COMMENT

ANY CLUB THAT WOULD HAVE ME AS A MEMBER: THE HISTORICAL BASIS FOR A NON-EXPRESSIVE AND NON-INTIMATE FREEDOM OF ASSOCIATION

INTRODUCTION

With the Supreme Court's recent decision in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*,[1] the constitutional boundaries of associational freedom are as relevant as ever. Modern freedom of association doctrine hinges upon the level to which entities are intimate or expressive.[2] However, scholars have recognized that

[1] 130 S. Ct. 2971 (2010) (holding school's "all-comers policy," which required the Christian Legal Society to accept all applicants regardless of their religious beliefs, to be constitutional). Freedom of association precedent is not at the forefront of *Martinez*, as the opinion is based largely on limited-forum precedent. However, associational freedom was certainly the driving force behind the litigation, and as such, *Martinez* indicates that the contours of those rights remain unclear.

[2] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995); N.Y. State Club Ass'n, Inc.

this analysis is problematic and may not offer adequate associational protection for certain groups.[3] Further, the origins of modern associational rights are unclear, and this has led to the uncertainty surrounding their true levels of protection. John Inazu argues that the right of assembly was "traded" for the freedom of association, which he believes emerged from *NAACP v. Alabama ex rel. Patterson*.[4] To counter his argument, this article will present historical and precedential evidence that a non-expressive, non-intimate freedom of association pre-dates *Patterson*, as it can be discerned from the debates amongst Fourteenth-Amendment framers and the opinions of nineteenth-century courts.

This paper proceeds in three main parts. Part I describes the questionable roots and current problems of the modern freedom of

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v. City of New York, 487 U.S. 1 (1988); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[3] *See, e.g.*, Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821 (2002); William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68 (1986); Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839 (2005); Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in* Boy Scouts of America v. Dale, 35 CREIGHTON L. REV. 641 (2002); Kevin J. Worthen, *One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of "Intimate" Government Entities*, 71 N.C. L. REV. 595 (1993).

[4] John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 486, 562 (2010) ("[N]either the right of association nor its doctrinal problems began with *Roberts*, as the Court first recognized a constitutional right of association just over fifty years ago in . . . *NAACP v. Alabama ex rel. Patterson*. . . . Much of the current vulnerability of the right of association stems from the Court's reformulation of that right in *Roberts*. But *Roberts* cannot bear all of the blame. If today's freedom of association is less protected than some might like it to be, the roots of its problems may lie in the political, jurisprudential, and theoretical factors present at its inception." (footnote omitted)) [hereinafter Inazu, *Strange Origins*]; John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 611-12 (2010) ("It may be that the principles encapsulated in the constitutional right of association embrace a kind of group autonomy that broadens the conception of assembly. But I suspect otherwise. I have detailed elsewhere the doctrinal problems with the freedom of association, both in its original form that emerged in . . . [*Patterson*] and its transformation in . . . [*Roberts*]. These cases and others have converted the right of association into an instrument of control rather than a protection for the people. In doing so, they have lost sight of the dissenting, public, and expressive groups that once sought refuge under the right of assembly." (footnotes omitted)) [hereinafter Inazu, *Forgotten Freedom*].

association doctrine. Part II presents the historical evidence that an alternative associational right is deeply rooted in the American tradition of civil liberty, beginning with the congressional debates surrounding the Civil Rights Act of 1875 and continuing with an overview of the traditional limits placed on the scope of public accommodation laws by contemporaneous courts. Finally, Part III utilizes these historical sources to propose a modification of the existing doctrine that would require (1) affording associational freedom to activities unaffected with a public interest, even if those activities are neither expressive nor intimate, and (2) recognizing that the vindication of social rights, as opposed to civil rights, does not constitute a public interest.

I. THE MODERN DOCTRINE

In 1958, the Supreme Court formally announced the freedom of association in *NAACP v. Alabama ex rel. Patterson* by holding that the NAACP could not be forced to disclose its membership list to state authorities.[5] The Court did not once mention the First Amendment, but rather focused on the "fundamental freedoms protected by the Due Process Clause."[6] In Justice Harlan's confusing opinion, the applicable fundamental freedom stemmed from the liberty provision of the Fourteenth Amendment, but embraced freedom of speech principles.[7]

Twenty-six years later, the Court recognized in *Roberts v. United States Jaycees* that implicit in this freedom of association is the freedom not to associate.[8] Despite this recognition, the Court held that Minnesota's public accommodation law could be

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[5] 357 U.S. 449 (1958).

[6] *Id.* at 460. It is interesting that the Court employed the Fourteenth Amendment without mentioning the First Amendment itself because, prior to *Patterson*, the Court *had* considered the First Amendment in Fourteenth Amendment contexts. *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) (holding that professor's conviction for refusal to answer questions concerning political affiliations violated his "liberties in the areas of academic freedom and political expression").

