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An Unimproved Lie: Gender Discrimination Continues at Augusta National Golf Club

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Comments

AN UNIMPROVED LIE: GENDER DISCRIMINATION CONTINUES AT AUGUSTA NATIONAL GOLF CLUB

Women are welcome as guests, they may play anytime they like, they have a lovely changing room, but the club is for men. What could possibly be wrong with that?

I. INTRODUCTION

The tradition of the Masters began in 1934 when Bob Jones and Clifford Roberts decided to hold an annual golf tournament. Originally named the Augusta National Invitation Tournament, the tournament’s name was changed to the Masters Tournament in 1939, five years after the first tee-off. Many of the original rules and regulations are still observed today. Among them are “the four-day stroke playing of [eighteen] holes each day . . . , eliminating qualifying rounds, and denying permission for anyone except the player and the caddie to be in the playing area.” These traditions have endured through the three years the tournament was not played because of World War II, amidst amazing shots, shattered records, and the admission of the club’s first African-American member. However, one of the Masters’ longest standing policies

1. Michael Bamberger, She Means Business: A Letter Asking Augusta National to Admit Women Set Off the Boss of the Masters, and a Firestorm that Continues to Burn, SPORTS ILLUSTRATED, July 29, 2002, ¶ 1, 2002 WL 24262648. This statement was made by Ian Brooks, a member of the Honourable Company of Edinburgh Golfers, in reference to the equal access of women in “men’s only” golf clubs. See id. Even though this statement was not made in reference to Augusta National Golf Club’s policy, or an opinion expressed by a current member of the club, it represents the sentiment expressed by some members of men’s only golf clubs. See id.


3. See id.

4. See id. ¶ 2 (discussing long-standing traditions and relative permanence of rules at Masters).

5. Id.

6. See id. ¶¶ 3-4 (discussing significant events in Masters’ history); see also Bamberger, supra note 1, ¶¶ 5-6 (noting acceptance of Ron Townsend as first black member). “In 1935 Gene Sarazen hit ‘the shot heard ‘round the world’ scoring a double eagle on the par 5 15th hole, tying Craig Wood and forcing a playoff.” Masters, supra note 2, ¶ 3. “[T]he Tournament was not played the following three years, 1943, 1944 and 1945, during the war.” Id. “[I]n 1965-1966 Jack Nicklaus became the first Masters champion to defend his title successfully.” Id. ¶ 4. Seve
does not relate to the tournament itself, but to the club that hosts
the Masters Championship, the Augusta National Golf Club (“Au-
gusta National”). That is, since Augusta National opened its
greens, the club has not admitted a woman member.7

The continued non-admittance of women at Augusta National
constantly raises the question: How long will Augusta National’s tra-
dition of discrimination continue? In June 2002, Martha Burk,
chairwoman of the National Council of Women’s Organizations
(“NCWO”), called for Augusta National to admit women as full
members.8 Once again, the spotlight was on Augusta National’s
greens, with numerous supporters of female membership asking
some of golf’s greatest players to boycott the 2003 Masters.9 Al-
though no professional golfers, including Tiger Woods, have taken
up the charge to boycott the championship, the issue is not dor-
mant.10 In light of the looming controversy, Augusta National
dropped all of its corporate sponsors for the 2003 Masters. In addi-
tion, a number of groups protested both for and against Augusta
National’s discriminatory policies.11

Ballesteros won in 1980, just four days after his 23rd birthday, becoming the Tour-
nament’s youngest winner to date. “In 1986 at age 46, Nicklaus donned his sixth
Green Jacket. And in 1997, Tiger Woods broke the Tournament four-day scoring
record that had stood for [thirty-two] years.” Id.

7. See Bamberger, supra note 1, ¶ 2 (discussing controversy over Augusta Na-
tional’s policy of permitting only male members).

8. See id. ¶ 7-8 (discussing NCWO’s involvement in pursuing admission of
women at Augusta National). Burk, in a letter addressed to William “Hootie”
Johnson, chairman of Augusta National, urged the club to review its policies “so
that [discrimination was] not an issue when the tournament [was] staged next
year.” Id.; see also Associated Press, Burk to File for Protest Permit, GOLFWORLD, Feb.

9. See Associated Press, Times: Woods Should Skip Masters, GOLFWORLD, Nov. 18,
2002 (discussing New York Times editorial calling on Tiger Woods and other pro-

10. See Associated Press, Tiger Sticking with His Opinion, GOLFWORLD, Nov. 19,
2002 (noting Tiger Woods’ position on admission of women at Augusta National),
20021119woods.html. Tiger Woods feels women should be admitted as members
at Augusta National, but he believes it is for the members to decide. See id. ¶ 3.
Tiger stated he is an honorary member, without voting rights, and that the admis-
sion of women is not a decision for him to make. See id.

11. See Burk Protest, supra note 8 (discussing NCWO application for permit to
protest at Masters); see also Associated Press, Ku Klux Klan Backs Augusta National,
GOLFWORLD, Feb. 28, 2003 (noting application for protest permits by Ku Klux
Klan (“KKK”) splinter group and Reverend Jesse Jackson’s Rainbow/PUSH Coalition),
20030228kkk.html. A KKK splinter group intended to demonstrate to show
its support of Augusta National’s discriminatory policy. See id. ¶ 1. The Imperial
Wizard, Joseph Harper, remarked, “[t]his equal rights stuff has gotten out of hand

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This Comment will examine the constitutional issues that arise when dealing with freedom of association with respect to "private clubs," and the possible remedies that may be sought by those who find themselves victims of discrimination by these clubs. Section II surveys the history and development of the freedom of association.\textsuperscript{12} That section will explore federal constitutional, federal legislative, and state statutory protections established to secure redress for individuals who are the victims of discrimination by "men's clubs."\textsuperscript{13} Additionally, Section II will review recent Supreme Court precedent, as well as examine the history of gender discrimination in private golf clubs.\textsuperscript{14} Next, Section III will analyze the current situation confronting the admission of women at Augusta National using a hypothetical client situation, and suggest possible avenues to help end gender discrimination at this exclusive golf club.\textsuperscript{15} Finally, Section IV will address the possible impact of significant changes affecting discriminatory practices and the likelihood of federal or state relief.\textsuperscript{16}

II. BACKGROUND

A. History of Freedom of Association

There is no express grant of the right of freedom of association within the Constitution.\textsuperscript{17} Yet, courts infer this right through other "rights and protections guaranteed by the Constitution."\textsuperscript{18} In 1958, anyone who knows anything about Augusta National Golf Club or its members knows this is not something that the club would welcome or encourage'..." \textit{Id.} ¶ 5 (comma omitted).

12. For a survey of the history of Freedom of Association, see \textit{infra} notes 17-47 and accompanying text.

13. For a discussion of federal and state protections against discrimination, see \textit{infra} notes 48-92 and accompanying text.

14. For a review of the Supreme Court precedent in the area of private clubs, see \textit{infra} notes 93-123 and accompanying text. For an analysis of the history of gender discrimination in golf clubs and at Augusta National, see \textit{infra} notes 124-65 and accompanying text.

