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**Exclusion and Expulsion from Non-Profit Organizations—The Civil Rights Aspect**

Robert S. Pasley*

To what extent do voluntary non-profit associations have the right (a) to deny admission to membership, and (b) to expel existing members? Space does not permit discussion of all the ramifications of these two questions and some limitation of scope becomes necessary. The theme selected has been the "civil rights" aspect of the problem; more specifically, the right, in certain areas, to be protected against racial and religious discrimination, and the privilege to exercise the ordinary rights of citizenship, such as the right of free speech, of petition, of voting, of resort to the courts, and to employment.

In the absence of statute, a truly private, voluntary association, not affected with an over-riding "public interest," may limit its membership on any ground it chooses, provided this is not merely a sham arrangement to accomplish indirectly what the law would not permit to be done directly.

Generally, two problems can be distinguished, one constitutional, the other statutory, although there is some overlap. The constitutional problem, as traditionally stated, is whether a given "private" organization is so far affected by, or partakes of, governmental activity that "state action" is involved within the

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1. Chafee's classic study, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930) dealt with clubs, trade unions, professional associations, secret societies, churches, and educational institutions. I shall follow his lead, with emphasis on the first three categories. The mystique of the secret society seems to be losing its appeal, and few recent cases have been found dealing with them. Churches present special problems of religious freedom, best left to separate treatment. And educational institutions present a whole gamut of problems, ranging from segregation and "integration" of pupils to academic freedom and tenure of faculty, which would far transcend the limits of a single article. As to disciplinary procedures generally, see, Oleck, *Non-Profit Corporations & Assns.*, c. 26 (1956).

2. Very little seems to turn on the question whether the association is incorporated. See, Chafee, *supra*, at 996. Accordingly, what is said herein can be taken as equally applicable to both incorporated and unincorporated organizations, except as specifically noted.

meaning of the Fourteenth Amendment to the United States Constitution. The statutory problem is, given a statute which prohibits discrimination in admitting persons to public places of accommodation, whether an allegedly "private" organization is in fact a subterfuge for evading the statute.

The Constitutional Problem

Since the Civil Rights Cases, it has been settled constitutional doctrine that the prohibitions of the Fourteenth and Fifteenth Amendments to the United States Constitution apply only to "state action" and not to "purely" or "merely" individual or "private" action. The concept of "state action" has, however, been progressively broadened until it now embraces many types of activity hitherto considered "private." For example, it has come to include not only acts of state officers and agents, state and municipal legislation, acts of the state judiciary, and some types of state "inaction," but also private actions resulting from mandatory state legislation, actions of private organizations which perform quasi-governmental functions, and, in some instances, actions of private organizations which are in receipt of substantial benefits from the state. Another formulation suggests that actions of private groups are subject to constitutional limitations when (i) the organization is exercising a basic state function, typically with the affirmative cooperation of the state, (ii) it invokes affirmative state action by seeking judicial enforcement of a private contract, or (iii) it derives its power to act (usually monopolistic or exclusive) by virtue of statute and is regulated by governmental authority. Potentially, the most expansive of these concepts is that which was invoked in the restrictive covenant cases, that judicial enforcement of private

4 109 U. S. 3 (1883).
5 So far as are here relevant, these are principally the prohibitions against denying any person the equal protection of the laws, and against denying the right of a citizen to vote on account of race, color, or previous condition of servitude.
6 Civil Rights Cases, supra, n. 4, at 11, 17.
discrimination agreements is "state action" and hence unconstitutional. Probably the broadest extensions of the concept proposed thus far are set forth in Mr. Justice Douglas's concurring opinion in *Garner v. Louisiana*,\(^\text{10}\) that "state action" may be found in the customs of a society, reinforced by a general pattern of legislation; and in the majority opinion in *Lombard v. Louisiana*,\(^\text{11}\) finding "state action" in proclamations of the Mayor of New Orleans and the Superintendent of Police that "sit-in demonstrations" would not be permitted.

Many commentators have observed that, once this process of extension got under way, there was no logical stopping point, short of finding that all private action (not actually prevented by the state) is "state action," in the sense that it is authorized or permitted by law; hence the search for "state action" is a futile exercise which obscures the real issues.\(^\text{12}\) The concurring opinion in *Garner v. Louisiana*\(^\text{13}\) has been described as discarding "the substance of the state action limitation while maintaining it as a verbal facade."\(^\text{14}\) And again, "the real lesson of *Lombard* is that the state action concept has become a meaningless principle in the field of constitutional law—a hollow fiction without substance upon which to rest an opinion."\(^\text{15}\)

Moreover, warn some of these commentators,\(^\text{16}\) blind adherence to the "state action" concept imperils other protected rights.

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\(^{10}\) 368 U. S. 157, at 176 (1961).

\(^{11}\) 373 U. S. 267 (1963).


\(^{13}\) *Supra*, n. 10.

\(^{14}\) Karst and Van Alstyne, op. cit. *supra*, note 12, at 763.

\(^{15}\) Comment, A Statement Against State Action, 37 S. Calif. L. Rev. 463, at 467 (1964).

\(^{16}\) E.g., Williams, op. cit. *supra*, note 12; Karst and Van Alstyne, op. cit. *supra*, note 12.
notably freedom of association, and the privilege of individual persons or private groups to discriminate (within limits) in their social and business relations.

Various alternatives have been proposed, all resembling each other to the extent that they suggest balancing tests, based on the degree of state involvement (if any), the actual impact and seriousness of the alleged discrimination, and the practical consequences of granting or withholding relief. As suggested by Professor Williams, the real problem is "to determine the extent to which the private group has moved toward a relationship with the public which gives the public the obligation to police on a constitutional basis the group's desire to discriminate." 19

Despite the force of the critics' objections, the Supreme Court has continued to adhere to the "state action" requirement, attenuated as it has become.

State Action

(a) Leased Premises—One of the most common situations in which the question of unconstitutional discrimination by a private organization has been at issue arises where the organization occupies premises leased from a governmental body. Here the allegation is that the lease is a form of governmental aid, which converts the ostensibly private acts of the organization into a form of "state action." While the results of the cases have not been uniform, some lines of demarcation can be staked out.

The problem can be avoided altogether by holding that a lease of public property to a private club, to which the public generally is not admitted is beyond the powers of the municipality or state agency. 20


18 Williams, op. cit. supra, note 12, at 390.

19 Id. at 378.

The opposite approach is to hold that the lessee is a mere "agent" or "instrumentality" of the municipality or state body and therefore can discriminate no more than could the latter acting directly. More recent cases have omitted any reference to the "agency" or "instrumentality" theory, and have simply held that where a municipality or state body owns a public park, or other facility for amusement or recreation, it may not avoid its obligation not to discriminate simply by leasing the facility to a private operator.

In two cases involving fairly short-term leases to theatrical groups, it was held that there was no violation of the fourteenth amendment, primarily on the ground that, since the property was for the time surplus to the needs of the city, it could be leased to a private person to use as he saw fit, and that, since the city did not participate in the operations of the lessee and was willing to lease the facilities at other times to Negro organizations on a non-discriminatory basis, there was no violation of the Fourteenth Amendment.

