176-77.
\end{enumerate}
\end{footnotesize}
operation of the private club, the Court turned to the license itself to determine if the licensing scheme caused Moose Lodge to become a state actor. The record did not indicate that state law discriminated against minorities' rights to apply for Liquor Control Board licenses or to buy liquor in public accommodations.

To operate the brothel, both Fleiss's Stud Farm and its employees must obtain county licenses. Like in Moose Lodge, these licenses do not impact the brothel's internal operations or policies. Rather, they are directed toward the health of the employees and patrons. Moreover, Fleiss can argue that those licenses merely serve to limit and account for legal brothels, not to inject state or county influence into the brothel's operations. Therefore, following the Supreme Court ruling in Moose Lodge, any incidental requirements the licenses impose on the Stud Farm and its employees do not encourage discrimination of homosexuals or make Nevada the brothel's partner. To be sure, the licensing scheme does not appear to be discriminatory against homosexuals either. Overall, the licensing requirement imposed on brothels in Nevada suggests, at best, the tenuous finding that a private establishment like the Stud Farm constitutes a state actor.

For further support of her policy, Fleiss may also turn to Reitman v. Mulkey. In Reitman, the United States Supreme Court held that the California constitution's permission of housing discrimination amounted to state action. In doing so, the Court explained that "the right to discriminate . . . was now embodied in the State's basic charter, immune from legislative, executive, or judicial action." For further discussion of the county-based licensing requirements for brothels, see supra notes 54-77 and accompanying text.

For a discussion of brothel regulations focused on health, see supra notes 23, 67 and accompanying text.

For a further discussion of the licensing process of Nevada brothels, see supra notes 54-77 and accompanying text.

For a further discussion of the similarities between the Moose Lodge and the Stud Farm, see supra notes 293-99 and accompanying text.

For a further discussion comparing the licensing scheme in Moose Lodge to that of the brothels, see supra notes 293-95.

See 387 U.S. 369, 378-79 (1967) (recognizing that state involvement in private conduct must be judged on case-by-case basis).

See id. (highlighting that United States Supreme Court adopted state supreme court's rationale).
judicial regulation at any level of the state government."  The
Court expressly stated that under the article in question, those indi-
viduals who were practicing discrimination could operate under ex-
press constitutional authority and be free from any official
scrutiny. Relying on Reitman, Fleiss can argue that courts look
for express involvement by the state in identifying state action. Fleiss
can posit that because no legislation or other explicit support
for discrimination exists at either the county or state level, as was
the case in Reitman, her brothel is not a state actor. As a private
actor, Fleiss can claim that she is entitled to conduct her brothel
business as she wishes.

In addition, Jackson v. Metro. Edison Co. also supports Fleiss's
position. There, a utility customer sued a privately owned utility
company for cancellation of her service before giving notice, a
hearing, and the chance to pay past due amounts. The Supreme
Court determined that the state was not sufficiently connected to
the service cancellation to constitute state action by the utility com-
pany. The customer argued that although the utility company
was privately owned and operated, the state regulated much of its
business. The Court quickly clarified that "[t]he mere fact that a
business is subject to state regulation does not by itself convert its
action into that of the State . . . [n]or does the fact that the regula-
tion is extensive and detailed . . . ." Pointing to this language,
Fleiss can maintain that Nevada's regulation of its brothels creates
an insufficient nexus to classify them as state actors. Like the utility
company in Jackson, the Stud Farm is privately owned and operated

