THE MEMBERSHIP OF JUDGES IN GENDER DISCRIMINATORY PRIVATE CLUBS

INTRODUCTION

> [Private] clubs can be seen as the community's spinal column connecting the vertebrae of business, industry, finance, politics, the universities, and the foundations. Within the clubs, this spine can stiffen with the relentless homogeneity of an anachronistic power structure, or it can be supple enough to support a more dynamic city.[1]

Private clubs often appear to be social and recreational retreats from the pressures of the outside world. For many members this may be true. Yet, for others, the private club environment may also facilitate economic and political advancement. Persons excluded from this environment are denied access to avenues that lead to career advancement and economic opportunity.

Excluding women from all-male clubs significantly contributes to the maintenance of a rigid caste system which perpetuates the view that women should not be in positions of authority. Denying women the opportunity to participate in an activity that often confers an immeasurable benefit upon the careers of their male colleagues creates a gender-based barrier to continued personal and professional growth.

Despite recent dramatic increases in the number of women in the workforce, particularly in the legal profession,[2] it is apparent that career advancement opportunities for women have not increased proportionally.[3] Explanations for this discrepancy include the traditional relegation of women to the private sphere, and the reluctance of men to accept women as appropriate participants in the public sphere.[4] All-male private organizations which exclude

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1. Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321, 405 (1983) (quoting Bracewell, *Sanctuaries of Power*, HOUS. CITY MAG., May 1980, at 50).

2. "[T]he 103,000 women lawyers in the United States today accounts for about 15% of the country's lawyers. That is a substantial increase from 1980, when 8.1% of the country's lawyers were women." Graham, *It's Getting Better, Slowly*, A.B.A. J., Dec. 1, 1986, at 54.

3. "[W]hile women seem to be making important gains in entry-level positions they are still not making a significant impact on the prestigious and powerful areas of the law." K. MORELLO, THE INVISIBLE BAR 195 (1986).

4. *Id.* at 179.

women contribute to this discrepancy by perpetuating traditional stereotypes that undermine efforts to ensure equal economic opportunity for all.

Although anyone who becomes a member of a gender discriminatory club contributes to disparate economic opportunity, the situation becomes even more serious when members of the judiciary choose to join these clubs. The membership of judges in gender discriminatory private clubs implies that judges endorse the discriminatory practices. It also raises the concern that judges are not impartial towards women who enter their courts as either attorneys or litigants.[5] As a result, public confidence in the judiciary is jeopardized.

This note will examine the issue of judicial membership in gender discriminatory private clubs and evaluate whether this private, non-official conduct is subject to restriction. Part I of this note traces the evolution of the regulation of judicial conduct. As judicial independence has yielded to societal concern regarding the conduct of public officials, regulation of judicial conduct has expanded to include non-official as well as official behavior.[6] Part II outlines state and federal procedures currently in place which address allegations of judicial misconduct and restrict judicial behavior.

Part III discusses constitutional restraints on the regulation of private clubs. States may proscribe gender discrimination in private clubs which will mitigate public objection to judicial membership in these clubs. However, before the state can regulate private clubs, two constitutional hurdles must be overcome. First, under the fourteenth amendment, the private club and the government must be intertwined to such an extent that actions of the club are imputed to the state. Secondly, any regulation of a private club must take into account the first and ninth amendment rights of the club's members.

Part IV examines different methods of addressing judicial membership in gender discriminatory private clubs and the resulting public perception of judicial bias in the courtroom. Special committees created by both the New York and New Jersey State

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5. *See* Blodgett, *I Don't Think Ladies Should Be Lawyers*, A.B.A. J., Dec. 1, 1986, at 52-53.

6. The terms "non-official conduct" and "off-the-bench conduct" are used in this note to refer to judges acting in their capacity as private citizens.

Bar Associations to study the problem of courtroom bias have suggested two approaches. One proposal is to require judicial education, and another is to adopt a rule prohibiting prejudicial behavior by the judiciary. A more direct approach is found in New York City's Local Law 63 which confers public status on clubs that do not meet the city's definition of "distinctly private." The designation of the club as "public" would then subject the club to regulation and the discriminatory policy could be invalidated. As a result, judicial membership in the club would no longer be objectionable.

I. The Evolution of the Regulation of Judicial Conduct

For our system of justice to function effectively, it is vital to maintain the image of an honest, conscientious and independent judiciary. Careful selection processes are one means of attempting to ensure that only those persons possessing these qualities become judges.[7] However, no selection method can guarantee the continued fitness of the judiciary. Therefore, a system must be implemented to ensure that judges are held accountable for improper behavior. The evolution of judicial discipline reflects the struggle to balance the inherent tension between the need for an independent judiciary and the need for judicial accountability.

A. Balancing Independence and Accountability: An Historical Perspective

In his commentary on the formulation of a judiciary, Alexander Hamilton observed that one of the most important elements of the judiciary would be its independence.[8] Hamilton concluded that because the judiciary was to possess "neither force nor will"[9] but only judgment, the judiciary was "beyond comparison the weakest of the three departments of power."[10] Thus, to protect the fragile independence of the judiciary the constitution mandated impeachment as the only form of judicial discipline.[11]

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7. *See generally* A. Ashman & J. Alfini, The Key to Judicial Merit Selection: The Nominating Process (1974).

8. "The complete independence of the courts . . . is peculiarly essential in a limited constitution." The Federalist No. 78, at 356-57 (A. Hamilton) (Rhys ed. 1934).

9. *Id.* at 356.

10. *Id.*

11. U.S. Const. art. I, § 2, cl. 5. In addition, tenure on the bench would be permanent, with the stipulation that the judges maintain a "good behavior" standard. *Id.* art. III, § 1.