On the other hand, in Derrington v. Plummer, the court enjoined renewal of a lease by the county of a courthouse cafeteria to a tenant who allegedly intended to continue his practice of excluding Negroes. The county itself was not a party to the discrimination, and did not control the lessee, but the fact that it owned the building, that it was a public building, and that the cafeteria was intended to be patronized by persons having occasion to be in the courthouse, were held to be enough to meet the requirements of "state action." The same reasoning was used

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21 Lawrence v. Hancock, 76 F. Supp. 1004 (S. D., W. Va. 1948); Culver v. City of Warren, 84 Ohio App. 373, 83 N. E. 2d 82 (1948). (Both cases involved municipal swimming pools.)

22 City of Greensboro v. Simkins, 246 F. 2d 425 (4th Cir. 1957) (Golf course built by city with aid of WPA funds, partially on land owned by City Board of Education); Department of Conservation v. Tate, 231 F. 2d 615 (4th Cir. 1956), cert. denied, 352 U. S. 838 (1956) (State Park).

23 Harris v. City of St. Louis, 233 Mo. App. 911, 111 S. W. 2d 995 (1938). To the extent that the opinion of the trial court, adopted by the appellate court, approves the "general state custom of segregation," it must today be regarded as suspect.


25 240 F. 2d 922 (5th Cir. 1956), cert. denied, 353 U. S. 924 (1957).

26 By way of dictum, the court said that it would not be unconstitutional for a purely private lessee of surplus public property to discriminate, when the municipality had no such purpose, did not join in the enterprise, and did not reserve control. Id. at 925.
under similar facts in *Burton v. Wilmington Parking Authority*, finding a restaurant "an integral part of a public building devoted to a public parking service."

Reviewing the lease and concession cases, it seems significant that "state action" has been found (albeit not without occasional straining) in all but a very few, and those of somewhat uncertain standing today. It would not be safe to conclude, however, that any lease by a public authority would now be held to constitute "state action." No case has squarely repudiated the idea that a lease of property, surplus for the time to the public's needs, made at arm's length for an adequate consideration to a private organization, where the lessor has no purpose of discrimination and reserves no substantial control over the lessee, is not "state action." The difficulty is that all these conditions are rarely met. Even if they are, no one can be sure, on the basis of existing precedents, just what the criteria for this exception really are.

If the search for "state action" per se is abandoned, and a balancing test applied, it seems clear that the "agency" cases would be decided the same way, as would the cases of subterfuge, as well as the cases involving the leasing of public parks, swimming pools, golf courses, and other places of amusement, which by their nature are intended to be for the benefit of the public at large. The "short-term" leases involved in the *Harris* and *Muir* cases are not so easy of solution. Here, supporters of a balancing theory would reject the "surplus property" test and ask, rather, whether the operations of the lessee,

27 365 U. S. 715 (1961), rev'g. 157 A. 2d 894 (Del. 1960). A restaurant located in a building leased from a State parking authority and financed by public funds. State action was found in the public ownership and financing of the building, the responsibility of the parking authority to maintain the building, and certain tax exemptions afforded the lessee, but primarily in the reciprocal, physical and financial relationship between the restaurant and the rest of the parking facility. See 59 Mich. L. Rev. 452 (1961); Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 Col. L. Rev. 1458 (1961).

28 In his dissent in the *Burton* case, Mr. Justice Harlan said that the majority had found "state action" by "undiscriminatingly throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer." 365 U. S. 715, at 728 (1961).

29 See Lewis, op. cit. supra, note 27.

30 See, e.g., Williams, op. cit. supra, note 12, at 384; Van Alstyne and Karst, op. cit. supra, note 12 at 55.

31 Supra, note 23.

32 Supra, note 24.
and their impact on the public, were matters of such "high public interest," under all the circumstances, that discriminatory action should be deemed such action of the state as to demand constitutional protection. The nature and duration of the lease would of course be relevant, but even more relevant would be the nature of the activity carried on in the leased premises, the general public demand for the entertainment or other facilities offered therein, and the availability of other facilities.

(b) Economic Aid—Where a state or municipality renders substantial economic assistance to an organization, by way of subsidy, tax concessions, use of the power of eminent domain, or the like (or any combination of these), the case for "state action" would appear to be much stronger. Paradoxically, the opinion in the leading case, Dorsey v. Stuyvesant Town, which involved a housing project financed by a private insurance company with substantial state aid, found no "state action," on the grounds that the state had not "consciously exerted its power in aid of discrimination," and the private organization had not "acted in a governmental capacity so recognized by the state." Similarly, where the only governmental assistance involved was FHA and VA financing on the houses sold, the court held that this was not enough to constitute "state action."

In Eaton v. Board of Managers of James Walker Memorial Hospital, a private hospital, which received some grants-in-aid from the city and had contracted with the county to pay for the care of indigent patients, granted "courtesy staff" privileges to doctors on a race-discriminatory basis. It was held that "state

33 St. Antoine, op. cit. supra, note 8, at 1011.
34 Cf. Williams, op. cit. supra, note 12, at 378.
35 It should be noted that very few of the lease or concession cases involve genuine private clubs or non-profit associations. The one which most clearly did so, Lincoln Park Traps v. Chicago Park Dist., supra, n. 20, was not decided on federal constitutional grounds. The municipal golf and swimming clubs were not truly "private" in any fair meaning of that term. The cafeteria and restaurant cases involved business enterprises. The private opera and theater company cases are closer to our problem, but are still somewhat distinguishable. The leasing test, then, whatever its other deficiencies, has had little impact in this precise area, although the principles involved would of course be relevant to any case which might arise.
37 Id. at 535, 87 N. E. 2d 541, at 551.
action" was not involved and that the alleged discrimination was therefore not unconstitutional.

Norris v. Mayor and City Council of Baltimore⁴⁰ involved a private art school which received a subsidy from the state and city amounting to 23 per cent of its income. State and city officials were permitted to appoint students for free tuition scholarships, but in all other respects management of the school was free of public control. It was held that "state action" was not involved and that the school was free to discriminate.

But where a library,⁴¹ which had started out as a private charitable foundation, was receiving a subsidy from the city amounting to virtually all its annual income, title to its real and personal property had vested in the city, the city audited its accounts, and the city had established rules for appointment of its trustees, it was held that "state action" was involved and that the library could not constitutionally deny admission, on the ground of race, to a Negro applicant for a library training course.