324. Id. at 377.
325. See id. (concluding that article at issue gave express permission to
discriminate).
326. See id. at 378-80 (recognizing case that shows need to look for direct
involvement by state).
327. See Reitman, 387 U.S. at 376 (noting that California's Constitution specifi-
cally involves state in discrimination).
328. 419 U.S. 345, 346 (1974) (permitting utility company to discontinue ser-
vice to any customer).
329. See id. at 346, 347 (setting forth facts of case).
330. See id. at 358-59 (articulating holding of Court that denied nexus be-
tween state and private utility company).
331. See id. at 350 (examining state regulations on utility and insufficient ef-
fect such registration had on characterizing state action).
332. Id. (referencing that state regulation does not necessarily indicate state
action). The Court explained that the actions of a heavily regulated industry will
more frequently be state actions. See id. at 350-51. However, the required inquiry
remains whether there is a sufficiently close nexus between the state and the en-
tity's action so that the action can be fairly treated as the state's own. See id. at 350
(citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972)).
and will be subject to significant county regulation. This factual similarity suggests that a court following the Jackson decision would find that the Stud Farm is not a state actor.

Jackson helps Fleiss defend herself as a private actor in two additional ways. In Jackson, the state required the utility company to file a general tariff, one provision of which stated the utility’s right to cancel service for nonpayment. The Supreme Court noted that the district court’s findings showed that the only connection between the utility company and the state was the filing of the tariff, followed by the lack of any action by the state to prohibit it. With the Stud Farm, Fleiss can argue that the only connection with Nevada is through county, not state, business regulations and licenses. Further, Fleiss can argue that many Nevada businesses are subject to regulation yet are able to maintain their status as private entities rather than state actors.

The final way Jackson supports Fleiss’s Stud Farm policy centers around the lack of a symbiotic relationship between the state and the private entity. In Jackson, the Court determined there was no symbiotic relationship between the state and the utility company. In particular, the Court noted that the utility company alone was responsible for providing its power services to customers. Also, the utility was privately owned and operated, and it paid taxes like other corporations in the state. According to the Court, the

333. See Jackson, 419 U.S. at 354 (referring to another element of case that supports Fleiss’s position: state tariff had previously never been used to establish status as state actor).

334. See id. at 355 (explaining weak connection between private utility and state). “The only apparent state involvement with the activity complained of here is in [the] Tariff Reg[ulation]. . . . No state official participated in the practice complained of, nor is it alleged that the state requested or co-operated in the suspension of service.” Id. at 355 n.15 (citing Jackson v. Metro. Edison Co., 348 F. Supp. 951, 958 (M.D. Pa. 1972)).

335. For a further discussion on the regulation of brothels at the county level and examples of such regulations, see supra notes 55-77.

336. See Jackson, 419 U.S. at 357 (stating that utilities, by their very nature, are often required by state regulation to get approval for practices that other, less stringently regulated businesses would be free to implement without regulatory approval). The approval by a state official or agency, where the official or agency has not “put its own weight on the side of the proposed practice by ordering it,” does not amount to state action. Id.

337. For an illustration of the symbiotic relationship that demonstrates state action, as seen in Burton v. Wilmington Parking Authority, see supra notes 295, 297 and accompanying text.

338. See Jackson, 419 U.S. at 357 (stating no symbiotic relationship present to constitute state action).

339. See id. at 358 (mentioning state had no responsibility to customers of utility).

340. See id. (listing two ways utility was similar to other businesses in state).
combination of these factors showed only a heavily regulated, privately-owned utility company that chose to cancel service in a manner permitted by state law. Similarly, Fleiss can argue that the Stud Farm is a privately owned business that will operate in a state regulated environment and will pay taxes just as any other business in the state. Therefore, similar to the utility company in Jackson, the Stud Farm cannot be considered a state actor.

Fleiss can further support her claim that she is a private actor by citing Blum v. Yaretsky. There, the Court indicated that a state can be held responsible for a private action only when the state exercises coercive power or significant encouragement. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." Following this rationale, Fleiss can argue that the counties, as state agents, do not exercise any coercive or encouraging control over her brothel. The county merely provides basic license requirements that amount to no more coercion or encouragement than any other business receives. Without the county's oversight of her business operations, Fleiss can claim that the county has acquiesced to her policies, and that the level of influence does not rise to the level necessary for finding state action.

