

# COUNTRY CLUB DISCRIMINATION AFTER *COMMONWEALTH V. PENDENNIS*

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**Abstract:** In American country clubs, there is a long tradition of discrimination against racial minorities and women. These clubs maintain that they are private and thus able to operate free from government sanction. In 2004, the Supreme Court of Kentucky ruled that the state's Commission on Human Rights had the statutory authority to investigate private country clubs to determine if they discriminate in their membership practices. In Kentucky, if a club is found to discriminate, its members are disallowed certain tax deductions. While this is a step in the right direction to end discriminatory practices at country clubs, the Supreme Court of Kentucky still points out that private clubs have the right to discriminate without fear of legal liability. This Note evaluates other states' reactions and statutes regarding discrimination at private clubs and contends that such approaches are more effective in eradicating discrimination in these clubs than tax consequences.

## INTRODUCTION

Augusta National Golf Club (Augusta National), constructed in 1931 in Augusta, Georgia is one of the most prominent golf courses in the world.<sup>1</sup> It has hosted the Masters tournament for almost seventy years and has included members such as President Eisenhower, who joined the club in 1948.<sup>2</sup> Augusta National's beautiful scenery is displayed through the magnolia trees that line the club, individually selected plants that decorate and name each of the eighteen holes and a variety of plants that have been added to the landscape since the

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<sup>1</sup> See Charles P. Charpentier, *An Unimproved Lie: Gender Discrimination Continues at Augusta National Golf Club*, 11 VILL. SPORTS & ENT. L.J. 111, 130 (2004); The Official Site of the Masters Tournament, History of the Club, [http://www.masters.org/en\\_US/history/jacket/club\\_history.html](http://www.masters.org/en_US/history/jacket/club_history.html) (last visited Jan. 15, 2006).

<sup>2</sup> See Charpentier, *supra* note 1, at 138; The Official Site of the Masters Tournament, Frequently Asked Questions at the Masters [http://www.masters.org/en\\_US/info/faq/index.html](http://www.masters.org/en_US/info/faq/index.html) (last visited Jan. 15, 2006). The Masters is a prestigious and public golf tournament held annually at Augusta National. Charpentier, *supra* note 1, at 111, 138. It is one of the sport's four major championships. See Michael McCarthy & Erik Brady, *Privacy Becomes Public*, USA TODAY, Sept. 27, 2002, at 1C.

course was built.<sup>3</sup> Although the grounds of Augusta National are aesthetically pleasing and diverse, the club's members are not very different, but are instead similar in appearance and background.<sup>4</sup>

Much controversy has surrounded Augusta National over the past few years as a result of its exclusive membership policies.<sup>5</sup> The club refuses to admit women, and of the approximate 300 members, fewer than ten are African-American.<sup>6</sup> Unfortunately, Augusta National's exclusionary policies are not unique, as discrimination against racial minorities and women is a deep seeded tradition in American country clubs.<sup>7</sup> History shows that the country club is "one of the least diverse

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<sup>3</sup> See The Official Site of the Masters Tournament, Landmarks, [http://www.masters.org/en\\_US/course/landmarks.html](http://www.masters.org/en_US/course/landmarks.html) (last visited Jan. 15, 2006).

<sup>4</sup> See *id.*; McCarthy & Brady, *supra* note 2, at 1C. Augusta National is a men's only golf club. *Id.* Journalists McCarthy and Brady point out that the club's members "are a who's who of corporate power and old money." *Id.* It is the definition of an "old boys club," in that the average age is seventy-two, more than a third of the members are retired, and the majority are a part of "old-line industries," such as banking, oil and manufacturing. *Id.* Only twenty-five of Augusta's 199,570 residents are members. *Id.* As of July 2002, only six of the nearly 300 member club were African-American. See Charpentier, *supra* note 1, at 131-32.

<sup>5</sup> See Charpentier, *supra* note 1, at 112; Scott R. Rosner, *Reflections on Augusta: Judicial, Legislative and Economic Approaches to Private Race and Gender Consciousness*, 37 U. MICH. J.L. REFORM 135, 135 (2003); Gary Mihoces, *Burk Wants Federal Officials out of Exclusionary Clubs*, USA TODAY, Apr. 1, 2003, at 3C. Martha Burk, chair of the National Council of Women's Organizations, has led an unrelenting campaign to open membership at Augusta National to women. See Mihoces, *supra*, at 3C. On the other side of the argument, a Ku Klux Klan splinter group applied for a protest permit in order to demonstrate at the 2003 Masters to show support of the exclusionary policy. See Charpentier, *supra* note 1, at 112 n.11. Joseph J. Harper, the imperial wizard of the American Knights of the Ku Klux Klan, said, "[t]his equal rights stuff has gotten out of hand." *Id.*

<sup>6</sup> See Rosner, *supra* note 5, at 136. Augusta National's new members are nominated by current members and as a result, one cannot apply for membership. See McCarthy & Brady, *supra* note 2, at 1C. The club did not admit its first African-American member until 1990 and did so as a result of problems involving a tournament at Shoal Creek Golf and Country Club, an all-white Alabama club. See Charpentier, *supra* note 1, at 131. The Professional Golfers Association (PGA) Championship took place at Shoal Creek only after it admitted its first black member and Augusta National followed suit a month later. *Id.*

Rosner contends that the "barriers to African-American golfers . . . were largely ignored by the popular press until a much-publicized interview in 1990." Rosner, *supra* note 5, at 179. When asked about Shoal Creek's racially discriminatory admissions policy weeks before the club hosted the 1990 PGA Championship, the president and co-founder of the club, Hall Thompson, responded, "[t]he country club is our home and we pick and choose who we want . . . I think we've said we don't discriminate in every other area except for blacks." *Id.* When questioned whether members brought African-American guests to the club, Thompson stated, "that's just not done in Birmingham." *Id.* at 179-80.

<sup>7</sup> See Rosner, *supra* note 5, at 136.

American institutions by design.”<sup>8</sup> The membership of Augusta National and many other present day clubs reveal that this tradition of prejudice continues.<sup>9</sup>

While country clubs have been condemned over the years for their discriminatory membership practices, most clubs assert the defense that they are distinctly private and thus able to operate and discriminate free from government sanction.<sup>10</sup> In response, many states have taken steps to eradicate discrimination in private clubs by broadly interpreting and writing their public accommodations laws or by enacting legislation that specifically targets these clubs.<sup>11</sup> A recent example of this kind of state approach occurred in *Commonwealth v. Pendennis Club*, decided in 2004 by the Supreme Court of Kentucky (Kentucky Court).<sup>12</sup> In that case, the Kentucky Court held that the Kentucky Commission on Human Rights (the Commission or KCHR) had the authority to investigate private country clubs to determine if they deny membership based on race.<sup>13</sup> If the Commission concludes

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<sup>8</sup> Jennifer Jolly-Ryan, *Chipping Away at Discrimination at the Country Club*, 25 PEPP. L. REV. 495, 495 (1997). Country clubs were generally created by wealthy Caucasian Protestants between 1880 and 1930 and were never meant to be welcoming to everyone. *See id.* at 495–96. Allegedly, President Kennedy was once questioned by his Secretary of Labor, future Supreme Court Justice Arthur Goldberg, about his membership to the Links Country Club because of its exclusion of Jews. *Id.* at 495 n.3 (citing Frank Whelan, *Few Minorities at Country Clubs*, ALLENTOWN MORNING CALL, June 5, 1997, at D1). President Kennedy reportedly chuckled and replied, “[h]ell, Arthur, they don’t even allow Catholics.” *Id.*

In some cases, because of the discriminatory policies, those excluded opted to form their own country clubs that discriminated against other minority groups. *See id.* at 496. For example, when wealthy Irish and German Jewish Americans were denied membership to Protestant-only country clubs, they formed their own private clubs and excluded Italians and African-Americans. *See id.*

<sup>9</sup> *See* Rosner, *supra* note 5, at 136.

<sup>10</sup> *See id.* at 137.

<sup>11</sup> *See* John P. McEntee & Walter J. Johnson, *Teed Off: Female Golfers Seek Equal Access*, N.Y. L.J., Dec. 8, 2000, at 1, 6. For example, some states deny liquor licenses to clubs that discriminate as to who can be a member, while other states eliminate tax exemptions for these clubs. *Id.*

<sup>12</sup> *See generally* 153 S.W.3d 784 (Ky. 2004).

<sup>13</sup> *Id.* at 789. The *Pendennis* case started 14 years ago after Louis Coleman filed complaints against the Pendennis Club, the Louisville Country Club, and the Idle Hour Country Club claiming that they used discriminatory membership practices. *Id.* at 786. A 2002 article about private clubs in Kentucky describes the Pendennis Club in Louisville as a social club where the city’s “business and political leadership have entertained, wine, dined and networked.” Lisa Summers, *Behind Closed Doors*, THE LANE REP., Sept. 2002, <http://www.kybiz.com/lanereport/issues/september02/behindcloseddoors.html>. Unlike Augusta National, the Pendennis Club allows women access in all areas of the club, but did not do so until 2001, 120 years after its opening. *Id.* The Club’s three floors contain a library, dining and meeting rooms, a men’s athletic area, a squash court and a main ballroom. *Id.* In 2002, the Club had around 800 members, all of whom had been approved for

that a club discriminates in its membership practices, Kentucky law prohibits members from taking tax deductions for amounts paid to the club.<sup>14</sup>

*Pendennis* is an important decision that upholds the Kentucky Commission on Human Rights' authority to look into the practices of private clubs and "refuse[s] endorsement" of discriminatory conduct by disallowing tax deductions to members.<sup>15</sup> Yet, questions remain regarding whether the state is doing enough to end racist and sexist policies at country clubs.<sup>16</sup> The Kentucky Commission on Human Rights' mission is "[t]o eradicate discrimination in the Commonwealth through enforcement of the Kentucky Civil Rights Act."<sup>17</sup> While *Pendennis* was a victory for the KCHR, this Note argues that in light of other state statutes and cases, there may be other measures that Kentucky can take to accomplish more fully the KCHR's goal of eradicating discrimination.<sup>18</sup>

Part I of this Note presents a brief history of the KCHR and how it attempts to eradicate discrimination. Part II provides an overview of the constitutional, legislative and U.S. Supreme Court precedent that involves private club discrimination. Part II also discusses the reasoning behind *Pendennis* and its implications for the effectiveness of the KCHR. Part III examines what other states, like California and Connecticut, have done to ensure that county clubs will end their dis-

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membership by a board of directors. *Id.* Its literature described *Pendennis* as "a gathering of friends, where decency, decorum, civility, good manners and the social graces are still very much in style." *Id.*

<sup>14</sup> See KY. REV. STAT. ANN. § 141.010(11)(d) (taxpayers) (LexisNexis 2003); *Id.* § 141.010(13)(f) (corporations); *Pendennis*, 153 S.W.3d at 789.

<sup>15</sup> See *Pendennis*, 153 S.W.3d at 789.

<sup>16</sup> See *id.* The Kentucky Court explicitly states that the case is not about whether clubs actually discriminate nor the rights of the clubs or their members. *Id.* at 785. In furtherance of this idea, the Kentucky Court clearly makes the point that private clubs "have a statutory right . . . to discriminate in affording the benefits of membership without fear of legal liability." *Id.*

<sup>17</sup> See Kentucky Commission on Human Rights, Our Mission, <http://www.state.ky.us/agencies2/kchr/> (last visited Jan. 15, 2006) [hereinafter Our Mission].

<sup>18</sup> See CONN. GEN. STAT. ANN. § 52-571d (West 2004); Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 798 (Cal. 1995) (holding that the country club in question was a business establishment and thus subject to the state's civil rights act); Joseph B. Chervin, *It's Not Just Your Father's Game Anymore: Recent Connecticut Legislation Prohibits Gender Discrimination at Golf Country Clubs*, 8 DEPAUL-LCA J. ART & ENT. L. & POL'Y 175, 177-79, 187-89 (1997-1998) (discussing the Connecticut statute that expressly prohibits discrimination at golf country clubs); Rosner, *supra* note 5, at 158-66, 171-91 (addressing federal and state legislation pertinent to the issue as well as proposing alternative solutions to the problem of country club discrimination); Our Mission, *supra* note 17.

criminatory membership policies. This Note concludes with recommendations for Kentucky to help rid country clubs of discrimination.

## I. HISTORY AND OVERVIEW OF THE KENTUCKY COMMISSION ON HUMAN RIGHTS

Since the 1960s, the Kentucky General Assembly has passed laws and established a Commission to address issues of discrimination.<sup>19</sup> The KCHR is a state agency that was created by the Kentucky legislature in 1960 “to act only as a forum for minority groups in seeking peaceful Solutions to racial problems.”<sup>20</sup> The Kentucky Civil Rights Act, which prohibits discrimination in employment and places of public accommodation, was passed in 1966, and a Fair Housing Law was passed in 1968, protecting against discrimination in housing.<sup>21</sup> Although amended over the years, the Kentucky Civil Rights Act presently prohibits discrimination on the basis of race, color, religion, sex, disability, national origin, age, smoking and familial status in housing situations.<sup>22</sup>

Eleven commissioners, who are appointed by the governor, review, guide and approve the day to day activities of the executive director

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<sup>19</sup> See Kentucky Commission on Human Rights, Overview of the Kentucky Commission on Human Rights, <http://www.state.ky.us/agencies2/kchr/aboutkchr.htm> (last visited Jan. 15, 2006) [hereinafter Overview]. The Kentucky General Assembly is a bicameral legislature comprised of 38 Senate and 100 House of Representative seats. Kentucky Legislature, Legislative Branch of Government, <http://lrc.ky.gov/legproc/lbranch.htm> (last visited Jan. 15, 2006). Bills are introduced in the House or Senate, referred to a standing committee, and if approved, returned to the chamber in which they were introduced for voting. Kentucky Legislature, How a Bill Becomes Law, [http://lrc.ky.gov/legproc/how\\_law.htm](http://lrc.ky.gov/legproc/how_law.htm) (last visited Jan. 15, 2006).