The Constitution requires that impeachment proceedings be instituted in the House[12] and tried in the Senate[13] in order to protect the balance of power between the three branches of government.[14] It seems clear, from these protective requirements, that the framers of the Constitution believed that impeachment proceedings would be instituted only rarely.[15] As a result, the judiciary would be shielded from the arbitrary will of the more powerful branches and from the vicissitudes of public opinion.[16]

However, public opinion took on new importance with the election of Andrew Jackson in 1828. The resurgence of democracy brought an increase in popular controls and an aversion to aristocratic institutions.[17] The resulting political reform reached the judiciary in 1832 when Mississippi became the first state to institute elections for its entire judiciary.[18] By the Civil War judicial elections had been implemented in seventy percent of the states.[19] Although still widely employed, removing judges by popular vote is marred by the same political undertones that often motivated impeachment proceedings.[20]

In 1887, the State of Alabama adopted a code of ethics in an effort to assist the legal profession in dealing with the problems attending ethical matters.[21] Other states borrowed heavily from the Alabama code in constructing their own codes, as did the American Bar Association, which enacted its Canons of Professional Ethics in 1908.[22] In 1924, the Bar Association noted the unique position of the judiciary in society and supplemented the original canons with

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12. *Id.* art. I, § 2, cl. 5.

13. *Id.* art. I, § 3, cl. 6.

14. THE FEDERALIST No. 78, at 396.

15. *Id.*

16. *Id.* at 396-99.

17. "The concept of an elected judiciary emerged during the Jacksonian era as a part of a larger movement aimed at democratizing the political process in America. It was spearheaded by reformers who contended that the concept of an elitist judiciary . . . did not square with the ideology of a government under popular control." P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 3 (1980) (quoting Atkins, *Judicial Elections: What the Evidence Shows*, FLA. B.J., Mar. 1976, at 152).

18. *See* Schoebaum, *A Historical Look at Judicial Discipline*, 54 CHI.[-]KENT L. REV. 1, 9 (1977).

19. *Id.*

20. *Id.*

21. ABA Comm. on Professional Ethics and Grievances, Annotated Canons of Ethics 5 (1926).

22. *See id.*

the Canons of Judicial Ethics.[23] In 1972, the current Code of Judicial Conduct replaced the original canons.[24]

Dissatisfaction with the disciplinary methods of impeachment and election, coupled with a growing concern that the Canons were largely ignored, led to increased state bar association involvement.[25] Between 1938 and 1957 several state bar associations developed procedures for investigating charges of judicial misconduct.[26] Although the bar association procedures were more effective than earlier disciplinary measures, the fact that the judiciary was regulated by its own members and the lawyers who practiced before it, created the impression that instances of judicial misconduct could be "whitewashed."[27] The bar association actions were, however, the forerunners of the permanent judicial disciplinary commissions.[28]

B. The Creation of Permanent Judicial Disciplinary Commissions

In 1960, in response to the need for a fair and effective method to investigate allegations of judicial misconduct, California became the first state to create a permanent judicial disciplinary commission.[29] The California Commission on Judicial Performance included both lawyers and non-lawyers, thereby avoiding the appearance of a "whitewash" by the judiciary.[30] The California commission also recommended disciplinary measures for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[31] Because "conduct" may include non-official as well as official behavior,[32] this provision lays the foundation for the regulation of a judge's non-official conduct.

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23. ABA Comm. on Professional Ethics and Grievances, Canons of Professional and Judicial Ethics 5 (1957).

24. CODE OF JUDICIAL CONDUCT (1972).

25. Schoebaum, *supra* note 18, at 10.

26. These states include Missouri, Ohio, Utah, Virginia and Wisconsin. *See* Schoebaum, *supra* note 18, at 11.

27. Schoebaum, *supra* note 18, at 13 (quoting O. PHILIP & P. MCCOY, CONDUCT OF JUDGES & LAWYERS 144 (1952)).

28. Schoebaum, *supra* note 18, at 13.

29. *See* CAL. CONST. art. VI, § 8.

30. Schoebaum, *supra* note 18, at 19.

31. *See* CAL. CONST. art. VI, § 18.

32. Martineau, *Disciplining Judges for Non-Official Conduct: A Survey and Critique of the Law*, 10 U. BALT. L. REV. 225, 229 (1981).

In 1980, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act[33] in response to increasing public concern over the conduct of public officials, and a significant rise in the number of judges needed to meet the growing judicial needs of the country.[34] The Act established a federal parallel to the state judicial disciplinary commissions, and created a procedure for investigating complaints of non-impeachable offenses against the federal judiciary.[35] The Act, like the state disciplinary commissions, opened the door to the regulation of judicial behavior by providing for disciplinary actions in cases where the judicial conduct "brings the judicial office into disrepute."[36]

The formulation of new state and federal judicial disciplinary systems has broadened the scope of behavior that may be regulated. There is no question that official behavior may be restricted. The difficult question regarding the regulation of judicial conduct involves the private, non-official behavior of a judge. The regulation of a judge's non-official conduct is suggested in regulatory provisions of both the federal and state disciplinary commissions.[37] As one commentator has noted, "[t]he ultimate basis for subjecting a judge to discipline for non-official conduct is the same as that for official conduct to maintain public confidence in the judiciary and the judicial process."[38]

C. Public Confidence and Cooperation

Public cooperation is a vitally important element in the process of enforcing judicial orders and decrees.[39] If, in the view of the public, cases are decided with bias, public confidence in the judiciary may be destroyed despite the accuracy of the perception.[40]

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33. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980).

34. S. REP. No. 362, 96th Cong. 2d Sess. 4321 (1980).

35. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980).

36. Martineau, *supra* note 32, at 227.

37. *See generally* Schoebaum, *supra* note 18, at 7.

38. Martineau, *supra* note 32, at 245.

39. *Id.* at 235.

40. *See* Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 986 (1985). *See also Rehnquist Alters Restrictive Deed*, N.Y. Times, Nov. 16, 1986, at 50, col. 1.