15. For an analysis of the present policy of gender discrimination at Augusta National, see \textit{infra} notes 166-81 and accompanying text. For suggestions that may assist in ending gender discrimination at Augusta National, see \textit{infra} notes 182-96 and accompanying text.

16. For a discussion of the impact that significant changes may have on the current gender discrimination, see \textit{infra} notes 197-200 and accompanying text.

the Supreme Court first recognized the right of freedom of association in *NAACP v. Alabama ex rel. Patterson,* where the Court prevented Alabama from prohibiting the NAACP from operating in the state. In *Patterson,* the Court stated that the freedom to associate, for the purpose of advancing ideas and beliefs, was an integral part "of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraced freedom of speech." The Court concluded that freedom of association should be granted the same protection as all other enumerated constitutional rights.

Two schools of thought on associational rights emerged following the judicial establishment of freedom of association. The first of these rights was expressive association, based on the First Amendment right to associate with others in ideological pursuits. The second right was intimate association. This right was derived from the right to privacy found implicit in the Due Process Clause of the Fourteenth Amendment.

1. **Right of Expressive Association**

The Supreme Court has attempted to clarify the activities that would be protected under the right of expressive association. In *NAACP v. Button,* the Court held that litigation was a protected form of expression, and there was no compelling state interest in preventing the NAACP from soliciting potential plaintiffs as a


20. See McKenna, supra note 17, at 1063 (citing *Patterson,* 357 U.S. at 451-52, 460-61 (1958)).


22. See id. at 461 (calling freedom of speech, press, and association "indispensable liberties"); cf. McKenna, supra note 17, at 1064 (restating Supreme Court's adoption of right to freedom of association). "In the [*Patterson*] opinion, the Court decreed that freedom of association would possess the same status as those rights specifically enumerated in the Constitution." Id. (footnote omitted).


24. See id. (citing *Roberts,* 468 U.S. at 622). "[E]xpressive association ... is based on the 'right to engage in activities protected by the First Amendment ... to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" Id. (quoting *Roberts,* 468 U.S. at 622).

25. See id.


means to encourage social change. Absent a compelling interest, the Court has been extremely reluctant to limit a group's right to expressive association, as it does not wish to interfere with constitutionally protected speech. Due to such reluctance, clubs may use the protected right of expressive association to maintain discriminatory practices and exclude individuals or particular groups from membership consideration. The courts have countered this belief by holding that there is no absolute right to discriminate within the expressive association doctrine. Further, only completely private clubs maintain the ability to discriminate in the selection of their members.

2. Right of Intimate Association

The right of intimate association originates from the right to privacy and is an essential element of personal liberty. The Supreme Court has long recognized that the Bill of Rights was adopted to protect “individual liberty [and] . . . afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.” The Court has interpreted the right of intimate association as protecting an individual’s right to form and maintain intimate relations with others, as well as “an indispensable means of preserving other individual liberties.”

The right of intimate association was developed during the 1920s with the first right to privacy cases. In Meyer v. Nebraska

28. See McKenna, supra note 17, at 1066 (citing Button, 371 U.S. at 429, 438-39).
29. See Button, 371 U.S. at 438-39 (noting only compelling state interest justifies interference with constitutionally protected speech); see also McKenna, supra note 17, at 1066 (referring to Court’s “laissez-faire” attitude towards intimate groups to avoid interference with protected speech).
30. See McKenna, supra note 17, at 1066 (citing Gerald L. Edgar, Note, Roberts v. United States Jaycees: Does the Right of Free Association Imply an Absolute Right of Private Discrimination?, 1986 Utah L. Rev. 373, 376 (1986)).
31. See id. (citing United States Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding dislike for particular group not sufficient to justify exclusion)).
33. See Kamp, supra note 23, at 97 (referring to origins of right of intimate association).
34. Id. (quoting Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984)).
36. See McKenna, supra note 17, at 1068 (noting Supreme Court laid foundation for right to privacy when deciding several cases in 1920s).
37. 282 U.S. 390 (1923).
and *Pierce v. Society of Sisters*,\(^{38}\) the Supreme Court recognized the right to privacy within the family and established the right for parents to maintain control over rearing their children.\(^{39}\) These parental rights were later clarified and extended through subsequent judicial decisions.\(^{40}\) In *Prince v. Massachusetts*,\(^{41}\) the Court held that the state was precluded from interfering with the family unit within the confines of the home.\(^{42}\) However, the Court stressed that this protection was confined to the home, and the state may regulate family activities only when they enter into the public sphere.\(^{43}\)

In 1965, the Supreme Court came close to formalizing a right to privacy when it declared a Connecticut statute forbidding the distribution of contraceptives to married couples unconstitutional.\(^{44}\) In *Griswold v. Connecticut*,\(^{45}\) the Court recognized that the intimacy of a marital relationship should be protected from governmental intrusion.\(^{46}\) Later cases expanded the right to privacy and held that not only were marital and family rights protected, but reproductive and sexual preference rights as well.\(^{47}\)

\(^{38}\) 268 U.S. 510 (1925).

\(^{39}\) See McKenna, *supra* note 17, at 1068 (citing *Meyer* as striking down Nebraska statute requiring all school children be taught only in English, even if non-speakers, and *Pierce* as declaring act requiring parents to send their children to public school unconstitutional).

\(^{40}\) See *id.* (noting later decisions expanding right to privacy).

\(^{41}\) 321 U.S. 158 (1944).

\(^{42}\) See *McKenna, supra* note 17, at 1068 (citing *Prince*, 321 U.S. at 165-66).

\(^{43}\) See *id.* (citing *Prince*, 321 U.S. at 165). The Court in *Prince* noted the mother of a nine-year-old girl was guilty of violating state child labor laws when she allowed her daughter to sell religious magazines on the street. *See id.* (citing *Prince*, 321 U.S. at 159-62). Prince, a Jehovah's Witness, felt it was his religious duty to sell the literature to the public. *See id.* (citing *Prince*, 321 U.S. at 162-63).

\(^{44}\) See *McKenna, supra* note 17, at 1068-69 (citing *Griswold v. Connecticut*, 381 U.S. 479, 482, 484 (1965)).

\(^{45}\) 381 U.S. 479 (1965).

\(^{46}\) See *id.* at 485-86.

We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

*Id.* at 486.

B. Federal Civil Rights Protection

1. The Constitution

The United States Constitution provides virtually no protection from the discriminatory practices of private clubs.48 The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination only when it is a "state action."49 The actions of a private golf club usually do not rise to the level of state action.50 However, there are three tests that, if satisfied, would qualify private clubs as a state actor under the Equal Protection Clause.51 These tests are: 1) the public function test, 2) the state compulsion test, and 3) the joint action or "nexus" test.52 Unfortunately, for victims of private discrimination, none of these tests are useful in categorizing the private action of clubs as state action.53

It appears the only potential constitutional remedy lies within a freedom of association attack on First Amendment grounds. The First Amendment ensures freedom of association protection for those private clubs not involved in a significant amount of commercial activity.54 Private clubs involved in commercial pursuits that

405 U.S. 438, 443 (1972) (holding unconstitutional statute prohibiting distribution of contraceptives to unmarried persons). The Court in Lawrence stated private sexual conduct is protected by the Due Process Clause of the Constitution. See Lawrence, 123 S. Ct. at 2484. Thus, states do not have the authority to make private sexual conduct a crime, as such. See id.