<sup>20</sup> See Overview, *supra* note 19. Most states have similar agencies created by their respective legislatures. See generally Connecticut Commission on Human Rights & Opportunities Homepage, <http://www.state.ct.us/chro/> (last visited Jan. 15, 2006); Massachusetts Commission Against Discrimination Homepage, <http://www.mass.gov/mcad/> (last visited Jan. 15, 2006); Pennsylvania Human Relations Commission Homepage, <http://www.phrc.state.pa.us/> (last visited Jan. 15, 2006). For example, the Connecticut Commission on Human Rights and Opportunities was America's first official civil rights agency, created in 1943 by state law. See Connecticut Commission on Human Rights and Opportunities, Connecticut Civil Rights Law Chronology, <http://www.state.ct.us/chro/metapages/lawchron.htm> (last visited Jan. 15, 2006).

<sup>21</sup> See generally KY. REV. STAT. ANN. § 344 (LexisNexis 1997); Overview, *supra* note 19. The Civil Rights Act outlines the KCHR's powers and duties, such as, “to conduct research . . . and publish reports on discrimination . . . to receive and investigate complaints of discrimination and to recommend ways of eliminating any injustices occasioned thereby,” and “to make an annual report to the Governor of its activities.” § 344.180 (2), (3), (7).

<sup>22</sup> See § 344.120. The last change to the Kentucky Civil Rights Act was made in 1994 when the Kentucky General Assembly amended the Act to prohibit discrimination in employment based on age. See Overview, *supra* note 19.

and staff at the KCHR.<sup>23</sup> The Commission's major focus is receiving, investigating and carrying out complaints filed by Kentucky citizens.<sup>24</sup> Any person who believes that he or she has been affected by a discriminatory practice or act may file a complaint with the KCHR, which in turn, "collect[s] and summarize[s] the evidence" to see if there is probable cause that discrimination has occurred.<sup>25</sup> If probable cause exists, a formal attempt to settle the case is made, and if achieved, "a written Consent Agreement" is signed and submitted to the KCHR for approval.<sup>26</sup> If a settlement cannot be reached, the case is tried at an administrative hearing with a KCHR attorney representing the complainant and a hearing officer or appointed commissioner presiding.<sup>27</sup> A final order by the KCHR is binding, although either party may appeal.<sup>28</sup>

After *Pendennis*, the KCHR has the ability to respond to complaints about country clubs by going through the investigative and fact-seeking process described above to determine if discriminatory membership practices are employed.<sup>29</sup> Prior to the case, the KCHR dismissed such complaints, reasoning that the clubs were private and thus exempt from the Kentucky Civil Rights Act.<sup>30</sup> The KCHR's con-

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<sup>23</sup> See Overview, *supra* note 19.

<sup>24</sup> See *id.* The KCHR is divided into three separate groups: the Enforcement Branch, the Legal Division and the Research & Information Branch. *Id.* The Enforcement Branch handles the case processing when a citizen calls the office or an appointed commissioner brings an issue to the staff's attention. *Id.* This group also investigates the complaint by interviewing parties and reviewing records to determine if there is probable cause. Overview, *supra* note 19. The Legal Division provides legal services to those who allege discriminatory grievances by negotiating conciliation agreements and representing the complainant in an administrative hearing or the state's court system. *Id.* Finally, staff members who are part of Research & Information coordinate the agency's field offices, community relations and public affairs. *Id.*

<sup>25</sup> See Kentucky Commission on Human Rights, Jurisdiction, <http://www.state.ky.us/agencies2/kchr/jurisdiction.htm> (last visited Jan. 15, 2006) [hereinafter Jurisdiction].

<sup>26</sup> See *id.* If the agreement is approved by the KCHR, a Consent Agreement has the same effect as a final order. *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* If the KCHR holds that discrimination did occur, a final order may involve a "cease and desist order and require further affirmative action that will eliminate discrimination." *Id.* Such action might include reinstatement to a job, monetary relief or making a home or apartment available to the complainant. *Id.*

<sup>29</sup> See *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784, 789 (Ky. 2004); Jurisdiction, *supra* note 25.

<sup>30</sup> *Pendennis*, 153 S.W.3d at 786. The KCHR dismissed Louis Coleman's complaints because the Kentucky Civil Rights Act states that "[a] private club is not 'a place of public accommodation, resort or amusement' if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests." See KY. REV. STAT. ANN. § 344.130 (1) (LexisNexis 1997); *Pendennis*, 153 S.W.3d at 786.

firmed power to investigate private clubs is a step forward in accomplishing its goal of eradicating discrimination.<sup>31</sup>

While country club membership may not appear to be the most important source of discriminatory practices, it is a significant and timely area for Commissions like the KCHR to pursue.<sup>32</sup> For example, Scott Rosner, a lecturer at the University of Pennsylvania, argues that membership in a private country club generates a business advantage because of the networking relationships that are cultivated in the club setting.<sup>33</sup> Another reason to acknowledge and attack discrimination in private clubs is because the discrimination is not so obvious.<sup>34</sup> Lastly, private club discrimination is a timely issue in that it negatively impacts many minority groups.<sup>35</sup> Despite the KCHR's important accomplishment, there may be stronger measures the Commission and states can employ to fight the exclusionary practices in country clubs.<sup>36</sup>

<sup>31</sup> See *Pendennis*, 153 S.W.3d at 789.

<sup>32</sup> See Rosner, *supra* note 5, at 138–39, 142.

<sup>33</sup> See *id.* at 138–39. The exclusion of minorities from membership thus “manifests itself” in their exclusion “from significant parts of the marketplace” and “perpetuates the socioeconomic differences between the excluded and non-excluded groups.” *Id.* at 139. Terminating discrimination at country clubs, Rosner contends, results in benefits like, “[p]reventing stigmatization, leveling the playing field . . . and promoting diversity.” *Id.* at 142. Martha Burk recently expressed this idea when asked if she would attend the 2005 Masters golf tournament. See Deborah Solomon, *Questions for Martha Burk: Women's Work*, N.Y. TIMES MAG., Mar. 6, 2005, at 17. Burk responded, “I wouldn't go near a golf course. I am so disgusted with what I learned about the way corporate America uses golf and how women are excluded from the business access that it provides.” *Id.*

<sup>34</sup> See Jolly-Ryan, *supra* note 8, at 529. Jennifer Jolly-Ryan, a law professor, makes the point that discrimination in private clubs might not seem like a pressing issue when compared to acts like hate crimes, but the fact that the blatant prejudice can be entirely legal because of the clubs' private status may actually be even “more harmful to the excluded individuals and society as a whole.” *Id.* at 528–29.

<sup>35</sup> See *id.* at 528. Most recently, private country clubs have become defendants in law suits involving same-sex partners. See Ann Carrns, *Gay Club Members Seek Spousal Rights*, WALL ST. J., Feb. 20, 2004, at A11. Many country clubs have policies of giving privileges to members' significant others, including Druid Hills Golf Club in Atlanta, Georgia. *Id.* When registered domestic partners Lee Kyser and Lawrie Demorest decided to join the club, however, they were told that they would each have to join as individuals and pay separate \$40,000 initiation fees. *Id.* Dr. Kyser joined anyway and her formal requests for spousal status for Demorest have been denied twice. *Id.* An attorney in Atlanta claims that “the legal and political battles that will arise from the Druid Hills case will have a long-term impact on how gays are treated in Atlanta and Georgia,” which clearly displays the importance of the issue. See Cameron McWhirter, *High Stakes in City-Club Dispute*, ATLANTA J. CONST., Jan. 9, 2005, at 1A.

<sup>36</sup> See Chervin, *supra* note, 18 at 177–79, 187–89; Rosner, *supra* note 5, at 158–66, 171–91.

## II. OVERVIEW AND IMPLICATIONS OF THE LAW BEHIND COUNTRY CLUB DISCRIMINATION

Before understanding *Pendennis* and its potential effectiveness for accomplishing the KCHR's goal of eradicating discrimination, one must be familiar with the constitutional, legislative and U.S. Supreme Court precedent that deal with freedom of association and private clubs.<sup>37</sup> Specifically, most private clubs deny that they impose any legal harm with their discriminatory practices because of their private status and the right of freedom of association.<sup>38</sup>

### A. Legislation

Although one might believe that the Constitution and federal and state civil rights statutes protect minorities from discrimination at private clubs, the anti-discrimination laws are applicable only to places of public accommodation, and therefore private clubs are usually beyond their scope.<sup>39</sup> The U.S. Constitution, for example, does not offer a remedy for discrimination at private country clubs because the Equal Protection Clause of the Fourteenth Amendment applies only to prohibitions of state, not private, action.<sup>40</sup> There are three common law tests, however, that when satisfied would trigger the Equal Protection Clause and could qualify a private club as a state actor: 1) the public functions test, 2) the state compulsion test, and 3) the joint action or "nexus" test.<sup>41</sup> Unfortunately, these tests probably would not make a

<sup>37</sup> See Charpentier, *supra* note 1, at 113; Our Mission, *supra* note 17.

<sup>38</sup> See U.S. CONST. amend. I; Rosner, *supra* note 5, at 137. When Martha Burk wrote a letter to Augusta National chairman Hootie Johnson urging the club to admit women, he responded defiantly stating, their "members are people who enjoy each other's company and the game of golf" and their "membership alone decides [thei]r membership—not any outside group with its own agenda." See *id.* at 181–82 n.294. He continued, "[t]here may well come a day when women will be invited to join our membership, but that timetable will be ours and not at the point of a bayonet." *Id.* He ended the letter by hoping that "Dr. Burk and her colleagues recognize the sanctity of [the club's] privacy." *Id.*

<sup>39</sup> See U.S. CONST. amend. XIV; 42 U.S.C. § 1983 (2000); Nancy Kamp, *Gender Discrimination at Private Golf Clubs*, 5 SPORTS LAW. J. 89, 92 (1998).

<sup>40</sup> U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*; Kamp, *supra* note 39, at 92.

<sup>41</sup> See Kamp, *supra* note 39, at 92–93. The public functions test allows for a private entity to be considered a state actor if the entity performs a function traditionally done by the government. See *Marsh v. Alabama*, 326 U.S. 501, 508 (1946) (ruling that a privately owned town was a state actor). The state compulsion test looks to see if the state has become so involved with the private action that the state seems to endorse the private conduct. See *Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967) (holding state's legislation allow-



private club a state actor, and thus, the Constitution does not apply to discrimination at a private club.<sup>42</sup>

In an attempt to offer remedies for private discrimination, Congress enacted the Civil Rights Act of 1964.<sup>43</sup> The Act contained various titles that dealt with specific areas of discrimination, such as discrimination in employment (Title VII), education (Title IX) and public accommodations (Title II).<sup>44</sup> Although the Civil Rights Act of 1964 broadly proscribes discrimination in or by public accommodations, the act contains an express exemption for private clubs.<sup>45</sup> The Act does not define "private," which has led to various interpretations of the word and these interpretations have caused some clubs to comply with the standards of the Act.<sup>46</sup> Determining whether a club is private has become a fact-based question that courts have construed both narrowly

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ing private discrimination lawful under California Constitution). The joint action or "nexus" test provides that a state action exists when a state enforces or upholds a discriminatory contract or covenant. *See Shelley v. Kraemer*, 334 U.S. 1, 22–23 (1948) (ruling that a court's enforcement of a racially restrictive covenant violated the Fourteenth Amendment).

<sup>42</sup> *See* Kamp, *supra* note 39, at 93. Under the public functions test, a court probably would not hold that a private club performs a government function. *Id.* Under the state compulsion test, Kamp reasons that activities of private clubs such as leasing publicly-owned land or holding a liquor license generally do not rise to the level of state action. *Id.* Lastly, under a joint action or "nexus" test, a state action would not be found because the discrimination would be determined private and not judicially enforced. *Id.*

<sup>43</sup> *See* 42 U.S.C. § 1981 (2000); Kamp, *supra* note 39, at 94.

<sup>44</sup> *See* 42 U.S.C. § 1981; Kamp, *supra* note 39, at 94. Title II reads, "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (2000).

<sup>45</sup> *See* 42 U.S.C. § 2000a(c). This section provides that,

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

*Id.* The subsection referred to above states that places of public accommodations include "[e]stablishments 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." *See* § 2000a(b).

<sup>46</sup> *See* *Bell v. Kenwood Golf & Country Club, Inc.*, 312 F. Supp. 753, 758 (D. Md. 1970). In *Bell*, the court held that a country club that prohibited members from bringing African-American guests to the club was not a private club within the meaning of the exemption of the Civil Rights Act because it was owned by a profit-making corporation. *See id.* at 753; Kamp, *supra* note 39, at 94.

and broadly.<sup>47</sup> Because of the different interpretations that have arisen in federal courts, federal civil rights law is not the most effective or dependable way for minorities to gain equal access to private clubs.<sup>48</sup>

Because of the vague definitions in the Civil Rights Act, the majority of states have adopted their own form of civil rights legislation, but the laws "fall short of establishing a clear precedent to be followed in cases involving country club discrimination."<sup>49</sup> These statutes usually define public accommodations broadly, which may result in including some country clubs within the protections of these laws.<sup>50</sup> Other states have adopted laws that specifically deal with discrimination at country clubs and are discussed below in comparison to Kentucky's response to private club discrimination.<sup>51</sup>

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<sup>47</sup> See Jolly-Ryan, *supra* note 8, at 509. Courts may look at several factors, such as the selective nature of the club's membership practices, the history and purpose of the organization, the use of facilities by non-members, the club's size and the membership's control over the club's policies. See *id.* at 510-15.

<sup>48</sup> Kamp, *supra* note 39, at 95. Kamp also points out that Title II of the Civil Rights Act does not protect against gender discrimination and therefore a woman could not sue a private club for equal membership and privileges under the Act. *Id.*

Interestingly, it has been argued that federal courts are hospitable places to litigate civil rights violations because they are more objective in their approaches than state courts. See Karl A. Cole-Frieman, Note, *The Ghosts of Segregation Still Haunt Topeka, Kansas: A Case Study on the Role of the Federal Courts in School Desegregation*, 6 KAN. J.L. & PUB. POL'Y 23, 24 (1996). In a discussion of *Brown v. Board of Education*, Cole-Frieman contends that the federal courts are the only institution insulated and powerful enough to protect the constitutional rights of black children. See also Cole-Frieman, *supra*, at 37-38. See generally 347 U.S. 483 (1954). Martin Luther King, Jr. once wrote:

It was a great relief to be in a federal court. Here the atmosphere of justice prevailed. No one can understand the feeling that comes to a Southern Negro on entering a federal court unless he sees with his own eyes and feels with his own soul the tragic sabotage of justice in the city and state courts of the South . . . . But the Southern Negro goes into the federal court with the feeling that he has an honest chance before the law.

