JUDICIAL INTERVENTION IN THE CONDUCT OF PRIVATE ASSOCIATIONS: BASES FOR THE EMERGING TREND OF JUDICIAL ACTIVISM

I. INTRODUCTION

The last century has seen a dramatic increase in the size and number of voluntary associations[1] in the United States. These associations now encompass such diverse groups as bankers and bar owners, farmers and cemetary managers, doctors and athletes, to name only a few.[2] Understandably, the expanding presence of such voluntary groups has had its concomitant effect, in their detrimental impact upon the lives of members and nonmembers alike.

Although it is impossible to catalogue exhaustively the private interests which may be adversely affected by the actions of these groups, one can include an individual's mental[3] or physical well-being,[4] social relations,[5] reputation,[6] intellectual development,[7] religious activities,[8] access to forums for the expression of beliefs,[9] property interests,[10] ability to earn a living[11] and political advocacy.[12] In addition, a private association may also have a serious impact upon public interests, when, for example, it controls the discharge of a public office,[13] forbids members to join the

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1 The term "association" has lent itself to a wide variety of interpretations. See, e.g., People v. Bander, 244 Ill. 26, 27, 91 N.E. 59, 60 (1910); Van Pelt v. Hilliard, 75 Fla. 792, 780, 78 S. 693, 695 (1918). Courts have found "association" to include "the act of a number of persons uniting together for some purpose," Pickering v. Alyea-Nichols, 21 F.2d 501, 506 (7th Cir. 1927), and "an organized union of persons for a good purpose; a body of persons acting together for the promotion of some object of mutual interest or advantage," In re Lloyds of Texas, 43 F.2d 383, 385 (N.D. Tex. 1930).

2 This list is by no means complete. See generally 7 C.J.S. Associations §1 (1937).

3 See, e.g., Carter v. Papineau, 222 Mass. 464, 111 N.E. 358 (1916) (mental anguish caused by refusal of priest to administer Communion to parishioner).

4 See, e.g., State v. Williams, 75 N.C. 121 (1876) (member of local benevolent association suffered injuries while suspended from wall by a cord).

5 See, e.g., Yoder v. Helmuth (Ohio C.P. 1947), noted in L. Green and others, Cases on Injuries to Relations 47 (1959) (church member ostracized by an entire community for using an automobile).

6 See, e.g., Anthony v. Syracuse University, 130 Misc. 249, 223 N.Y.S. 796 (Sup. Ct. 1927), rev'd, 224 App. Div. 487, 231 N.Y.S. 435 (4th Dep't 1928) (expulsion from university without explanation).

7 See, e.g., Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909).

8 See, e.g., Randolph v. First Baptist Church, 68 Ohio L. Abs. 100, 120 N.E.2d 485 (1954).

9 See, e.g., Madden v. Atkins, 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958) (expulsion from union for orgainizing against union leadership).

10 See text accompanying notes 30-32 infra.

11 See text accompanying notes 38-50 infra.

12 See, e.g., Smith v. Allwright, 321 U.S. 649 (1944) (candidate barred from primary).

13 See, e.g., Schneider v. Local 60, United Ass'n of Journeymen Plumbers, 116 La. 270, 40 So. 700 (1905) (union fined and expelled certain of its members who accepted positions on public Board of Examiners).

armed forces,[14] to testify against the group's interests,[15] or to advocate the enactment of legislation which the group opposes.[16]

Given the great potential for conflicts generated by the conduct of voluntary associations, it is not surprising that serious questions have arisen as to the desirability and propriety of judicial interference in such associations' affairs.[17] Recent cases have evidenced a growing tendency by both federal and state courts to combine and apply the previously distinct, but for the most part ineffective, legal concepts of public policy and state action to private conduct. For while these concepts have been of fundamental importance in other areas of law, they have had little application in this area.[18]

This Note will examine the growing willingness of the courts to interfere in associational conduct by considering, first, the partial collapse of the long established "doctrine of private associations" and, second, the constitutional developments that have found state action in private group conduct and thus have subjected it to the proscriptions of the fourteenth amendment. Particular attention will be directed to cases involving high school athletic associations and the medical profession, since it is in these two areas that the courts have been most active.[19]

II. THE WEAKENING OF THE "DOCTRINE OF PRIVATE ASSOCIATIONS"

A. Traditional Limitations on Judicial Interference in the Conduct of Associations

A body of common law developments that may be termed collectively the "doctrine of private associations" partially insulates the conduct of private associations from judicial review.[20] In justifying the development of this doctrine certain scholars have argued that because individuals have innumerable and often conflicting likes and dislikes it is impossible to generate a workable notion of what is the common good.[21] Consequently they felt that the state should give maximum freedom not only to individuals but also to groups, and should intervene to settle conflicts only where it can clearly be demonstrated that private resolution of the conflict will harm interests which traditionally have been thought important enough to warrant legal protection.[22] The state was conceived of as being but one of many groups to which individuals

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14 See, e.g., In re Charter of the Rev. David Mullholland Ben. Soc'y, 10 Phila. 19, 30 Phila. Leg. Int. 85 (Phila. Ct. C.P. 1873).

15 See, e.g., Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931).

16 See, e.g., Mitchell v. International Ass'n of Machinists, 196 Cal. App. 2d 796, 16 Cal. Reptr. 813 (Dist. Ct. App. 1961).

17 See, e.g., G. Bowles, Michigan Interprofessional Effort, 3 Family L.Q. 112 (1969); R. Braemer, Disciplinary Procedures for Trade and Professional Associations, 23 Bus. Law. 959 (1968); Note, Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy, 1970 Duke L. J. 1181; Note, State High School Athletic Associations: When Will A Court Interfere? 36 Mo. L. Rev. 400 (1971).

18 See generally Chaffee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930); Note, Developments in the Law – Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983 (1963) [hereinafter Developments].

19 See notes 38-72, 183-208 infra and accompanying text.

20 See Chafee, supra note 18, at 936-39.

21 H. Magid, English Political Pluralism: The Problem of Freedom and Organization 10-30, 47-62 (1941).

22 Id. at 81-85, 92.

might owe allegiance;[23] private associations were thus viewed as sovereignties, each competing with the state and other groups for individual loyalties,[24] and each was therefore entitled to immunity from interference in its affairs by the state.[25]

Likewise courts have traditionally been reluctant to interfere with the internal affairs of such associations in the belief that they require a certain degree of freedom from external intervention in order to achieve their purposes.[26] Nonetheless, in particular situations where the considerations of public policy and justice are sufficiently compelling, the courts have been ready to grant relief – for the most part in cases involving improper expulsions from pre-existing membership which required mandamus for reinstatement or other suitable relief.[27]

In granting limited judicial review to complaints of expulsion from membership, courts have generally founded their jurisdiction on either of two grounds – the plaintiff's property rights or the contract theory.[28] The former basis is present where the complainant's expulsion has deprived him of some vested interest in the assets of the association.[29] Examples of property rights, the denial of which is sufficient to

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23 Laski, Foundations of Sovereignty 239-42 (1921).

24 Laski, Studies in Law and Politics 244-46, 249, 259 (1932).

25 Laski, supra note 23.

26 See Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, 432 F.2d 650, 655 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970); Higgins v. American Soc'y of Clinical Pathologists, 51 N.J. 191, 202, 238 A.2d 665, 671 (1968). Cf. Chaffee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 903, 1021 (1930); Note, Expulsion and Exclusion from Hospital Practice and Organized Medical Societies, 15 Rutgers L. Rev. 327, 329 (1961). Thus the court in Brotherhood of R.R. Trainmen v. Price, 108 S.W.2d 239, 241 (Tex. Civ. App., 1937) noted:

> Courts are not disposed to interfere with the internal management of a voluntary association. The right of such an organization to interpret its own organic agreements, its laws and regulations, after they are made and adopted, is not inferior to its right to make and adopt them. And a member by becoming such, subjects himself, within legal limits, to his organization's power to administer, as well as to make, its rules. To say that courts may exercise the power of interpretation and administration reserved to the governing bodies of such organizations would plainly subvert their contractual right to exercise such power of interpretation and administration.

See also Trautwein v. Harbourt, 40 N.J. Super. 247, 123 A.2d 30 (1956) (no liability for excluding a plaintiff from a fraternal association); Chapman v. American Legion, 244 Ala. 553, 14 So. 2d 225 (1943) (failure to issue a local charter is not violative of the first or fourteenth amendments); Harris v. Thomas, 217 S.W. 1068 (Tex. Civ. App. 1920) (membership in a voluntary association is a privilege which may be withheld at pleasure); Kearns v. Howley, 188 Pa. 116, 41 A. 273 (1898) (equity lacks jurisdiction to interfere with the acts of a political committee); Levy v. United States Grand Lodge, I.O.S.B., 9 Misc. 633, 30 N.Y.S. 885 (Sup. Ct. 1894) (courts will refuse to interfere with the internal questions of benevolent associations in the absence of bad faith).