48. See Kamp, supra note 23, at 92.

49. See id. (citing Civil Rights Cases, 109 U.S. 3 (1883)).

50. See id. at 92-93 (discussing how actions of private clubs do not rise to level of state action).

51. See id. at 92 (outlining three tests for private action rising to level of state action, triggering Equal Protection Clause of Fourteenth Amendment).

52. See id. at 92-93 (developing three tests). The public function test provides for a finding of state action if a private entity performs a function traditionally provided by the state. See Marsh v. Alabama, 326 U.S. 501, 507-08 (1946) (holding public has interest in functioning of company-owned town). Next, the state compulsion test asks if the government has taken part in the action to such extent it can be seen to encourage the action. See Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967) (holding legislation authorizing private discrimination in housing market lawful under California Constitution). The final test is the joint action or nexus test. See Shelley v. Kraemer, 334 U.S. 1, 22-23 (1948). If a government's judiciary enforces the discriminatory action of another by upholding a discriminatory contract or covenant, then a state action exists. See id. (holding state courts granting injunctions to enforce racially restrictive covenants violate Fourteenth Amendment).

53. See Kamp, supra note 23, at 93 (noting three tests have proved unsuccessful in pursuing private club under state action doctrine).

54. See Jennifer Jolly-Ryan, Chipping Away at Discrimination at the Country Club, 25 PEPP. L. REV. 495, 503 (1998). If a club ceases to be private and begins to provide services to the general public or in any way provides business opportunities, contacts, or becomes a forum for business deals, then it is possible that the club may be considered a "public accommodation" and lose the First Amendment
gage in discriminatory practices may find themselves without the constitutional protections they once enjoyed.55

2. Federal Statutes

Congress attempted to provide some protection against gender discrimination in our society. Some of the legislation includes: 42 U.S.C. §§ 1981-1982,56 42 U.S.C. § 1983,57 42 U.S.C. § 2000e-4 ("Title VII"),58 20 U.S.C. §§ 1681-1688 ("Title IX"),59 and 42 U.S.C. § 2000a ("Title II").60 Unfortunately, in the realm of federal protection against gender discrimination by private clubs, very few of the previously mentioned statutes provide any safeguards.61 However, these legislative measures may provide some insight into potentially persuasive arguments.

In 1866, Congress passed the first Civil Rights Act with the intent to abolish slavery and any remaining "badges of slavery."62 The

55. SeeJolly-Ryan, supra note 54, at 503.
62. Id. at 504; see also 42 U.S.C. §§ 1981-1982 (2000). Section 1981 sets out the following:
(a) Statement of equal rights[.] All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
(b) "Make and enforce contracts" defined[.] For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
(c) Protection against impairment[.] The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.
42 U.S.C. § 1981. Moreover, § 1982 provides for the protection of property rights and states, "[a]ll citizens of the United States shall have the
Act was codified in 42 U.S.C. § 1981 and 42 U.S.C. § 1982, prohibiting racial discrimination by private actors in the “mak[ing] and enforc[ing] of contracts” and sale or rental of property. These protections have limited applicability with regards to discriminatory membership practices of private golf clubs; however, the Supreme Court has held that in some instances membership in private clubs is the equivalent to becoming “part of that property.”

Another possible avenue for protection against discrimination is 42 U.S.C. § 1983, which provides for “equal protection under color of state law.” Section 1983 prevents any state action from denying an individual equal protection. Therefore, it is extremely difficult to invoke § 1983 protection against discriminatory actions taken by private golf clubs because their actions do not rise to the level of state action. The Supreme Court has held that licensing and regulations enforced by a state do not rise to the level of state involvement. Accordingly, it has been held that the mere issuance of a liquor license to a club is insufficient to qualify as state

same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”


63. Jolly-Ryan, supra note 54, at 504 (footnotes omitted).

64. Id. (citing Tillman v. Wheaton-Haven Recreation Ass’n, 410 U.S. 431, 437 (1973) (finding membership created property right and discriminatory membership policy violated § 1982); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969) (holding leasehold and membership in nonprofit company offering recreational facilities constituted property)).

65. 42 U.S.C. § 1983. This section provides for a “civil action for deprivation of rights” and states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.


67. See id. at 504-05. For a discussion of state action theories, see supra notes 48-54 and accompanying text.

68. See Jolly-Ryan, supra note 54, at 505 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding mere issuance of state liquor license insufficient to constitute state action)).
action under § 1983. Given the limited scope of protection that § 1983 provides against private club discrimination, it is logical to pursue a different avenue when attempting to confront this form of gender discrimination.

Following the enactment of the Civil Rights Act of 1964, Congress attempted to ensure the equal protection of women in educational and athletic activities at public schools. One commentator has described Title IX of the Education Amendments as the only federal protection against gender discrimination. Unfortunately, Title IX offers no protection against discrimination by private golf clubs. However, it does provide for a strong, logical argument appealing to members' common sense: if many of these private clubs allow female teams to practice and compete on their courses, while at the same time allowing the wives of male members to play on the course and use the facilities, then little is being accomplished by the clubs' exclusive membership policies.

The last federal legislative protection relevant to confronting gender discrimination does not directly address gender on its face. Congress enacted this protection through Title II of the Civil Rights Act of 1964. Title II prohibits discrimination "on the

69. See id. at 505 (noting limited utility of § 1983 in eliminating discrimination).

70. 20 U.S.C. § 1681 (2000). This section reads, in pertinent part, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Id.


73. See Jolly-Ryan, supra note 54, at 506-07 (discussing how Title II provides for protection against race, color, and national origin, but not gender).

74. 42 U.S.C. § 2000a (2000); see also Jolly-Ryan, supra note 54, at 506. Title II reads, in pertinent part:

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

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments[.] Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter [42 U.S.C. §§ 2000a-2000a(6)] if its operations affect
basis of race, religion, color, or national origin at places of ‘public accommodation’ that affect commerce.” 75 This section of the Civil Rights Act makes it illegal to discriminate in places such as restaurants, theaters, stadiums, hotels, and large entertainment venues. 76 Unfortunately, Title II does not specifically provide protection against gender discrimination. However, even if Title II were to encompass gender, private clubs could still possess a complete exemption. 77

The exemption provided to private clubs may only be retained if the private nature of the club is proven through facts presented by the party against whom the discriminatory practices have been alleged. 78 Therefore, the club bears the burden of proving it quali-

commerce, or if discrimination or segregation by it is supported by State action:


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

(c) Operations affecting commerce; criteria; “commerce” defined[.] The operations of an establishment affect commerce within the meaning of this subchapter [42 U.S.C. §§ 2000a-2000a(6)] . . . in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; . . . . For purposes of this section, “commerce” means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Support by State action[.] Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter [42 U.S.C. §§ 2000a-2000a(6)] if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) Private establishments[.] The provisions of this subchapter [42 U.S.C. §§ 2000a-2000a(6)] shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.