The issue of public confidence and judicial impartiality surfaced during ratification proceedings for Chief Justice William Rehnquist. A background check conducted by the Senate Judiciary Committee revealed the existence of a restrictive covenant in the deed to the Rehnquists' summer home in Greensboro, Vermont. The covenant prohibited the lease or

If the public is to accept and abide by decisions rendered by its courts, it is essential that members of the judiciary "conduct their personal lives so as not to detract from their dignity or impartiality."[41] Judicial dignity is a "relative term" that defies precise definition.[42] Its meaning, therefore, will fluctuate with each analysis of a judge's behavior.[43] The Code of Judicial Conduct does not and could not contain a list of prohibited activities. However, when it becomes necessary in each case to draw the line between activities that are permissible and those that are not, members of the judiciary should be afforded a "very reasonable degree of latitude."[44] It is only when the action does measurable damage to the court's dignity and appearance of impartiality, thereby causing an erosion of public confidence that judicial independence must give way to accountability. Restriction of judicial behavior is then appropriate.[45]

By maintaining a membership in a gender discriminatory private club, a judge impliedly condones the club's discriminatory policy and calls into question the judge's off-the-bench impartiality towards women attorneys and litigants. These doubts regarding judicial impartiality detract from the dignity of the judiciary and may cause the public to lose confidence in its judges. As a result, judicial membership in gender discriminatory private clubs is properly subject to restriction.

II. State and Federal Regulation of Judicial Conduct

The judiciary is, for the most part, self-regulated.[46] As a result, the judiciary is particularly susceptible to criticism when it fails to adequately regulate and supervise the conduct of its members.[47]

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sale of the home to "any member of the Hebrew race." Although this situation involved non-official conduct, members of the Senate Judiciary Committee expressed concern that the restrictive covenant would call into question Chief Justice Rehnquist's on-the-bench impartiality towards members of the Jewish faith. Although the covenant did not prevent Chief Justice Rehnquist's confirmation, the clause was eventually removed from the deed. *Id.*

41. Lubet, *supra* note 40, at 990.

42. Code of Judicial Conduct Canon 2 comment (1972) (amended 1984).

43. Lubet, *supra* note 40, at 990.

44. S. Lubet, Beyond Reproach: Ethical Restrictions on the Extra Judicial Activities of State and Federal Judges 37 (1984).

45. Lubet, *supra* note 40, at 990.

46. *See* Schoebaum, *supra* note 18, at 4-8.

47. Peskoe, *Procedures for Judicial Discipline: Type of Commission, Due Process and Right to Counsel*, 54 Chi.[-]Kent L. Rev. 147 (1977).

The institution of a relatively uniform standard of conduct for judges, and of visible mechanisms for enforcing those standards, will counter the image of a profession reluctant to sanction its own members.[48]

A. The Code of Judicial Conduct

The primary source for the regulation of both official and non-official judicial behavior is the Code of Judicial Conduct (hereinafter the Code). The Code presents the judiciary with a "self-imposed guideline" that delineates the behavior that is expected of them.[49] The Code is not, however, statutory, and while its canons may influence the judiciary toward a certain standard of ethical conduct, it does not have the force of law.

The current version of the Code, adopted in 1972, reflects the concern of the American Bar Association that the original canons inadequately addressed the non-official activities of judges.[50] Of the Code's seven canons, only Canon Three deals exclusively with official judicial conduct.[51] Canon One calls for the judiciary to "uphold the integrity and independence of the judiciary",[52] and therefore involves both official and non-official behavior. The remaining five Canons involve the non-official conduct of the judges.[53] In 1984, the American Bar Association approved additional commentary to Canon Two of the Code which stated that it is "inappropriate for a judge to hold membership in any organization that practices invidious discrimination."[54] In the two years since the adoption of the commentary, no judge has been disciplined by either a state or federal disciplinary commission for failing to adhere to the standard of conduct outlined in the commentary.[55] As a result, while the emphasis of the current Code is clearly on the non-official aspects of judicial behavior, the state and federal disciplinary commissions have not rigorously enforced the Code's dictates.

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48. *Id.* at 175.

49. Bell, *Private Clubs and Public Judges: A Non-Substantive Debate About Symbols*, 59 TEX. L. REV. 733, 748 (1981).

50. *See* CODE OF JUDICIAL CONDUCT Canon 1 (1972) (amended 1984).

51. *Id.* Canon 3.

52. *Id.* Canon 1.

53. *Id.* Canons 2, 4-7.

54. CODE OF JUDICIAL CONDUCT Canon 2 comment (1972) (amended 1984).

55. Lubet, *supra* note 40, at 1004.

B. Regulating a Judge's Non-Official Conduct

In order to ensure public confidence in the judiciary, it is necessary to subject the conduct of judges to a higher degree of scrutiny than is accorded to members of any other profession or to any other government official.[56] Because off-the-bench conduct can cause an erosion of public cooperation and confidence, this scrutiny must encompass not only the official conduct of the judge, but also the judge's private, non-official behavior.[57]

Judges are expected not only to obey the law, but also to avoid many activities that would not be subject to restriction if engaged in by ordinary citizens.[58] Policy reasons offered as justification for the regulation of a judge's non-official behavior include: "(1) the need to maintain public confidence in the judiciary, (2) the need to avoid the appearance of partiality or favoritism, and (3) the need to ensure that judges will not be distracted by non-judicial activities."[59]

The difficulty in restricting the non-official conduct of a judge lies in determining the extent to which the need for public confidence in an impartial judiciary justifies intrusion into a judge's private life. When the non-official conduct of a judge is public and visible, it has a greater impact on public perception of the judiciary.

In *In re Babineaux*,[60] the Supreme Court of Louisiana suspended several judges from office without pay for refusing to resign their positions on the Board of Directors "of certain financial institutions or businesses affected with a public interest."[61] The court expressed concern that the public nature of the judges' involvement with the organizations would cast doubt upon the judges' impartiality in matters relating to the organizations.[62] The court stated that "there is no question but that such persistent and public conduct is prejudicial to the administration of justice and that

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56. *See, e.g.*, Cincinnati Bar Ass'n v. Heitzler, 32 Ohio St. 2d 214, 221, 291 N.E.2d 477, 482 (1972).