27 Thus, an American Legion regulation restricting dissent by local chapters was found invalid because "[t]o subject a subordinate group of the Legion, consisting of sixty-seven members, to the disgrace of banishment because its officers failed to comply with a regulation such as this, designed to suppress public expression of an independent view by a subdivision of the National body, on a matter which is wholly outside the scope of the granted powers of the American Legion as defined by its charter, is contrary to law, unsound in principle, and out of harmony with the noble ideals for which this fine organization was founded." Gallagher v. American Legion, 154 Misc. 281, 285, 277 N.Y.S. 81, 85 (Sup. Ct. 1934), aff'd, 242 App. Div. 630, 271 N.Y.S. 1109 (4th Dep't 1934). See Spayd v. Ringing Rock Lodge No. 665, Brotherhood of Railroad Trainmen, 270 Pa. 67, 113 A. 70 (1921), where the Pennsylvania Supreme Court sustained a lower court order restoring the plaintiff to membership in a labor union from which he had been expelled because he had petitioned the legislature for the repeal of a law which his union favored. See also Berstein v. Almeda-Contra Costa Medical Ass'n, 139 Cal. App. 2d 241, 293 P.2d 862 (Dist. Ct. App. 1956); People ex rel. Gray v. Medical Soc'y, 24 Barb. 570, 577 (Sup. Ct. 1857); Reid v. Medical Soc'y, 156 N.Y.S. 780, 791 (Sup. Ct. 1915); Annot., 89 A.L.R.2d 964, 971-80 (1963); Annot., 175 A.L.R. 438, 506 (1948).

28 Developments, supra note 18, at 998-1002.

29 Id. at 999.

authorize judicial review, are an individual's right to use his association's physical property[30] and a member's right to a pro rata share of the association's assets in the event of dissolution.[31] On rare occasions, even a denial of a personal interest has been held sufficient.[32]

The contract theory rests on the assumption that the laws of an organization constitute a contract between the member and the organization.[33] Under this approach, the courts will determine whether an association has acted in accordance with its rules, and whether those rules violate public policy.[34] Consequently, on either of these jurisdictional bases, courts would intervene solely on behalf of aggrieved members; individuals who had been wrongfully denied membership could not expect judicial action on their behalf.

B. Judicial Intervention and the Emerging Balancing Test

1. Pecuniary Impact of Associational Conduct

Cognizant of the insulation from nonmember grievances provided by the doctrine of private associations, several courts have nevertheless indicated an increased willingness to examine the functions that private associations perform in contemporary society and the effects they have on private individuals. For example, while professional associations are normally voluntary,[35] membership in a particular association is often essential to the profitable pursuit of one's trade or profession. The control exercised by such groups over the affairs of a particular profession may make membership in these groups the only practical means of influencing working environment or of obtaining meaningful employment.[36] In placing more emphasis on the *aspect of control* exercised by voluntary associations, a number of courts have eschewed the doctrine of private associations and have looked instead to the particular facts and policies which each case presents.[37] There seems to be emerging, then, a new balancing process in which the courts consider the particular policies, actions, remedies and interests at stake for both the aggrieved individual and the public at large.

Owing to this increased emphasis on the interests of the individual and the public, the differences between cases of expulsion and, for example, exclusion, while still relevant, have diminished in significance. The first indication of departure from judicial abstention appeared in litigation involving labor unions,[38] but it was not until

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[30] Davis v. Scher, 356 Mich. 291, 97 N.W. 137 (1959); Hawkins v. Obremski, 33 Misc. 2d 1009, 227 N.Y.S. 2d 307 (Sup. Ct. 1962); Heaton v. Hull, 51 App. Div. 126, 64 N.Y.S. 279 (3d Dep't 1900).

[31] Stein v. Marks, 44 Misc. 140, 89 N.Y.S. 921 (Sup. Ct. 1904).

[32] See Berrien v. Pollitzer, 165 F.2d 21 (D.C. Cir. 1947) (personal right of membership, humiliation and injury to feeling owing to expulsion); Joesph v. Passaic Hosp. Ass'n, 38 N.J. Super. 284, 118 A.2d 696 (1955) (right to earn a livelihood).

[33] Developments, supra note 18, at 1001.

[34] Id. See Parsons v. North Cent. Ass'n, 271 F. Supp. 65 (N.D. Ill. 1967); Weyrens v. Scotts Bluff County Medical Soc'y, 133 Neb. 814, 277 N.W. 378 (1938). See also notes 59-61 infra.

[35] The involuntary aspect of these organizations has been recongized to some extent. See, e.g., Group Health Cooperative v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1952). See also Chafee, The Internal Affairs of Associations Not For Profit, 43 Harv. L. Rev. 993 (1930).

[36] For a fuller discussion of these factors see Tobriner & Grodkin, The Individual and the Public Service Enterprise in the New Industrial State, 55 Calif. L. Rev. 1247, 1252-255 (1967).

[37] Id.

[38] There has been a significant trend away from judicial abstention involving labor unions. See Summers, Union Powers and Workers' Rights, 49 Mich. L. Rev. 805 (1951).

a trilogy of decisions,[39] beginning with *Falcone v. Middlesex County Medical Society*,[40] that this judicial balancing process was reflected in cases involving private associations. In *Falcone*, the plaintiff was denied membership in the county medical society because he did not spend four years at an A.M.A. approved school, though he had obtained an M.D. degree.[41] The lower court held that

> where an organization is in fact involuntary and/or is of such a nature that the court should intervene to protect the public, and where an exclusion results in a substantial injury to a plaintiff, the court will grant relief, providing that such exclusion was contrary to the organization's own laws . . . *or* the application of a particular law or laws of an organization was *contrary to public policy*. It follows that each case must stand upon its own facts.[42]

The New Jersey court concluded that the medical society had virtual monopolistic control over the practice of medicine in that locality, and that by denying membership to the plaintiff, the society effectively precluded him from using hospital facilities.[43] By virtue of this exclusion from membership, the plaintiff was held to have suffered a substantial, remediable injury.[44] In a subsequent case, *Blende v. Maricopa County Medical Society*,[45] the Arizona Supreme Court relied heavily on *Falcone*. In agreeing with the New Jersey court and granting a mandamus proceeding, the Arizona court held that while private groups should have the right to determine their own membership, this right does not extend to situations where a medical society exercises control over a doctor's access to hospital facilities. "[T]he society's exercise of a quasi-governmental power is the legitimate object of judicial condern."[46]

The last case in the original trilogy, *Pinsker v. Pacific Coast Society of Orthodontists*,[47] when read in conjunction with the previous two cases, manifests a strengthening of the recent evolution of judicial concern over the growing impact of professional associations. Significantly, in *Pinsker* the California court steered away from an exclusive requirement of economic necessity for membership.[48] The court's

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39 Pinsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969); Blende v. Maricopa County Medical Soc'y, 96 Ariz. 240, 393 P.2d 926 (1964); Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961), aff'g 62 N.J. Super. 184, 162 A.2d 324 (1960).

40 34 N.J. 582, 170 A.2d 791 (1961) aff'g 62 N. J. Super. 184, 162 A.2d 324 (1960). One early case often cited as evidence of judicial review in cases of exclusion is Hillery v. Pedic. Soc'y, 189 App. Div. 766, 179 N.Y.S. 62 (1st Dep't 1916). In that case plaintiff, a black individual, was duly elected to membership. Subsequently the society changed its bylaws in order to make its entrance requirements more stringent. The court held that the revision of the bylaws, as applied to the plaintiff, was a nullity, and that he was duly elected and remained a member.

41 Falcone had received a D.O. degree from the Philadelphia College of Osteopathy, and subsequently obtained an M.D. degree. The theory of osteopathy is not generally accepted by many in the medical profession, and recognition of osteopaths as regular physicians has often been withheld. 34 N.J. 582, 583, 170 A.2d 791, 793 (1961), aff'g 62 N.J. Super. 184, 162 A.2d 324 (1960).

42 62 N.J. Super. 184, 197, 162 A.2d 324, 331 (1960), aff'd, 34 N.J. 582, 170 A.2d 791 (1961) (emphasis added).

43 Recent decisions have upheld social and fraternal groups' absolute discretion to exclude, but have distinguished situations in which "the organization has a business monopoly." Sebastian v. Quarter Century Club of United Shoe Mach. Corp., 327 Mass. 178, 179, 97 N.E.2d 412, 413 (1951).

44 62 N.J. Super. 184, 197, 162 A.2d 324, 331 (1960), aff'd, 34 N.J. 582, 170 A.2d 791 (1961).

45 96 Ariz. 240, 393 P.2d 926 (1964).

46 Id. at 244, 393 P.2d at 929.

47 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969).