75. Jolly-Ryan, supra note 54, at 506 (citation omitted).
76. See Kamp, supra note 23, at 94 (citing examples of public accommodations where discrimination would be prohibited); see also 42 U.S.C. § 2000a(b) (1)–(4).
77. See Kamp, supra note 23, at 94 (citing 42 U.S.C. § 2000a(e) (providing private clubs with exemption from antidiscrimination provision of this statute)).
78. See Jolly-Ryan, supra note 54, at 507 n.101 (citing United States v. Richberg, 398 F.2d 523, 529 (5th Cir. 1968)).
fies as a “private club . . . not in fact open to the public.” In Brown v. Loudoun Golf & Country Club, Inc., the court stated that a variety of factors must be reviewed when determining whether a golf club is truly private and may therefore be permitted to discriminate in its membership practices. Among these factors are: “whether the club is truly selective about its members, whether the club made insubstantial changes in its prior operation to avoid the impact of civil rights laws, whether the club operates for profit, and whether the club is owned and controlled by members.”

The Brown court noted that the key factor in this determination was whether the membership practices of the club were truly selective, which would be determined by a finding of fact. The private club exemption provides a strong means of defending against a suit on the basis of discriminatory membership practices. Therefore, because the federal statutes appear to offer little in the way of remedies for gender discrimination, states have begun to extend protection through their own public accommodation statutes.

C. State “Public Accommodation” Acts

In an attempt to address the limited protection provided by Title II, a majority of states have adopted statutes extending coverage of their public accommodation statutes to include gender.

79. 42 U.S.C. § 2000a(e). See, e.g., Nesmith v. YMCA, 397 F.2d 96, 101-02 (4th Cir. 1968) (holding YMCA did not meet burden of proof in showing private club status). “The YMCA, with no limits on its membership and no standards for admis-

sibility, is simply too obviously unselective in its membership policies to be adjudicated a private club.” Id. at 102.


81. See id. at 402.

82. Id. at 402-03 (citations omitted).

83. See id. at 403.

84. See Jolly-Ryan, supra note 54, at 516 (discussing how private club discrimination issue needs reconsideration and methods to eliminate lawful segregation).

85. See McKenna, supra note 17, at 1073 (discussing how federal courts essentially closed to gender-based discrimination actions).

Additionally, states have tended to define public accommodation more broadly than Congress, so as to expand the reach of their statutes and limit the scope of the private club exemption. 87

The Supreme Court has held that a state's compelling interest in prohibiting discrimination may outweigh an individual's right to freedom of association. 88 Currently, approximately forty states have public accommodation statutes that prohibit discrimination on the basis of sex. 89 Many of the state public accommodation statutes closely resemble federal law by providing an exemption for "distinctly private" clubs. 90 Very few states provide specific definitions

87. See Kamp, supra note 23, at 95 n.37 (citing Fla. Stat. Ann. ch. 760.60(1) (West 1995); Minn. Stat. Ann. § 273.112 (West 1995); Mo. Ann. Stat. § 213.035 (Vernon 1994); Cal. Civ. Code § 51 (West 1995)). In particular, the Florida law made discrimination illegal at clubs "with more than 400 members, that provide regular meal service, and regularly receive dues or fees for use of facilities or services." Id.

88. See Finlay, supra note 86, at 382 (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).


90. See Finlay, supra note 86, at 383-84 (discussing how states exempt private clubs from public accommodation statutes through provisions similar to 42 U.S.C. § 2000a(e)).
of a "private club," and only Louisiana identifies specific criteria for determining private-club status. Unfortunately, because no uniform criteria for defining a "private club" exists, it is difficult to determine whether and under what circumstances a woman would be protected from gender discrimination.

D. Supreme Court Precedent

In the 1980s, the Supreme Court decided three landmark cases affecting gender discrimination in private clubs. In each of these cases, the Court held that states with public accommodation laws have a compelling interest in prohibiting discrimination, which outweighs the private clubs' asserted right of freedom of association. However, the Court made it clear that any potential conflicts arising between these competing interests will be fact specific and addressed on a case-by-case basis.

The Supreme Court first addressed a state public accommodation statute with a private club exemption in *Roberts v. United States Jaycees*. In *Roberts*, the Court established a basic framework for analyzing potential conflicts that arise between an individual's right to freedom of association and a state's public accommodation laws. The issue in this case was the membership practices of the Jaycees, a nonprofit organization founded to "promote and foster the growth and development of young men's civic organizations in the United States."

Two Minnesota Jaycees chapters admitted women as members, an act consistent with the Minnesota Human Rights Act, but in vio-

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91. See id. at 384 (discussing Louisiana statute private club factors). The Louisiana statute contained the following factors: "1) selectiveness of the group in adding new members; 2) existence of formal membership procedures; 3) membership governance; 4) history of the organization; 5) use of club facilities by nonmembers; 6) substantiality of dues; 7) advertisement of the organization; and 8) predominance of a profit motive." Id. (citing LA. REV. STAT. § 49:146(3)).

92. See id. at 385 (noting lack of "private club" definition in statutes and relative uncertainty of protection).


94. See id. For a discussion of these Supreme Court cases, see infra notes 96-123 and accompanying text.

95. See id. (looking at types of associational rights interpreted by Court and their application to private golf clubs).


97. See Cherry, supra note 86, at 121 (citing Roberts, 468 U.S. at 618).

lalion of the National Jaycees' bylaws. The National Jaycees challenged the finding of the Minnesota Department of Human Rights that the Jaycees constituted a public accommodation under the meaning of the Minnesota Human Rights Act and filed a complaint stating that the Act "violate[d] the male members' constitutional rights of free speech and association." The Supreme Court upheld the constitutionality of the Minnesota public accommodations statute by employing a two-part test to determine if a public accommodations statute would impose upon another's constitutional right. The test consisted of distinguishing between the right to intimate association and the right to expressive association. In determining whether an intimate association would receive protection, the Court first articulated some basic relevant criteria to take into consideration, including "size, purpose, policies, selectivity, [and] congeniality."

The second part of the Court's analysis focused on the right to expressive association. Here, the Court found that the right to expressive association was not absolute, and Minnesota's interest in eliminating gender discrimination in no way infringed upon or suppressed the Jaycees' ideas and outweighed the Jaycees' asserted associational rights. Therefore, although the Court found that the Jaycees had a right to expressive association, the compelling interests of the state, coupled with the fact that the Minnesota Human Rights Act was determined to be the least restrictive means, gave the Court sufficient justification to find the Minnesota statute constitutional.