If a principle is to be gleaned from this line of cases, it seems to be that state economic aid standing alone (unless it is very substantial) is not enough to constitute "state action," but where it is coupled with state control of policy or management, or accompanied by a conscious intention on the part of the state authorities to discriminate, "state action" will be found. It is doubtful, however, whether this principle will long remain unchallenged, in view of current theories as to what constitutes "state action." ⁴²

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⁴² The Stuyvesant Town case, supra, n. 36, was a 4-3 decision, and it has been severely criticized. See e.g. Williams, op. cit. supra, n. 12, at 377. It is questionable whether the James Walker Memorial Hospital case, supra, n. 39, would today be able to escape a finding of state action. (See Williams, at 381.) Doubts might even be expressed concerning the Baltimore art school. VA and FHA financing are still probably not enough to justify a finding of "state action." Discrimination in the sale by the original entrepreneur of housing for which the government guarantees mortgage loans is now forbidden by Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962). Ambitious urban redevelopment plans may well prove to be another story. See Smith v. Holiday Inns of America, Inc., 220 F. Supp. 1 (M. D. Tenn. 1963). Cf. dissenting opinion of Rives, J., in Barnes v. City of Gadsden, 268 F. 2d 593, at 594 (5th Cir. 1959), cert. denied, 361 U. S. 915 (1960). And see Ming v. Horgan, 3 Race Rel. Rep. 693 (Super. Ct., Sacramento Co. Calif. 1958).
Under a "balancing" test, the results would be less clear, but perhaps easier to rationalize. For example, the Stuyvesant Town case might well be decided the other way, on the ground that the "intimate relationship between the city and slum clearance, the size of the housing project, and the fact that the city had to exercise its powers of condemnation to obtain the property for the corporation show the quasi-public nature of the corporation." 43

(c) State licensing.—The argument has been advanced that licensing of an enterprise by a State or municipality is enough to constitute "state action." The most extreme statement of this position is found in the concurring opinions of Mr. Justice Douglas in Garner v. Louisiana 44 and in Lombard v. State of Louisiana. 45 In the former case he said:

But one who operates an enterprise under a license from the government enjoys a privilege that derives from the people. . . . The necessity of a license shows that the public has rights in respect to those premises. 46

And in the latter:

This restaurant needs a permit from Louisiana to operate and during the existence of the license the State has broad powers of visitation and control. This restaurant is thus an instrumentality of the State since the State charges it with duties to the public and supervises its performance. . . . 47

But as critics have observed, 48 this argument breaks down when the purpose of the licensing requirements in these cases is

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43 Williams, op. cit. supra, n. 12, at 378-79. The James Walker Hospital case, supra, n. 39, would involve "evaluating whether the private group has so moved into the area of public concern that the public's interest in eliminating the particular discrimination in question must outweigh the personal right to discriminate." See Williams, op. cit. supra, n. 12, at 382. The same could well be said of the original financing of a new housing development with the aid of federal mortgage guarantees. On the other hand, subsequent private sales of individual lots in the same development would appear to be much less a matter of "high public concern." This is the line drawn by Exec. Order No. 11063, supra, n. 42, although not expressly on constitutional grounds.

considered. They were merely health regulations, which had nothing to do with who should be served, but only what should be served. The state could not demand either a policy of segregation or of integration as a prerequisite to issuing the license. In other words, while the licensing was "state action," without question, still it had nothing to do with the alleged discrimination. Mr. Justice Douglas's views have not been accepted by a majority of his colleagues, and they do not represent the general view of the courts, which have in the main rejected the licensing argument.

Of course where the State health regulations require segregated facilities, the matter is entirely different. But this is not so much a matter of licensing as of affirmative regulation. Similarly, where the "licensing" amounts to an exclusive franchise, in effect giving the licensee a monopoly, "state action" is sufficiently involved so that racial segregation is regarded as violating the Fourteenth Amendment.

The most common application of the licensing situation to a truly private club would be a requirement that a license be obtained for the sale of liquor on the premises. Here, unless the licensing statute, as worded or as enforced by state officials, itself imposes a segregation requirement, it would seem clear that no "state action" is involved in the constitutional sense. Where, however, the nature of the establishment approaches a place of "public accommodation," the constitutional problem, whether licensing is required or not, becomes more formidable and approaches the insoluble. Fortunately, this matter is now largely covered by recent civil rights legislation, and to this we now turn.

Civil Rights Legislation

Title II of the Civil Rights Act of 1964 prohibits, inter alia, racial or religious discrimination or segregation in any places of

public accommodation53 (principally hotels, restaurants, gasoline stations, and places of amusement), if their operations affect interstate commerce or if discrimination or segregation is supported by state action. We are concerned here principally with the exclusionary language of Section 201 (e):

The provisions of this title 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).

The intent of the latter exception apparently is to foreclose such devices as operating a “private” night club or bar for the benefit of the patrons of a motel, for example, on a discriminatory basis. Senator Humphrey explained the purpose of the subsection (e) as follows:

The test as to whether a private club is really a private club, or whether it is an establishment, really not open to the public, is a factual one...

It is not our intention to permit this section to be used to evade the prohibitions of the title by the creation of sham establishments which are in fact open to the white public and not to Negroes. We intend only to protect the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis.54

While no decisions known to the author have yet been rendered under Section 201 (e) of the Act, a large number of states now have statutes prohibiting discrimination in places of public accommodation,55 many of which contain similar exclusionary language,56 and there have been some state court rulings on what it means.

A leading case is Matter of Castle Hill Beach Club, Inc. v. Arbury.57 Petitioner was a membership corporation which oper-

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53 P. L. 88-352, 78 Stat. 243. The term “place of public accommodation” is defined in detail in Section 201 (b) of the Act.
55 As of May 31, 1964, there were some 35 states having such statutes.
57 2 N. Y. 2d 596, 142 N. E. 2d 186 (1957).
ated a 16-acre bathing and recreation park in the Bronx. In finding that the petitioner was operating a "place of public accommodation," and was not a private club, the New York State Commission Against Discrimination and the Courts found, inter alia, (i) that from 1928 to 1950 the facilities had been operated on a commercial basis as a place of public accommodation; (ii) that formation of the membership corporation in 1950 did not change the essential nature of the operation, the facilities and management, or the rates; (iii) that after 1950 those who had been season members were automatically admitted to the newly formed membership corporation; (iv) that applications for membership were accepted without interview, investigation, or sponsorship, on the pro forma recommendation of a number of the governing committee; (v) that the "members" had no say in the management, affairs, or policies of the corporation; (vi) that petitioner was listed in the classified telephone directory as a public bathing beach; and (vii) that petitioner was licensed as a public bathing establishment, held a commercial beer license (rather than a club liquor license), and paid a New York City gross business tax. These facts led to the conclusion that "the membership corporation was a mere sham designed to conceal the truly public nature of the enterprise." 

In Everett v. Harron, the Supreme Court of Pennsylvania struck down a "crude attempt" to give a commercial swimming pool and recreational facility "the character of a private club in order to justify a selective admission of applicants" as a "device to keep Negroes from the swimming pools." The court was not swayed by the fact that the statute defining "place of public accommodation, resort or amusement" enumerated some forty odd places, but did not specifically name "swimming pools."

The same result has been reached in Ohio. Although the

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60 Id. at 125, 110 A. 2d 383, 385.


Ohio statute\textsuperscript{63} apparently contains no specific exclusion for private clubs, the court in the case cited assumed that such an exemption existed, but held that it had no application to an alleged private club operated by a lessee, which was in fact a "subterfuge" through which the owner "attempted to avoid the legal consequences of discrimination in operating a place of public amusement." \textsuperscript{64}

It has been held that the prohibitions of these statutes cannot be avoided by such devices as, for example, setting aside certain banquet or meeting rooms in a public restaurant and claiming that they are "private facilities," \textsuperscript{65} or "contracting" with a private club or lodge for the operation of a public park on a particular day, ostensibly for the benefit of members of the lodge, but in fact for everyone but members of the N.A.A.C.P. or of a City Council on Human Rights.\textsuperscript{66}

This is not to suggest that the defense of a private club will never be sustained. In Garfield v. Sands Beach Club, Inc.,\textsuperscript{67} the court had merely to point out that the plaintiffs themselves had joined the club and had been accepted as members!