48 Because the associations exercise extensive control over the specialty of orthodontics, membership in the defendant associations became a practical necessity. This does not mean that the plaintiff would have been unable to achieve reasonable success in the practice of orthodontics without being a member in the associations. Rather, he suffered a loss of substantial economic advantage and damage to his reputation by being denied membership. Thus, although in the past

concern focused on public policy as determined by a careful weighing and balancing of factors.[49] It stated:

> Defendant associations hold themselves out to the public and the dental profession generally as the sole organizations recognized by the A.D.A. which is itself a virtual monopoly, to determine standards, both ethical and educational, for the practice and certification of orthodontists. Thus, a public interest is shown, and the associations must be viewed as having a fiduciary responsibility with respect to the acceptance or rejection of membership applications.[50]

Thus membership in private associations may not arbitrarily be denied solely on the ground that the association's conduct is immune from judicial interference because neither property nor contract rights are violated.[51]

2. *Arbitrary Application of Association Rules*

Litigation involving associations has not been limited to questions of membership in professional groups. A second major area in which private associations[52] have been facing increasing individual and judicial resistance is that of high school athletics.[53]

Several aggrieved high school athletes have argued[54] that participation in interscholastic sports is an integral part of their education, that the right to an education includes the right to participate and that eligibility to participate cannot be taken away by a high school athletic association.[55] This conceptual attack strikes at athletic associations' immunity from judicial interference on the basis of the doctrine of private associations. However, this "educational right" argument has seldom been successful. Though a student may have a constitutional right to go to school and a concomitant right to physical training, courts have consistently held that "participation in interscholastic athletics . . . is a privilege which the school, or a voluntary association whose rules a school agrees to follow, may withdraw if the student fails to qualify for the privilege."[56]

In some instances courts have been willing to intervene in cases in which state high school athletic associations have acted arbitrarily.[57] However, what is "arbitrary"

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courts have sometimes distinguished between economic advantages and economic necessity, the court here emphasizes public policy as a factor to be considered in justifying its departure from the traditional judicial hands-off policy. Id. at 165-66, 460 P.2d at 498-99, 81 Cal. Rptr. at 626-27.

49 See also Tobriner & Grodkin, The Individual and the Public Service Enterprise in the New Industrial State, 55 Cal. L. Rev. 1247, 1258-260 (1967), in which the authors explore the various factors employed in the balancing process of similar cases.

50 Id. at 166, 460 P.2d at 499, 81 Cal. Rptr. at 627.

51 See also Grempler v. Multiple Listing Bureau, 258 Md. 419, 266 A.2d 1 (1970) (court sustained brokers' association denial of membership to broker not having her principal office in that county); Kurk v. Medical Soc'y, 24 App. Div. 2d 897, 264 N.Y.S.2d 859 (2d Dep't 1965) (court sustained medical association's denial of membership to doctor who was an osteopath and not a medical doctor).

52 See note 117 infra.

53 See Note, State High School Athletic Associations: When Will A Court Interfere? 36 Mo. L. Rev. 400 (1971).

54 See, e.g., Robinson v. Illinois High School Ass'n, 45 Ill. App. 2d 277, 286, 195 N.E.2d 38, 43 (1963), cert. denied, 379 U.S. 960 (1965); Marino v. Waters, 220 So. 2d 802, 806 (La. Ct. App. 1969).

55 See generally Note, State High School Athletic Associations: When Will A Court Interfere? 36 Mo. L. Rev. 400 (1971).

56 Marino v. Waters, 220 So. 2d 802, 806 (La. Ct. App. 1969).

57 See, e.g., Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 432 F.2d 650, 655-56 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970), wherein the court observed that in many instances the extent to which judicial power to regulate the standards of private associations is directly related to the necessity for intervention.

varies from one court to another.[58] To some courts the rules of an association are not unlawfully arbitrary "so long as the member schools want them."[59] To other courts such rules are not arbitrary if they are based upon "uniformly applied classifications which bear some reasonable relationship to the objectives [sought]."[60] The Minnesota Supreme Court best articulated the traditional approach to judicial intervention when it noted that so long as there is "room for two opinions on the matter" it would not consider an association's action "arbitrary" even though it believed the action to be unfounded.[61]

While athletic association cases reflect judicial deference to the rules of private associations, they do demonstrate that courts will intervene on behalf of aggrieved members of the public at large even though such individuals cannot claim impaired contract or property rights.

C. Standards of Judicial Scrutiny in Reviewing an Association's Conduct

The degree of scrutiny a court will use to examine an association's justification for its action, and correspondingly, the plaintiff's burden of proof in such an action, is as yet uncertain. The high school athletic cases manifest substantial judicial deference to the association on the issue of reasonableness;[62] indeed, no reported case has yet overturned an eligibility ruling by a state high school athletic association. However, courts have been willing to engage in a more searching review when the plaintiff's career or livelihood is involved. In *Pinsker*,[63] the court ruled that the plaintiff had a right to judicial review in order to determine whether exclusion was reasonable.[64] The court indicated that the defendant society would have to introduce evidence on the reasonableness of its actions.[65] In a later case,[66] the same court cited *Pinsker* for the proposition that exclusions from professional associations must be based on *substantial* evidence that the excluded individual was not qualified for admission.[67] *Pinsker* has also been cited recently by another court which acknowledged that some deference may be due to professional societies regarding qualifications for membership,[68] but went on to hold that regardless of that deference, those decisions *would be reviewed.*[69]

Thus, while the courts in the high school cases placed the burden on the athletes to persuade the court as to the unreasonableness of the challenged action,[70] the substantial evidence requirement of *Pinsker* indicates that an association may be required to persuade the court as to reasonableness where the public and private interests are significant.

It must be noted that while the doctrine of private associations suggests an approach that is independent of constitutional restrictions, at least one court has stated

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58 While the arbitrary application of a rule is not the functional equivalent of an arbitrary rule, courts fail to distinguish between the two. See notes 59-61 infra and accompanying text.

59 Morrison v. Roberts, 183 Okla. 359, 361, 82 P.2d 1023, 1024-25 (1938).

60 Marino v. Waters, 220 So. 2d 802 (La. Ct. App. 1969).

61 Brown v. Wells, 288 Minn. 468, 181 N.W.2d 708 (1970).

62 Id.

63 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969).

64 Id. at 165, 460 P.2d at 498, 81 Cal. Rptr. at 626.

65 Id. at 166, 460 P.2d at 498, 81 Cal. Rptr. at 626.

66 Bixby v. Pierno, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

67 Id. at 146, 481 P.2d at 253, 93 Cal. Rptr. at 245.

68 Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 432 F.2d 650, 655, (D.C. Cir.), cert. denied, 400 U.S. 965 (1970).

69 Id.

70 See, e.g., Estay v. La Fourche Parish School Bd., 230 So. 2d 443, 447 (La. Ct. App. 1969).

that certain private associations are subject to the limitations of the fourteenth amendment.[71] The court did not indicate whether the applicable limitations were the same as those applied to all the forms of state action, or whether they were merely similar. As a result, clear distinctions between judicial treatment of private associations and public agencies are difficult to draw. However, it may be safe to say that private associations have greater freedom from judicial review than those associations that are directly linked with the state.[72]

III. CONSTITUTIONAL DEVELOPMENTS AND JUDICIAL INTERFERENCE IN THE CONDUCT OF PRIVATE ASSOCIATIONS

A. The "Right" of Association

Before considering the overall constitutional norms applicable to the conduct of private associations, it is necessary to examine the "right" of association and its applicability to individuals and groups in general.

The right of association is not specifically mentioned in the Constitution,[73] and, consequently, its contours must be gleaned from a series of Supreme Court cases recognizing this right. Even before 1958, several distinct "associational" rights were recognized; the freedom to form, join and support religious associations;[74] the freedom of employees to associate together for collective bargaining;[75] and the right to form and join political parties.[76] These rights arose either through legislation or as necessary adjuncts to specific constitutional guarantees which proscribed governmental interference with private and group conduct.

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71 See Quimby v. School Dist., 10 Ariz. App. 69, 72, 455 P.2d 1019, 1022 (1969).

72 See notes 199-202 infra and accompanying text.

73 There is little in the way of constitutional history relating to the right to freedom of association. In fact, during the 1700's some fear was expressed by prominent Americans over the dangers of factionalism and insurrection that might follow from the formation of groups. See The Federalist No. 9, at 124-30 (Wright ed. 1961) (J. Madison, A. Hamilton & J. Jay). For a more detailed discussion of the constitutional background of freedom of association, see C. Rice, Freedom of Association 34-41 (1962).

74 Since the right to associate voluntarily for religious purposes was basic to the aspirations of many of the original colonists, religious associations were among the first to be formed in America. See generally, E. Greene, Religion and the State (1941). Governmental neutrality toward religious association is firmly established today, and the right of the individual to be free of unreasonable restraints in such association is guaranteed. See Niemotko v. Maryland, 340 U.S. 268 (1951).