99. See Cherry, supra note 86, at 121 (citing Roberts, 468 U.S. at 614). The national bylaws only allowed women as associate members and withheld full privileges, including voting. See Roberts, 468 U.S. at 613.

100. Cherry, supra note 86, at 121-22 (quoting Roberts, 468 U.S. at 615).

101. See Roberts, 468 U.S. at 631 (reversing Eighth Circuit holding and instituting new two-pronged means of analysis); see also Cherry, supra note 86, at 122 (citing Roberts, 468 U.S. at 618). Freedom of association protects first "the right 'to enter into and maintain certain intimate human relationships,'" and second, the "right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition . . . , and the exercise of religion." Id. (footnotes omitted).


103. Cherry, supra note 86, at 122 (quoting Roberts, 468 U.S. at 620). The Court believed the smaller and more selective the nature of a group was, the more likely it would take on the characteristics of a private group. See id. Therefore, if a group was relatively small and highly selective, it would be easier for the Court to find it was in need of protection from state regulation. See id.

104. See id. at 122-23 (quoting Roberts, 468 U.S. at 623, 627).

105. See id. (explaining Court's reasoning in Roberts).
The Supreme Court reaffirmed *Roberts* a few years later in *Board of Directors of Rotary International v. Rotary Club of Duarte*. Similar to *Roberts*, the Rotary Club of Duarte lost its national charter for admitting women as members. Following its charter revocation, the local chapter sued Rotary International for violating California's public accommodations statute. The Court found the Rotary Club to be more selective than the Jaycees, as it required that its members be among the "leading business and professional men in the community." Much like in *Roberts*, the Court found that the Rotary Club did not satisfy the intimate association test because of the large number of members and the public nature of some of the club's activities. In addressing the right to expressive association, the Court found that the admission of women would not hinder the organization's purpose of "provid[ing] a means for business and professional men to offer humanitarian service to the world." Unfortunately, the *Rotary* decision was unsuccessful in clarifying some of the ambiguities left over from *Roberts*. The Supreme Court was able to extend *Roberts* to more selective organiza-

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107. See Hofmeister, supra note 98, at 1020 (citing *Rotary*, 481 U.S. at 541).

108. See id. The Rotary Club of Duarte, California, filed suit under the Unruh Civil Rights Act seeking an injunction against Rotary International from enforcing the discriminatory practice and from revoking the local club's charter. See id.


110. See id. at 99-100 (citing *Rotary*, 481 U.S. at 546). The Rotary's claim to a right of freedom of association did not succeed because the relationships within the Rotary were not of the intimate, familial type that are granted constitutional protection: the size of the clubs ranged from twenty to more than 900 members, there was a high dropout rate, and many activities were carried out in the presence of strangers.

111. Id. at 100 (citing *Rotary*, 481 U.S. at 539, 549).

112. See Finlay, supra note 86, at 387 (citing *Rotary*, 481 U.S. at 548 n.6). We have no occasion in this case to consider the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country. Whether the 'zone of privacy' established by the First Amendment extends to a particular club or entity requires a careful inquiry into the objective characteristics of the particular relationships at issue.

Id. at 387 n.99 (quoting *Rotary*, 481 U.S. at 548 n.6) (citations omitted).
tions in *Rotary*, but did not set forth clear guidelines for the states and private clubs to follow.\(^{113}\)

The third influential case heard by the Supreme Court on this subject was *New York State Club Association, Inc. v. City of New York*.\(^{114}\) New York City amended its human rights law to prohibit discrimination by any "place of public accommodation, resort, or amusement," but provided a specific exemption for distinctly private clubs.\(^{115}\) New York Local Law No. 63 sets forth the following definition for a distinctly private club:

[An] institution, club or place of accommodation . . . shall not be considered in its nature distinctly private [if it] has more than 400 members . . . , provides regular meal service and regularly receives payments for dues, fees, usage of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business.\(^{116}\)

Additionally, the statute declares that all benevolent orders and religious corporations are considered to be "distinctly private."\(^{117}\)

The New York State Club Association claimed that the ordinance violated its members' First and Fourteenth Amendment rights.\(^{118}\) The Association charged that the law was overbroad and facially invalid.\(^{119}\) The Supreme Court rejected these arguments and found that the plaintiff did not meet its burden of showing that the ordinance "threatened any particular club’s 'ability to associate together or to advocate public or private viewpoints.'"\(^{120}\) The Court found that New York City made a good faith effort to define what constituted a distinctly private club, and the ordinance fo-

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113. See id. at 387. The Court failed to define explicitly characteristics of private clubs or to establish the boundaries of right of association. Instead, the Court increased the ambiguity by proposing that lower courts judge clubs on the 'objective characteristics of the particular relationship at issue.' Such a proposal leaves both state and purportedly private clubs without guidance in determining what activities are private. Id.


117. See Finlay, *supra* note 86, at 388 (citing N.Y. City Admin. Code § 8-102(9)).

118. See id. (citing N.Y. State Club, 487 U.S. at 7).

119. See N.Y. State Club Ass’n, Inc. v. City of New York, 487 U.S. 1, 11-14 (rejecting both facial attack and overbroad challenges).

cused on relevant factors of size, exclusivity, and purpose when evaluating associational rights. In states with laws similar to New York, the success or failure of a gender discrimination suit against a private golf club may therefore depend on the level of commercial activity conducted within the club.

E. History of Gender Discrimination in Private Golf Clubs

There is a long history of “men-only” clubs in the United States. Since the passage of many of the Civil Rights Acts, the number of these clubs still operating is continually declining. However, twenty-four men-only private golf clubs continue to prohibit women from obtaining memberships. The “old boys’ network” still thrives in many of these private clubs, despite Congress’s legislative attempts. Many of these private clubs allow members’ wives and children to participate in club activities, but their discrimination in membership practices still persists. Some of these private golf clubs allow women as auxiliary members, but they are not provided full voting rights or allowed to sit on the board. Additionally, the members’ wives, also called “‘WORMS’—Wives Of Regular Members,” are often not allowed to tee off on weekends and holidays.