Not so easy of disposition was the case of Delaney v. Central Valley Golf Club.\textsuperscript{68} Plaintiffs, who were Negroes, were denied the privilege of playing on a golf course maintained by defendant, which was a duly organized membership corporation managed by a Board of Governors. Although there were highway signs advertising the course as "public," there was no evidence that defendant had erected them. Defendant's by-laws limited the privileges of the course to members and their guests, although admittedly there had been occasional "relaxation of the

\textsuperscript{63} Ohio Rev. Code, § 2901.35 (Page, 1954).

\textsuperscript{64} Supra, n. 62, at 223, 91 N. E. 2d 290, 291.


\textsuperscript{67} 137 N. Y. S. 2d 58 (Sup. Ct., Nassau Co. 1954). The grievance was allegedly wrongful "ejection," but there was no allegation of discriminatory denial of privileges. Held: not properly brought under N. Y. Civil Rights Law.

enforcement of the rules.” The trial court concluded, on all the evidence, that the club was private and was not a place of “public accommodations, resort or amusement.” Significantly, the court said that even if it were public, the detailed enumeration in the statute of many types of public places, omitting golf courses, indicated a legislative intent not to cover the latter.

These cases demonstrate that, while the courts will not be deceived by a sham club concealing what is really a place of public accommodation, there are many close factual situations which are not capable of precise delineation. Since possible combinations of facts are infinite, no “rule” other than one of sound judgment and common sense can be laid down. One interesting and recurrent pattern, however, is that of the so-called “bottle club,” which holds a state or local liquor license and purports to sell to “members only.”

In 1957, the Attorney General of Michigan rendered an opinion that a “semi-public” golf club, which held a Class C license, authorizing it to sell liquor at retail for consumption on the premises, was prima facie subject to the Michigan civil rights statutes and could not deny golf privileges to Negro applicants. While other factors might also be relevant, the fact that the “club” held a type of liquor license intended for those selling at retail, rather than a club license, would be proper evidence that it was not operating on a bona fide basis as a private club.

A recent law review note on this subject suggests that “the best test for distinguishing the bona fide private club from a sham is the presence or absence of a profit motive.” This makes a good deal of sense and, moreover, provides a test which is not limited to the liquor license cases. Although it may not solve all the problems in this area, it would at least serve as a convenient starting point.

69 28 N. Y. S. 2d 932, at 934.
70 On this point, the court's rationale is flatly contra to that of the Pennsylvania court in Everett v. Horton, supra, n. 59. The New York legislature promptly amended the statute to include public golf courses. The Court of Appeals affirmed per curiam, solely on the ground that a question of fact had been presented “in regard to the reason for exclusion,” and there was a short and pungent dissent by Judge Finch, in which Judge Desmond concurred. 289 N. Y. 277, at 278, 43 N. E. 2d 716, at 717.
Other Considerations

We turn now to some of the special problems presented by particular types of organizations. Here we shall find that, in addition to the Fourteenth Amendment and the Civil Rights Statutes, other laws, regulations, legal principles, and policies often play a decisive role.

Private Schools

Brown v. Board of Education\(^7\) is of course the leading case outlawing racial segregation in the public schools. Although Brown and its companion cases involved elementary and high schools, prior\(^7\) and subsequent\(^7\) rulings of the Supreme Court have made it clear that the same principle also applies to public institutions of higher learning. It is clear that the device of an ostensible private school, which is in fact supported by public funds, cannot be used by state or local authorities as a subterfuge to evade the requirements of the Brown case.\(^7\)

But what of the bona fide private school? Clearly, it has a constitutional right to exist\(^7\) and, subject to state supervision of its educational standards, to determine its own policies on admission, curriculum, and so on. But whether this includes the power to deny admission on racial or religious grounds has thus far, in the absence of statute, arisen in only a few cases, and in these the decisions have turned on the presence or absence of "state action."\(^7\)

\(^7\) 347 U. S. 483 (1954).
\(^7\) See, e.g., Lucy v. Adams, 350 U. S. 1 (1955); Meredith v. Fair, 305 F. 2d 343 (5th Cir. 1962), cert. denied, 371 U. S. 828 (1962).
\(^7\) See Cooper v. Aaron, 358 U. S. 1 (1958), at 17, the "constitutional rights of children not to be discriminated against in school admissions on grounds of race or color . . . can neither be nullified openly and directly by state legislation or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously'”; Griffin v. County School Board of Prince Edward County, 377 U. S. 218 (1964). Held: the action of the County School Board in closing the public schools, meanwhile contributing to the support of private segregated white schools which took their place, denied Negro school children the equal protection of the laws.
\(^7\) Pierce v. Society of Sisters, 268 U. S. 510 (1925).
\(^7\) The questions are distinct. Many private schools are denominational and exist primarily to furnish education in the context of a particular religion.

(Continued on next page)
In the *Girard College Case*, the question received a somewhat mechanistic answer. Stephen Girard died in 1831 leaving the bulk of his fortune to the City of Philadelphia for the establishment of a "college" for "poor white male orphans." The City of Philadelphia created a special Board of Trustees to administer the estate, and later the Legislature created a Board of Directors of City Trusts, to which administration of the trust was transferred. In 1954, six Negro orphan boys were denied admission by the Board. A petition to the Orphans' Court for an order to show cause why they should not be admitted was denied, and this decision was affirmed, citing the clear provisions of the Girard Will. The courts further held that state action was not involved, such as would make enforcement of the terms of the trust violative of the Fourteenth Amendment. The United States Supreme Court reversed and remanded, saying in a short *per curiam* opinion that, since the Board which operated Girard College was a state agency, its action, even as trustee, was "discrimination by the state," forbidden by the Fourteenth Amendment. The Orphans' Court thereupon removed the Board as Trustee and substituted thirteen private citizens, taking no further action toward ordering admission of petitioners. The Supreme Court of Pennsylvania affirmed, and the United States Supreme Court denied certiorari.

Somehow, the result seems less than satisfactory. Girard College remained essentially the same before and after the

(Continued from preceding page)

To deny such schools the power to confine admission to those of their own religion might well be an invasion of religious liberty. It is interesting, however, that many denominational schools do admit students of other religions, usually excusing them from the religious observances normally required.


80 It was not really a "college" in the current sense of the word, but an orphans' institution, the chief function of which was to provide a home, including room, board, and incidentally, instruction.

81 This Board included the Mayor, President of City Council, and 12 other citizens appointed by the Board of Judges of the Court of Common Pleas.


change of trustees, as did the unfortunate applicants. That the decision rested solely on the presence or absence of state officials on the Board of Trustees would seem to demonstrate the highly artificial nature of the "state action" test. One can agree with the majority of the Pennsylvania Supreme Court that Girard's "primary object" was to establish and maintain Girard College, and that administration of the trust by the City was a mere means, which could and should be changed if necessary to carry out Girard's primary objective. But this leaves unanswered the argument advanced by Judge Musmanno in his dissenting opinions that Girard College, in the light of its whole history and operation, and regardless of the nature of its trustees, was in fact a "public institution," as much as the University of Pennsylvania, and therefore bound by the Fourteenth Amendment.