57. CODE OF JUDICIAL CONDUCT Canons 2, 4-7 (1972) (amended 1984).

58. *Id.* Canon 2 ("A judge should avoid impropriety and the appearance of impropriety in all his activities.").

59. Lubet, *supra* note 40, at 985-86.

60. 346 So. 2d 676 (La.), *cert. denied*, 434 U.S. 940 (1977).

61. *Id.* at 677.

62. *Id.* at 679-80.

it . . . bring[s] the judicial office into disrepute."[63]

Judicial membership in gender discriminatory private clubs raises many of the same concerns recognized by the court in *Babineaux*. The public nature and high visibility of the membership, combined with increasing public awareness of the adverse effects of gender bias in the courtroom justifies restriction of the judge's non-official behavior.[64]

C. Regulating the State Judiciary

Many states have adopted, in some form, the Code of Judicial Conduct.[65] Every state has established permanent disciplinary commissions which are vested with the responsibility of enforcing the guidelines suggested by the Code.[66] The state judicial disciplinary commissions have become increasingly concerned with the personal conduct of the judiciary.[67] An explanation for this increased desire to regulate the non-official conduct of judges may be found in the general distrust of government officials that grew out of the Watergate experience.[68]

Traditionally, state courts have regulated the personal conduct of attorneys through their state constitutional authority to regulate bar admissions and to discipline attorneys.[69] Regulating the personal conduct of judges is a natural extension of the practice of regulating the personal conduct of attorneys, because the same rationale applies in both cases.[70] Most state constitutions explicitly proscribe "wilfull misconduct in office,"[71] as well as conduct which may have an adverse effect on the "integrity of the judicial system."[72] Because non-official behavior may undermine the integrity

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63. *Id.* at 681.

64. *See infra* notes 149-61 and accompanying text.

65. Illinois, Maryland, Montana, Rhode Island and Wisconsin have enacted a portion of the Code of Judicial Conduct or have enacted their own standards. The remaining 45 states have adopted the Code of Judicial Conduct in full. *See* Lubet, *supra* note 40, at 983 n.5.

66. Martineau, *supra* note 32, at 227.

67. *Id.*

68. *Id.* at 228.

69. *See* Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 318 A.2d 811 (1974).

70. Martineau, *supra* note 32, at 227-28. (The rationale for regulating the personal conduct of judges is the "preservation of public confidence in the judicial process.").

71. *See, e.g.*, CAL. CONST. art. VI, § 18(c) (1879, amended 1976); COLO. CONST. art. VI, § 23(3)(b); DEL. CONST. art. IV, § 37.

72. *See* Overton, *Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions*, 54 CHI.[-]KENT L. REV. 59, 60-61 (1977). *See, e.g.*, MICH. CONST. of 1964, art. VI, § 30(2); PA. CONST. of 1968, art. V, § 18(d); VA. CONST. of 1971, art. VI, § 10.

of the judicial system, many states may regulate this behavior.[73]

D. Regulating the Federal Judiciary

Congress passed The Judicial Councils Reform and Judicial Conduct and Disability Act in 1980 to establish procedures for processing complaints against federal judges.[74] On March 17, 1987, the Judicial Conference considered the case of Judge Alcee Hastings of Miami.[75] Six charges were originally filed in 1983 by two of Hastings' fellow judges,[76] including allegations of "outspoken and unseemly" conduct and "odious behavior."[77] These charges relate both to Hastings' official conduct[78] and his non-official conduct.[79] The allegations regarding Judge Hastings' non-official behavior have since been eliminated and the two remaining charges deal with his official conduct in allegedly conspiring to sell judicial favors.[80] Although Judge Hastings was acquitted of all conspiracy charges in federal court,[81] several of Judge Hastings' fellow judges were concerned with the damage already done to the image of the judiciary.[82]

Judge Hastings has filed several unsuccessful suits challenging the constitutionality of the process authorized by the Judicial Councils Reform and Judicial Conduct and Disability Act.[83] A five-judge investigation committee appointed by the United States Court of Appeals for the Eleventh Circuit conducted a three and one-half year investigation before voting unanimously to refer Judge Hastings' case to the Judicial Conference. Judge Hastings challenged the constitutionality of this process and argued that the framers of the United States Constitution intended to ensure judi-

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73. Martineau, *supra* note 32, at 229.

74. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980).

75. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 41 (1987). The only previous opportunity for the Judicial Conference to evaluate judicial conduct arose in 1986 in the case of Judge Harry Claiborn. However, because impeachment proceedings had already been instituted in the House, the Judicial Conference was not required to act. Friend, *Peer Pressure*, AM. LAW., Nov. 1986, at 81, 86.

76. *See generally*, Friend, *Peer Pressure*, AM. LAW., Nov. 1986, at 81.

77. *Id.* at 82.

78. *Id.* (*e.g.* selling judicial favors, allowing law clerks to make his decisions).

79. *Id.* (exploiting his position as a judge to help his friends).

80. *Id.*

81. Friend, *supra* note 75, at 81.

82. *Id.*

83. *Id.* at 86.

cial integrity by vesting the power of investigation and impeachment in the House of Representatives.[84] After considering the results of an investigation conducted by the Judicial Council of the Eleventh Circuit and statements submitted by Judge Hastings, the Judicial Conference concurred in the determination of the Judicial Council that impeachment may be warranted.[85]

The processing of only one complaint against the judiciary in the six years since the Act was enacted is a reflection of the reluctance of the judiciary to regulate itself. This reluctance undermines public confidence in the federal judiciary. It appears unlikely, given the absence of disciplinary action taken by the conference to date, that non-official behavior such as membership in a gender discriminatory private club will be seen as warranting disciplinary action.