Cole-Frieman, *supra*, at 23 (citing MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM* 151-52 (1964)).

<sup>49</sup> See Rosner, *supra* note 5, at 159.

<sup>50</sup> See *id.* These laws do not specifically discuss country club discrimination, but courts have interpreted anti-discrimination laws as including country clubs when the clubs meet certain criteria. *Id.* For example, if a club allows wedding receptions or fundraising events where guests enter the facilities, a court could find the club to be a public accommodation under the state statute. See Kamp, *supra* note 39, at 101.

<sup>51</sup> See Rosner, *supra* note 5, at 159. Some states have simply included country clubs in the definition of "public accommodation" in their anti-discrimination laws. *Id.* at 166. In Kansas, for example, private clubs are included within the definition of public accommodations if they have over 100 members, provide regular meal services, and receive payment for dues, services or use of facilities from non-members. See KAN. STAT. ANN. § 44-1002

### B. Litigation

U.S. Supreme Court precedent has presented another issue in private country club discrimination: a member's right to freedom of association.<sup>52</sup> In the 1980s the Supreme Court decided a trilogy of landmark cases that involved discrimination in private country clubs.<sup>53</sup> In each case, the Court held that state legislatures that have enacted public accommodation laws have a compelling interest in preventing discrimination, which overrides a member's right to freedom of association.<sup>54</sup>

In *Roberts v. United States Jaycees*, the U.S. Jaycees, a non-profit organization founded to "promote and foster the growth and development of young men's civic organizations," brought an action challenging the Minnesota Department of Human Rights' application of the state's Human Rights Act.<sup>55</sup> The Minnesota Human Rights Act forbids discrimination on the basis of sex in "places of public accommodation" and the Jaycees did not allow women to vote or hold office in their organization.<sup>56</sup> The Jaycees argued that the law requiring them to accept women as equal members violated the current members' right of free association.<sup>57</sup> The Supreme Court held that neither the right to intimate association nor the right to expressive association were violated by the Human Rights Act and that the state's compelling interest in eliminating discrimination justified the result.<sup>58</sup>

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(i) (2) (2000). In Florida, private clubs are subject to the state's civil rights laws if they serve over 400 members. See FLA. STAT. ANN. § 760.60 (1) (West 1997).

<sup>52</sup> See Rosner, *supra* note 5, at 146–47. The Supreme Court has ruled that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

<sup>53</sup> See Kamp, *supra* note 39, at 96 (citing *N. Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 12 (1988)); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

<sup>54</sup> See *id.*

<sup>55</sup> *Roberts*, 468 U.S. at 612; Kamp, *supra* note 39, at 97–98.

<sup>56</sup> *Roberts*, 468 U.S. at 614–15; Kamp, *supra* note 39, at 98.

<sup>57</sup> *Roberts*, 468 U.S. at 615; Kamp, *supra* note 39, at 98.

<sup>58</sup> *Roberts*, 468 U.S. at 623; Kamp, *supra* note 39, at 98–99. Intimate association includes personal affiliations that are shown by certain characteristics and, therefore, involve personal relationships people have with one another. See Rosner, *supra* note 5, at 147. Expressive association is part of the First Amendment because of the idea that "[a]n individual's freedom to speak, to worship, and to petition the government for redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts*, 468 U.S. at 622; Rosner, *supra* note 5, at 147.

In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Supreme Court reaffirmed *Roberts*.<sup>59</sup> When the Rotary Club of Duarte's charter was revoked by Rotary International because it admitted women as members, the Duarte Club sued Rotary International for violating California's public accommodation statute.<sup>60</sup> The Supreme Court found for the Duarte Club by holding that Rotary Clubs did not have a right to intimate association and their right to expressive association was outweighed by the state's interest in eradicating discrimination.<sup>61</sup>

Lastly, *New York State Club Association, Inc. v. City of New York* involved an amendment to New York City's human rights law that banned discrimination by any "place of public accommodation, resort, or amusement," but exempted distinctly private organizations.<sup>62</sup> The law defined "distinctly private" as follows:

[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.<sup>63</sup>

After the enactment of the amendment, 125 private clubs filed suit claiming that the law was facially invalid for being vague and overbroad.<sup>64</sup> The Supreme Court rejected these arguments and found the law valid, as it sufficiently defined what constituted a distinctly private

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When deciding if an intimate association would qualify for protection, the Court said that the "size, purpose, policies, selectivity, [and] congeniality" of the club should be taken into consideration. Charpentier, *supra* note 1, at 125 (quoting *Roberts*, 468 U.S. at 627). The Court also found that the Jaycees did have a right to expressive association, but that the compelling interests of the state outweighed this right. *See id.*

<sup>59</sup> 481 U.S. at 549.

<sup>60</sup> *See* Charpentier, *supra* note 1, at 126 (citing *Rotary*, 481 U.S. at 541).

<sup>61</sup> *See Rotary*, 481 U.S. at 546, 549; Kamp, *supra* note 39, at 99–100. Kamp points out that the Rotary Clubs did not have a right of freedom of intimate association because the "relationships within the Rotary were not of the intimate, familial type that are granted constitutional protection." Kamp, *supra* note 39, at 99 (citing *Rotary*, 481 U.S. at 549). The Court found that some of the clubs had more than 900 members, there was a high drop-out rate and many of the activities were completed individually instead of as a group. *See* Kamp, *supra* note 39, at 100 (citing *Rotary*, 481 U.S. at 546).

<sup>62</sup> *See N.Y. State Club*, 487 U.S. at 5; Kamp, *supra* note 39, at 100 (citing N.Y. CITY ADMIN. CODE §§ 8-101, 8-102(9) (1986)).

<sup>63</sup> *See* Kamp, *supra* note 39, at 100 (citing N.Y. CITY ADMIN. CODE § 8-109(9)).

<sup>64</sup> *See* Kamp, *supra* note 39, at 100 (citing *N.Y. State Club*, 487 U.S. at 7.)

club.<sup>65</sup> In the Supreme Court's view, the private clubs that filed suit were not distinctly private but "commercial" in nature because of the business deals and contacts that are created at these clubs.<sup>66</sup> After this case, states like Kansas and Florida responded by passing laws similar to New York City's law, which contain specific factors highlighting the commercial nature of clubs.<sup>67</sup>

*Roberts*, *Rotary* and *New York State Club* are encouraging because in each decision the Supreme Court ruled in favor of non-discrimination over freedom of association for club members.<sup>68</sup> The U.S. Supreme Court's most recent look at the issue, however, could raise concern about the future of cases involving prejudice in private organizations of all kinds.<sup>69</sup> In *Boy Scouts of America v. Dale*, James Dale, a homosexual member of the Boy Scouts, had his adult membership in the Boy Scouts revoked because of his sexual orientation.<sup>70</sup> Dale sued, claiming the revocation violated New Jersey's public accommodation statute, which prohibited discrimination on the basis of sexual orientation in places of public accommodation.<sup>71</sup>

The case eventually reached the United States Supreme Court, where Justice Rehnquist wrote for the majority and reversed the New Jersey Supreme Court ruling in favor of Dale.<sup>72</sup> The Court found that applying the state's public accommodations law to the Boy Scouts violated its members' rights to expressive association, relying on the fact that the organization had a mission to promote certain values.<sup>73</sup> The decision could affect future cases that involve country club discrimination because, even though this case did not deal with intimate association, a private country club could make amendments to their by-laws to convey that, like the Boy Scouts, they are organized to

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<sup>65</sup> See *N.Y. State Club*, 487 U.S. at 12.

<sup>66</sup> See Kamp, *supra* note 39, at 101. Kamp mentions that the Supreme Court did not rule out the ability for a private club to make a fact-based claim that it has special characteristics to provide protection for freedom of association. *Id.*

<sup>67</sup> See *id.*; FLA. STAT. ANN. § 760.60 (1) (West 1997); KAN. STAT. ANN. § 44-1002 (i) (2) (2000).

<sup>68</sup> See Rosner, *supra* note 5, at 155.

<sup>69</sup> See generally *Boy Scouts of Am. v. Dale*, 530 U.S. 655 (2000). See Rosner, *supra* note 5, at 155.

<sup>70</sup> 530 U.S. at 645.

<sup>71</sup> *Id.*; N.J. STAT. ANN. § 10:5-4 (West 2000).

<sup>72</sup> See *id.* at 643-44.

<sup>73</sup> See *id.* at 649. The Court concluded that the general mission of the Boy Scouts was "to instill values in young people" by encouraging "morally straight" behavior. *Id.* at 649-50; Rosner, *supra* note 5, at 157.

promote certain values.<sup>74</sup> With a few subtle changes to their rules, private country clubs may be able to claim they are protected from government interference under *Boy Scouts of America*.<sup>75</sup>

### C. *Discussion of Commonwealth v. Pendennis, Inc.*

The *Pendennis* litigation, a recent case regarding country club discrimination, commenced in 1991 and concluded in 2004.<sup>76</sup> Thirteen years after the case's origination, Acting Executive Director of the KCHR, Morgan Ransdell, stated, "[t]his important decision by the Kentucky Supreme Court demonstrates that the Commission has not been lax in its work, and . . . [t]he Commission is vigorously striving to reach the goal set forth by the General Assembly in the Kentucky Civil Rights Act, namely to eradicate unlawful discrimination."<sup>77</sup> Ransdell went on to say that "[a]ll private clubs in Kentucky should sit up and take notice that the Kentucky Revenue Cabinet will deny business expense deductions regarding payments to private clubs that are found by the Commission to discriminate."<sup>78</sup>

It took a long time for the KCHR to demand that the clubs in Kentucky take notice.<sup>79</sup> Although the original complaints alleged that Louis Coleman was denied membership to three clubs based on his race, the KCHR dismissed them, concluding that although the Commission had the jurisdiction to investigate places of public accommodation for discrimination, private clubs are specifically exempt from being classified as a public accommodation in the Kentucky Civil Rights Act.<sup>80</sup> After the KCHR dismissed the complaints, Representa-

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<sup>74</sup> See Rosner, *supra* note 5, at 158. Rosner presents an example of a club including by-laws that a particular religion is against its beliefs. *Id.* at 158 n.160. This would most likely limit the possibility for followers of that religion from joining the club; a Muslim, for instance, would not want to join a club that states that the Muslim faith is against its beliefs. *Id.* People of the particular religion could be members of a minority group in the United States and the country club would thus be discriminating without government intervention. See *id.*

<sup>75</sup> See *id.* at 158.

<sup>76</sup> See *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784, 786 (Ky. 2004).

<sup>77</sup> Press Release, Kentucky Commission on Human Rights, Kentucky Supreme Court Upholds Commission Decision to Investigate The Pendennis Club, The Louisville Country Club, and Idle Hour Country Club (Nov. 18, 2004) available at <http://www.state.ky.us/agencies2/kchr/Press%20release/11-18-04%20Pendennis%20ruling%20for%20KCHR.doc>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See KY. REV. STAT. ANN. § 344.130 (LexisNexis 1997); Brief for Appellants at 5, *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784 (Ky. 2004) (No. 2002-SC-00508-D); *Kentucky Supreme Court Rules in Favor of KCHR to Investigate Pendennis and Other Private Clubs for*

tive Anne Northup, who sponsored the Revenue Code amendments that prohibited tax deductions for discriminatory clubs, was concerned that the Commission had passed up an investigation that the new amendments ordered, and requested an opinion by Attorney General Fred Cowen.<sup>81</sup> In November of 1991, the Attorney General issued an opinion that stated that the KCHR had the “legal authority” to investigate clubs to determine if they engage in discriminatory practices.<sup>82</sup> He based this opinion on the Revenue Code, which stated that a determination of such practices was to be made by the courts or by “an agency established by the General Assembly and charged with enforcing the Civil Rights Laws of the Commonwealth.”<sup>83</sup>

Two years after the Attorney General’s opinion, KCHR Commissioner Mae Cleveland filed complaints against each of the three clubs.<sup>84</sup>

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*Discrimination*, HUM. RTS. REP., Fall 2004, at 1–2, available at <http://www.state.ky.us/agencies2/kchr/Fall%20newsletter%202004%20color%20for%20email%20%20web.pdf> [hereinafter *Kentucky Supreme*]. The Coleman complaints contended that the clubs violated Kentucky’s public accommodation law, but made no reference to the Revenue Code provisions which barred tax payers from deducting amounts paid to private clubs that have been determined to discriminate on the basis of race, color, religion, national origin or sex. See KY. REV. STAT. ANN. § 344.120; KY. REV. STAT. ANN. § 141.010(11)(d), (13)(f); Brief for Appellants, *supra*, at 2, 5. Instead of prohibiting private club discrimination, Kentucky amended its Revenue Code in 1990 to terminate tax deductions for discriminatory clubs. See KY. REV. STAT. ANN. § 141.010(11)(d), (13)(f); Brief for Appellants, *supra*, at 2–3. Before it was amended, this state benefit had the effect of subsidizing and approving discrimination. Brief for Appellants, *supra*, at 3. Under the amended provisions, state taxpayers cannot take:

[a]ny deduction for amounts paid to any club, organization, or establishment which has been determined by the courts or an agency established by the General Assembly and charged with enforcing the civil rights laws of the Commonwealth, not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations to any person because of race, color, religion, national origin or sex.

KY. REV. STAT. ANN. § 141.010(11)(d). This statute is “the genesis for the entire controversy between the clubs and [the] KCHR.” Brief for Appellants, *supra*, at 2.

<sup>81</sup> See Brief for Appellants, *supra* note 80, at 5. Representative Northup wrote a letter asking if “the bill passed in 1990 implicitly grant[s] the Human Rights Commission the authority to make a determination of discrimination with regard to the clubs.” *Id.* at 5–6. She went on to assert that Kentucky “has a right to ensure that it does not continue to be an ‘enabler’ to discrimination.” *Id.* at 6.

<sup>82</sup> See *id.* at 6–7.