121. See id. (noting State's reasonable reliance on important elements of associational rights when determining private club distinction).
122. See Kamp, supra note 23, at 101 (discussing application of commercial distinction when clubs provide forum for contacts and business deals).
123. See id. at 101-02 (noting level of commercial activity may dictate whether clubs will be able to discriminate against women in future). In New York State Club, the Court “approved the use of a statutory presumption that large clubs serving food and receiving payments from nonmembers are not entitled to protection as a First Amendment intimate or expressive private association.” Id. at 101.
124. For a discussion of men-only clubs that have been forced to allow women to join, see supra notes 93-123 and accompanying text.
126. See Sawyer, supra note 72, at 202-03 (discussing perpetuation of “All White Male Private Club[s]”). “This type of discrimination signals to other members of the white male ‘good ol’ boy’ network that deliberate discrimination has not yet become discredited enough to express proudly and openly.” Id. at 203.
128. See CHAMBERS, supra note 127, at 55-71 (describing limitations on ways women may play golf at private clubs); see also Kamp, supra note 23, at 89.
day mornings, even if they are playing a round with their husbands.\textsuperscript{129}

The practice of restricting women to certain tee-times and only allowing men to reserve the coveted weekend and holiday morning times is one of the most common policies followed by these private clubs.\textsuperscript{130} In many clubs, women may receive reserved tee-times, but only on one or two weekday mornings.\textsuperscript{131} This practice seems to be based on the historical stereotype of women as non-working housewives who are home during the week and thus, more able to take advantage of weekday tee-times.\textsuperscript{132} Of course, this is no longer the case, as women are now an integral part of the workforce and should be afforded the same recreational and networking opportunities on their weekends.\textsuperscript{133}

Another discriminatory practice at these private clubs comes in the form of the “men-only grill rooms.”\textsuperscript{134} Women and children are strictly forbidden from these dining areas.\textsuperscript{135} Grill rooms are essentially places where male members bring male guests to conduct discussions or business deals without the distractions of the family dining room.\textsuperscript{136} While the men are networking in the grill room, females are left to entertain their guests in the family dining room along with the other wives and children.\textsuperscript{137}

The perception that private clubs are purely social is somewhat misconceived, as many large corporations pay for their employees’

\textsuperscript{129} See Kamp, \textit{supra} note 23, at 90 (discussing numerous restrictions on women’s participation). “[S]tandard practice allows only men to reserve tee-times on weekend and holiday mornings with women often forbidden to tee off until after noon.” \textit{Id.}

\textsuperscript{130} See Chambers, \textit{supra} note 127, at 72-86 (explaining preferential tee-times).

\textsuperscript{131} See Kamp, \textit{supra} note 23, at 90 (elaborating on restrictions).


\textsuperscript{133} See id. (pointing to increase in women’s involvement in business, government, and corporate America).

\textsuperscript{134} See Chambers, \textit{supra} note 127, at 87-94 (discussing men-only “grill rooms” at several different clubs). This practice is followed not only by all-male clubs, but also by clubs that allow female members and impose separate and preferential tee-times. \textit{See id.}

\textsuperscript{135} See Kamp, \textit{supra} note 23, at 90-91.

\textsuperscript{136} See id. at 91 (implying male members of private clubs prefer conducting business and engaging in conversations with other male members and guests away from their families in men-only grill rooms).

\textsuperscript{137} See Chambers, \textit{supra} note 127, at 89-90 (discussing desire and need for women to be able to entertain guests and clients in same manner as men). Efforts of men-only clubs to maintain a separate dining area include changing the name from “grill room” to “locker room” and serving men in the changing facilities. \textit{See id.} at 90-91.
Additional, corporations frequently hold meetings and entertain clients at these clubs. Corporations receive significant tax advantages for business use of these private clubs, and executive positions in these corporations often seem contingent upon club membership. As more businesswomen play golf and seek club memberships, more harm will be caused by the continued discriminatory practices of private clubs.

Our society has recognized that individuals who condone discriminatory practices should be carefully scrutinized if they wish to be considered for public offices or for the judicial bench. When Justices Anthony Kennedy and Harry Blackmun resigned their memberships to men-only clubs, the Senate Judiciary Committee noted that any future judicial nominee’s appointment could be impaired by the individual’s membership in a club that discriminates on the basis of sex. Following his nomination, Treasury Secretary, John W. Snow, resigned his membership to Augusta National prior to undergoing Senate confirmation hearings.

F. History of Practices at Augusta National Golf Club

Augusta National Golf Club is considered one of the most prestigious golf courses in the world. Founded in 1931, Augusta National’s policies have traditionally been determined by the sitting

138. See Kamp, supra note 23, at 91 (“The reality is that membership in these clubs fostered political and economic power . . . . Businesses, as well as the women that work for them, are harmed when women are excluded from this opportunity to network with clients.”).

139. See id. (noting corporations use private club facilities to hold meetings, events, and entertain clients).


141. See id. (citing Michele Marchetti, Kicking Off Their Heels: The Changing Corporate World is Pushing Women to Make a Play for the Golf Course, SALES & MKTG. MGMT., Nov. 1995, at 126). In 1994, women made up more than one-fifth of active golfers. See id.

142. See Finlay, supra note 86, at 373 n.10 (noting two Justices of United States Supreme Court resigned memberships to clubs with discriminating membership policies).

143. See Kamp, supra note 23, at 91 (citing Note, State Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations, 104 HARV. L. REV. 1835, 1835 n.1 (1991)).


chairman. There have been five chairmen since the club officially opened in 1932. Since 1998, William Woodward ("Hootie") Johnson has been the acting chairman of the club and a staunch preserver of tradition. Tradition, however, has not always been the sole driving force behind all decisions made with regard to club membership.

In 1990, under the direction of Hord Hardin, chairman from 1980-1991, the golf club admitted Ronald Townsend, its first black member and the President of Gannett Television at the time, following the crisis surrounding the Professional Golfers Association ("PGA") tournament at Shoal Creek in Birmingham, Alabama. Shoal Creek was the site of one of the PGA annual tournaments, and it did not admit blacks as members of the club. After many of the event’s corporate sponsors withdrew their funding, Shoal Creek made the decision to admit black members, and Augusta National followed a month later. Because of the events at Shoal Creek, the United States Golf Association ("USGA"), the PGA Tour, and the PGA of America amended their bylaws to include language requiring clubs, which wished to host events sponsored by their organizations, to not discriminate on account of race, religion, or sex. Augusta National, however, did not go as far as these organizations in eliminating discrimination in its membership practices, as the club’s exclusion of women continues today.

Augusta National differs slightly from the twenty-three other private men-only clubs. The nearly 300-member club is made up

146. See id. (stating chairman runs "like a benevolent autocracy").
148. See Ferguson, supra note 147, ¶ 13 (noting Mr. Johnson calls preserving tradition "the goal of every chairman"). "The legacy he wants to leave is not one of innovator, but simply to preserve the tradition, which he calls the goal of every chairman." Id.
149. For a discussion of issues affecting membership decisions, see infra notes 150-53 and accompanying text.
150. See CHAMBERS, supra note 127, at 31 (discussing near economic disaster at Shoal Creek when sponsors pulled tournament backing upon learning Shoal Creek excluded blacks).
151. See id.
152. See id. (recounting steps taken by chairman, Hord Hardin, to admit first black male to Augusta National).
153. See Bamberger, supra note 1, ¶ 6 (noting no group included language prohibiting discrimination against homosexuals or handicapped people).
154. See CHAMBERS, supra note 127, at 31.
155. See Owen, supra note 125 (noting characteristics of Augusta National).
of America’s male corporate elite, which as of July 2002 only six members were African American. Unlike many all-male private clubs, however, Augusta National does allow women to play the course. In 2002, three of the Ladies Professional Golf Association’s (“LPGA”) best golfers and the University of South Carolina women’s golf team played Augusta National. Additionally, Augusta National has no policy of reserving men-only tee-times, as is characteristic of many private clubs including those that admit women as members, and wives of members may also play as guests with their husbands.