Unless the Judicial Conference decides otherwise, the only method of disciplining the federal judiciary is a recommendation for impeachment to the House of Representatives. Judicial misconduct that does not rise to the level of an impeachable offense, but nonetheless harms the image of the judiciary, should also be subjected to disciplinary action. Because the Act provides for disciplinary action in cases where judicial conduct "brings the judicial office into disrepute,"[86] regulating judges' non-official conduct is within the authority and responsibility of the conference. The methods of investigating complaints must reflect this responsibility.

III. Counterbalancing Constitutional Restraints on Further Regulation

Judicial membership in gender discriminatory private clubs may be regulated indirectly through state regulation of the clubs themselves. However, before a state can regulate discriminatory private clubs and, consequently, judicial non-official behavior, two federal constitutional barriers must be overcome.

First, a challenge to discriminatory membership policies based on the equal protection clause of the fourteenth amendment can-

84. *Id.*

85. Report of the Proceedings of the Judicial Conference of the United States 42 (1987).

86. Martineau, *supra* note 32, at 229.

not succeed without a finding of state action. The private entity and the government must be intertwined to such an extent that actions of the private club are found to be actions of the state.[87] Second, state regulations of private clubs must always be balanced against any adverse effects the regulation may have upon the members' first and ninth amendment rights.

A. Fourteenth Amendment Challenges to Private Club Discrimination

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.[88]

Traditionally, victims of discriminatory practices based on race and ethnicity have founded their challenges on the equal protection clause of the fourteenth amendment.[89] Under the amendment, a governmental body must have been responsible for the alleged discriminatory practice.[90] In order for private club discrimination to implicate fourteenth amendment guarantees, the private entity must be intertwined with the government to such an extent that its conduct constitutes state action.[91]

1. Satisfying the State Action Requirement: Intermediate vs. Strict Scrutiny

One commentator has suggested that the lower level of scrutiny employed in cases of gender-based discrimination increases the level of state involvement required for a finding of state action.[92] Because gender is not considered to be a "suspect" class, gender-based discrimination currently receives an intermediate level of scrutiny.[93] To survive a constitutional challenge under this test, the practice must "[bear] a rational relationship to a State objective . . . sought to be advanced" by the practice.[94] While this test is more stringent than the rational basis requirement that was

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87. Burns, *supra* note 1, at 355-56.

88. U.S. CONST. amend. XIV, § 1.

89. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

90. U.S. CONST. amend. XIV, § 1. ("No *state* shall . . .) (emphasis added).

91. Burns, *supra* note 1, at 355.

92. Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 SW. U.L. REV. 237, 260 (1982).

93. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971).

94. *Id.* at 76.

applied to gender discrimination claims, it falls far short of the compelling state interest requirement of a strict scrutiny analysis.[95] The strict scrutiny test is utilized in analyzing discriminatory practices involving race, which the courts consider to be a suspect category.[96]

Even if state action is shown, the court may uphold the discriminatory practice if it determines that the classification is substantially related to an important government interest.[97] If the standard of review in cases of gender-based discrimination was raised to strict scrutiny, the governmental objective would have to be compelling as opposed to merely important. The higher standard of review would require a determination that there are no less burdensome alternatives available for accomplishing the state interest.[98] A strict scrutiny analysis would serve to lessen the difficulty encountered by the sex discrimination plaintiff in proving state action.[99] Thus, raising the level of scrutiny in gender discrimination cases would afford sex discrimination plaintiffs the same fourteenth amendment protections offered to victims of racial discrimination.[100]

2. *The Government/Private Entity Nexus*

There are three ways in which a private entity, as a result of its involvement with the government, may be deemed sufficiently "public" so that state action is found.[101] First, goods or services that are normally provided by the government may instead be provided by a private entity. The entity, then, in effect, performs a government function.[102] Second, government may also, through licensing regulation, become sufficiently involved with the private entity.[103] Finally, government enforcement of a private organization's discriminatory covenant would constitute sufficient govern-

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95. *See generally* Burns, *supra* note 1, at 352.

96. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944), *but c.f.* Burns, *supra* note 1, at 352 (One commentator has observed that "women are not as historically disadvantaged, politically powerless, or as discrete and insular a minority as certain racial and ethnic groups.").

97. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 429 U.S. 190 (1976).

98. *See* Burns, *supra* note 1, at 352.

99. *See* Goodwin, *supra* note 92, at 244-45.

100. *Id.*

101. Burns, *supra* note 1, at 355-56 nn.125-31.

102. *See, e.g.*, McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

103. Burns, *supra* note 1, at 355-56 nn.125-31.

ment involvement in the organization.[104]

a. The Performance of a Government Function

The most significant inroad against the discriminatory practices of private clubs has been accomplished through challenges to the federal tax exemptions afforded these clubs.[105] For example, in *McGlotten v. Connally*,[106] the United States District Court held that tax exemptions to racially discriminatory fraternal organizations constituted federal financial assistance under Title VI of the Civil Rights Act of 1964.[107] Therefore, tax exemptions qualified as state action. The *McGlotten* court noted that the underlying purpose of the exemptions was to induce the organization to provide a service that the government would otherwise be required to provide.[108] Thus, the organization, in effect, performs a government function. Tax exemptions to these organizations indicate government approval of the organization's racially discriminatory conduct.[109] As a result, the organization was not entitled to tax benefits.[110] *McGlotten* dealt exclusively with the issue of racial discrimination.[111] Victims of sex discrimination have not, however, been afforded the same analysis by the courts. For instance, in *McCoy v. Schultz*,[112] tax benefits conferred upon persons contributing to the charitable activities of an exclusively male club were not subjected to the *McGlotten* analysis. The lower level of scrutiny employed in sex discrimination cases allowed the court in *McCoy* to find that the regulations were too far removed from the discrimination.[113] As a result, the tax benefits were allowed to continue.[114]

b. Government Licensing and Regulations of the Private Entity

Government involvement with private entities frequently involves licensing regulations and requirements, and property