<sup>83</sup> See KY. REV. STAT. ANN. § 141.010(11)(d), (13)(f); Brief for Appellants, *supra* note 80, at 6–7. The KCHR is the only agency that meets this definition. Brief for Appellants, *supra* note 80, at 7.

<sup>84</sup> See Brief for Appellants, *supra* note 80, at 7. The Cleveland complaints specifically alleged that pursuant to the Revenue Code, “the Commission is authorized to take appropriate action and make the necessary determinations pursuant thereto.” See KY. REV. STAT. ANN. § 141.010(11)(d), (13)(f); Brief for Appellants, *supra* note 80, at 7. Commissioners of

The clubs sought to dismiss these complaints, arguing that the KCHR was bound by its prior dismissal of the Coleman complaints.<sup>85</sup> On March 15, 1995, the KCHR followed the Attorney General and denied the clubs' motion to dismiss, reasoning that the KCHR had jurisdiction to investigate private clubs under the Revenue Code.<sup>86</sup> At this point, the KCHR requested membership lists from the clubs, but they refused to turn over the information and filed suit in federal court claiming that the request for lists violated their club members' constitutional right of free association.<sup>87</sup>

The U.S. District Court narrowly construed the Kentucky Civil Rights Act and the Revenue Code by holding that it was not within the KCHR's statutory powers to investigate private clubs.<sup>88</sup> Two years after this decision, the United States Court of Appeals for the Sixth Circuit reversed and vacated the decision, reasoning that the federal district court should have let state courts handle the case.<sup>89</sup> Because the federal litigation was concluded, the KCHR made another request that the clubs reveal "bare statistical demographic information regarding their membership."<sup>90</sup> The clubs refused to provide the information, leading the KCHR to seek a judicial declaration in state circuit court concerning the scope of the Commission's investigative authority.<sup>91</sup> Eventually,

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the KCHR are allowed to initiate complaints under the Kentucky Civil Rights Act. *See* KY. REV. STAT. ANN. § 344.190(8); KY. REV. STAT. ANN. § 344.200(1).

<sup>85</sup> *See* Brief for Appellants, *supra* note 80, at 7.

<sup>86</sup> *See* KY. REV. STAT. ANN. § 141.010(11)(d), (13)(f); Brief for Appellants, *supra* note 80, at 8.

<sup>87</sup> *See* Brief for Appellants, *supra* note 80, at 8. In their brief, the appellants' make note that although the clubs claimed that they did not engage in discriminatory membership practices, the clubs "sought to hide behind an asserted right of intimate association" and further alleged that the KCHR violated the civil rights of the club members by asking for membership lists. *Id.* The brief points out that the clubs have not provided any information about their membership policies, "which many clubs openly display on their walls, for members and guests alike to see." *Id.*

<sup>88</sup> *See id.* The KCHR argued that the opinion written by Judge Hood was flawed because he mistakenly thought that the General Assembly could only grant the KCHR powers explicitly found in the Kentucky Civil Rights Act. *Id.* at 8-9. Alternatively, the KCHR alleged that the legislature gives state agencies' powers in different Kentucky statutes. *Id.* at 9.

<sup>89</sup> *See Louisville Country Club v. Watts*, 178 F.3d 1295, 1999 WL 232683, at \*3 (6th Cir. Apr. 16, 1999) (unpublished per curiam). The Sixth Circuit decision was binding upon the parties and the U.S. District Court dismissed the clubs' federal case. *See* Brief for Appellants, *supra* note 80, at 9.

<sup>90</sup> *See* Brief for Appellants, *supra* note 80, at 9.

<sup>91</sup> *See id.* at 10. The KCHR wanted a declaratory judgment affirming the Attorney General's opinion as well as a declaration stating that the Commission had the authority to investigate private clubs for the limited purpose of enforcing the Revenue Code provisions.



both the KCHR and the clubs filed motions for summary judgment and the issue came down to whether the Revenue Code read in conjunction with the Kentucky Civil Rights Act granted the KCHR the authority to investigate private clubs to determine if they discriminate.<sup>92</sup>

On August 29, 2000, a state circuit court issued a partial summary judgment in favor of the clubs, holding that the KCHR lacked statutory authority to investigate private clubs.<sup>93</sup> After the Commission appealed in 2002, the Kentucky Court of Appeals affirmed the state circuit court, reasoning that the drafters should have been explicit in granting the Commission the power to investigate private clubs in the Revenue Code.<sup>94</sup> The KCHR then appealed to the Kentucky Supreme Court.<sup>95</sup>

Although *Pendennis* certainly involved the evils of discrimination, the Kentucky Court made clear that the case was not about whether the alleged discriminatory practices existed, but rather about statutory construction.<sup>96</sup> The question before the Kentucky Court was whether the KCHR had the statutory authority to investigate private clubs to determine if they discriminate.<sup>97</sup> In the Appellants' brief, the Attorney General and the KCHR argued that the General Assembly intended for the KCHR to investigate private clubs when it amended the Revenue Code provisions.<sup>98</sup> Alternatively, the clubs argued in the Appellees' Brief that the KCHR does not have such authority because neither the Kentucky

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See KY. REV. STAT. ANN. § 141.010(11)(d), (13)(f); Brief for Appellants, *supra* note 80, at 10.

<sup>92</sup> See Brief for Appellants, *supra* note 80, at 12–13.

<sup>93</sup> See *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784, 786 (Ky. 2004); Brief for Appellants, *supra* note 80, at 13. The court reasoned that if the author of the Revenue Code amendments intended to give the KCHR the authority to investigate, she would have explicitly stated that it had the ability to do so. Brief for Appellants, *supra* note 80, at 13.

<sup>94</sup> See *Pendennis*, 153 S.W.3d at 786; Brief for Appellants, *supra* note 80, at 14.

<sup>95</sup> See Brief for Appellants, *supra* note 80, at 15.

<sup>96</sup> See *Pendennis*, 153 S.W.3d at 785. The Kentucky Court began the opinion by outlining what the “case is not about.” *Id.* Justice Lambert wrote, “[t]his case is not about whether the clubs actually engage in discriminatory practices” or “the rights of clubs nor their members.” *Id.* He goes on to say, “[w]hat this case is about is whether the General Assembly has granted the KCHR authority to so investigate.” *Id.*

<sup>97</sup> See *id.*

<sup>98</sup> See KY. REV. STAT. ANN. § 141.010(11)(d), (13)(f); Brief for Appellants, *supra* note 80, at 15. The Attorney General and KCHR contended that the statutes should be interpreted to ascertain the intentions of the legislature. See Brief for Appellants, *supra* note 80, at 16. With that idea in mind, if the KCHR did meet the description in the Revenue Code of an “agency established by the General Assembly with enforcing the civil rights laws of the Commonwealth,” the appellants alleged that the statute would be meaningless. See KY. REV. STAT. ANN. § 141.010(11)(d), (13)(f); Brief for Appellants, *supra* note 80, at 18. It certainly would not have been the intention of the General Assembly to enact a meaningless statute. See Brief for Appellants, *supra* note 80, at 17–18.

Civil Rights Act nor the Revenue Code expressly states this power.<sup>99</sup> In addition to the statutory construction question, both appellants and appellees presented other arguments in favor of their respective views.<sup>100</sup>

The *Pendennis* Court ruled in favor of the appellants and reversed the lower court decisions.<sup>101</sup> The Kentucky Court held that although the Revenue Code does not explicitly authorize the KCHR's investiga-

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<sup>99</sup> See KY. REV. STAT. ANN. § 344.120; KY. REV. STAT. ANN. § 141.010(11)(d), (13)(f); Brief for Appellees at 13–14, *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784 (Ky. 2004) (No. 2002–SC–00508–DG). The clubs argued against an implied jurisdiction and stated that “nothing in the [Kentucky Civil Rights Act] or the Revenue Code authorizes the KCHR to embark on an intrusive investigation into the membership practices of clubs that have already been deemed private . . . .” See Brief for Appellees, *supra*, at 15. The clubs also contended that the private club exemption in the Kentucky Civil Rights Act prevents the KCHR from investigating private clubs. See KY. REV. STAT. ANN. § 344.130; *Pendennis*, 153 S.W.3d at 787.

<sup>100</sup> See Brief for Appellants, *supra* note 80, at 41–44; Brief for Appellees, *supra* note 99, at 25, 44. The Attorney General and the KCHR discussed the implications of the case at the end of their brief by stressing the problem of discrimination and the history of prejudice in private clubs. See Brief for Appellants, *supra* note 80, at 41–44. The appellants argued that this archaic practice of discrimination in country clubs has contributed to the small number of women and minorities in top business or government fields today. *Id.* at 41–42. They noted that Tiger Woods would likely not be allowed to join some Kentucky golf clubs because “bigoted members would undoubtedly blackball him and argue this is their constitutional privilege.” *Id.* at 42. These passionate public policy arguments demanded a liberal interpretation of the statute in order to advance “the cause of equality and justice.” *Id.* at 44.

The clubs responded with extreme examples by alleging that if the appellants’ argument were accepted, the KCHR’s jurisdiction would be without limit and “every family, business and religious organization in Kentucky” would be subject to the oversight of the Commission. See Brief for Appellees, *supra* note 99, at 25. In this same vein, the brief called the KCHR an “over-zealous agency” that would then be able to investigate any club “it arbitrarily presumes is immoral or bigoted.” *Id.* at 44. They also attacked the Commission by saying it stereotypically assumes “that golfers who look like Jack Nicklaus (but not Tiger Woods) are ‘evil.’” *Id.* In a Reply Brief, the appellants asked the Kentucky Court to ignore the clubs’ personal attacks and distortions. See Appellants’ Reply Brief at 10, *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784 (Ky. 2004) (No. 2002–SC–00508–DG). They also requested that the Kentucky Court find the legislative intent in the statutes “and if additional guidance is needed,” look to the public policy arguments. *Id.*

Interestingly, Tiger Woods reportedly told Oprah Winfrey that he has dealt with discrimination at country clubs and stated, “I got kicked off of golf courses numerous times; been called some pretty tough words to my face.” See Jolly-Ryan, *supra* note 8, at 498 n.28 (citing Frank Whelan, *Few Minorities at Country Clubs*, ALLENTOWN MORNING CALL, June 5, 1997, at D1). Despite his experiences with prejudice, Tiger Woods continues to play at the Masters Tournament at Augusta National and won, for his fourth time, the most recent Masters Tournament on April 10, 2005. See Terence Moore, *The Masters: Dramatic Win at 18th a Gift to Ailing Father*, ATLANTA J. CONST., Apr. 11, 2005, at 1C. No professional golfers, including Woods, have boycotted the championship because of the club’s discriminatory policies. See Charpentier, *supra* note 1, at 112.

<sup>101</sup> See *Pendennis*, 153 S.W.3d at 785.

tory powers, they exist by implication.<sup>102</sup> By looking at the purpose of the KCHR as well as the purpose behind the Revenue Code amendments, the Kentucky Court concluded that the General Assembly had intended to prohibit discriminatory clubs from benefiting from tax deductions, and that the KCHR was legally entitled to investigate in furtherance of that goal.<sup>103</sup>

Although *Pendennis* was a victory for the KCHR in that it clarified the Commission's statutory right to investigate private clubs, the Kentucky Court points out several times in the opinion that private clubs have a constitutional right to discriminate based on race.<sup>104</sup> Justice Lambert stated that the KCHR is authorized to investigate private clubs "[t]o assure that no such tax deduction is taken" and that neither the KCHR nor any court can force a club to discontinue its discriminatory practices.<sup>105</sup> These qualifications are a reminder that nothing can bar these clubs in Kentucky from discriminating.<sup>106</sup> The KCHR can investigate a club, and if it discovers discriminatory membership practices, the Commission informs the Revenue Cabinet, and club members are denied tax deductions.<sup>107</sup> Although the tax consequences deter discrimination in private clubs and is a common strategy in many states for dealing with private club discrimination, tax consequences do not eliminate the discrimination itself.<sup>108</sup> The blatant reminders in *Penden-*

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<sup>102</sup> See *id.* at 789. The Kentucky Court highlighted the fact that the Revenue Code states that deductions will not be allowed for payments made to "any club" that has been determined to discriminate. See KY. REV. STAT. ANN. § 141.010(11)(d); *Pendennis*, 153 S.W.3d at 788. The words "any club" show that investigations were not intended to be limited to "non-private clubs." See *id.* at 788. Additionally, the Kentucky Court reasoned that since the Revenue Code clearly conveys that there is a power to make a "determination" as to discrimination, inherent in determining, is the power to investigate. *Id.* at 789. Pointing out that this proposition was established by Chief Justice Marshall, the Kentucky Court cited *McCulloch v. Maryland*, where the U.S. Supreme Court concluded that powers under the U.S. Constitution are not limited to what is explicitly enumerated in the text. See 17 U.S. 316, 405 (1819); *Pendennis*, 153 S.W.3d at 788.

<sup>103</sup> See *Pendennis*, 153 S.W.3d at 787–89. Justice Lambert explained that the KCHR was established "to safeguard the rights of citizens to be free from discrimination on the basis of race and other enumerated characteristics." *Id.* at 786–87. In order to accomplish this mandate, the KCHR was given the power to investigate and hold hearings. *Id.* at 787.

<sup>104</sup> See *id.* at 785, 789. Justice Lambert made clear that truly private clubs have the statutory right to discriminate in their membership policies "without fear of legal liability." *Id.* at 785.

<sup>105</sup> *Id.* at 789.