The final outcome has been criticized, even under the state action theory. Applying his balancing theory, Professor Williams sees "state action" in both cases, but concludes that the result in the second decision is "clearly acceptable on the basis of a balancing of an individual's right to designate how his property will be used as against the public concern with discrimination." One might agree with this approach and yet question the result in the case of Girard College.

A possible solution to the type of problem posed by the Girard case is to apply the doctrine of cy pres, or the related doctrine of deviation, to strike the discriminatory language from the terms of the gift, leaving the balance of the trust intact. The Pennsylvania Court felt powerless to do this, in view of the express language of the will. So did the Supreme Court of Michigan in a somewhat comparable case. On the other hand, the courts of New Jersey, New York, and England have invoked

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87 See, e.g., 47 Geo. L. J. 391 (1958); 33 N. D. Law. 495 (1958).


cy pres to delete racial restrictions with which the donee or administrator of a trust fund was unwilling to comply.\(^{91}\)

A case which presented even more squarely the issue of discrimination by a private university was *Guillory v. Administrators of Tulane University of Louisiana*.\(^{92}\) Here, different Judges reached startlingly different conclusions from the same basic facts. Without any criticism intended, it is quite apparent that widely varying attitudes toward the role of the courts and of the Constitution in this area have shaped these different conclusions. In the first round, Judge Wright held that Tulane could not discriminate in its admissions policy on racial grounds, first, because it was and always had been a public institution, but even if it were not, the involvement of the state was sufficient to constitute "state action."\(^{93}\) In support of his conclusions, Judge Wright reviewed the history of Tulane (which had admittedly started as a state university), cited its immunity from taxes, its revenues from state lands, the control by the legislature of its scholarship policies, and the presence on its governing board of three public officials. By way of *dictum*, Judge Wright questioned whether any school or college could be so "private" as to escape the reach of the Fourteenth Amendment.\(^{94}\)

On rehearing, Judge Ellis vacated Judge Wright's summary judgment and set the case down for trial, indicating that he would demand a showing of "substantial" or "significant" state action before granting the relief prayed for.\(^{95}\) Seven months later, he rendered his decision denying plaintiffs relief.\(^{96}\) Reviewing the evidence, Judge Ellis found it "overwhelming" that the "Administrators of the Tulane Educational Fund" (a corporation organized in 1882 to accept gifts, on which the donors had placed racial restrictions) was a "private corporation, pri-


\(^{92}\) 203 F. Supp. 855 (E. D. La. 1962) (motion for summary judgment granted), 207 id. 554 (1962) (summary judgment vacated), 212 id. 674 (injunction denied), aff'd. 306 F. 2d 489 (5th Cir. 1962).


\(^{94}\) Id. at 858-59.

\(^{95}\) 207 F. Supp. 554 (E. D. La. 1962), aff'd. 306 F. 2d 489 (5th Cir. 1962).

\(^{96}\) 212 F. Supp. 674 (E. D. La. 1962).
vately endowed, and engaged in the activity of academic instruction and pursuit."97 Any state participation he found to be *de minimis*.98

The opposing positions taken by Judge Wright and Judge Ellis on the same facts cannot be reconciled. Judge Wright is prepared, if necessary, to find all education, public or private, so affected with a public interest as to be subject to the restrictions of the Fourteenth Amendment, whereas Judge Ellis is unwilling to apply the Fourteenth Amendment to private schools, except as he may be compelled to do so by square holdings of the Supreme Court. Obviously, what is at stake here is more than a different view of the law or even of the Constitution. Rather it is a different philosophy of education, of society, of the rights of donors, and of the rights of individuals. These conflicts run far too deep to be resolved by rules about "state action," or even by formulae for the "balancing" of interests.

In a perceptive article,99 one of the very few devoted to the problem,100 Professor Arthur S. Miller concludes, *inter alia*, that the question whether private schools may discriminate is only one facet of the overall question of Negro-white relations in this country, that the legal problems can be understood only as part of this context, that voluntary racial integration by private schools (already widespread, especially on the part of denominational schools) is probably the key to future developments both in the private and public school areas, but that meanwhile the judicial decisions have been "edging" toward an outlawing of racial clauses in private agreements, as a matter of public policy.101 Eight years later, I cannot find much to add to Professor Miller's cautious observations.

By way of a footnote, mention should be made of a recent California case, *Reed v. Hollywood Professional School*.102 The court refused to construe the California civil rights statute103 as being applicable to private schools, and held that a Negro

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97 Id. at 677.
98 Id. at 681.
99 Miller, Racial Discrimination and Private Schools, 41 Minn. L. Rev. 145, 245 (1957).
101 Miller, op. cit. supra, note 99, at 281-86.
child who had been denied admission to such a school had no constitutional grievance.

In a few states, the civil rights statutes do extend to private educational institutions. Thus, Section 40 of the New York Civil Rights Law covers “kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension course, and all educational institutions under the supervision of the regents of the state of New York,” as well as all such institutions which are “supported in whole or in part by public funds or by contributions solicited from the general public.” Section 296-4 of the New York Executive Law bars nonsectarian, tax exempt educational institutions from discriminating on grounds of race, color or religion. Similar statutes exist in Massachusetts and New Jersey.

**Fraternities and Sororities**

Is there a constitutional bar to fraternity discrimination? Professor Horowitz, writing in 1952, concluded that there was, in the case of fraternities on a state university campus. Admitting that discriminatory fraternities did not themselves act in violation of the Constitution, and that in no case could a fraternity be forced to admit a particular member, nevertheless “recognition” by a state university of a fraternity constituted “state action,” making the Fourteenth Amendment operative on the fraternity’s admission policies.

In 1959, the Attorney General of California, in a more guarded opinion on this question, said that specific answers depended on the specific relation between a particular school and its fraternities, and concluded that, since the types of relations possible between fraternities and state universities were almost unlimited in number, the most that could be said was

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104 The exact nature of the school does not appear, other than from the name and from the fact that plaintiff was only five years old. Under the “state action” test, the type of school would be irrelevant; under a “balancing” test, it might be significant.


that some relations were such that discrimination by a state university fraternity would be unconstitutional, as well as contrary to public policy, whereas in other situations this would not be the case. Inconclusive as this may sound, it is more persuasive than Professor Horowitz's rather dogmatic assertion that "state action" may be found wherever "official recognition" is given by the state university.

At the other extreme is the argument advanced in a recent student note that none of the customary relationships between a state university and a fraternity, taken singly or collectively, is enough to constitute "state action."\textsuperscript{110} This probably goes too far.

If the result of the "state action" test is inconclusive, what of a "balancing" test? From the point of view of the student discriminated against, it makes no difference whether he is attending a state or private institution. Nor is there any discernible difference in the social patterns of the student body. The state's involvement in the financing and operation of the state university has very little bearing on the social relationships of the students. Application of a balancing theory would therefore tend to support the conclusion of the student editor just cited, but for different reasons.