104. *Id.*
105. *See, e.g.*, Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1195 (D. Conn. 1974).
106. 338 F. Supp. 448 (D.D.C. 1972).
107. 6 U.S.C. § 601 (1964).
108. McGlotten v. Connally, 338 F. Supp. 448, 456 (D.D.C. 1972).
109. *Id.* at 462.
110. *Id.*
111. *Id.*
112. 73-1 U.S.T.C., para. 9233 (D.D.C. 1973).
113. *Id.*
114. *Id.*

leases.[115] If a state is significantly involved with the private individual or group, the private entity will be held to the same constitutional standards as the state.[116] The courts have generally required a 'symbiotic relationship' such as a state attempt to exercise some control over the lessee's conduct or to secure additional benefits for the state.[117] To date, government licensing and regulation of private clubs have not been utilized to challenge gender discriminatory practices.

c. Government Enforcement of Private Discriminatory Agreements

In *Shelley v. Kraemer*,[118] the United States Supreme Court held that government enforcement of a private discriminatory covenant constituted state action.[119] As a result, fourteenth amendment guarantees were invoked.[120] Because private clubs rarely have overt discriminatory covenants, the Court's rationale in *Shelley* does not have a significant effect upon victims of private club discrimination.

d. Two Approaches to Determining the Existence of State Action

The Supreme Court has generally employed a seriatim analysis in its consideration of the state action issue. In this type of analysis the Court examines separately each factor that might indicate sufficient governmental involvement.[121] However, in many cases state action may only be proven by an aggregation of these factors.[122] Seriatim analysis is unlikely to have an adverse effect on racial discrimination cases, given the strict scrutiny level of review employed by the courts. When considered separately, few aspects

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115. W. LOCKHART, Y. KAMISAR, J. CHOPER, S. SHIFFRIN, CONSTITUTIONAL RIGHTS AND LIBERTIES 1080 (6th ed. 1986).

116. *Id.*

117. *See, e.g.*, Citizens Council on Human Relations v. Buffalo Yacht Club, 438 F. Supp. 316 (W.D.N.Y. 1977).

118. 334 U.S. 1 (1948).

119. Shelley v. Kraemer, 334 U.S. 1, 23 (1948).

120. *Id.*

121. Burns, *supra* note 1, at 357.

122. *See, e.g.*, Citizens Council on Human Relations v. Buffalo Yacht Club, 438 F. Supp. 316 (W.D.N.Y. 1977) (The fact that the city leased property to the club should be considered in combination with other instances of participation to determine the aggregate effect of the state's actions.).

of state involvement in a private organization constitute state action. However, an image of significant involvement may be projected when these aspects are viewed in the aggregate.[123] If the activities of an ostensibly private club are deemed state actions, the state may then invalidate the discriminatory policies on fourteenth amendment grounds. Without these discriminatory policies objections to judicial membership are diminished.

B. First and Ninth Amendments

The right of individuals to associate freely with whomever they choose is not explicitly guaranteed by the Constitution but has been interpreted by the courts as emanating from the first or ninth amendments.[124] Thus, the Constitution may serve as a shield that protects the discriminatory private club from governmental intrusion.[125] However, these rights of association must always be balanced against any corresponding deprivation of rights.[126] Governmental intrusion is appropriate when the harm which may result from an individual's exercise of his or her right of association outweighs the rights of others.[127]

The need to protect the integrity of the judiciary by closely examining a judge's behavior gives rise to an inevitable tension between a judge's right to free association and restrictions on official and non-official conduct.[128] In the absence of a compelling governmental interest that would justify intrusion, courts have protected the rights of individuals to associate for the purpose of pursuing common interests such as politics or religion.[129]

Although judges are expected to conform their behavior to standards higher than those applied to other citizens,[130] they do not, upon becoming judges, forfeit their rights of privacy and association in entirety. However, situations may occur because of the judge's position in society in which these rights must take a back

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123. Burns, *supra* note 1, at 357.

124. Goodwin, *supra* note 92, at 269 n.221. (The right of association also arises from substantive due process.).

125. Bell, *supra* note 49, at 744-45.

126. Goodwin, *supra* note 92, at 270.

127. *Id.*

128. Lubet, *supra* note 40, at 988.

129. Burns, *supra* note 1, at 349.

130. CODE OF JUDICIAL CONDUCT Canon 2 (1972) (amended 1984).

seat to the overriding public policy concerns.[131] The question then becomes, when does damage to public policy interests justify interference with the judge's freedom of association.

1. Inclusive Organizations

Membership in an "inclusive" private club is restricted to persons sharing common religious, political, cultural and ethnic beliefs.[132] In *NAACP v. Alabama ex rel. Patterson*,[133] the Supreme Court held that an Alabama Supreme Court order requiring the NAACP to produce a membership list violated the associational rights of the organization's members.[134] The Court noted that it was "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[135] In the Court's opinion, the State of Alabama failed to show a compelling interest that would justify governmental intrusion into a constitutionally protected organization.[136]

Patterson is an example of the treatment given to "inclusive" organizations by the courts. Political, religious and ethnic organizations "enjoy a preferred position in American society."[137] Because the associations form with the purpose of perpetuating beliefs and cultural distinctions, they have been afforded constitutional protection.[138] When an organization is limited to members of a particular religious sect or group, there is no stigma attached to non-members. Because the group is exercising its constitutional rights of association, the non-member would have no ground to challenge exclusion from the organization. Therefore, there is no compelling interest that would permit governmental intrusion.[139] It would follow, then, that a judge's membership in an inclusive organization does not justify a restriction of his or her constitutional rights of privacy and association. There is no stigma attached to persons ex-

131. Bell, *supra* note 49, at 745.
132. *Id.*
133. 357 U.S. 449, 460 (1957).
134. *Id.*
135. *Id.*
136. *Id.* at 463.
137. Burns, *supra* note 1, at 349.
138. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1957).
139. *Id.*

cluded from the "inclusive" club; therefore, the judge's impartiality is not compromised.