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*

<sup>108</sup> See Jolly-Ryan, *supra* note 8, at 521–24. For example, Minnesota prohibits property tax deferments and exemptions to clubs with five or more acres of "open space" that discriminate. See MINN. STAT. ANN. § 273.112 (West 1999); Jolly-Ryan, *supra* note 8, at 523.

nis that discriminatory practices are legal among private clubs cast a negative light on an otherwise positive decision and raise the question of whether the KCHR, given its goal of eradicating discrimination in Kentucky, can do anything else to stop discrimination in private country clubs.<sup>109</sup>

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California disallows deductions for taxpayers' "expenditures made at, or payments made to, a club which restricts membership or the use of its services or facilities on the basis of age, sex, race, religion, color, ancestry, or national origin." See CAL. REV. & TAX. CODE § 24343.2(a) (West 2004); Jolly-Ryan, *supra* note 8, at 523. Professor Jolly-Ryan claims that prohibiting discriminatory private clubs from taking tax exemptions and deductions is "attractive from moral, social, and political standpoints." Jolly-Ryan, *supra* note 8, at 524. She quotes Representative Northup of Kentucky, who said, "[w]e can't force people to change who they associate with, but they should not enjoy any government benefit at all if they choose to discriminate." *Id.*

The tax consequences for private clubs do not necessarily deter them from eliminating the discrimination in their policies. See Kamp, *supra* note 39, at 106. In 1986, the Maryland Legislature barred country clubs with discriminatory membership or guest privilege practices from qualifying for preferential tax assessment. See MD. CODE. ANN., TAX-PROP. § 8-212, -214 (West 2005). Burning Tree Country Club, located in Montgomery County, Maryland was informed that its lands would be assessed at their full cash value because the club restricted its membership to men. See Brief for Appellants, *supra* note 80, at 34. In *State v. Burning Tree Club*, the Maryland Court of Appeals held that governments do not have "to sanction, subsidize or support discrimination by private entities." 554 A.2d 366, 384 (Md. 1989); Brief for Appellants, *supra* note 80, at 35. The case permitted the Maryland tax assessor to retroactively apply taxes to the club which amounted to a reported \$938,000. See Kamp, *supra* note 39, at 106. Despite the financial loss and the disqualification from tax benefits, Burning Tree still prohibits women from entering its grounds. See *id.*

Interestingly, Burning Tree Country Club has appeared in the news again recently, displaying the idea that eliminating tax benefits did not discourage the club from discriminating against women. See Mihoces, *supra* note 5, at 3C. Martha Burk supported U.S. Representative Carolyn Maloney of New York's introduction of a House resolution that no member of Congress, the federal judiciary or the executive branch should belong to a club that discriminates on the basis of sex or race. See H.R. Con. Res. 130, 108th Cong. (2003); Mihoces, *supra* note 5, at 3C. The resolution was a response to the controversy surrounding Augusta National, but also to clubs like Burning Tree, of which Senator John Warner of Virginia and Senator Don Nickles of Oklahoma are members. See *id.* Representative Maloney stated that by excluding women, these clubs are sending a message to women that "you are not our equal partner, and you do not deserve the opportunity to mix and mingle with CEO's of America's top corporations." See Press Release, Rep. Carolyn B. Maloney, Maloney & Burk: It's Time for Fair Play (Mar. 31, 2003), available at <http://www.house.gov/maloney/press/108th/20030331FairPlay.html>. The bill was referred to the House subcommittee on the Constitution on May 5, 2003. See GovTrack, H. Con. Res. 130[108]: Fair Play—Equal Access in Membership Resolution, <http://www.govtrack.us/congress/bill.xnd?bill=hc108-130> (last visited Jan. 15, 2006).

<sup>109</sup> See *Pendennis*, 153 S.W.3d at 785, 789; Our Mission, *supra* note 17.

### III. OTHER STATE APPROACHES TO ELIMINATING COUNTRY CLUB DISCRIMINATION

It may be difficult for federal and state statutes to reach private clubs because usually they are not found to be places of public accommodation.<sup>110</sup> Some states, however, have enacted bold pieces of legislation that specifically address private club discrimination and more effectively discourage and, in some instances, ban prejudicial membership policies.<sup>111</sup> Such measures addressed below indicate how, although *Pendennis* was a positive step to end discrimination, the General Assembly of Kentucky could go further to accomplish the KCHR's goal of eradicating discrimination in the state.<sup>112</sup>

#### A. Connecticut

In 1997, the Connecticut Legislature, representing a state "known for its affluent golfers and bucolic New England surroundings," passed a law explicitly prohibiting discrimination at private country clubs.<sup>113</sup> This far-reaching equal access law prevents a private country club that has at least twenty members and nine holes of golf and which either financially profits from nonmembers or holds a liquor license from discriminating in its membership or access policies.<sup>114</sup> It also requires that private clubs allow all members equal access to the facilities.<sup>115</sup>

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<sup>110</sup> See Kamp, *supra* note 39, at 92.

<sup>111</sup> See CAL. CIV. CODE § 51 (West 2005); CONN. GEN. STAT. ANN. § 52-571d (West 2004); LA. REV. STAT. ANN. § 49:146 (West 2003); MICH. COMP. LAWS ANN. §§ 37.2301-.2303 (West 2001).

<sup>112</sup> See *Pendennis*, 153 S.W.3d at 785, 789; Our Mission, *supra* note 17.

<sup>113</sup> See § 52-571d; Chervin, *supra* note 18, at 176. Chervin adds that "Connecticut has always been in the forefront of ensuring equality among all its citizens." See Chervin, *supra* note 18, at 187. In furtherance of this point, he cites *Evening Sentinel v. National Organization for Women*, which stated that the legislators of the state unambiguously displayed intent to abolish sex discrimination when it approved the equal rights amendment to the United States Constitution. See 357 A.2d 498, 504 n.5 (Conn. 1975); Chervin, *supra* note 18, at 186 n.75.

<sup>114</sup> See CONN. GEN. STAT. ANN. § 52-571d. The statute provides in relevant part:

(a) For purposes of this section, "golf country club" means an association of persons consisting of not less than twenty members who pay membership fees or dues and which maintains a golf course of not less than nine holes and (1) receives payment for dues, fees use of space, facilities, services, meals or beverages, directly or indirectly, from or on behalf of nonmembers or (2) holds a permit to sell alcoholic liquor . . .

After hearing testimonials from female country club members regarding the discriminatory practices of the clubs throughout the state,

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(b) No golf country club may deny membership in such club to any person on account of race, religion, color national origin, ancestry, sex, marital status or sexual orientation.

(c) All classes of membership in a golf country club shall be available without regard to race, religion, color, national origin, ancestry, sex, marital status or sexual orientation.

....

(g) Any person aggrieved by a violation of the provisions of this section may bring a civil action in the Superior Court to enjoin further violations and to recover the actual damages sustained by reason of such violation or two hundred fifty dollars, whichever is greater, together with costs and a reasonable attorney's fee.

(h) If, an action brought under subsection (g) of this section, the court finds that a golf country club holding a permit to sell alcoholic liquor . . . has violated any of the provisions of this section, it may, in addition to any relief ordered under said subsection (g), order the suspension of such permit until such time as it determines that such club is no longer in violation of this section.

*Id.*

<sup>115</sup> *Id.* The statute reads in relevant part:

(d) A golf country club that allows the use of its facilities or services by two or more adults per membership, including the use of such facilities or services during restricted times, shall make such use equally available to all adults entitled to use such facilities or services under that membership. The requirements of this subsection concerning equal access to facilities or services of such club shall not apply to adult children included in the membership. Nothing in this subsection shall be construed to affect the assessment by a golf country club of any fees, dues or charges it deems appropriate, including the ability to charge additional fees, dues or charges for access by both adult members during restricted times.

(e) A golf country club that has food or beverage facilities or services shall allow equal access to such facilities and services for all adults in all membership categories at all times. Nothing in this subsection shall be construed to require access to such facilities or services by any person if such access by such person would violate any provision of the general statutes or a municipal ordinance concerning the sale, consumption or regulation of alcoholic beverages.

*Id.*

These provisions in the Connecticut statute are important because many private country clubs that open their doors to women continue to treat their female members differently than the males. *See* Charpentier, *supra* note 1, at 128–89. It is a common practice, for example, to restrict women to specific tee-times during the week and permit men to reserve weekend and holiday morning spots. *Id.* Another discriminatory custom at these clubs are “men-only grill rooms.” *Id.* at 129. Grill rooms are dining areas where women and children are forbidden to enter and male members can invite guests to conduct business discussions and network. *Id.*

the Connecticut legislature enacted the comprehensive law.<sup>116</sup> The law forbids discrimination in private clubs, creates a private right of action for enforcement, and allows the state to suspend a club's liquor license.<sup>117</sup> The law—unlike others “without teeth”—places country clubs on notice that the state will no longer accept discrimination.<sup>118</sup>

Although the statute goes further than many other states in attempting to eliminate discriminatory practices, the legislators in Connecticut responded with mixed reactions.<sup>119</sup> Those who voted against the bill argued that a club's board of directors should have the authority to change club policies, not the legislature.<sup>120</sup> Others thought the best way to deal with the issue would be for women and minorities to

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<sup>116</sup> See CONN. GEN. STAT. ANN. § 52-571d; Chervin, *supra* note 18, at 177.

<sup>117</sup> CONN. GEN. STAT. ANN. § 52-571d.

<sup>118</sup> See CONN. GEN. STAT. ANN. § 52-571d; Chervin, *supra* note 18, at 179. Just after the law took effect, more than two dozen members of the Wethersfield Country Club filed a discrimination lawsuit, accusing the club of bias against women. See McEntee & Johnson, *supra* note 11, at 1; *Club Is Sued in Bias Claim*, N.Y. TIMES, June 10, 1998, at B9. Wethersfield became the first private golf club to be sued under the statute. See *Club Is Sued in Bias Claim*, *supra*, at B9. Wethersfield opened its doors to women in 1991, at which point, members' wives who had previously been restricted to limited tee times were allowed to apply for full membership on their own and receive unlimited playing status by paying a reduced initiation fee of \$4000. See Colin Poitras, *Judge Rules Club Did Not Discriminate*, HARTFORD COURANT, Aug. 18, 1998, at A3. The plaintiffs claimed that the requirement to pay the initiation fee discriminated against women and violated the Connecticut statute. *Id.* The Middletown Superior Court judge concluded that the initiation fee did not circumvent the legislation and that the fees were at or below the level charged by other country clubs for similar memberships. See *WCC Members for Fair Play v. Wethersfield Country Club, Inc.*, 1998 WL 646842, at \*5 (Conn. Super. Ct. Aug. 12, 1998) (unpublished per curiam); Poitras, *supra*, at A3. At the time of the lawsuit, of the 375 resident members, 374 were men. See *id.*

<sup>119</sup> See Chervin, *supra* note 18, at 179–80. Ironically, several powerful women in the state were opposed to the statute, while many males supported it. *Id.* at 179. The first female president of the Hartford Golf Club, Valerie Bulkeley, was quoted as saying, “I am opposed to discrimination obviously. But when it comes to the internal workings of a club, I think you have to work that out within the club.” *Id.* (citing Maxine Bernstein, *Female Golfers Looking to Strike Discrimination Aim to Eliminate Sex Based Biases at Private Clubs*, HARTFORD COURANT, Apr. 1, 1997, at A3). Chervin makes note that Bulkeley's statement does not take into account the fact that the majority of country clubs' governing boards are male and will most likely continue to discriminate against women unless they are prohibited from doing so by law. See *id.*

<sup>120</sup> See *id.* at 179–80. Connecticut State Representative Marilyn Hess, a member of the prestigious Greenwich Country Club, voted against the bill, saying, “why the legislature should have anything to do with it is beyond me.” *Id.* (citing Matthew Daly, *Bill Would Give Women Country-Club Equality*, HARTFORD COURANT, May 8, 1997, at A3).

join non-discriminatory clubs.<sup>121</sup> In the end, many legislators fully supported the bill and it was signed into law on January 1, 1998.<sup>122</sup>

Although Connecticut is not the first state to address the problem of discrimination at country clubs, its approach seems to be one of the most comprehensive in that it "provides specific legal and equitable remedies for a wronged party."<sup>123</sup> Other states that have statutes like Connecticut's may only ban discrimination against clubs' current members, while the Connecticut law uniquely prohibits a club from discriminating in member selection.<sup>124</sup> Additionally, instead of simply

<sup>121</sup> See *id.* at 180. In his testimony before the Connecticut State Assembly, State Representative Michael J. Jarjura questioned why a woman would want to join a discriminatory club. *Id.* at 180 n.32.

<sup>122</sup> See *id.* at 177, 180. The bill's sponsor, Representative Ellen Scalettar, asserted that "[p]eople are shocked this goes on in this day and age—but it does." See *id.* at 180. Connecticut Attorney General Richard Blumenthal lent his support to the bill, stating that, "clubs should be able to establish whatever rules they want," but that "the state should not be a participant where there is illegal discrimination." See *id.*

A recent case involving the Connecticut statute was decided in July, 2004. See generally *McNamara v. Tournament Players Club of Conn., Inc.*, 851 A.2d 1154 (Conn. 2004). In that case, Brian McNamara was a member of a golf club owned by the defendant and his membership was cancelled after he had a verbal dispute with another male member in the club's locker room. See *id.* at 1156. A few months later, his wife applied for membership in the club, but was denied. *Id.* The plaintiff alleged that the refusal to admit her was "because, and only because, she is a woman who is married to the plaintiff Brian McNamara." *Id.* The club contended that the denial of her application was based on her status as McNamara's spouse and had nothing to do with her gender. *Id.* at 1158. The Supreme Court of Connecticut agreed with the defendant and found that the rejection did not constitute gender discrimination in violation of § 52-571d. See CONN. GEN. STAT. ANN. § 52-571d; *McNamara*, 851 A.2d at 1164–65. Both plaintiffs testified that the atmosphere at the club was not discriminatory toward women, that she would have been admitted had she been married to someone else and the club had "never refused" an application by a woman. See *McNamara*, 851 A.2d at 1164.

<sup>123</sup> See Chervin, *supra* note 18, at 181.

<sup>124</sup> See CONN. GEN. STAT. ANN. § 52-571d; Chervin, *supra* note 18, at 181–82. For example, New Jersey passed a similar law on August 1, 1997. See N.J. STAT. ANN. § 10:5–12(f)(2) (West 2004); Chervin, *supra* note 18, at 181. The New Jersey law states that a private club or association cannot

directly or indirectly refuse, withhold from, or deny to any individual who has been accepted as a club member and has contracted for or is otherwise entitled to full club membership any of the accommodations, advantages facilities or privileges thereof, or to discriminate against any member in the furnishing thereof on account of the race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, disability or nationality of such person.