75 The history of organized labor's struggle to overcome resistance to the formation of unions and the principle of collective bargaining is well known. See G. Abernathy, The Right of Assembly and Association 180-90 (1961). The right to freedom of association in labor unions was codified in the National Labor Relations Act, 29 U.S.C. § 151 (1973) (originally enacted as Act of July 5, 1935, ch. 372 §§ 1 et seq. 49 Stat. 449). "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." Id. § 7 at 452. The Labor-Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. § 151 (1964) provides that workers are entitled to "full freedom of association, self-organization, and designation of representatives of their own choosing. . . ."

76 See, e.g., Britton v. Board of Election Comm'rs, 129 Cal. 337, 61 P. 1115 (1900).

In 1958 came formal recognition of a constitutional right to freedom of association in *NAACP v. Alabama*.[77] After being found in contempt for having refused to produce membership lists pursuant to a registration statute,[78] the NAACP appealed, claiming that such disclosure as well as anticipated pressures would inhibit membership. The Court noted that group action might well be essential to effective advocacy and overturned the contempt conviction, at the same time recognizing a freedom of association:

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable part of "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of Speech. . . . [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[79]

Two years later in *Shelton v. Tucker*,[80] an Arkansas statute which required teachers to disclose all organizational membership was held to violate the freedom of association. Unlike *NAACP v. Alabama*, in which no legitimate state interest in the legislation had been found, the state's legitimate interest in knowing certain organizational ties of its teachers precipitated strong judicial dissent.[81] Nonetheless, the majority held that the required disclosures of all organizational ties was unnecessarily broad leading to "constant and heavy"[82] pressures on teachers to avoid controversial associations. Indeed, the Court had earlier reasoned that the right of association may be a necessary element of free speech, noting that "[e]ffective advocacy of public and private points of view . . . is undeniably enhanced by group association."[83]

Freedom to associate was expanded in scope during the mid-1960's to embrace certain protected group activities. In an attempt to curb the NAACP's legal attack on racial barriers, the state of Virginia enacted a statute prohibiting an attorney's acceptance of employment or compensation from any person who was not a party to, or had no pecuniary rights in, a judicial proceeding.[84] The statute further prohibited

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[77] 357 U.S. 449 (1958). However, the constitutional freedom of association was referred to several times prior to its formal recognition in 1958. See Watkins v. United States, 354 U.S. 178, 188 (1957); American Communications Ass'n v. Douds, 339 U.S. 382, 409 (1950). In Seezy v. New Hampshire, 354 U.S. 234 (1957), the Court observed:

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression *and association*. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations.

Id. at 250 (emphasis added).

[78] The impairment was an indirect, but obvious attack on the right of the NAACP to exist as a political pressure group. Such attacks by southern states in particular upon the viable existence of the NAACP were common in the 1950's. See American Jewish Congress, Assault Upon Freedom of Association, A Study of the Southern Attack on the National Association for the Advancement of Colored People (1957).

[79] 357 U.S. at 460-61.

[80] 364 U.S. 479 (1960).

[81] Id. at 490-99 (Justices Frankfurter, Harlan, Clark and Whittaker). Justice Frankfurter was "unable to say, on the face of this statute, that Arkansas could not reasonably find that information which the statute requires – and which may not be otherwise acquired by asking the question which it asks – is germane to that selection." Id. at 496.

[82] Id. at 486.

[83] 357 U.S. at 460.

[84] Va. Code Ann §§ 54-(74), -(78), -(79) (1950), as amended by Acts of 1956, Ex. Sess., ch. 33, Replace. Vol., 1958, as amended, Acts of 1964, Va. Sess. Laws, ch. 201, 622.

an organization's soliciting of legal business for an attorney. The NAACP had retained a legal staff and encouraged private lawsuits which it financed when an NAACP lawyer was used by the litigant. Virginia's highest court, in a suit for declaratory relief, held that the soliciting, encouraging and financing of litigation by the NAACP was prohibited by the statute.[85] Noting that litigation by the NAACP was more than a "technique of resolving private differences" and was actually "a form of political expression,"[86] the Supreme Court reversed in *NAACP v. Button*.[87] Recognizing that "association for litigation may be the most effective form of political association,"[88] the Court held that the statute, as applied, violated rights of association and was unjustified by any counterbalancing state interest in the regulation of the legal profession.

Significantly, *Button* was not subsequently limited to instances in which litigation was found to be the functional equivalent of political expression for association. For in *Brotherhood of Railroad Trainmen v. Virginia*,[89] the Court invalidated a Virginia court decree prohibiting legal solicitation by a labor union and encouragement of the legal actions of its members.[90] The Court held that the first amendment protected the workers' right to combine in order to assert more effectively their statutory rights. Specifically relying on *Button*, the Court made clear that "the Constitution protects the associational rights of the members of the Union precisely as it does those of the NAACP."[91]

Nowhere in the *Trainmen* decision was litigation equated with political expression. Therefore, the case extended the freedom of association beyond association for political expression. Although the right to associate for the purpose of collective bargaining had been established by statute,[92] the *Trainmen* case extended the constitutional freedom of association for the first time to an economic, as opposed to a politically motivated, association. Though the decision was based upon the implied first amendment right of freedom of association, the Court noted that *express* first amendment rights protected the rights of a group to assist its members to litigate effectively.[93]

Moreover, the freedom to associate, as developed in these early cases, has been sustained and enlarged in later decisions. In its discussion of penumbral areas of the Bill of Rights, the Court in *Griswold v. Connecticut*[94] described the right of association:

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85 NAACP v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1960), rev'd, 371 U.S. 415 (1963).

86 NAACP v. Button, 371 U.S. 415, 429 (1963). The Court observed: "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment . . . for the members of the Negro community in this country." Id.

87 Id.

88 Id. at 431.

89 377 U.S. 1 (1964).

90 Id.

91 Id. at 8.

92 See note 75 supra.

93 The Court stated:

> It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another.... The right ... to consult with each other ... includes the right to select a spokesman ... to give the wisest counsel.

377 U.S. at 5-6.

94 381 U.S. 479 (1965). In that case, the constitutionality of a Connecticut statute making the use of contraceptives a criminal offense was challenged by appellants who had been convicted of violating the statute. The Court held that the statute was an unconstitutional invasion of the zone of privacy created by several constitutional guarantees, including the right of association.

> [M]ore than the right to attend a meeting[,] it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression or opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.[95]

And in his concurring opinion in *Bell v. Maryland*,[96] Justice Goldberg bluntly stated that every person has the constitutional right "to close his home or *club* to any person . . . solely on the basis of personal prejudices including race."[97]

This same respect for the autonomy of private associations is evidenced in federal legislation[98] and its construction by the courts. The Civil Rights Act of 1964, in exempting private clubs from coverage,[99] appears to be based on the tenet that in enacting the fourteenth amendment, Congress was particularly concerned that the civil rights of a citizen should remain distinct from his social rights.[100] Subsequent to passage of the Act, many establishments sought to evade its proscriptions by claiming private club status,[101] and, as a consequence, the courts were faced with the task of determining which clubs were legitimately private. Because of the absence of legislative definitions, the courts were forced to examine the nature of each establishment to determine whether it possessed the characteristics of a private club.[102] For example, in *United States v. Jordan*,[103] the owner of Landry's Fine Foods Restaurant in Louisiana formed Landry's Private Dining Club, Inc. after the passage of the 1964 Act. Membership and service were restricted to white persons. After a comprehensive analysis based on the legislative history of the Act,[104] the district court held that Landry's was not a bona fide private club. The key indicia used by the court in this determination were the extent to which members were chosen in a genuinely selective manner, and the degree of control which the members exercised over the establishment's operations.[105] If a club is adjudged to be genuinely private, the courts cannot provide a remedy for discriminatory practices under the Civil Rights Act.[106]

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95 Id. at 483.

96 378 U.S. 226 (1964).

97 Id. at 313 (emphasis added).

98 42 U.S.C. § 2000(a) et seq. (1970).

99 The Civil Rights Act of 1964, 42 U.S.C. § 2000(a) (1970) provides in part:

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> ....
>
> (e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public. . . .

See also notes 109-132 infra and accompanying text for a discussion of the "state action" doctrine.

100 Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

101 See, e.g., Daniel v. Paul, 395 U.S. 298 (1969); Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968); United States v. Northwest Louisiana Restaurant Club, 256 F. Supp. 151 (W.D. La. 1966).

102 For a more detailed treatment of the varied judicial approaches, see Note, Public Accomodations Laws and the Private Club, 54 Geo. L.J. 915 (1966); Note, The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judical Confusion, 44 N.Y.U.L. Rev. 1112 (1969).

103 302 F. Supp. 370 (E.D. La. 1969).