2. *Exclusive Organizations*

Membership in "exclusive" clubs is restricted through the exclusion of persons with particular characteristics. In *Cornelius v. Benevolent Protective Order of Elks*,[140] the United States District Court upheld government withdrawal of tax benefits to a private club whose membership policy excluded blacks.[141] The court stated that the club's racially discriminatory membership policy was "reprehensible."[142] Therefore, the government's interest in discouraging such conduct justified the intrusion.[143]

A judge's membership in an exclusive club communicates an entirely different message to the public than membership in an inclusive club. With respect to an exclusive club, the excluded group may be perceived as inferior to the members.[144] The judge's membership in the exclusive discriminatory organization therefore raises questions concerning his or her impartiality on the bench toward members of the excluded group. It is this situation that justifies restricting the associational rights of the judge. The appearance of bias created by the judge's membership may do immeasurable harm to the public's image of the judiciary.[145]

This possibility of damage is not mitigated by the fact that the judge's membership is honorary as opposed to paid. Regardless of the judge's financial support of the organization, the communicated message remains the same. The judge's name on the discriminatory club's membership rolls implies that the judge sanctions the club's discriminatory practice.[146]

C. *The Effects of the Constitutional Barriers*

The fourteenth amendment state action requirement does not create an insurmountable obstacle to further regulation of judicial

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140. 382 F. Supp. 1182, 1195 (D. Conn. 1974).

141. Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1195 (D. Conn. 1974).

142. *Id.* at 1187.

143. *Id.*

144. Bell, *supra* note 49, at 745 n.77.

145. Lubet, *supra* note 40, at 990.

146. Bell, *supra* note 49, at 745.

non-official conduct. At least one state has responded to this requirement by allowing its local municipalities to define when a club ceases to be "private."[147] Courts have upheld this definition as a "valid and constitutional exercise of the [city's] police power."[148] Although the club member's associational rights must always be considered, a city's strong public policy in eliminating discrimination must outweigh the associational rights of anyone who chooses to belong to a discriminatory private club.

IV. Recent Regulatory Approaches

A. Judicial Education

Several state bar associations, recognizing the need for an accurate evaluation of the extent of gender bias in the courtroom, have created special committees to determine the severity of the problem and to recommend solutions.[149]

In March of 1986, the New York Task Force on Women in the Courts issued the results of its twenty-two month investigation into the treatment of women in New York courts. The report concluded that "gender bias against women litigants, attorneys, and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity."[150]

A 1984 New Jersey Supreme Court Task Force report on gender bias in New Jersey courtrooms reached similar conclusions.[151] The New Jersey report found that gender bias often adversely influences decision-making in the areas of damages, domestic violence, juvenile justice, matrimonial law, and sentencing.[152]

Addressing the role of the judiciary in the perpetuation of gender bias, the New York report noted that "the root cause of these unacceptable occurrences is the cultural conditioning of a male oriented judiciary."[153] The New York report, like the New Jersey re-

147. *See infra* notes 163-71 and accompanying text.

148. New York State Club Ass'n v. New York, 513 N.Y.S.2d 349, 350 (Ct. App. 1987).

149. *See, e.g.*, N.Y. Task Force on Women in the Courts, 1986 Report 9 (1986). (A copy of this report is available from the New York State Bar Association).

150. *Id.* at i.

151. N.J. Supreme Court Task Force on Women in the Courts, First Report 24 (1984).

152. *Id.*

153. N.Y. Task Force on Women in the Courts, 1986 Report 9 (1986).

port, recommended that educational programs for the judiciary resulted in "substantial improvement in the behavior and attitudes of the Bench and the Bar towards women," but the problem remained unsolved.[154] The 1986 New Jersey report recommended the addition of specific language in the New Jersey Code of Judicial Conduct prohibiting or discouraging improper treatment of women.[155] In addition, the New Jersey report recommended increased bar association action to communicate the effects of gender bias to the judiciary.[156] The report cited as a possible bar association response the "express definition and recognition of this type of unethical conduct, either in the rules themselves or in accompanying commentary."[157] Because of increasing public awareness of the pervasive nature of gender bias in the courts, the report stressed that any response to the problem should be publicized to enhance public confidence in the judiciary.[158]

The New York and New Jersey Task Forces, both at the state and national levels, have recommended express provisions in state and national ethical codes, prohibiting judicial membership in gender discriminatory private clubs. While increased judicial education is desirable, New Jersey's two year experience with this method demonstrates that education alone is not sufficient.[159] In light of the power wielded over persons coming before the courts, the judiciary has a "special obligation to reject—not reflect—society's irrational prejudices."[160] The New York report notes that a solution to gender bias in the courtroom is contingent upon the willingness of the legal profession to examine its beliefs and behavior and the willingness of the public to demand justice and equality in its courts.[161] It is only through affirmative bar association actions such as an express prohibition of judicial membership in gender discriminatory private clubs that the public will be assured that judicial behavior, that perpetuates outdated, stereotypical beliefs and prejudices, will be addressed and dealt with.

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154. N.J. SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, SECOND REPORT (1986) (letter from New Jersey Supreme Court Chief Justice Robert N. Wilentz).

155. *Id.* at 102.

156. N.Y. TASK FORCE ON WOMEN IN THE COURTS, 1986 REPORT 271 (1986).

157. *Id.*

158. *Id.* at 272.

159. *Id.* at 271.

160. *Id.* at 273.

161. *Id.*

B. Specific Legislative Approaches: Conferring Public Status on the Private Club

In an attempt to remedy the effects of private club discrimination, several cities have either enacted or are considering anti-discrimination legislation.[162] This legislation is directed toward determining when a club loses its "private" status.

1. The New York City Approach

The New York City Administrative Code prohibits discriminatory practices in "place[s] of public accommodation."[163] Establishments considered to be "distinctly private" are not subject to this prohibition.[164] However, the code did not contain a definition of "distinctly private."