Pursuing the "balancing" theory further, it would seem that this is a matter best left to local responsibility. As a practical matter, local authorities are largely eliminating the problem voluntarily. Just as many private universities have barred the discriminatory fraternity, many state legislatures have taken similar measures with respect to fraternities at state universities, and at public schools in general. Sometimes this has gone to the extreme of barring fraternities altogether (probably for reasons not directly related to racial or religious discrimination), or at least those affiliated with national organizations. Drastic though such action seems, it has consistently withstood constitutional attack.\textsuperscript{111} A fortiori, the lesser measure of outlawing discrimi-


nation at fraternities on a state university campus would be within the authority of a state legislature.\textsuperscript{112}

**Welfare Clubs**

In *Mitchell v. Boys Club of Metropolitan Police*,\textsuperscript{113} defendant, a private corporation, operated boys' clubs in the District of Columbia on a segregated basis. It received extensive cooperation from the District police in its drives for membership and donations, it used the services of some ten uniformed policemen in its club activities, and it had in the past used three abandoned properties owned by the District. The Court held that defendant was a private corporation and that the cooperation of the District and the Metropolitan Police, on the facts, had not converted it into an "instrument of government."

Of course, this is not quite the question. Under the traditional test, the question is whether "state action" is involved. Certainly it was present here, in some measure. Surely the public tends to identify boys' clubs sponsored by the police with the police; in fact, the latter rely on this identification in their appeals to donors and in their appeals to the boys themselves.

On the other hand, under a "balancing" test, the result may have been justified. No subterfuge was involved. Defendant was a private organization, dependent on voluntary contributions; police participation, although significant, was in no sense a wielding of police authority. Plaintiffs were not denied the benefits of membership in a boys' club; they were simply required to accept such membership, if at all, on a segregated basis. However one may personally deplore the practice of racial segregation, there is a real question whether it is the function of the Fourteenth Amendment and of the federal courts to strike it down whenever and wherever it rears its ugly head.

An opposite result was reached on somewhat similar facts, in *Statom v. Board of Commissioners of Prince George's County*.\textsuperscript{114} Here the court found that the use, without charge, by a privately sponsored boys' club of county offices, and of public school premises and playgrounds, was enough to constitute "state action," requiring operation of the club on a de-


\textsuperscript{114} 233 Md. 57, 195 A. 2d 41 (1963).
The Maryland court found the Mitchell case difficult to reconcile with the decisions of the Supreme Court, especially the intervening case of Burton v. Wilmington Parking Authority. A recent news account states that a series of lawsuits against 180 local segregated branches of the Y. M. C. A. in the South is being started by the N. A. A. C. P. The first suit was filed on February 20, 1965, in the federal court in Charlotte, N. C., the second on February 25, in Norfolk, Va. Both suits invoke the "public accommodation" sections of Title II of the new Civil Rights Act. While the National Council of the Y. M. C. A. favors desegregation, it allows considerable autonomy to local branches. If the latter fight the lawsuits, it will undoubtedly be on the basis of the exemption afforded by the statute to "private clubs." The outcome will be awaited with interest.

Political Clubs.

In 1890, the New York Court of Appeals held that the Democratic General Committee of Kings County, which was the controlling body of the Kings County Democratic organization, was merely a voluntary association of individuals, which could exclude at will a delegate purportedly elected to represent a town association which the Committee had ordered disbanded. In 1953, the United States Supreme Court held that the "Jaybird Democratic Association" of Fort Bend County, Texas, could not exclude qualified Negro voters from membership.

What is the distinction between the two cases? The Jaybird Association, although ostensibly a private organization not governed by state election laws and not using state elective machinery, was an integral part of the Democratic party machinery of the State of Texas. For sixty years its candidates had invariably been nominated in the Democratic primaries and elected to office. The Supreme Court had held that Negroes could not constitutionally be denied the right to vote in State primary elec-

117 The National Council's attorneys interpret the Act as applicable to Y. M. C. A. centers. A distinction may have to be drawn, however, between those centers which provide living and dining quarters and those which do not. Ibid.
Neither could they be denied such right by the use of a "club," or "voluntary association," the chief object of which was to deny them any voice or participation in the election of county officials.

Clearly, the device of a "voluntary" association or "private" club may not be used to deprive citizens of the right to vote, whether in general or primary elections, at the national, state, or local level. But where does this leave the old-fashioned political club, with its district leader and its "ward-heelers," or the State or county party committee, with delegates from local party groups? McKane v. Adams has not been overruled but its rationale, based on a privilege-right dichotomy and on the theory that the membership policies of voluntary associations are insulated from judicial control, is no longer valid. It is suggested that, as a political club or committee moves toward control of State or local elective machinery (and this can happen in Tammany Hall as well as in the Deep South), to that extent judicial concern should increase. If the result is to exclude a citizen from having an effective vote, the answer is clear. If it is less than that, for example denial of the right to participate in formulation of the party's platform, the answer is less obvious. Van Alstyne and Karst would draw the line just at this point: So long as no citizen is deprived of the right to have his vote count as effectively as any other's, he cannot be heard to complain if he is not admitted to the party's smoke-filled rooms and deliberative counsels. This makes sense as a pragmatic solution, but only the future can tell whether the line will in fact be drawn at this point. The provisions of the Civil Rights Acts of 1957, 1960, and 1964 would not seem to affect this conclusion.

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121 This result was foreshadowed in Baskin v. Brown, 174 F. 2d 391 (4th Cir. 1949), and in Rice v. Elmore, 165 F. 2d 387 (4th Cir. 1947), cert. denied, 333 U. S. 875 (1948).

122 Supra, n. 118.


EXCLUSION OR EXPULSION

Economic Organizations

(a) Labor Unions

In many industries and trades, denial of union membership is tantamount to denial of employment, at least on the level sought. Legal attack on discriminatory practices has taken three general forms: reliance on the constitution; invoking of statutes and regulations which affect the problem collaterally; and enactment of statutes which attack the problem directly. The first approach has had only limited success, the second has shown some modest victories, the third offers the best hope of a solution.

Constitutional Attack. In Oliphant v. Brotherhood of Locomotive Firemen and Engineermen, a Negro locomotive-fireman, barred from admission to an all-white union, claimed denial of due process under the Fifth Amendment. In denying relief, it was held that the railway brotherhood was not a state or federal agency, and that its certification as exclusive bargaining agent under the Railway Labor Act did not make it such. The Supreme Court of Wisconsin reached a similar result in Ross v. Ebert, involving a masons' and bricklayers' union. Contrary results have been reached by the courts of California and Kansas.

On the other hand, the Supreme Court has held that, while a union recognized by federal law as an exclusive bargaining agent cannot be compelled to admit Negroes to membership, it must represent fairly all the employees it serves in the process of collective bargaining. It may be questioned whether this is adequate, especially for a worker excluded from a union which has a closed-shop or union-shop agreement. An abstract right to be fairly represented is of little value if a worker cannot get a job in the first place.


128 275 Wis. 523, 82 N. W. 2d 315 (1957) (6-1 decision).