104 The court examined the genuineness of membership selectivity, existence of formalities, corporate purpose, creation of the membership corporation, control of operations and general characteristics such as initiation dues, etc. Id. at 374-77.

105 Id. at 378.

106 The courts at times have relied on some thirteen separate characteristics to distinguish a public accommodation from a private club. Note, The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion, 44 N.Y.U.L. Rev. 1112, 1117-118 (1969).

Indeed, strong judicial pronouncements have reinforced this autonomy of private clubs. "A private association restricted in its membership on a racial or other basis is one expression of . . . the freedom of association. . . ."[107] Such associations "have the right to make their own regulations as to admission or expulsion of members. . . ."[108] Consequently, the right of association has taken on a constitutional dimension wherein it acts as a two-edged sword, protecting members of an association while at the same time denying nonmembers relief, where the status of association insulates its conduct from judicial review.

If an aggrieved party wishes the courts to provide relief on the basis of the violation of a constitutional norm, he must establish the presence of state action in either the conduct or the inherent nature of the association itself.

B. The State Action Doctrine

From the time of the *Civil Rights Cases*[109] in 1883 until the 1940's, the restraints of the fourteenth amendment had been interpreted as applying only to actions by the state.[110] During the 1940's the Supreme Court began to expand the boundaries of this "state action" concept.[111] While direct state participation is still the cornerstone of the doctrine,[112] courts have found state action even where the state has played only a very limited role.[113] In particular, nominally private behavior has been equated with state action in three broad categories.

In the first category courts treat a private activity as state action if it is subject to a substantial degree of state control. For example, substantial state financing,[114] regulation[115] or administration[116] may subject a private organization to the limitations of the fourteenth amendment. With regard to private associations, much

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107 Wesley v. City of Savannah, 294 F. Supp. 698, 701 (S.D. Ga. 1969). See also Higgins v. American Soc'y of Clinical Pathologists, 51 N.J. 191, 199, 238 A.2d 665, 669 (1968), aff'd per curiam, 53 N.J. 548, 251 A.2d 761 (1969).

108 North Dakota v. North Central Ass'n, 23 F. Supp. 694, 699 (E.D. Ill.), aff'd, 99 F.2d 697 (7th Cir. 1938).

109 109 U.S. 3 (1883). The Court held that Congress could act under § 5 of the fourteenth amendment only where there was a state law or direct state action infringing rights guaranteed by the amendment.

110 See generally Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083 (1960). For a critical review of the literature dealing with state action as well as of the entire state action concept, see Black, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69 (1967).

111 Shelly v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944).

112 This category includes state legislation and municipal ordinances, e.g., Strauder v. West Virginia, 100 U.S. 303 (1880); unauthorized activities of state officials acting under "color of law," e.g., Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); and judicial enforcement of private agreements, e.g., Shelly v. Kraemer, 334 U.S. 1 (1948).

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> [T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.

United States v. Guest, 383 U.S. 745, 755-56 (1966).

114 Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945); Knight v. Board of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

115 Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952). However, mere licensing is not sufficient. See Williams v. Howard Johnson's Restaurant, 268 F.2d 845, 847 (4th Cir. 1959); notes 146-60 infra and accompanying text.

116 Evans v. Newton, 382 U.S. 296 (1966); Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

interest has been generated in the cases dealing with the previously discussed high school athletic associations,[117] in which the courts have found state action even though some of the members of the association were private schools.[118] In fact, state regulation and control has been, in certain circumstances, sufficient to make applicable the state action doctrine even to private schools acting alone.[119]

In the second category courts treat a private agent who performs an essentially governmental function as a surrogate for the state.[120] For example, where a corporation runs the business district of its company town,[121] or where a private organization assumes control of a previously publicly administered park,[122] the activity may be characterized as state action. Although this theory is based largely on two Supreme Court cases,[123] lower courts have been hesitant to expand overtly the scope of these limited precedents.[124] However, the public function theory has

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117 See notes 53-61, supra, and accompanying text. With the possible exception of Quimby v. School Dist., 10 Ariz. App. 69, 72, 455 P.2d 1019, 1922 (1969), the cases cited all treat disputes between high school athletes and high school athletic associations under the doctrine of private associations. For a discussion of a contrary line of authority treating such disputes under the rubric of "state action", see notes 118-45 infra and accompanying text. Although the state action cases would appear to undermine the authority of cases relying on the private association doctrine, several decisions based on the doctrine are recent. Id. at 1022.

118 At least for purposes of 18 U.S.C. § 242 (1970), "[p]rivate persons, jointly engaged with state officials, in the prohibited action, are acting 'under color' of law. . . . To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the state or its agents." United States v. Price, 383 U.S. 787, 794 (1966). Courts have occasionally found state action even though some of the members of the associations were private schools. See, e.g., Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 227 (5th Cir. 1968). Accord, Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155, 1157 (5th Cir. 1970); Kellev v. Metropolitan Bd. of Educ., 293 F. Supp. 485, 491 (M.D. Tenn. 1968).

119 See High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 228-29 (5th Cir. 1968):

> The result is not changed either by St. Augustine's being a private school seeking admission to an association composed predominantly of public schools or by the existence of private schools as members of the association. Having elected to allow private schools to participate in this state activity Louisiana must extend the benefits consistent with constitutional standards. And those private schools which choose to participate in this state program, to the extent of their role as members and participants become amenable to Fourteenth Amendment requirements.

120 See, e.g., Food Employers v. Logan Valley Plaza, 391 U.S. 308 (1968) (peaceful picketing lawful in a location open generally to the public even if on private property).

121 Marsh v. Alabama, 326 U.S. 501 (1946).

122 Evans v. Newton, 382 U.S. 296 (1966).

123 See notes 120-21 supra.

124 It has been argued that reliance on a public function approach to state action would result in the application of the fourteenth amendment whenever private action has a substantial impact on important interests of the individual, and thus place constitutional restrictions on all operations of private groups found subject to the amendment. See Berle, Constitutional Limitations on Corporate Activity – Protections of Personal Rights from Invasion through Economic Power, 100 U. Pa. L. Rev. 933, 948-55 (1952). The Supreme Court recently recognized the possibility of extending the logic of this state action test but noted:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in *The Civil Rights Cases* [109 U.S. 3 (1883)], ... and adhered to in subsequent decisions. Our holdings indicate that where the impetus for discrimination is private, the State must have "significantly involved itself with invidious discrimination," Reitman v. Mulkey, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

emerged covertly in the private association litigation. This is perhaps best illustrated by examining the experience of aggrieved plaintiffs in Indiana and Oklahoma. In *State ex rel. IHSAA v. Lawrence*,[125] the court held that because interscholastic sports were not part of the state's educational program, the state high school athletic association was a voluntary one, and therefore its rules were not subject to judicial review.[126] The case was based upon prior state decisions which left voluntary associations free to enforce their rules and regulations by any means they might deem proper.[127] Twelve years later the court in *Wellsand v. Valparaiso Community Schools*[128] found judicial review possible under 42 U.S.C. § 1983 if the association's actions or rules constitute state action. The court reasoned that public high schools cannot violate the rights of students by "cloaking their activities within the framework of a purported voluntary association"[129] such as the IHSAA. Since the IHSAA was found to be dependent upon state financed facilities, such as football bleachers and basketball gymnasiums, the state action requirement was deemed fulfilled.[130]

The *Wellsand* finding that actions by a voluntary association could constitute state action was not without precedent. In *Smith v. YMCA*[131] the local YMCA's racially discriminatory admissions regulation was struck down under 42 U.S.C. § 1983. The district court found that through tax exemptions and a cooperative use of city recreational facilities, the organization had become so entwined in governmental policies and so impregnated with governmental character as to be subject to constitutional limitations grounded upon state action.[132] In effect, then, *Wellsand* and *Smith* seem to be relying upon, albeit inferentially, the public function concept set forth by Justice Black in *Marsh v. Alabama*.[133] In finding state action in the company's management of its town, Justice Black noted: "Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation."[134]

Therefore, the conduct of voluntary associations may constitute state action if it affects the use of facilities built and operated primarily to benefit the public. While recognizing that state educational programs only provide for physical education classes and leave interscholastic sporting events to voluntary associations, the *Wellsand* case extends the public function rationale to such associations. Interscholastic athletics perform a public function since public facilities are used, public schools are association members and the athletic events are attended by the public. Hence, the association's control of high school athletics constitutes state action.

The final category is a type of hybrid of the first two. In approaching this type, a court will look to all factors of state participation in the private activity to determine if the aggregate reaches some minimum level of involvement.[135] If there is a sufficient nexus between the state and the private action, the activity may be treated as state action for the purposes of the fourteenth amendment. This cumulative characterization of all relevant factors[136] implies that "the vital requirement is State

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125 240 Ind. 114, 162 N.E.2d 250 (1959).