Finally, Augusta National is notably distinguished from other all-male clubs as it hosts the Masters, arguably golf’s most prestigious championship. During the first full week in April, Augusta National opens its doors to the public for the Masters. Millions of dollars are raised during Masters’ week through television sponsors, tickets, food and drink, and pro-shop sales. This was true every year prior to the 2003 championship, when Augusta National chairman Hootie Johnson decided that the Masters telecast would forgo corporate sponsorship. However, the Masters generates more than twenty million dollars beyond any money provided by sponsors and television broadcasters. This revenue is generated by men and women alike, who purchase tickets to view the event, buy souvenirs from the official pro-shop, and enjoy food and drink from the concession stands.

157. See id. (noting Karrie Webb and Kelly Robbins from LPGA played Augusta National in 2002); see also Associated Press, Golf: Augusta Chairman Refuses to Give Ground, ST. PAUL PIONEER PRESS, Sports, Nov. 12, 2002, ¶ 14, 2002 WL 7866021 (noting Augusta National claims women played more than 1000 rounds of golf on their course in 2002).
159. See id. ¶ 12, 14 (noting Muirfield, site of British Open, prohibits women in clubhouse).
160. See Chambers, supra note 127, at 31 (discussing wide acclaim of Masters golf tournament and proceeds generated at Augusta National).
161. See id. (noting Augusta opens course to public for one week every spring).
162. See id. at 32 (noting championship raises approximately ten million dollars during Masters’ week, six million dollars from pro-shop sales).
164. See id. ¶ 4 (citing Golf World estimates).
165. See Chambers, supra note 127, at 32 (noting people come in hordes to purchase Masters memorabilia).
III. ANALYSIS

In order to further illustrate the obstacles facing women seeking membership to Augusta National, the following hypothetical will attempt to explore the existing protections against gender discrimination.

A client walks into your office seeking your counsel. She is an avid golfer, a very good one at that, and she conveys to you that she has attempted to gain a membership to one of the nation's most prestigious golf clubs. Thus far, she has not been successful in obtaining an invitation to become a member. Her attempt to gain membership in Augusta National has been met with the response that it is a private member club that does not admit women. For the sake of argument, let us add to the scenario that this potential client is a distinguished board chairperson of one of the largest, most powerful Fortune 100 corporations in the United States. In your conversation with her, she indicates that throughout her life she has battled discrimination, from her early educational years to breaking through the glass ceiling in her profession. She says she is not about to let gender discrimination affect her anymore. What comfort may you offer her by way of legal precedent or legislative relief?

A. Federal Protection

In order to determine whether Augusta National may legally discriminate on the basis of gender, one must look to the specific characteristics of the club itself and how those characteristics affect the application of the legal safeguards. First, the Fourteenth Amendment does not offer an individual protection against discrimination by Augusta National because the club's operation does not constitute a state action. The golf club does not satisfy any of the three tests for state action. The club does not perform a public function, as it does not provide goods or services that would traditionally be under state government authority.

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166. For a discussion of case-by-case analysis to determine if a club is private, see supra note 95 and accompanying text.

167. For a discussion of private club and state action theories, see supra notes 48-55 and accompanying text.

168. For a discussion of the tests for state action, see supra notes 48-55 and accompanying text.

169. See Kamp, supra note 23, at 92-93 (citing Marsh v. Alabama, 326 U.S. 501 (1946)). "Under the public function test, a court would not find that a private club performs a government function, although an argument can be made that the extensive intermingling of government and business leaders at clubs where
Next, the government has not enacted legislation that would authorize Augusta National to discriminate against women, and therefore no state compulsion exists. Thus, there is no joint state action present, as there has been no judicially mandated enforcement of a discriminatory practice in the membership practices of the club.

Moreover, there exists virtually no recourse for the exclusionary membership practices of Augusta National in the federal statutes that could provide relief for gender discrimination. First, because membership in the golf club is by invitation only, the property and contract right protections of the first Civil Rights Act do not apply. Likewise, § 1983 does not provide any possible remedies, as the actions of Augusta National, a private club, do not rise to the level of state action. Further, Title IX of the Education Amendments would offer no protection in this case because we are focused on the discriminatory membership practices of the club, and not whether female students are prohibited from participating in certain collegiate activities.

The final relevant federal statutory protection is Title II. Unfortunately, Title II does not directly address gender, and thus offers no protection against sex discrimination. Title II offers protection from race, religion, color, or national origin discrimination "at places of 'public accommodation' that affect commerce." Additionally, Augusta National would probably be exempt from the government decisions are made does create a forum for government decision-making." Id. at 93 (footnotes omitted).

170. See id. at 92-93 (citing Reitman v. Mulkey, 387 U.S. 369 (1967)). "Under the state compulsion theory, activities such as leasing or monopolistic use of publicly-owned land, liquor licensing, government granting of tax benefits, and government control over a club's labor practices, generally do not rise to the level of state action." Id. at 93 (footnotes omitted).

171. See id. at 93-94 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)). "[U]nder the joint action ... theory ... no state action would be found at a private club because the discrimination would be deemed private and not judicially enforced by the state." Id. at 93.

172. See Jolly-Ryan, supra note 54, at 504 (discussing possible contract or property claims). "[M]embership in a private club ordinarily does not involve property or contract rights. However, in limited circumstances, the Supreme Court has held that private club membership can be so closely associated with the sale or lease of property as to become 'part of that property.'" Id. (footnotes omitted).


174. For a discussion of Title IX, see supra notes 70-72 and accompanying text.

175. For a discussion of Title II, see supra notes 73-77 and accompanying text.

application of this provision even if it did encompass gender, as it is a private club with highly selective membership practices. 177

B. Public Advocacy for a Public Accommodation Act in Georgia

The next logical step is to look at the relevant state and local laws that may provide some protection from gender discrimination by Augusta National. Unfortunately, Georgia is one of five states without a public accommodation statute that addresses private country clubs. 178 Further, only one city in the state, Atlanta, has a city ordinance tailored after the New York City ordinance prohibiting discriminatory practices by private clubs with more than “four hundred members, serving meals, and receiving payments for dues, fees, use of space, facilities, services, meals, or beverages for the furtherance of business or trade.” 179 This ordinance has no authority over Augusta National since it is not located within the city limits of Atlanta, but in an entirely different county of Georgia. 180 The fact that neither the state of Georgia, nor the city of Augusta, has laws prohibiting discrimination on the basis of gender by a golf club appears to insulate the membership practices of public accommodations or private clubs for the time being. 181

C. Other Avenues for Protection

The unique nature of the situation surrounding Augusta National leads to an exploration of additional avenues of protection. Among the possible methods that may be used to challenge the discrimination in membership practices at private clubs are: 1) revisions in the Internal Revenue Code, 2) revisions in the state tax code, and 3) restructuring of liquor laws. 182

177. See Brown v. Loudoun Golf & Country Club, Inc., 573 F. Supp. 399, 402-03 (E.D. Va. 1983) (discussing how membership practices will be key factor in determining whether club is private). “Relevant here are the size of the club’s membership fee, whether and how many white applicants have been denied membership relative to the total number of white applicants... whether the club advertises its memberships, ... and whether the club has well-defined membership policies ... .” Id. at 403 (citations omitted).