N.J. STAT. ANN. § 10:5–12(f)(2). This law's limited scope has apparently been effective in curbing gender discrimination against existing country club members. See Rosner, *supra* note 5, at 166. Nonetheless, the law does not concern discrimination against nonmembers or membership practices. See *id.* Because of this exclusion, "the New Jersey law does not



denying a discriminatory club governmental benefits, the Connecticut statute bans discrimination at clubs explicitly and entirely.<sup>125</sup>

A law like Connecticut's furthers the KCHR's goal of eliminating discrimination in its state because it provides a remedy and bans discrimination.<sup>126</sup> When comparing Kentucky's Revenue Code and *Pendennis* to the Connecticut law, it is clear that the Kentucky General Assembly could do more to end discriminatory practices in private clubs.<sup>127</sup> Such legislation would not just exempt these clubs from tax benefits, but would aid in the effectiveness of the KCHR and further its goal of eradicating discrimination in the state.<sup>128</sup>

### B. California

California has taken a different approach to help eliminate discrimination in private clubs as evidenced by the state's "public accommodation" statute.<sup>129</sup> This law, commonly known as the Unruh Act, states that, "[a]ll persons . . . are free and equal, no matter what their sex, race, color, religion, ancestry, national origin, or disability, or, medical condition [and] are entitled to full and equal accommodations, advantages, facilities, privileges or services in all business es-

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further the ultimate goal of prohibiting" discrimination in private clubs. See Chervin, *supra* note 18, at 182.

<sup>125</sup> See CONN. GEN. STAT. ANN. § 52-571d (West 2004); Chervin, *supra* note 18, at 182-83. In Iowa, for example, the Attorney General wrote an opinion stating that no personal tax deduction will be allowed "for Iowa income tax purposes, if a club imposes time and/or place limitations or restrictions upon the use of its services or facilities based upon age or sex." See 1992 Op. Iowa Att'y Gen. 126, 1992 WL 470349, at \*3 (Iowa A.G.); Chervin, *supra* note 18, at 182-83. The opinion makes clear that discrimination is not actually prohibited, but tax deductions will be denied to those "who patronize private clubs which employ such restrictions." See *id.* Iowa's practice is similar to the Kentucky Revenue Code and equally ineffective when compared to Connecticut's statute. See CONN. GEN. STAT. ANN. § 52-571d; KY. REV. STAT. ANN. § 141.010(11)(d)(13)(f) (LexisNexis 2003); Op. Iowa Att'y Gen., 1992 WL 470349, at \*3.

<sup>126</sup> See CONN. GEN. STAT. ANN. § 52-571d; Chervin, *supra* note 18, at 187; Our Mission, *supra* note 17.

<sup>127</sup> See CONN. GEN. STAT. ANN. § 52-571d; KY. REV. STAT. ANN. § 141.010(11)(d)(13)(f); *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784, 789 (Ky. 2004). Chervin alleges that Connecticut should be applauded for attempting to eradicate discrimination in country club membership because "discrimination on any level should not be condoned." Chervin, *supra* note 18, at 189. He goes on to praise the state's "courage . . . to take on these exclusive fortresses of wealth and power . . ." See *id.* at 189-90.

<sup>128</sup> See CONN. GEN. STAT. ANN. § 52-571d; Chervin, *supra* note 18, at 183; Our Mission, *supra* note 17.

<sup>129</sup> See CAL. CIV. CODE § 51 (West 2005); *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 777 (Cal. 1995).

tablishments of every kind whatsoever.”<sup>130</sup> Since the Unruh Act is very broad, judicial interpretation was needed to determine how the law would affect private clubs.<sup>131</sup> *Warfield v. Peninsula Golf and Country Club* provided this interpretation and can be looked at in comparison to *Pendennis* for how it furthers the eradication of discrimination.<sup>132</sup>

In *Warfield*, the plaintiff, Mary Ann Warfield, claimed that the Peninsula Golf and Country Club’s membership policies violated the Unruh Act because they excluded women from holding full Regular Family Memberships.<sup>133</sup> The plaintiff and her husband initially joined the club in 1970 when he was approved for a Regular Family Membership.<sup>134</sup> Her participation in the club increased over the years as she become a member of the “ladies golf team” and made valuable social and business relationships.<sup>135</sup> Warfield and her husband divorced in 1981, and she requested that the board of directors transfer the Regular Family Membership previously held by her husband into her name.<sup>136</sup> The board of directors refused her request and claimed that they were restricted by the club’s governing bylaws, at which point the

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<sup>130</sup> See CAL. CIV. CODE § 51. Jesse M. Unruh, nicknamed the “Big Daddy” of the California Legislature, served as state treasurer for twelve years and as Assembly Speaker for over seven years. Steve Lawrence, *Insider Sheds New Light on Tempestuous Unruh Years*, LA TIMES, Jan. 3, 1988, at 3. He was a white son of an illiterate Texas sharecropper and supported civil rights by introducing the Unruh Civil Rights Act in 1959. See CAL. CIV. CODE § 51; Kenneth Reich, *Unruh Eulogized as Protector and Political Teacher*, LA TIMES, Aug. 10, 1987, at 3.

<sup>131</sup> See CAL. CIV. CODE § 51; Rosner, *supra* note 5, at 160. Rosner, however, states that where the Civil Rights Act of 1964 is vague as to what defines a private organization, “the Unruh Act is unmistakably clear.” See *id.*

<sup>132</sup> See *Pendennis*, 153 S.W.3d at 789; *Warfield*, 896 P.2d at 798.

<sup>133</sup> See *Warfield*, 896 P.2d at 782. In 1981, the relevant time period for the case, the Peninsula Golf and Country Club’s facilities included a golf course, a driving range and putting greens, tennis courts, a swimming pool, a clubhouse and a dining room, several bars, a ballroom, and golf and tennis shops. *Id.* at 778. At this time, the club had a variety of membership packages, “each carrying its own distinct set of privileges with regard to use of the club’s facilities.” *Id.* The “Regular Family Membership,” the category at issue in the case, was limited to 350 members of the club. *Id.* at 780. Under Peninsula’s bylaws, the holders of a Regular Family Membership had the right to vote for the club’s board of directors, serve as a director, or help in the decision-making process as to who can become new members. *Id.* These members also enjoyed the most privileges in regards to the club’s facilities. See *id.* In March 1970, the club’s bylaws were amended to limit Regular Family Memberships to “adult male persons” and not to “females or minors.” See *id.* at 781.

<sup>134</sup> See *id.* The selection process for membership involved an application, sponsorship by existing members, reviews by committees, a credit check and a final approval by the board of directors. *Id.*

<sup>135</sup> See *id.* at 781–82.

<sup>136</sup> See *id.* at 782. In the plaintiff’s divorce settlement, she was awarded “all right, title and interest in and to the membership of Dr. and Mrs. Warfield in the Peninsula Golf and Country Club.” *Id.*

plaintiff filed a complaint for damages and injunctive relief.<sup>137</sup> The issue before the California Supreme Court was whether the club qualified as a “business establishment” under the Unruh Act.<sup>138</sup>

The plaintiff argued that by looking at the specific attributes of the club, the court could conclude that it was a business establishment and not truly private.<sup>139</sup> For example, she contended that the size of the membership, “700 members plus their spouses and children” was too large to meet selective standards.<sup>140</sup> She also argued that since non-members could enjoy the club’s pro-golf and tennis shops as well as “sponsored events,” the club was inherently not exclusive to members.<sup>141</sup> The Court agreed with the plaintiff and found that the club’s members derived a direct and indirect financial benefit from the club’s business transactions with non-members.<sup>142</sup> With this reasoning, the Court held that the Peninsula Club was a business establishment, not a private organization, and therefore had to comply with the Unruh Act.<sup>143</sup>

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<sup>137</sup> See *id.* at 782. At the time of the lawsuit, the club’s bylaws provided that upon termination of the marriage of a Regular Family Member, “the Husband shall continue to be the Regular Family Member, and all rights, privileges and obligations shall be his.” *Id.* at 781. The bylaws specify that, “[i]n the event of an award of the Certificate of Regular Family Membership in the final judicial action to the female spouse, and the male spouse does not forthwith thereafter purchase the female spouse’s interest . . . such Membership may, by action of the Board, be terminated.” *Id.* Interestingly, when the board of directors reviewed the plaintiff’s request in October, 1981, the club’s membership committee recommended to transfer the membership to her. *Id.* at 782.

<sup>138</sup> See CAL. CIV. CODE § 51; *Warfield*, 896 P.2d at 783.

<sup>139</sup> See *Warfield*, 896 P.2d at 792, Rosner, *supra* note 5, at 161–62.

<sup>140</sup> See *Warfield*, 896 P.2d at 792, Rosner, *supra* note 5, at 161.

<sup>141</sup> See *Warfield*, 896 P.2d at 792, Rosner, *supra* note 5, at 162. The plaintiff also claimed that the fact that only half of the members governed the club and membership selection showed that her entrance into the club would not affect the governance of the club. See *Warfield*, 896 P.2d at 792, Rosner, *supra* note 5, at 161–62. Lastly, she maintained that “the opportunity for obtaining advantageous business contacts” was a vital element of her own membership, which displayed that the purpose could be viewed as business instead of social. *Warfield*, 896 P.2d at 792, Rosner, *supra* note 5, at 162.

<sup>142</sup> See *Warfield*, 896 P.2d at 779, 793; Kamp, *supra* note 39, at 103. The Court emphasized that the income derived from nonmembers was a product of “regular and repeated” business transactions. See *Warfield*, 896 P.2d at 793 n.11. Isolated fundraisers would thus probably not make a private club a business establishment. See *id.*

<sup>143</sup> See *Warfield*, 896 P.2d at 798; Kamp, *supra* note 39, at 103. Some have argued that all clubs that are used in furtherance of any kind of business opportunity should be categorized as a public accommodation. See Jolly-Ryan, *supra* note 8, at 517. Jolly-Ryan, for example, contends that by narrowly defining a private club, these clubs will be forced to abide by the nondiscrimination rules for public accommodations and eventually, “the last stronghold of legal segregation” would be eliminated. See *id.* at 517–18.

While not as comprehensive as Connecticut's statute, the Unruh Act is written so broadly that many private clubs fall within its reach.<sup>144</sup> The *Warfield* Court noted that a private club "is not automatically exempt from the strictures of [the statute] simply because it characterizes itself as a 'private social club.'"<sup>145</sup> These words suggest the power of the Unruh Act, and show that such a statute might be a more effective route for a state like Kentucky to combat discrimination.<sup>146</sup> Private golf clubs are scrutinized under such a law, and if found to be business establishments, are forbidden from using discriminatory membership practices.<sup>147</sup> This kind of sanction is more meaningful than a prohibition of tax deductions and consequently, may better accomplish the KCHR's goal.<sup>148</sup>

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<sup>144</sup> See CAL. CIV. CODE § 51; CONN. GEN. STAT. ANN. § 52-571d; Rosner, *supra* note 5, at 160. Although California's decision to prohibit discrimination in private country clubs that qualify as business establishments was a courageous step, it has been criticized for not creating a clear rule as to when a private club constitutes a business establishment for the purposes of the Unruh Act. See *Warfield*, 896 P.2d at 798; Chervin, *supra* note 18, at 186. The *Warfield* court did, however, consider several factors to determine whether a club is private or public, and other states could use these factors to make their statutes more specific. See Rosner, *supra* note 5, at 161. These factors were: (1) the selectivity of the group in the admission of members, (2) the size of the group, (3) the degree of membership control over the governance of the organization, (4) the degree to which club facilities are available for use by nonmembers, and (5) whether the primary purpose served by the club is social or business. See *Warfield*, 896 P.2d at 791-92.

<sup>145</sup> *Warfield*, 896 P.2d at 791.

<sup>146</sup> See *id.*; Rosner, *supra* note 5, at 161. Rosner states that the *Warfield* Court's warning that private clubs are not automatically exempt from the Unruh Act is an "important distinction" since "any establishment, no matter what its true purpose, could claim to be a private club in order to escape the legal burden of equal rights." See Rosner, *supra* note 5, at 161.

<sup>147</sup> See CAL. CIV. CODE § 51; *Warfield*, 896 P.2d at 798.

<sup>148</sup> See *Kamp* *supra* note 39, at 106 (see discussion *supra* note 108); *Our Mission*, *supra* note 17. Massachusetts recently dealt with a case similar to *Warfield* when nine women brought a sex discrimination case against a suburban Boston country club, alleging it engaged in discrimination by offering them limited memberships. See *Borne v. Haverhill Golf & Country Club, Inc.*, No. 966511C, 1999 WL 1411366, at \*1 (Mass. Super. Nov. 19, 1999) (unpublished per curiam); Rosner, *supra* note 5, at 162-63. The women sued under a state statute that prohibits places of public accommodation from discriminating against "persons of any religious sect, creed, class, race, color, denomination, sex, sexual orientation . . . in the full enjoyment of the accommodations . . . offered to the general public by such places of public accommodation, resort or amusement." MASS. GEN. LAWS ch. 272, § 92A (2000). The statute defines a place of public accommodation as a place "which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be . . . a place of public amusement, recreation, sport, exercise or entertainment." *Id.*

The plaintiffs successfully argued that they had suffered gender discrimination at the private club in violation of state law and a unanimous jury awarded them \$1.97 million. See Rosner, *supra* note 5, at 162. The women described the discrimination through a variety of

### C. Michigan

Michigan has used a different method to tackle the problem of private club discrimination.<sup>149</sup> While it is not as direct and inclusive as Connecticut's statute, it has been effective in bringing about equality for minorities in private clubs.<sup>150</sup> Michigan's law prohibits private clubs from denying individuals equal access to the club's facilities.<sup>151</sup> Additionally, Michigan's Elliot-Larson Civil Rights Act (MELCRA) specifically includes private country clubs within the definition of a

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evidentiary examples, including the fact that the only package available to women was the limited membership, which meant they were denied tee times on weekend mornings and during predetermined weekday blocks. *See Borne*, 1999 WL 1411366, at \*2; Rosner, *supra* note 5, at 163. The Club limited the number of primary members, which received unlimited tee time access to 320 members, of which only four were women at the time of the case. *See Rosner*, *supra* note 5, at 163. Additionally, if a woman tried to change her membership package, she had to pay an initiation fee, while a man making a similar change did not have to pay. *See Borne*, 1999 WL 1411366, at \*4; Rosner, *supra* note 5, at 164. Because the club also rented out three function rooms to the public for banquets and meetings, it was found to be a place of public accommodation and subject to state law. *See Borne*, 1999 WL 1411366, at \*3; Rosner, *supra* note 5, at 162–63.