126 Id. at 120-23, 162 N.E.2d at 252-54.

127 Id.

128 No. 71H 122(2) (N.D. Ind. Sept. 1, 1971).

129 Id. at 5.

130 Id. at 6.

131 316 F. Supp. 899 (M.D. Ala. 1970).

132 Id. at 908.

133 326 U.S. 501 (1946).

134 Id. at 506.

135 See, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961): "Only by sifting and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance."

136 See, e.g., Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962), cert. denied, 371 U.S. 911 (1962); Smith v. Holiday Inns of America, 220 F. Supp. 1, 7 (M.D. Tenn. 1963), aff'd, 336 F.2d 630, 634 (6th Cir. 1964).

responsibility — that somewhere, somehow, to some extent, there be an infusion of conduct by officials panoplied with State power . . . "[137]

Though not specifically differentiating among the three state action tests, the Supreme Court and some lower courts have begun to show a genuine preference for this cumulative characterization test when dealing with the conduct of private associations.[138] The cases dealing with high school athletic associations seem to reflect this preference. For example, in holding that such an association was guilty of violating the petitioner's constitutional rights, the Fifth Circuit Court of Appeals[139] noted that interscholastic athletics is a program in which the state is actively and intensively involved, and "for the state to devote so much time, energy and other resources to interscholastic athletics and then refer coordination of those activities to a separate body cannot obscure the real and pervasive involvement of the state in the total program."[140] Indeed, while these associations do not typically invoke the state action doctrine for procedural purposes,[141] there is sufficient state involvement to allow a federal court to entertain a complaint against such association under 28 U.S.C. § 1341 and 42 U.S.C. § 1983.[142]

In the past, federal courts have based findings of state action on such associations' power to control school curricula pertaining to physical education, their power to investigate, discipline and punish member schools and their use of state-owned facilities for athletic contests.[143] Similarly, in *Oklahoma High School Athletic Association v. St. Augustine High School*,[144] the Court of Appeals for the Tenth Circuit grounded a finding of state action on the fact that the Oklahoma association was governed by a board of control whose membership was composed of high school principals. Since these men were public employees who continued to act in that capacity when serving on the board, enforcement of the association's rules was held to be conduct under color of law for purposes of 42 U.S.C. § 1983.[145]

While these cases invite the conclusion that state action is present in a variety of situations involving superficially private associational conduct, recent case law has indicated the contrary. In 1972 the Supreme Court handed down what may yet prove to be the most far-reaching case dealing with presence of state action in the conduct of a private association, *Moose Lodge No. 107 v. Irvis*.[146] It held that the grant of a state liquor license to a private club which refuses to serve black guests, and the

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137 Terry v. Adams, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring).

138 See text accompanying notes 139-45 infra.

139 Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968).

140 Id. at 228.

141 The typical high school athletic association is a voluntary association of high schools, governed by a board or committee selected from among educators and representing different intrastate regions. They are funded from association sponsored meets and tournaments and their adopted rules govern rulings on eligibility and violations which can result in membership suspension. See State ex rel. IHSAA v. Lawrence, 240 Ind. 114, 162 N.E.2d 250, 254 (1959).

142 See note 145 infra.

143 See note 139 supra.

144 396 F.2d 224, 227 (5th Cir. 1968).

145 Id. at 272-73.

146 407 U.S. 163 (1972). Appellee Irvis, a black, visited Moose Lodge as a guest of a member, and after being refused service solely because of his race, he brought suit under 42 U.S.C. § 1983 for injunctive relief against both the Lodge and the Pennsylvania Liquor Authority. Irvis claimed that, because the state liquor authority had issued Moose Lodge a private club license authorizing the sale of alcoholic beverages on its premises, the refusal of service constituted discriminatory state action forbidden by the equal protection clause. A three-judge district court, relying heavily on the "uniqueness and all-pervasiveness" of Pennsylvania's regulation of the sale of liquor, Irvis v. Scott, 318 F. Supp. 1246, 1248-49 (M.D. Pa. 1970), and the discretion of the Liquor Control Board to refuse to issue licenses, id. at 1249, declared the Moose Lodge liquor license invalid so long as it continued its racially discriminatory membership and operating practices. On appeal, the Supreme Court reversed 6-3 in an opinion by Justice Rehnquist, with Justices Douglas and Brennan dissenting in separate opinions in which Justice Marshall joined.

regulation of the club by the state liquor control board consequent upon that grant, do not constitute sufficient state involvement to invoke the equal protection clause of the fourteenth amendment.[147] In so doing, the Court served notice that the state action doctrine still places real limits on the scope of the equal protection clause.[148]

The Court was careful not to make a sharp break with recent precedent expanding the definition of state action. It applied the formula adopted in *Reitman v. Mulkey*,[149] that a state may not "significantly involve ... itself with invidious discriminations."[150] The Court also sought to distinguish, on the basis of factual dissimilarities, prior cases involving racial discrimination in public eating places.[151] In *Moose Lodge*, the Court stressed the fact that Pennsylvania played no role in establishing or enforcing the membership or guest practices of its club licensees.[152] Despite extensive regulation of such far-reaching aspects of licensees' affairs as hours of operation, condition of the premises and kinds of entertainment presented, the Court concluded that Pennsylvania's scheme of liquor licensing did not foster or encourage racial discrimination.[153] In so holding, it refused to expand the application of the language in *Burton v. Wilmington Parking Authority*,[154] that even inaction may place the "power, property and prestige" of the state behind racial discrimination in those areas where the state is extensively involved with the private activity.[155]

While holding that the particular set of relationships between the state liquor authority and Moose Lodge did not amount to state action, the Court made little contribution to the definition of what level of connection with the state would convert otherwise private conduct into that governed by the fourteenth amendment. Nonetheless, the majority did seem to suggest two new indicia to determine when there is sufficient state involvement: whether the state plays a role equivalent to that of a partner or a joint venturer in the discriminating enterprise, and whether the state grants a monopoly to a private enterprise which discriminates.[156] But because the rationales underlying either factor seem to warrant a finding of state action in *Moose Lodge* itself, the meaning of these suggestions remains uncertain.[157] It may well be

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147 Id. at 175. The equal protection clause, U.S. Const. amend. XIV, provides: "[N]or shall any state ... deny to any person within its jurisdiction the equal protection of the law."

148 See Black, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69 (1967), for a discussion of possible reasons for the demise of the state action doctrine.

149 387 U.S. 369 (1967).

150 407 U.S. at 173, quoting 387 U.S. at 380.

151 Id. at 173-75.

152 Id. at 175. But see note 147 supra, indicating that the district court, on the same facts, found to the contrary.

153 Id.

154 365 U.S. 715 (1961).

155 Id. at 725.

156 407 U.S. at 177.

157 While it did not define the terms "partnership" and "joint venture" with any precision, the Court probably intended a relationship of mutual benfit between the state and the private activity similar to that present in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In that case, the state used public funds to finance the construction of a parking garage in which the discriminating restaurant was located. The public nature of the building guaranteed the restaurant tax exemption for any improvements it might make. In addition, rental payments by the private enterprise were found to be essential to the successful financing of the public project. Id. at 724. Justice Rehnquist contended in *Moose Lodge* that the facts of the case before him did not approach the "symbiotic relationship between lessor and lessee that was present in *Burton*." 407 U.S. at 175. However, both Pennsylvania and its liquor licensee derive distinct benefits from their relationship. Pennsylvania monopolizes the sale of liquor within the state, and the retail licensees must purchase the liquor from the state. 318 F. Supp. at 1249. Thus while a licensee receives a license to operate a profitable enterprise, the state is provided with a distribution system for its liquor and derives substantial revenues therefrom. It is therefore difficult to see why this is not a "symbiotic relationship" within the purview of *Burton*.

The Court's suggestion that a state grant of a monopoly to a private enterprise which discriminates may constitute prohibited state action apparently rests on the proposition that in

that the Supreme Court recognized the need for delineating the proper limits of the state action doctrine in order to accord the freedom to associate its constitutional importance in the context of a fraternal order.[158] For as a New Jersey court observed in *Trautwein v. Harbourt*:[159]

> Fraternal association implies a degree of social intimacy but one step removed from that of the family. So long as this form of social organism remains as deeply embedded in our culture as it is now, the law must respect it and its ordinary concomitants, chief among which is selectivity of membership.[160]

In summary, then, the state action doctrine may be applicable to the conduct of a private association if such an association is linked sufficiently to state power. However, the courts will abjure a finding of state action if to do so would significantly impinge on associational rights of members *and* such a finding would, in the vague language of the Supreme Court, "utterly emasculate the distinction between private as distinguished from State conduct."[161]

C. The Due Process and Equal Protection Clauses

Assuming that the plaintiff can establish some degree of state involvement in the conduct of the private association, there are two standards by which courts will gauge the propriety of that conduct. The first is found in the due process clause.[162] While the fourteenth amendment speaks of deprivation of "life, liberty, or property,"[163] the impairment of a substantial right or interest is sufficient to invoke the benefit of fourteenth amendment protection.[164] In each factual situation the Supreme Court has evaluated "[t]he precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, [and] the available alternatives to the procedure that was followed. . . ."[165]

The procedural protections afforded by the fourteenth amendment are substantial[166] despite the fact that courts no longer scrutinize economic legislation under the

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making such an exclusive grant the state deprives the victims of goods and services which they might otherwise obtain. Yet as Justice Douglas noted in his dissent, Pennsylvania restricts the number of club licenses to be issued and the state-wide quota has been filled for many years. 407 U.S. at 182. Therefore, depending on the relative number of licensees practicing discrimination, blacks may be significantly foreclosed from opportunities to purchase liquor. Id. at 182-83. The Court's failure to inquire into the degree of the foreclosure suggests that the grant of the franchise would have to be almost exclusive to amount to state action.