132 Wellington, op. cit. supra, n. 127, at 361.

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**Collateral Attack.** Since 1941, all federal Government contracts (with minor exceptions) have been required to include a clause whereby the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin.\(^{133}\) It has been observed that the practice of "Jim Crow" unionism is bound to frustrate the purpose of this program.\(^{134}\)

In *Todd v. Joint Apprenticeship Committee*,\(^{135}\) plaintiffs had been denied participation in defendant union's apprenticeship program, and consequently from membership in the union. They claimed that they were thus effectively excluded from employment on a Government construction contract. The District Court granted mandatory injunctive relief, both on constitutional grounds (the federal Government's participation in the project constituting state action), but not on the ground that plaintiffs were third-party beneficiaries of the non-discrimination clause of the Government contract.\(^{136}\) Unfortunately for this bold attempt at making new law, the court of appeals vacated the judgment on the ground that completion of the Government contract had rendered the matter moot.\(^{137}\) The Supreme Court has denied *certiorari*.\(^{138}\)

In the *Todd* opinion, Judge Campbell rejected the argument that jurisdiction of such a controversy had been pre-empted by the National Labor Relations Act, holding that Section 8(b) (1) of that Act,\(^{139}\) dealing with unfair labor practices, did not cover


\(^{136}\) And in Farmer v. Philadelphia Electric Co., 329 F. 2d 3 (3d Cir. 1964), *aff'g* 215 F. Supp. 729 (E. D. Pa. 1963), it was held that the nondiscrimination clause conferred no third-party beneficiary rights on aggrieved applicants for employment, at least until the latter had exhausted their administrative remedies. See Pasley, *op. cit. supra*, note 134, at 855.

\(^{137}\) 332 F. 2d 243 (7th Cir. 1964).

\(^{138}\) 33 U. S. L. W. 3284, 3286 (1965).

EXCLUSION OR EXPULSION

the type of discriminatory practices here involved. Ironically, this is just what the National Labor Relations Board did not hold, when the question was actually presented to them. In the case of Metal Workers Union (Hughes Tool Co.),\textsuperscript{140} the Board held that a racially discriminatory admissions policy by a union was an unfair labor practice within Section 8(b)(1)(A) of the Act. Specifically, the unfair practice consisted in refusing to process the grievance of a Negro employee who had been denied an apprenticeship by the employer in a job reserved for white employees under the collective bargaining agreement negotiated by the union with the employer. This result was anticipated by a prior ruling of the Board\textsuperscript{141} that a union's failure to fulfill its obligation of fair representation under the Steele case\textsuperscript{142} was an unfair labor practice. In that case, however, the court of appeals had denied enforcement.\textsuperscript{143}

The practical result of a finding of an unfair labor practice is to deny or rescind certification of the union, a potent weapon in the industrial relations area. The Board has not been unanimous in its approach, however. Chairman McCulloch and Member Fanning do not believe that Congress intended to make a union's violation of its duty of fair representation an unfair labor practice. While they concurred, in part, in the Hughes Tool Case, it was on the ground that the union had refused to process a grievance for an employee who was a non-union member, not because racial discrimination was involved. Their dissenting views find support in two recent law review notes.\textsuperscript{144}

\textbf{Direct Statutory Attack.} In some states, the civil rights statutes expressly prohibit racial or religious discrimination by labor unions.\textsuperscript{145} Title VII of the Civil Rights Act of 1964\textsuperscript{146} attacks the

\textsuperscript{140} 146 N. L. R. B. No. 166, 56 L. R. R. M. 1289 (July 1, 1964).
\textsuperscript{141} Miranda Fuel Co., Inc., 140 N. L. R. B. 181 (1962).
\textsuperscript{142} Steele v. Louisville & Nashville Railroad, 323 U. S. 192 (1944).
\textsuperscript{143} N. L. R. B. v. Miranda Fuel Co., Inc., 326 F. 2d 172 (2d Cir. 1963) \textsuperscript{(2-1 decision). The rationale of the Hughes Tool case, supra, n. 40 and Miranda Coal case, supra, n. 141, has been followed by the Board in Local 1367, Int'l Longshoremen's Assn. (Galveston Maritime Assn., Inc.), 148 N. L. R. B. No. 44, 57 L. R. R. M. 1083 (Sept. 11, 1964) and in Local No. 12, United Rubber, Cork, Linoleum & Plastic Workers, 150 N. L. R. B. No. 18, 4 CCH Labor Law Rep. \textsuperscript{7} §13,655 (Dec. 16, 1964).
\textsuperscript{145} E.g., § 43 of the New York Civil Rights Law prohibits a labor organization, by practice, constitution, by-law, tacit agreement, or otherwise, from
problem squarely by prohibiting discrimination in employment opportunity on the ground of race, color, religion, national origin, or sex. (Some exceptions are permitted as to the last three, where these are bona fide occupational qualifications.) Labor unions are covered if (1) they maintain a hiring hall, or (2) they have 25 or more employees and are (a) certified under the National Labor Relations Act or the Railway Labor Act, (b) recognized by an employer covered by Title VII, or (c) related in certain ways to a labor organization which is covered. Title VII does not go fully into effect until July 2, 1965.147

It has been suggested that the Civil Rights Act should be construed to preclude NLRB expansion into the area which it covers, although the general counsel for the NAACP has urged resort to the NLRB procedures as speedier than those afforded by the Act.148

In the case of a union member claiming wrongful expulsion for exercising a constitutional or political right, a leading case is Mitchell v. International Association of Machinists.149 Petitioners were expelled from their union for campaigning in support of a "right-to-work law, in contravention of the official policy of the union. The court ordered them reinstated, on the ground that the citizen's right to engage in personal political activity is so important that the union will not be allowed to use its power over its individual members to curb advocacy of their

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denying membership by reason of race, creed, color, or national origin, or to deny equal treatment to any of its members for such reasons. The constitutionality of this statute has been upheld by the New York Court of Appeals and the United States Supreme Court in Railway Mail Ass'n v. Corsi, 293 N. Y. 315, 56 N. E. 2d 721 (1944), aff'd, 326 U. S. 88 (1945). An interesting recent case involving this statute, and others, is Gaynor v. Rockefeller, 21 App. Div. 2d 92, 248 N. Y. S. 2d 792 (1st Dept. 1964). In a situation not unlike that of the Todd case, supra, n. 135, the New York courts denied relief, for a variety of reasons. See discussion by Hanslowe, Annual Survey of New York Law—Labor Relations Law, 16 Syracuse L. Rev. 244-46 (1964).