After many post-trial motions, Judge John Cratsley of the Massachusetts Superior Court issued a permanent injunction prohibiting Haverhill Golf and Country Club from “making any distinction, restriction, or discrimination on the basis of sex in relation to any rights, benefits, services, and/or privilege at the club.” *See Rosner*, *supra* note 5, at 164. He also demanded that the club provide gender discrimination avoidance training to its board members, keep records of its membership and wait lists, disclose the process of members' rights to prospective applicants and provide the judge with reports of the application process. *See id.* The Appeals Court of Massachusetts affirmed the trial court's decision in 2003 and the state's Supreme Judicial Court refused to review the case. *See Borne v. Haverhill Golf & Country Club, Inc.*, 440 Mass. 1101, 1101 (2003); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 919 (Mass. App. Ct. 2003).

Interestingly, the women started the case by filing a complaint with the Massachusetts Commission Against Discrimination, the state's version of the KCHR. *See Rosner*, *supra* note 5, at 164; Lynn Rosellini, *‘Those women’ vs. the ‘Neanderthals’*, *Gender Politics at a Massachusetts Golf Club*, U.S. NEWS & WORLD REP., June 12, 2000, at 56. At that time, a bar called the 19th Hole was open only to male members, but after the complaint, women were given equal access to the bar. *See id.* The plaintiffs claimed in the law suit, however, that they were still discouraged from entering, thus adding to the discrimination. *See Rosner*, *supra* note 5, at 164. An article written about the case shortly after the judgment, illustrated that feelings at the club had grown worse. *See Rosellini*, *supra*, at 56. One of the litigants described being “shunned” on the golf course and the author noted that “[m]ore than seven months after the court ruling, the atmosphere inside the 19th Hole could ice the Budweiser behind the bar.” *Id.*

<sup>149</sup> *See* MICH. COMP. LAWS ANN. §§ 37.2301–2303 (West 2001).

<sup>150</sup> *See* CONN. GEN. STAT. ANN. § 52-571d (West 2004); Rosner, *supra* note 5, at 166.

<sup>151</sup> *See* MICH. COMP. LAWS ANN. § 37.2302(a). The law states in relevant part that a person shall not “[d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.” *Id.*

place of public accommodation.<sup>152</sup> MELCRA was amended in 1992 to ensure that country, yachting and sports clubs were included in places of public accommodation.<sup>153</sup> The amendment was adopted in order to eliminate exclusionary practices at private clubs, such as golf clubs restricting certain times that spouses, typically wives, of members could use certain facilities.<sup>154</sup>

On its face, Michigan's approach appears to be comprehensive in that it specifically states that a country club is a place of public accommodation, but a closer reading reveals that the statute applies to the *facilities* of private clubs and therefore might not protect against discrimination in membership practices.<sup>155</sup> *The Benevolent and Protective Order of the Elks v. Reynolds* exemplifies this idea and suggests the statute's shortcomings.<sup>156</sup> In that case, the plaintiff, representing seventy-three Michigan lodges of the Elks Club along with 50,000 members of those lodges, brought suit against the director of Michigan's Department of Civil Rights, alleging that MELCRA violated the Elks Club's rights to intimate and expressive association "by prohibiting its gender-based membership requirements and precluding its use of the private club exemption."<sup>157</sup>

Although the District Court acknowledged that the state legislature enacted the law to prohibit private clubs from restricting women from certain facilities and found that the law did not violate the Elks'

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<sup>152</sup> See MICH. COMP. LAWS ANN. § 37.2301(a)(i). MELCRA reads:

"Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

Place of public accommodation also includes the facilities of the following private clubs: (i) A country or golf club . . . .

*Id.*

<sup>153</sup> See MICH. COMP. LAWS ANN. § 37.2301(a)(i)-(a)(iv).

<sup>154</sup> See *Benevolent & Protect. Order of Elks v. Reynolds*, 863 F.Supp. 529, 531 (W.D. Mich. 1994) (explaining the purpose and history behind the amendment to MELCRA). The statute involves the liquor license laws and provides that if a club does not comply with the provisions, the state can deny renewal of its liquor license. See MICH. COMP. LAWS ANN. § 37.2304 (West 2001).

<sup>155</sup> See MICH. COMP. LAWS ANN. § 37.2301(a)(i); Kamp, *supra* note 39, at 104.

<sup>156</sup> See *Reynolds*, 863 F.Supp. at 533.

<sup>157</sup> See MICH. COMP. LAWS ANN. §§ 37.2301-2303; *Reynolds*, 863 F.Supp. at 530. The rules of the Elks Club provided that an applicant for membership must be a male citizen of the United States who is at least 21 years old, a believer in God, "of good character, not affiliated with the Communist Party, and does not advocate the forceful overthrow of the government." *Reynolds*, 863 F.Supp. at 530.

right of intimate and expressive association, the court ultimately found that no genuine issue of material fact existed.<sup>158</sup> The court held that MELCRA did not require the club to admit women as new members because it only applied to individuals who were current members of that private club.<sup>159</sup> Under *Reynolds*, the Elks Club was essentially prohibited from providing unequal access of its facilities to its current members or in other words, the club could not discriminate against men.<sup>160</sup> *Reynolds* has been criticized as hindering equal rights in private clubs.<sup>161</sup>

Four years later, however, another case that involved the Elks Club and MELCRA had a very different and more effective result in terms of eliminating discrimination.<sup>162</sup> *Schellenberg v. Rochester, Michigan Lodge No. 2225, of the Benevolent and Protective Order of the Elks* involved a woman who applied for membership to the Elks Club and was denied because of her gender.<sup>163</sup> She brought the action, claiming she was denied the full and equal enjoyment of the services of a place of public accommodation on the basis of gender in violation of MELCRA.<sup>164</sup> The defendant, on the other hand, argued that it was a private club exempt from the act.<sup>165</sup>

After a decision in favor of the plaintiff and a subsequent appeal, the defendant was ordered to reconsider the plaintiff's application without consideration of gender.<sup>166</sup> In 1994, seventy-one members of

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<sup>158</sup> See *Reynolds*, 863 F.Supp. at 531, 534 (holding that the statute does not affect the clubs' membership policies and practices because the statute only applies to the facilities of private clubs).

<sup>159</sup> See *id.* at 533; Kamp, *supra* note 39, at 104.

<sup>160</sup> See *Reynolds*, 863 F.Supp. at 533.

<sup>161</sup> See Kamp, *supra* note 39, at 104. Kamp points out that the case never looked at the issue of whether a liquor license should be denied because it was not found that the Elks Club violated MELCRA. *Id.* She calls the decision "a major set-back for women's rights" because the District Court discovered this "flaw" in the statute. *Id.*

<sup>162</sup> See *Schellenberg v. Rochester, Michigan Lodge No. 2225, of the Benevolent & Prot. Order of Elks of the United States of Am.*, 577 N.W.2d 163, 166 (Mich. Ct. App. 1998).

<sup>163</sup> See *Schellenberg*, 577 N.W.2d at 166.

<sup>164</sup> See MICH. COMP. LAWS ANN. § 37.2101; *Schellenberg*, 577 N.W.2d at 166.

<sup>165</sup> See MICH. COMP. LAWS ANN. § 37.2303; *Schellenberg*, 577 N.W.2d at 166. This section of the statute states that the "article shall not apply to a private club, or other establishment not in fact open to the public . . ." MICH. COMP. LAWS ANN. § 37.2303. It also makes clear that the particular section does "not apply to a private club that is otherwise defined as a place of public accommodation in this article." *Id.*

<sup>166</sup> See *Schellenberg*, 577 N.W.2d at 166. In 1989, the trial court found the Elks Club's gender-based rejection of Schellenberg's application a violation of MELCRA and the defendant appealed. *Id.* The Court of Appeals found the club to be a place of public accommodation and public service and that it "lacked the selectivity necessary to be considered a private club exempt from the act." See MICH. COMP. LAWS ANN. § 37.2302; *Schellenberg*, 577

the Elks voted on plaintiff's application for membership and fifty-eight voted against her becoming a member.<sup>167</sup> On the same evening, they voted on seven male applicants and all were approved as new members.<sup>168</sup> A week later, the plaintiff asked the trial court to order the club to accept her membership "with full and equal enjoyment of the services, facilities, privileges, and advantages and that the Elks . . . be permanently enjoined from denying her the full and equal enjoyment of the club as long as she continued to pay her dues."<sup>169</sup> The court found in favor of the plaintiff, holding that the evidence established her *prima facie* case that she was treated differently because of her sex.<sup>170</sup>

The Court of Appeals affirmed the trial court's holding and ordered that the plaintiff be admitted as a member.<sup>171</sup> It found that she was a member of a protected class under the statute and that the Elks had been deemed a place of public accommodation.<sup>172</sup> In establishing the *prima facie* case, the Court of Appeals held that the defendant was predisposed to discriminate against women because of its rules and that the club acted upon that predisposition when the plaintiff's application was denied.<sup>173</sup>

Unlike *Reynolds*, *Schellenberg* suggests that Michigan's statute can be extremely effective in eliminating discrimination in private clubs.<sup>174</sup> By specifically including country clubs as a place of public accommodation, these clubs are prohibited from using discriminatory practices.<sup>175</sup> Additionally, cases like *Schellenberg* are a good warning to these clubs.<sup>176</sup> In light of these facts, Michigan's route appears to be more effective than denying tax deductions and might better suit Kentucky's goal of eradicating discrimination throughout the state.<sup>177</sup>

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N.W.2d at 166. Since the defendant was to be held to the standards of MELCRA, the trial court's order that the defendant reconsider her application was affirmed. *See Schellenberg*, 577 N.W.2d at 166.

<sup>167</sup> *See Schellenberg*, 577 N.W.2d at 166.

<sup>168</sup> *See Schellenberg v. Rochester*, Michigan Lodge No. 2225, of the Benevolent & Prot. Order of Elks of the United States of Am., 577 N.W.2d 163, 166 (Mich. Ct. App. 1998).

<sup>169</sup> *Id.* at 166-67.

<sup>170</sup> *See id.* at 167. The trial court stated that, "men who are otherwise qualified are admitted routinely, [but] [p]laintiff's application was overwhelmingly rejected by men who did not know her." *Id.*

<sup>171</sup> *See id.* at 166.

<sup>172</sup> *Id.*

<sup>173</sup> *Schellenberg v. Rochester*, Michigan Lodge No. 2225, of the Benevolent & Prot. Order of Elks of the United States of Am., 577 N.W.2d 163, 166 (Mich. Ct. App. 1998).

<sup>174</sup> *See id.* at 166, 169; *Reynolds*, 863 F.Supp at 534.

<sup>175</sup> *See* MICH. COMP. LAWS ANN. § 37.2301(a)(i); Rosner, *supra* note 5, at 171.

<sup>176</sup> *See Schellenberg*, 577 N.W.2d at 166, 169.

<sup>177</sup> *See* MICH. COMP. LAWS ANN. §§ 37.2301-2303; Our Mission, *supra* note 17.



### D. Louisiana

Like many other states, Louisiana mentions the rights of private clubs in its public accommodations statute.<sup>178</sup> It is the only state, however, that explicitly identifies specific criteria for determining when a club is truly private.<sup>179</sup> To determine whether an organization is a private club for purposes of the law, the factors to be considered are: (1) selectiveness of the group in adding new members; (2) existence of formal membership procedures; (3) degree of membership control over internal governance; (4) history of organization; (5) use of club facilities by nonmembers; (6) substantiality of dues; (7) whether the organization advertises; and (8) predominance of a profit motive.<sup>180</sup> By stating specific factors, the Louisiana law provides a successful example of how to deal with country club discrimination, as illustrated by recent case law.<sup>181</sup>

In *Albright v. Southern Trace Country Club of Shreveport*, female members of the club challenged the club's policy of restricting the use of a dining area known as the "Men's Grille" to men only.<sup>182</sup> The trial court found in favor of the club, but the Court of Appeal reversed and granted the plaintiffs declaratory and injunctive relief.<sup>183</sup> The Supreme Court of Louisiana looked at the statutory requirements to determine if the club was a place of public accommodation

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<sup>178</sup> See LA. REV. STAT. ANN. § 49:146; Paula J. Finlay, Note, *Prying Open the Clubhouse Door: Defining the "Distinctly Private" Club After New York State Club Association v. City of New York*, 68 WASH. U. L.Q. 371, 383–84 (1990).

<sup>179</sup> See LA. REV. STAT. ANN. § 49:146; Finlay, *supra* note 178, at 384. The law states, "[i]n access to public areas, public accommodations, and public facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical or mental disability." See LA. REV. STAT. ANN. § 49:146 § 49:146.

<sup>180</sup> See LA. REV. STAT. ANN. § 49: 146 (3) (a)–(h).

<sup>181</sup> See *id.*; *Albright v. S. Trace Country Club of Shreveport, Inc.*, 879 So.2d 121, 138 (La. 2004).