158 See notes 73-108 supra for a discussion of the constitutional dimensions of the right of association.

159 40 N.J. Super. 247, 123 A.2d 30 (1956).

160 Id. at 267, 123 A.2d at 41.

161 407 U.S. at 173 (1971).

162 The due process clause, U.S. Const. amend. XIV, provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

163 Id.

164 The term "liberty" has evolved to embrace "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (dictum).

165 Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

166 See, e.g., Greene v. McElroy, 360 U.S. 474, 492, 496-97 (1959). In *Greene* the Supreme Court proscribed the executive branch of government from fashioning security programs whereby civilians might lose employment without being accorded the opportunity to challenge effectively the evidence against them. Id. at 500-02.

guise of substantive due process.[167] Courts have found that when governmental action deprives an individual of important interests, that person has a right to notice and a fair hearing,[168] and this can involve a variety of procedures.[169]

Often, a question akin to substantive due process arises in "just cause" hearings undertaken by association executive boards in determining whether there are grounds for expulsion or exclusion from membership.[170] Courts have considered, when determining the legality of the boards' decisions, whether the grounds for exclusion or expulsion were supported by substantial evidence, and reasonably related to legitimate purposes of the association.[171] The judicial standard is that of "reasonableness," as determined by a balancing of public and private interests.[172] Courts should ordinarily examine and weigh the social value of the association's goal, the appropriateness of the association's means and the reasonableness of the particular action.[173]

The second constitutional gauge for the legality of associational conduct, assuming the presence of state action, is that of the equal protection clause.[174] The scope of the equal protection clause has been generally summarized by the following formula: a classification is valid if it "includes all [and only those] persons who are similarly situated with respect to the purpose of the law."[175] While subject to some exceptions,[176] this formula expresses the constitutional norm. Three standards of review are used in the interpretation of the equal protection clause. Under the traditional equal protection standard, characterized by judicial restraint, a court merely determines whether there is a reasonable relationship between the purpose of the classification and the classification itself.[177] Courts have employed the "new equal protection" standards

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167 See, e.g., Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (statute imposing criminal liability on employer for not allowing his employees time to vote held constitutional); Olsen v. Nebraska, 131 U.S. 236 (1941) (statute limiting employment agency fee held constitutional).

168 See, e.g., Slochower v. Board of Educ., 350 U.S. 551 (1956); Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950).

169 Procedural rights may encompass: (1) timely and adequate notice detailing the charges facing the individual; (2) the right to counsel; (3) the opportunity to confront and question witnesses; (4) an impartial decision-maker; and (5) a decision based on evidence adduced at the hearing. Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970).

170 See, e.g., Blende v. Maricopa County Medical Soc'y, 96 Ariz. 240, 393 P.2d 926 (1964) (membership application may not be denied arbitrarily, but only on a showing of "just cause" in proceedings embodying the elements of due process); Gallagher v. American Legion, 154 Misc. 281, 282-83, 277 N.Y.S. 81, 83 (Sup. Ct. 1934) (member may not be expelled without notice of the charges and a reasonable opportunity to be heard).

171 See notes 63-69 supra.

172 The balancing process often considers the following factors: the right of the individual to practice his profession without undue restriction; the right of the public to have an unrestricted choice of members of the profession in question; and the justification for the association's action. Blende v. Maricopa County Medical Soc'y, 86 Ariz. 240, 243, 393 P.2d 926, 930 (1964).

173 Developments, supra note 18, at 1045-55.

174 See note 147 supra.

175 Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 346 (1949). "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

176 Quite often courts hold that underinclusion of individuals does not deny equal protection. The rationale behind this deviation rests on the belief that it may be desirable for a legislature to attack a problem in a piecemeal fashion. "Evils in the same field may be of different dimensions and proportions.... [T]he reform may take one step at a time addressing ... the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). See also Carrington v. Rash, 380 U.S. 89 (1965).

177 See Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

where "suspect classifications" or "fundamental interests" were involved.[178] When either of these factors is present a justification for the classification greater than mere rationality must exist.[179] The third test is a hybrid of the first two.[180] Justice Powell, writing for the majority in *Weber v. Aetna Casualty & Surety Co.*,[181] framed the test as follows: "What legitmate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[182]

In the past few years several cases have arisen which have questioned the vitality of the equal protection clause as applied to private associations. In *Mitchell v. Louisiana High School Athletic Association*[183] a student argued that a certain eligibility rule violated the equal protection clause. The rule made this student ineligible to participate in sports because he had once elected not to proceed to the next grade. But the rule did not apply to those who did not move upward because they had failed to pass. The court stated that since the classification was neither inherently suspect (e.g., a racial classification) nor an encroachment on a fundamental right (e.g., the right to vote), it would not intervene.[184] The court declined to engage in the active review undertaken in cases involving suspect classifications and fundamental interests, and instead adopted the restrained approach which holds that a court will give considerable deference to discrimination by a state regulatory organization.[185]

Federal courts, however, in at least four instances have given redress from actions by athletic associations on the basis of the equal protection clause. Two cases, the first arising in Alabama and the second in Louisiana, involved instances where two separate athletic associations existed in the same state – one for the white high schools and another for black high schools.[186] In the Alabama case, a three-judge panel ruled there could be only one state-wide athletic association and directed the two associations to submit plans for their integration.[187] In the Louisiana case, the Fifth Circuit affirmed a district court's order that the white association accept into membership any high school which qualified for membership under the constitution of the white association, regardless of race and regardless of the wishes of the majority of the members of the white association.[188]

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178 The equal protection clause is applied with special force to racial classifications. However, courts are unclear as to what other classifications exactly are "suspect." See generally Gunther, A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). Interests that have been identified as fundamental, and therefore deserving of special treatment under the equal protection clause, include voting, Reynolds v. Sims, 377 U.S. 533 (1964), rights with respect to criminal procedures, Griffin v. Illinois, 351 U.S. 12 (1956), and to a lesser degree education, Brown v. Board of Educ., 347 U.S. 483 (1954).

179 Harper v. Board of Election, 383 U.S. 663 (1966). Voting has traditionally been regarded as a fundamental interest. Courts often view monetary requirements as suspect because the financial classifications created unequal burdens on rich and poor. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) (dictum). Where a court finds a "suspect classification" or "fundamental interest" present, it may apply the "least onerous alternative" test. See, e.g., Carrington v. Rash, 380 U.S. 89, 95-6 (1965).

180 This test first emerged in Justice Marshall's dissent in Dandridge v. Williams, 397 U.S. 471, 520-21 (1970). Later, the Court in Eisenstadt v. Baird, 405 U.S. 438 (1972), although not explicitly, employed a test midway between rationality and compelling interest. See Note, The Impact of *Stanley v. Illinois* on Custody Procedures for Illegitimate Children: Procedural Parity for the Putative Father? 3 N.Y.U. Rev. L. & Soc. Change 31, 38-40 (1973).

181 406 U.S. 164 (1972).

182 Id. at 173.

183 430 F.2d 1155 (5th Cir. 1970).

184 Id. at 1158.

185 See Developments, supra note 18, at 1076-1133.

186 Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968); Lee v. Macon County Bd. of Educ., 283 F. Supp. 194 (M.D. Ala. 1968).

187 Lee v. Macon County Bd. of Educ., 283 F. Supp. 194, 198 (M.D. Ala. 1968).

188 Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 228 (5th Cir. 1968).