148 Recent Case Note, 78 Harv. L. Rev. 679, at 682-83 (1965).

http://engagedscholarship.csuohio.edu/clevstlrev/vol14/iss2/3
political views, at least where the latter are not patently in conflict with the union's best interests. 150

The rule of the Mitchell case is now embodied in the so-called "Bill of Rights" for union members, sections 101 and following of the Labor-Management Reporting and Disclosure Act of 1959. 151 These sections provide, inter alia, that union members may assemble freely with other members and express "any views, arguments, or opinion," subject, however to the union's right to enforce "reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." They also protect the right of union members to sue the union or its officers, to appear as witnesses, and to petition the legislature, the right to sue being subject to a requirement of reasonable exhaustion of internal union remedies. 152 These provisions have been broadly construed by the courts and the National Labor

150 Although there has been some tendency by the courts to hold that all such disciplinary action by private groups is beyond judicial supervision, there is respectable authority for the proposition that the courts will interfere if there has been denial of due process. In this context, this is taken to mean that (i) the rules invoked and the proceedings followed must be in accordance with natural justice, (ii) the expulsion must be in accordance with the rules, and (iii) the proceedings must be free from malice or bad faith. Requirement (i) is usually taken to call for notice of the charges and an opportunity to defend at a fair hearing before an impartial group. See Seavey, Dismissal of Students: Due Process, 70 Harv. L. Rev. 1406 (1960); University of Ceylon v. Fernando [1960], 1 A. E. R. 631 [1960], 1 W. L. R. 223 (P. C.), noted in 23 Mod. L. Rev. 428 (1960); Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961), rev'd. 186 F. Supp. 945 (M. D., Ala. 1960), cert. denied, 368 U. S. 930 (1961), noted, 75 Harv. L. Rev. 1429 (1962); 60 Mich. L. Rev. 499 (1962), 38 Geo. L. J. 314 (1961), 38 N. D. L. Rev. 346 (1962), 35 Temple L. Q. 437 (1962), 15 Vand. L. Rev. 1005 (1962); Knight v. State Board of Education, 200 F. Supp. 174 (M. D. Tenn. 1961). Cf., Woods v. Wright, 334 F. 2d 369 (5th Cir. 1964).

If these requirements are met, the courts will not normally question the decision of the association or consider the facts or seriousness of the alleged offense. See Chafee, The Internal Affairs of Associations Not for Profit, 63 Harv. L. Rev. 993, at 1014-20 (1930) and cases cited at 1016-18. See Comment, Administrative Law: Right to Hearing Before Expulsion from Private Club, 8 U. Fla. L. Rev. 125 (1955). See also Annotations, 20 A. L. R. 2d 344, at 364-65 (1951), 14 A. L. R. 1446 (1921).

In situations where it is alleged that in expelling or otherwise disciplining a member, the association is punishing him for exercising a basic constitutional right, these have caused some concern to the courts. See Steier v. New York State Education Commission, 271 F. 2d 13 (2d Cir. 1959), cert. denied, 361 U. S. 966 (1960), noted 73 Harv. L. Rev. 1388 (1960).


152 See Note, Bill of Rights of Members of Labor Organizations, 1959-1964, 40 N. D. Law. 86 (1964); Aaron, The Labor-Management Reporting and (Continued on next page)
Relations Board so as to protect basic civil and political rights. Thus, union members have been protected from disciplinary action for failing to exhaust their internal union remedies before bringing proceedings charging the union with unfair labor practices. On the other hand, where union members have filed a petition to decertify the union and have actively supported the decertification cause, the Board has held that they are attacking the very existence of the union, and that their expulsion is justified.

(b) Professional Associations

In principle, the right to join a professional association should present the same considerations as the right to join a labor union. But only gradually has it been realized that denial of such right may be tantamount to denial of, or serious interference with, a means of livelihood and therefore cannot be effected arbitrarily. It has recently been claimed that there is "a constitutional right to join an association which exists to facilitate access of its members to a livelihood." This, however, may be overstating the case.

Certainly, the older view was that a professional association was a mere private organization, which could set its own standards of admission, with which the courts would not interfere in the absence of obvious abuse. The question arose frequently in connection with medical associations which excluded doctors who had not met certain prescribed standards of education, or

(Continued from preceding page)


Tawas Tube Products, Inc., Harold Lohr, and United Steelworkers of America, AFL-CIO, 151 NLRB No. 9, 57 LRRM 1330 (1965).

who practiced unorthodox techniques such as osteopathy. Traditionally, the courts refused to interfere in such cases.\textsuperscript{167}

A recent important case casts doubt on the continued validity of such an absolute rule. In \textit{Falcone v. Middlesex County Medical Society},\textsuperscript{158} the Supreme Court of New Jersey held that it was arbitrary and unreasonable for defendant to exclude from membership, by invoking an unwritten rule requiring four years' attendance at an approved medical college, an osteopath who had an M.D. degree from an approved medical school, who had received an unrestricted license from the state to practice medicine and surgery, who was regarded by his colleagues as qualified, and who was not charged with any unethical conduct.

A related question is whether a private hospital may exclude Negro doctors from practice, or admit them only on a discriminatory basis.\textsuperscript{159}

In an attempt by members of a bar association to delete a discriminatory membership provision from its by-laws, the president at the meeting declared the motion carried by a voice vote. In a suit brought by some of the dissenters,\textsuperscript{160} it was ruled that the president had violated the by-laws and Robert's Rules of Order by failing to call for a rising vote. In so holding, however, the Court made the following interesting observation:

\begin{itemize}
\item \textsuperscript{157} Hayman v. City of Galveston, 273 U. S. 414 (1927) (Municipal hospital board excluded osteopaths from practice in hospital; held, not a violation of the Fourteenth Amendment); Harris v. Thomas, 217 S. W. 2d 1068 (Tex. Civ. App. 1949) (Osteopath excluded from practice in private hospital).
\end{itemize}
It is apparent to any person of fair mind that, if the defendant Association wishes to represent and to speak for all the lawyers of the District, then in all fairness it ought to make all lawyers eligible for membership. If it does not do so, then members of the bar who champion the proposed amendment ought to unite with other members of like mind and organize an all-inclusive bar association for the District which would be authorized to speak and act for all persons admitted to practice before the United States District Court.

The defendant Association, for a long time, has restricted its membership, and some of its members emphasize that object and purpose of the Association which is "to increase the mutual improvement and social intercourse of its members." If they feel that the social purposes of a limited membership are of more importance than being the agency of the entire bar of the District, their wishes and desires should not be overridden or denied except by action of the Association taken in accordance with the By-Laws.161

Conclusion

Groucho Marx once said that he would not join a club that would stoop so low as to have him as a member. Behind the mordant witticism lies a profound truth, that in the area of personal choice and voluntary association there is bound to be much that is arbitrary, capricious, and even irrational. Law is the enemy of the arbitrary, the capricious, and the irrational. It is understandable then that crusaders for constitutional rights should so often be impatient of the unfairness done, the injustice wreaked, and the emotional harm visited on their fellows by discriminatory individuals and groups. But law is also the embodiment of freedom. Freedom is the hallmark of personal choice and voluntary association, and these lead us back, in many instances, to the arbitrary, the capricious, the irrational.162

The two competing claims are irreconcilable. Either one, pushed to its ultimate, will necessarily oust the other. The law has had to strike a balance, somehow to steer a course between Scylla and Charybdis, somehow to give each its due, and thereby to arrive at that most elusive of man's goals, Justice. It has been the purpose of this paper to show how this has been attempted in the area of voluntary associations. On the whole, the solu-

161 Id. at 306.
tions arrived at seem pragmatic and sensible; none is final, none can be. No grand formula has been found; none has been sought. Rather, the process throughout is, and must be, one of balancing the sincere demand for equality of treatment against the no less genuine claim for freedom of choice. Beyond this, the answer lies in the realm of conscience and morality, not with law and the state.