<sup>182</sup> See *Albright*, 879 So.2d at 123. On March 26, 2000, four female members tried to get food service at the club and the Men's Grille was the only restaurant facility open on Sundays. See *id.* at 126. The women entered the Men's Grille and shortly after, they were approached by male employees who informed them they were not allowed in the Grille because they were women. *Id.* They were told they would not be served and were asked to leave the restaurant. *Id.* As the women were leaving, a member of the club yelled, "[d]on't let the door hit you on the ass on your way out." *Id.* When the women asked about the policy in the past, a former member of the Board of Directors told them that the Men's Grille atmosphere would offend "ladies" because "all those men do in there is spit, scratch, and cuss." *Id.*

<sup>183</sup> See *id.* at 123. The Supreme Court of Louisiana granted a writ to determine if the court of appeal used the proper standard of review and who had the burden of proof in such a case. *Id.*

and concluded that Southern Trace was a public facility, thus affirming the Court of Appeal decision.<sup>184</sup> While criticizing the club's policies, the Court said that the Men's Grille was "based on an inaccurate, stereotypical depiction of male behavior" and that the state's laws "espouse certain aspirational goals which limit gender discrimination" and these goals "impose an obligation to avoid arbitrary, capricious, or unreasonable discrimination based on gender."<sup>185</sup>

*Albright* is a positive decision in that it recognizes the need to fight discrimination and uses the specific factors in the Louisiana statute to arrive at its conclusion.<sup>186</sup> The goals mentioned in the case are the same as the KCHR and, once again, reflect another avenue for states like Kentucky to pursue in order to eliminate discrimination.<sup>187</sup>

#### IV. RECOMMENDATIONS

The *Pendennis* decision reflected the need to allow equal access to private clubs when it held that the KCHR has the statutory authority to investigate private clubs to determine if they discriminate in their membership practices.<sup>188</sup> The Kentucky Court made clear, however, that private clubs in the state have the right to "discriminate in affording the benefits of membership without fear of legal liability."<sup>189</sup> Instead of prohibiting discrimination in clubs, if such conduct is found by the KCHR, club members will be prohibited from deducting club payments on their state taxes.<sup>190</sup> At the very least, in order to provide equal access, states should not subsidize the private clubs that discriminate by providing tax exemptions and other government benefits that are in actuality funded by society.<sup>191</sup> It is questionable, how-

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<sup>184</sup> See LA. REV. STAT. ANN. § 49:146 (3) (a)–(h); *Albright*, 879 So.2d at 128. The Court mentioned the eight factors and found that there was no selectiveness in the addition of new members and no evidence of membership requirements other than the ability to pay dues. See *Albright*, 879 So.2d at 128. Additionally, the members did not have a voice in governance of the club, club facilities were consistently used by nonmembers, there was a considerable amount of advertising and there was a profit motive. *Id.*

<sup>185</sup> See *Albright*, 879 So.2d at 137–38.

<sup>186</sup> See LA. REV. STAT. ANN. § 49:146 (3) (a)–(h) (West 2003); *Albright*, 879 So.2d at 138.

<sup>187</sup> See *Albright*, 879 So.2d at 138; Our Mission, *supra* note 17. The Louisiana Supreme Court notes that the provisions of § 49:146 "provide an appropriate guide and analytical tool for the courts' use in delineating between a public facility and a private club." See *Albright*, 879 So.2d at 128.

<sup>188</sup> See *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784, 789 (Ky. 2004).

<sup>189</sup> See *id.* at 785.

<sup>190</sup> See *Kentucky Supreme*, *supra* note 80, at 1.

<sup>191</sup> See Jolly-Ryan, *supra* note 8, at 528–29. Many states, including Illinois, Maine, New Hampshire, New Jersey, New Mexico, and Utah, mandate holders of liquor licenses to

ever, if this route in and of itself is the most effective way to end discrimination in private clubs.<sup>192</sup> The recommendations below suggest alternative ways for states like Kentucky to accomplish the goal of eradicating discrimination.<sup>193</sup>

### A. *Following the States*

Although a good solution to end country club discrimination would be federal legislation that specifically prohibited the clubs from doing so, the likelihood of such legislation being passed is slim.<sup>194</sup> While new state legislation might also be difficult to pass for similar reasons, the end result of helping to eradicate discrimination may outweigh the fact that some state legislators are members of country clubs themselves.<sup>195</sup>

An examination of the ways other states have handled country club discrimination demonstrates that the state of Kentucky can do more to accomplish the KCHR's goal of eradicating discrimination in the state.<sup>196</sup> A statute like Connecticut's would be the most effective in eliminating discrimination since it explicitly forbids country clubs from discriminating against nonmembers as well as current members, creates a private right of action for enforcement, and allows for revocation of a club's liquor license.<sup>197</sup> It was a bold step for Connecticut "to take on these exclusive fortresses," and such a law in Kentucky

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refrain from discriminating against women and minorities and threaten to confiscate the licenses of clubs engaging in such behavior. *See* Rosner, *supra* note 5, at 173. Rosner contends that since socializing with friends is a benefit of club membership, the loss of alcohol at clubs would likely result in members spending less time at the country club. *Id.* at 174. On the other hand, Kamp argues that denying property tax exemptions is the most preferable of state laws that eliminate government benefits to discriminatory clubs "because it avoids the associational defense which is often brought by private clubs." *See* Kamp, *supra* note 39, at 107.

<sup>192</sup> *See* Kamp, *supra* note 39, at 106.

<sup>193</sup> *See* Our Mission, *supra* note 17.

<sup>194</sup> *See* Rosner, *supra* note 5, at 170. Rosner argues that new federal legislation is unlikely because many legislators are members of country clubs and many financial contributors to political campaigns are members of country clubs who would probably disfavor an act that negatively affected their interests. *See id.* at 171.

<sup>195</sup> *See id.* at 170–71. Rosner points out that state courts "champion equality at the expense of liberty." *See id.* at 171.

<sup>196</sup> *See* CAL. CIV. CODE § 51 (West 2005); CONN. GEN. STAT. ANN. § 52-571d (West 2004); LA. REV. STAT. ANN. § 49:146; MICH. COMP. LAWS ANN. §§ 37.2301–.2303 (West 2001); Our Mission, *supra* note 17.

<sup>197</sup> *See* CONN. GEN. STAT. ANN. § 52-571d.

would certainly help end discrimination in the types of clubs challenged in *Pendennis*.<sup>198</sup>

Instead of enacting an entirely new statute similar to Connecticut's, Kentucky could amend its public accommodation statute to further the goal of eliminating discrimination.<sup>199</sup> Kentucky could adopt a law similar to California's Unruh Act, which would be effective in ending prejudicial practices since state courts that have applied public accommodations laws to private clubs "have consistently held that the clubs are subject to these laws."<sup>200</sup> A law like the Unruh Act could be broad enough to reach country clubs and therefore help eradicate discrimination.<sup>201</sup>

Kentucky could also amend its public accommodation statute to be more like Michigan's, which specifically includes private country clubs within the definition of a place of public accommodation and demands that such clubs allow equal access to the facilities to all its members.<sup>202</sup> This law was successful in granting a female plaintiff membership into the all-male Elks Club and could therefore further the KCHR's goal.<sup>203</sup> Alternatively, Kentucky could be the second state, after Louisiana, to amend its statute to add specific factors to consider for determining if a club is private.<sup>204</sup> The Louisiana criteria gives courts a helpful guideline and can be interpreted to force country clubs to comply with the nondiscrimination provisions of the statute.<sup>205</sup> These options present the opportunity for Kentucky to go further to eliminate discrimination at country clubs and ultimately help accomplish the KCHR's goal.<sup>206</sup>

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<sup>198</sup> See *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784, 786 (Ky. 2004); Chervin, *supra* note 18, at 189-90.

<sup>199</sup> See KY. REV. STAT. ANN. § 344.130 (LexisNexis 1997); Rosner, *supra* note 5, at 171.

<sup>200</sup> See CAL. CIV. CODE § 51; Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 798 (Cal. 1995); Rosner, *supra* note 5, at 171.

<sup>201</sup> See *id.*

<sup>202</sup> See MICH. COMP. LAWS ANN. §§ 37.2301-2303.

<sup>203</sup> See *Schellenberg v. Rochester, Michigan Lodge No. 2225, of the Benevolent & Prot. Order of Elks of the United States of Am.*, 577 N.W.2d 163, 169 (Mich. Ct. App. 1998); *Our Mission*, *supra* note 17.

<sup>204</sup> See LA. REV. STAT. ANN. § 49:146.

<sup>205</sup> See *Albright v. S. Trace Country Club of Shreveport, Inc.*, 879 So.2d 121, 128 (La. 2004).

<sup>206</sup> See CAL. CIV. CODE § 51; CONN. GEN. STAT. ANN. § 52-571d; LA. REV. STAT. ANN. § 49:146; MICH. COMP. LAWS ANN. §§ 37.2301-2303; Kamp *supra* note 39, at 106 (see discussion *supra* note 108); *Our Mission*, *supra* note 17.

### B. *Following the Leaders and Internal Change*

While litigation and existing or new legislation may lead to the end of discrimination in private country clubs, it is important to consider alternative methods of combating discriminatory policies as well.<sup>207</sup> In any particular state, for example, local officials and representatives should have the courage not to join exclusive all-white or all-male clubs.<sup>208</sup> Additionally, professional athletes should be encouraged to be socially responsible when choosing events in which they compete.<sup>209</sup> Leading by example may effectuate change.<sup>210</sup>

Perhaps the most effective and simple way to end discriminatory practices in private clubs is through the insistence of the club's own members.<sup>211</sup> The members usually have the power and influence to pressure the club to change its policies.<sup>212</sup> While internal change appears simple in theory, it is actually difficult due to the long tradition of discrimination within country clubs and the personal risks that come along with pushing for new practices.<sup>213</sup> Looking at these meth-

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<sup>207</sup> See Rosner, *supra* note 5, at 172. Such "back door" alternatives include "the curtailment of the many government benefits and privileges afforded country clubs." *Id.*

<sup>208</sup> See Jolly-Ryan, *supra* note 8, at 527. Jolly-Ryan remarks that a candidate running for political office should take into consideration an "exclusive private club membership as a possible skeleton in the closet." *Id.*

<sup>209</sup> See Rosner, *supra* note 5, at 184. Interestingly, using professional athletes to combat discrimination has been done in the past. *Id.* Golf legend Tom Watson withdrew his membership at the Kansas City Country Club when it rejected Henry Block because he was Jewish and tennis star Serena Williams refused to play in the 2000 Family Circle Cup in South Carolina during an NAACP-led boycott surrounding the presence of the Confederate flag waving atop the state capitol building. *Id.* If a player like Tiger Woods threatened to boycott a tournament played at a discriminatory club, the club would either have to change its policies "or host a tournament missing the sport's biggest drawing card." See *id.* at 186.

<sup>210</sup> See *id.* Rosner argues that professional golf tours might help end discrimination at the country clubs that host their tournaments by "making their membership requirements more rigorous and then imposing harsh sanctions on clubs that refuse to comply." Rosner, *supra* note 5, at 183. The Country Club in Brookline, Massachusetts, for example, of which only two of the 1,300 members are African-American, was awarded the 2005 PGA Championship, but was unable to accommodate the size of the event. *Id.* at 181-83. If the PGA changed its direction and decided not to consider such a club as a host, the threat would bring negative publicity and might force the club to change its policies. *Id.* at 183.

<sup>211</sup> See Jolly-Ryan, *supra* note 8, at 529.

<sup>212</sup> See *id.* at 527-28.

<sup>213</sup> See Rosner, *supra* note 5, at 187; Rosellini, *supra* note 148, at 56. A member who objects to club practices may end up feeling ostracized or lose business from other members as a result. See Rosner, *supra* note 5, at 187-88. The women who successfully challenged the discrimination at Haverhill Golf and Country Club lost friendships and business contacts after the trial and several of the plaintiffs eventually resigned as members of the club. See

ods collectively in concert with the potential to amend or enact legislation, demonstrates that Kentucky can and should go further to eliminate discrimination at private country clubs.<sup>214</sup>

### CONCLUSION

Private country clubs are places "where contacts are made, corporate postures are relaxed, and deals are formed."<sup>215</sup> Because of the business connection to these clubs, as well as the fact that there is a long tradition of discrimination in American country clubs against racial minorities and women, litigation and legislation have been launched to help minorities gain the equal advantage that white men have long enjoyed.<sup>216</sup> While many private clubs claim that they are private and thus able to operate free from government sanction, this is not always the case, and "the desire to attain equality for all members of society should take priority over the liberty interests of the country club."<sup>217</sup>

The *Pendennis* decision held that the KCHR has the statutory authority to investigate private clubs to determine if they discriminate in their membership practices.<sup>218</sup> The Kentucky Court made note, however, that private clubs still have the right to "discriminate in affording the benefits of membership without fear of legal liability."<sup>219</sup> Instead of prohibiting discrimination in clubs, after an investigation by the KCHR, discriminatory club members are prohibited from deducting club payments on their state taxes.<sup>220</sup>

The goal of the KCHR is to eradicate discrimination in the Commonwealth of Kentucky and although *Pendennis* is a step toward accomplishing this goal, a look at other state's reactions to country club discrimination demonstrates that Kentucky could and should do more to further the KCHR's goal.<sup>221</sup> Other states explicitly prohibit

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*Borne v. Haverhill Golf & Country Club, Inc.*, No. 966511C, 1999 WL 1411366, at \*1 (Mass. Super. Nov. 19, 1999) (unpublished per curiam); Rosner, *supra* note 5, at 187-88.

<sup>214</sup> See Our Mission, *supra* note 17.

<sup>215</sup> See Kamp, *supra* note 39, at 107.

<sup>216</sup> See *id.*; Rosner, *supra* note 5, at 136. Rosner argues that country club discrimination should be given the recognition it deserves and "the legal, economic, and social support that is needed to make true change possible." Rosner, *supra* note 5, at 192.

<sup>217</sup> See *id.* at 136, 192.

<sup>218</sup> See *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784, 789 (Ky. 2004).

<sup>219</sup> See *id.* at 785.

<sup>220</sup> See *Kentucky Supreme*, *supra* note 80, at 1.

<sup>221</sup> See CAL. CIV. CODE § 51 (West 2005); CONN. GEN. STAT. ANN. § 52-571d (West 2004); LA. REV. STAT. ANN. § 49:146 (West 2003); MICH. COMP. LAWS ANN. §§ 37.2301-.2303 (West 2001); Kamp *supra* note 39, at 106 (see discussion *supra* note 108); Our Mission, *supra* note 17.

discrimination in country clubs, broadly define public accommodation, include country clubs as a place of public accommodation or list factors to take into consideration when determining if a club is truly private.<sup>222</sup> Such statutes, when looked at collectively with other alternative measures, appear to better accomplish the goal of eradicating discrimination.<sup>223</sup> Alternative legislation would demand that “[a]ll private clubs in Kentucky . . . sit up and take notice.”<sup>224</sup>

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<sup>222</sup> See CAL. CIV. CODE § 51; CONN. GEN. STAT. ANN. § 52-571d; LA. REV. STAT. ANN. § 49:146; MICH. COMP. LAWS ANN. §§ 37.2301-2303.

<sup>223</sup> See Rosner, *supra* note 5, at 170-92.

<sup>224</sup> See *Kentucky Supreme*, *supra* note 80, at 2.