In 1984, in an effort to clarify the meaning of "distinctly private" the New York City Council enacted Local Law 63.[165] Local Law 63 is considered to be one of the strongest anti-discrimination laws in the country and has faced a barrage of emotional opposition.[166]

The New York State Club Association, which represents 125 clubs, challenged Local Law 63 as violating "its members' rights to privacy, free speech and association."[167] Recognizing that membership in private clubs where business is conducted often leads to opportunities for career advancement,[168] the New York Court of Appeals stated that the city has a "compelling interest in assuring to women and minorities equal access to the advantages"[169] these

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162. Anderson, *Men's Clubs Pressed to Open Doors for Women*, N.Y. Times, Feb. 1, 1987, at E7, col. 1.

163. NEW YORK, N.Y., ADMINISTRATIVE CODE § 8-107(2)(1965).

164. *Id.* at § 8-102(9).

165. NEW YORK, N.Y., ADMINISTRATIVE CODE § 8-102(9) (amended 1984). Local Law 63 provides that a club loses its "distinctly private status if it (1) has more than 400 members, (2) provides regular meal services, and (3) regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business." *Id.* Currently, the Human Rights Commission has cited three private clubs, the Century Association, the Union League Club and The University Club as being in probable violation of Local Law 63. *See* Anderson, *supra* note 162.

166. Anderson, *supra* note 162.

167. New York State Club Ass'n v. City of New York, 513 N.Y.S.2d 349, 354 (Ct. App. 1987).

168. *Id.* at 355.

169. *Id.* at 351.

clubs have to offer. The court held that the city's compelling interest in eliminating discriminatory practices outweighs the club member's rights of association.[170] Therefore, the court upheld Local Law 63 as a "constitutional exercise" of the city's police power.[171]

2. *The Philadelphia Approach*

Philadelphia is the only other major city to have enacted an anti-discrimination law specifically aimed at private organizations.[172] The Philadelphia ordinance prohibits the city from contracting with employers who reimburse their employees' for membership fees in discriminatory private clubs.[173] The city's concern is that the use of city funds in the discriminatory private club constitutes a city endorsement of the discriminatory policies.[174]

Several other cities, including San Francisco, Los Angeles, and Washington, D.C., are in the process of developing anti-discrimination ordinances.[175] In light of the fact that New York City's Local Law 63 has been upheld by New York State's highest court, the New York City Law probably will influence the type of legislation enacted by other cities. Because anti-discrimination laws serve to open clubs to all persons regardless of sex, race, or religion, it would not be necessary for judges to resign their membership in these clubs. Thus, the issue of judicial membership in gender discriminatory private clubs may be addressed through strong, anti-discrimination laws aimed at the clubs themselves.

CONCLUSION

Given the increasing numbers of women in the workforce,[176] the inflexibility of discriminatory clubs hinders economic and social growth. Judges impliedly sanction the discriminatory practices through their membership in these clubs.

In the context of judicial membership in gender discriminatory private clubs, governmental intrusion is justified for two rea-

170. *Id.* at 355.
171. *Id.* at 350.
172. PHILADELPHIA, PA., CODE ch. 17-400 (1981).
173. *Id.* § 17-402.
174. Anderson, *supra* note 162.
175. *Id.*
176. *See supra* note 2 and accompanying text.

sons. First, the judge's membership does immeasurable harm to the image of the judiciary by creating a public perception that the excluded group cannot expect impartial treatment in the judge's court. This perception may contribute to the destruction of public confidence in the judiciary.[177] Public confidence is a crucial factor in the enforcement of orders. A judge's right of association does not outweigh the potential harm that may result from membership in a gender discriminatory private club.

A judge's implied sanction of discrimination through his or her membership becomes an even stronger public statement in light of the fact that the judge has chosen to ignore the behavioral standards of the Code of Judicial Conduct.[178] The public has an important interest in maintaining an impartial judiciary. It is vital to end discriminatory practices that deny economic opportunity to a significant portion of our society. The membership of a judge in a gender discriminatory private club runs contrary to these interests. Therefore, the judge must, because of his or her unique position in society, forego constitutional rights available to others.

The second justification for governmental intervention begins with the proposition that a judge's private conduct may be closely scrutinized and, if necessary, circumscribed. These behavioral restrictions extend beyond those applied to citizens who are not members of the judiciary. Therefore, it can be said that the primary reason for this heightened scrutiny is the judge's position as a representative of the judicial branch of government.

Because the private conduct restrictions on judges are accomplished and justified by citing the important governmental interests involved, it may be argued that a judge performs a government function even when acting in a private, non-official capacity. If the private conduct does not constitute the performance of a government function, then a judge's behavior should be subjected to the same restrictions as other citizens. Because of the nexus between the judge's membership and government involvement, it is possible that the membership may be found to constitute state action, thereby implicating fourteenth amendment guarantees.

The state and federal mechanisms currently in place to regu-

177. Bell, *supra* note 49, at 744.

178. CODE OF JUDICIAL CONDUCT Canon 2 comment (1972) (amended 1984).

late judicial misconduct appear to operate fairly and effectively.[179] However, the disciplinary commissions must formulate stronger policies regarding judicial membership in gender discriminatory clubs by forbidding membership altogether. The stronger disciplinary commission policies must be supported with clearly defined penalties.

It may be argued that in order to lessen the impact of exclusionary practices on the economic opportunities of women, it is necessary for women to develop their own exclusively female networks.[180] This argument fails to acknowledge that the exclusion of women serves to perpetuate a long-standing view of women as inferior to men.[181] Since the avenues of power have traditionally been male-dominated, men have little to lose through exclusion from all-female clubs.

It has been argued that challenging the membership policies of discriminatory private clubs can only produce symbolic reform that serves to trivialize the cause of civil rights.[182] However, our society places great importance on the symbol of an impartial judiciary and on the fundamental right to equal opportunity. Therefore, prohibiting judicial membership in discriminatory private clubs effectively destroys a symbol that our society must not recreate.

Wayne Doane

179. Lubet, *supra* note 40, at 1003.
180. Burns, *supra* note 1, at 333.
181. *Id.* at 352.
182. *Id.* at 352-53.