The third case, *Curtis v. NCAA*,[189] involved the National Collegiate Athletic Association (NCAA) rule requiring a minimum 1.600 grade point average for athletic eligibility.[190] Under traditional equal protection analysis it appears that the classification resulting from the rule has a reasonable relationship to the purpose that the NCAA seeks to achieve.[191] The *Curtis* case, however, is a clear example of the unreasonable results that may issue from the application of a general rule.[192] Because Curtis was admitted under a special minority program, he was excused from the normal entrance requirements of the university.[193] During his freshman and sophomore years, Curtis compiled a cumulative grade point average in excess of 3.0.[194] On these facts, the federal district court found that the imposition of the 1.6 rule was a violation of the equal protection clause, concluding:

> The consequence of that classification is that plaintiffs are permanently ineligible to participate in intercollegiate athletics despite the fact that each of the plaintiffs is at present in good academic standing. The classification is neither necessary nor rationally related to any of the objectives sought to be obtained by the N.C.A.A. in adopting the 1.600 Rule, or of any public policy or of any policy of the N.C.A.A.[195]

The court's holding in the *Curtis* case appears to be an instance in which the equal protection standard is applied not only to the face of the statute but also to the application of the rule to a specific situation.[196] Hence, this case may have great impact in the future.

The fourth case invoking the equal protection clause, *Wellsand v. Valparaiso Community Schools*,[197] involved the Indiana High School Athletic Association (IHSAA) rule which prohibited married students from participating in interscholastic sports.[198] Under this rule the plaintiff was ineligible for interscholastic athletic

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189 No. C-71 2088 ACW (N.D. Cal. Feb. 1, 1972).

190 According to the NCAA bylaws a college freshman's prior scholastic performance must predict an ability to maintain a 1.600 grade point average in order for him to be eligible to compete in athletic events or receive an athletic scholarship during his first year of college. NCAA Manual, Bylaws, Art. 4 §§ 1, 6 (1971-72). The prediction is based upon high school grades and/or rank in class and a score in the scholastic aptitude examination (the SAT or ACT). The *Curtis* case involved two athletes, James McAlister of UCLA and Isaac Curtis of University of California at Berkeley. The NCAA ruled the former ineligible because he had not taken the college entrance exam on a certified test date. Los Angeles Times, June 16, 1971, § 3, at 1, col. 6. See Sports Illustrated, Nov. 15, 1971, at 29-31. The NCAA ruled Curtis ineligible because it discovered that, as part of the minorities admission program, he was not required to take the college entrance examination. See New York Times, Aug. 22, 1971, § 5, at 25, cols. 4-6; Curtis v. NCAA, No. C-71 2088 ACW, at 6 (N.D. Cal. Feb. 1, 1972).

191 See text accompanying note 177 supra.

192 The NCAA had adopted the 1.6 rule to insure that athletes be "an integral part of the student body" and that intercollegiate athletics constitute "an integral part of the [member institution's] educational program." Curtis v. NCAA, No. C-71 2088 ACW (N.D. Cal. Feb. 1, 1972). See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

193 Curtis v. NCAA, No. C-71 2088 ACW, at 1 (N.D. Cal. Feb. 1, 1972).

194 Id. at 3.

195 Id. at 8.

196 See also Palmer v. Euclid, 402 U.S. 544 (1971); Yick Wo v. Hopkins, 118 U.S. 356 (1886). In the latter case the Supreme Court observed: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied ... so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibitions of the Constitution ...." Id. at 373-74.

197 No. 71H 122(2) (N.D. Ind. Sept. 1, 1971).

198 Rule K, I.H.S.A.A. 1970-71 Handbook, as cited in Wellsand v. Valparaiso Community Schools, No. 71H 122(2), at 2 (N.D. Ind. Sept. 1, 1971): "Married students shall not be eligible for participation in inter-school athletic competition. Students who have been divorced or whose marriages have been annuled are bound by the above rule."

competition during his senior year.[199] The court found the "marriage rule" invalid on its face because of its discrimination against married students.[200] Although *Wellsand* did not state explicitly that the burden rested on the IHSAA,[201] the fact that it was necessary for the IHSAA to show rational justification meant that the usual presumption of validity attached by courts to such rules was overriden by prima facie arbitrariness of the rule. The same result was reached in *Alexander v. Thompson*,[202] where the court held:

> The burden of proving in the state courts their alleged authority to deprive a California high school student of his right to a public education merely because of the length of his sideburns must fall on the defendants. The plaintiff has demonstrated in this court such a degree of arbitrary conduct on the part of the defendants that justice requires that the burden of expelling him must rest on the defendants.[203]

In dismissing several of the IHSAA's contentions, the *Wellsand* court seemingly relied upon the rational relationship test, since nonfundamental rights and nonsuspect classifications were involved.[204] Because no statistical evidence was presented by the defendants,[205] the correlation between divorce and dropping out was unsubstantiated, and the Association's classification was deemed "irrational" and violative of the *McGowan v. Maryland* test.[206] The court's reasoning seems to require that such classifications be based upon school authorities' observations of the actual effect of married student athletic participation upon divorce or drop-out rates. In light of *McGowan* the court stated that "in the case at bar, it is unnecessary to decide which test should be applied ... [since] the reasons to justify the rule fail to satisfy the more lenient 'rational basis' test."[207]

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199 The right to equal protection is included under the "rights, privileges or immunities" clause of 42 U.S.C. § 1983, 1970. However, to come within the § 1983 requirement of "under color of any statute, ordinance, or regulation ... of any State" there must be state action. Agencies and regulatory bodies of the states, upon occasion, have fallen within this category. Cf. Muhammad Ali v. Division of State Athletic Comm'n, 316 F. Supp. 1246 (S.D.N.Y. 1970), where the court found that the boxing commision's denial of a license violated equal protection. The commission was found to be part of a state agency so that state action was involved in the license issuance procedure.

200 Wellsand v. Valparaiso Community Schools, No. 71H 122(2), at 6 (N.D. Ind. Sept. 1, 1971).

201 Id.

202 313 F. Supp. 1389, 1395 (C.D. Cal. 1970).

203 Id. at 1399.

204 See notes 175-79 supra.

205 Wellsand v. Valparaiso Community Schools, No. 71H 122(2) at 6 (N. D. Ind. Sept. 1, 1971). In Board of Directors v. Green, 259 Iowa 1260, 1269, 147 N.W.2d 854, 859 (1967), statistics were presented to and accepted by the court to justify barring a married student from playing basketball. The survey showed that for the years 1960-65, 97 out of 139 married students were dropouts. Additionally, in Kissick v. Garland Independent School Dist., 330 S.W.2d 708, 710 (Tex. Civ. App. 1959), the court recognized that 24 out of 62 married students in the district dropped out of school. The court viewed this as an important factor, justifying the rule.

206 McGowan v. Maryland, 366 U.S. 420 (1961). The "rational basis" test allows state governmental organs wide discretion in enacting laws and regulations which effect citizens differently. The *McGowan* Court stated:

> Neither the Due Process nor the Equal Protection Clause demands logical tidiness. ... No finicky or exact conformity to abstract correlation is required of legislation. The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial reexamination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded. ... And what degree of uniformity reason demands of a statute is, of course, a function of the complexity of the needs which the statute seeks to accommodate.

Id. at 524.

207 Wellsand v. Valparaiso Community Schools, No. 71H 122(2), at 6 (N. D. Ind. Sept. 1, 1971).

Indeed, it is possible that *Wellsand* applies a standard more strict than the traditional rational relationship test by requiring statistical proof to be presented in addition to other evidence offered by the IHSAA. In refusing to give credence to the defendant's drop-out argument, the court seems to be approximating the "balancing of interests" approach used in substantive due process.[208]

To summarize, then, the proscriptions of the due process and equal protection clauses may attach to the conduct of private associations where state action is present. The former clause provides both procedural and substantive protections, the standards of which may be gleaned from an examination of prior case law. The equal protection clause, however, is an area of law which is still expanding and may yet encompass a broad "balancing of interests" test for the legality of private associational conduct.

IV. CONCLUSION

In describing the increasing judicial willingness to intervene in the conduct of private associations, a court once wisely observed: "The persistent movement of the common law towards satisfying the needs of the times is soundly marked by gradualness. Its step by step process affords the light of continual experience to guide its course."[209] As the impact of private associational conduct has increasingly affected both private and public interests, courts have been willing to depart from the hands-off policy dictated by the doctrine of private associations. As this Note has indicated, the complexities of modern society have made it possible for private groups to affect both pecuniary and nonpecuniary interests of individuals in an arbitrary and adverse fashion. The judicial response in the area of common law has taken a number of forms, including resort to a balancing of interests test.

Moreover, with the broadening scope of the state action doctrine, courts have shown an increased readiness to enforce constitutional restraints under the fourteenth amendment. Thus, nominally "private" conduct of associations has been subjected to judicial review to insure that members and nonmembers alike are guaranteed equal protection and due process under the law.

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[208] See Developments, supra note 18, at 1131; Karst, Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula," 16 U.C.L.A. L. Rev. 716 (1969). See also text accompanying notes 180-82 supra, for a discussion of the "new" equal protection standard.

[209] Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 588, 170 A.2d 791, 799 (1961), aff'g 62 N.J. Super. 184, 162 A.2d 324 (1960).