178. See Chambers, supra note 127, at 226 (listing four other states: Arkansas, Mississippi, North Carolina, and Texas).

179. Id. at 226-27 (discussing New York ordinance and cities adopting similar laws).

180. See id. (stating Atlanta, along with several other cities, have ordinances modeled after New York City’s law).

181. See id.

182. See Kamp, supra note 23, at 103-07 (discussing possible means of pressuring clubs to end discriminatory practices).
1. **Internal Revenue Code Revisions**

Under § 501(c)(7) of the Internal Revenue Code,\(^\text{183}\) clubs are exempt from paying income taxes if they are “organized [primarily] for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder.”\(^\text{184}\) This private club tax exemption does not apply if the club discriminates on the basis of race, color, or religion; however, application of the exemption is not limited by gender discrimination.\(^\text{185}\) Certainly, if this provision included gender discrimination as a basis for disqualification, many private clubs would feel the financial pinch of losing their income tax exempt status. However, as this step may assist in eliminating the discriminatory practices of some clubs, such a revision probably would not affect Augusta National. Even if Augusta National was required to pay income tax, it seems likely the club would rather do so than be forced to admit women, thus it seems unlikely that change could be fostered through revision of the Internal Revenue Code.\(^\text{186}\)

2. **Revisions of State Tax Code**

The next possible means of applying pressure to a private golf club is through the removal of any preferable state property tax exemptions currently accessible to clubs that discriminate.\(^\text{187}\) Maryland and Minnesota both adopted “Open Space” tax laws, exempting from property taxes clubs that do not discriminate on the basis

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\(^{184}\) Id.

\(^{185}\) See Kamp, *supra* note 23, at 107 (citing 26 U.S.C. § 501(i) (1994)). Section 501(i) states:

Notwithstanding subsection (a), an organization which is described in subsection (c)(7) shall not be exempt from taxation under subsection (a) for any taxable year if, at any time during such taxable year, the charter, bylaws, or other governing instrument, of such organization or any written policy statement of such organization contains a provision which provides for discrimination against any person on the basis of race, color, or religion.

\(^{186}\) See Sirak, *supra* note 163, ¶ 1 (stating Augusta National chairman will not be bullied into admitting females and will defend with offense). It is reasonable to think if the club was willing to drop all sponsors that it would be willing to pay its taxes even if the Internal Revenue Code were amended to include gender discrimination as a basis for prohibition from tax exemption. See Kamp, *supra* note 23, at 107.

\(^{187}\) See Kamp, *supra* note 23, at 105-06 (discussing litigation against Burning Tree Country Club in Maryland resulting in almost one million dollars in back taxes assessed).
of sex or marital status. In *State v. Burning Tree Club, Inc.*, a Maryland court of appeals found it unconstitutional for the Open Space tax exemption to apply to Maryland clubs that discriminate on the basis of sex with respect to the availability of their facilities. Maryland and Minnesota have been successful in removing tax benefits for clubs that discriminate in their membership and guest privilege practices. Nonetheless, because Augusta National pays income tax as an entity, it is safe to assume that if the club was currently receiving any additional tax benefits, it would sooner pay the difference and any back taxes owed rather than admit a single woman not on its own terms.

3. Restructuring of Liquor Laws

Many states have decided that if private clubs wish to discriminate in their policies and practices, then they will have to do so soberly. States have exercised the right to confiscate or refuse the issuance of a liquor license to a club that discriminates in its membership practices or in granting equal access to club facilities and services. States have the ability to institute these types of requirements through the power to regulate alcohol use granted to them under the Twenty-First Amendment. Although this seems to be an effective means of removing discriminatory practices within clubs, this attack has not yet proven to be the most successful approach. Clubs, like Augusta National, may be more willing to “go dry” than be forced to admit women as members. If this type of

188. *See id.* (noting provisions “similar to Maryland’s or Minnesota’s property tax laws could prove fruitful in creating change for the better”).
190. *See Kamp, supra* note 23, at 106 (citing *Burning Tree Club,* 554 A.2d at 371). However, *Burning Tree* chose to maintain its funds by fees, rather than accept women. *See id.*
191. *See id.*
192. For a discussion of the use of tax law to prevent discrimination, see *supra* note 182 and accompanying text.
193. *See Jolly-Ryan, supra* note 54, at 519-21 (noting clubs forced to give up liquor licenses for discriminating on account of race or gender).
194. *See Kamp, supra* note 23, at 103-04 (discussing confiscation of liquor licenses).
195. *See Jolly-Ryan, supra* note 54, at 520 (citing BPOE Lodge No. 2043 v. Ingraham, 297 A.2d 607, 608-16, 619-20 (Me. 1972)). “A state may constitutionally refuse to issue or reissue a liquor license to a club that discriminates in its membership practices, because the grant of such a license involves the unique power of the state under the Twenty-First Amendment to regulate liquor use.” *Id.*
196. *See Kamp, supra* note 23, at 104 (noting clubs could merely stop selling liquor and raise membership dues to recover loss in revenue).
statute were instituted in Georgia, it is likely the Masters would be played and won without a single beer served.

IV. CONCLUSION

The facts surrounding Augusta National are truly unique. The club has been the host of one of the most public events in golf for almost seventy years.\(^\text{197}\) No doubt, the honor and prestige of the championship, and the golf club that hosts it, will continue for at least another seventy years. Unfortunately, it appears as though the next step in ending discrimination at Augusta National must be taken by the club.\(^\text{198}\) If there is still one thing left uncertain, it is exactly if, and when, there will be a female member at Augusta National. It is not a matter for the PGA or the LPGA to decide, nor is it a matter for the NCWO to decide. It is also not a decision for the state or federal legislatures to make. One thing is certain; Augusta National will admit its first female member when it is ready — if a woman is not admitted under the current chairman, then maybe one will be admitted under the next. Maybe the next chairman will bend to public pressure, or maybe change will come simply with the passage of time. In the 1930s, it was said, "[w]omen lack[ed] the strength to play golf as well as men."\(^\text{199}\) Now, there are golfers, such as Annika Sorenstam, the first woman to compete in a PGA Tour event since 1945, who average 265 yards off the tee.\(^\text{200}\) Time can do wonderful and amazing things.

Charles P. Charpentier

\(^{197}\) See Chambers, supra note 127, at 31 (discussing long and prestigious history of Masters Championship beginning shortly after club's opening).

\(^{198}\) For a discussion of how the existing laws do not require Augusta National to admit women, see supra notes 166-96 and accompanying text.

\(^{199}\) See Chambers, supra note 127, at 19-20 (quoting Glenn Collett, Women in the Rough).