Another case where the Supreme Court addressed state action is Rendell-Baker v. Kohn. There, the Court announced that acts of a private party become those of a state when the private party acts in concert with state actors. Notably, the Court identified one

341. See id. (concluding utility remained private actor despite intense state regulation).
342. 457 U.S. 991, 1012 (1982) (holding Medicaid recipients "failed to establish 'state action' in the nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care" and thus failed to prove violations of their Fourteenth Amendment rights).
343. See id. at 1004 (noting characteristic of state action). In Blum, the Court held that regulations which allegedly "impose a range of penalties on nursing homes that fail to discharge or transfer patients," do not mandate the decision to move patients, they simply encourage discharge or transfer, and thus did not constitute state action. See id. at 1009-10.
344. Id. at 1004-05. In Blum, the state required the filing of patient assessment forms with state Medicaid officials, but nothing in the regulations authorized state officials to approve or disapprove patient transfer or discharge decisions. See id. at 1010. Instead, the state approved or disapproved payment of benefits after a change in a patient's medical services. See id.
345. 457 U.S. 830, 836-37 (1982) (holding discharged teachers at nonprofit, privately operated high school did not state claim for state action and were not due relief for deprivation of civil rights).
346. See, e.g., id. at 838 n.6 (tracing history of cases leading to this principle).
factor that may indicate state action as whether the state actor performs a public function. The issue appears to be whether the function performed has been "traditionally the exclusive prerogative of the State." Fleiss can distinguish her Stud Farm from Rendell-Baker. Unlike public education, which was at issue in Rendell-Baker, the Stud Farm does not provide a public function. County governments regulate brothels so significantly that they substantially limit the activities that take place inside the brothels. By limiting the permitted behavior at brothels, Fleiss can argue that the state and county governments actually make brothels less available to the public. Finally, Fleiss can rely on the mantra from Rendell-Baker: "That a private entity performs a function which serves the public does not make its acts state action." From this, Fleiss can maintain that the mere fact that her Stud Farm will be open to the public does not establish her Stud Farm as a state actor. Rather, her Stud Farm remains a private actor because it lacks any substantial connection to the state and provides no public function that is traditionally reserved exclusively for the states.

IV. CONCLUSION

Offering the Stud Farm’s services to homosexual men will make a forceful impact. In fact, some may even argue that this impact has just as much importance as the gay rights movement, constitutional rights defense, or even sex. The powerful force packing this substantial impact is money. Surveys estimate homosexuals

347. See id. at 842 (enumerating one characteristic of state actor). The Court stated, however, that "[t]he relevant question is not simply whether a private group is serving a 'public function . . . .'" Id. Therefore, serving a public function is not automatically indicative of a state action. See id.

348. Id. (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)). In Rendell-Baker, the Court emphasized education as a public function because the state planned to provide for students at the state's expense. See id. The Court made sure to clarify that a state legislative policy demonstrating the intent to provide education at the state's expense did not make education the exclusive duty of the state. See id.

349. For a further discussion of regulations counties impose on brothels, see supra notes 54-77 and accompanying text.

350. Rendell-Baker, 457 U.S. at 842. The Rendell-Baker record did not show any evidence that the state attempted to avoid its constitutional duties by disguising the provision of public services as acts of private parties. See id. at n.7 (comparing Evans v. Newton, 382 U.S. 296, 301-02 (1966)).

351. See id. (noting two characteristics of state actors that Stud Farm fails to satisfy).
possess an estimated $500 billion in annual purchasing power.\textsuperscript{352} With the potential for adding such a huge financial market, it seems like destructive business planning to exclude that kind of money from a company, even if that company happens to be a brothel. For sure, if something exists that Heidi Fleiss can never resist, it is money.\textsuperscript{353} If the threat of legal action fails to prompt Fleiss into rethinking her ban on male-to-male services, perhaps $500 billion will.

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\textsuperscript{353} For a further discussion of Fleiss's passion for money, see \textit{supra} notes 96, 99, 104 and accompanying text.