[7] *Sweezy*, 354 U.S. at 250. Professor Inazu suggests that the opinion's ambiguity was due to the pursuit of unanimity amongst the Court, and that certain Justices, such as Frankfurter, pushed for avoidance of First Amendment language. Inazu, *Strange Origins*, *supra* note 4, at 514.

[8] 468 U.S. 609, 623 (1984).

applied to require the Jaycees to accept women in their ranks.[9] For the Court, whether Minnesota's law violated the Jaycees' associational rights depended on whether the Jaycees were an intimate organization[10] or an expressive organization according to First Amendment principles.[11] The Court then asked whether the state had a compelling interest that could justify infringing the Jaycees' intimacy or expression, and whether such an infringement was the least restrictive means of achieving that state interest.[12] The Court found the Jaycees to be an expressive organization,[13] but also found that Minnesota had a compelling interest in preventing discrimination against women,[14] and because requiring the Jaycees to accept women would not inhibit its expression, it was the least restrictive means of achieving the state's anti-discrimination interests.[15]

The Court's pre-*Patterson* application of First Amendment principles to the states via the due process clause was murky, but most cases *did* deal with some form of direct expression.[16] As

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[9] *Id.* at 623, 626-27.

[10] *Id.* at 620. The Court noted that intimate associational protections are exemplified by cases involving marriage, childbirth, child-rearing, education, cohabitation, and other relationships "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others." *Id.* at 619-20. For the Court, the Jaycees' low level of selectivity was what primarily qualified it as non-intimate.

[11] *Id.* at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958))).

[12] *Id.* at 623-26.

[13] *Id.* at 626-27 (recognizing that the Jaycees engaged in many civic activities including lobbying and fundraising, and that these activities involved political stances, and therefore qualified it as an expressive organization).

[14] *Id.* at 625-26.

[15] *Id.* at 628-29. The Court found that the Jaycees failed to demonstrate that admitting women into its organization would impede it from engaging in these activities or "dissimenat[ing] its preferred views." *Id.* at 627. Further, being compelled to admit women would not prevent the organization from excluding individuals based on ideological differences and the Court also dismissed the notion that, if women were admitted, there would be some sort of inherent ideological shift or that the group's political stances would slowly change over time, refuting such an argument as stereotypical and generalized. *Id.* at 627-28.

[16] The incorporation of the First Amendment has a very ambiguous history. *See* Sweezy v. New Hampshire, 354 U.S. 234, 249-50 (1957) (plurality opinion)

such, *Patterson*, which arguably did not, serves as an odd bridge to the Court's holding in *Roberts* that only intimate and expressive associational rights are protected. This incongruence is apparent when one examines what elements *Patterson* lacks. It did not involve exclusion, discrimination, or public accommodation laws, and did not focus wholly on speech because it had little to do with expression. After all, the members of the NAACP wanted to *withhold* their identities. This is not to say that an organization cannot be expressive if its members are not known by name, but because Alabama was trying to force the organization to be more "extroverted" in a sense, and the NAACP was invoking the freedom of association to protect its ability to remain "introverted," it was a stretch for the Court to claim twenty-six years later that *expression* is a pre-requisite to non-intimate associational protection.[17]

("[P]etitioner's right to lecture and his right to associate with others were constitutionally protected . . . [by] the Fourteenth Amendment."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) ("[I]t is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake."); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) ("Such a censorship of religion . . . is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution." (citations omitted)); Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in [*Prudential*] that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question." (footnote omitted)); Prudential Ins. Co. of Am. v. Cheek, 259 U.S. 530, 543 (1922) ("[N]either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' . . . .").

[17] Further, the *Patterson* Court had noted that "it 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." NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958). This language also suggests that *Patterson* protects the right *to associate*, not the right to associate *to express*. *See* Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 646 (2002) ("[Reliance on the principles of] expressive association has *shifted the focus away from associating* and to the more

The first problem with the *Roberts* transition to protecting only First Amendment free speech principles in non-intimate associational contexts is that it requires courts to pry into the inner workings of organizations in order to (1) discern any expressiveness, and (2) determine what effectuates such expressiveness or may permissibly inhibit such expressiveness.[18] Many believe that courts are ill-equipped to make those determinations.[19] While it is not wholly illogical or disingenuous to assume that an organization like the Jaycees loses minimal expressive ability by being forced to accept women, this "court intrusion problem" would continue to be exacerbated by post-*Roberts* courts[20] and it would reach its problematic peak in *Boy Scouts of America v. Dale* and its lower-court progeny.[21]

The second problem with the *Roberts* analysis is that it places little weight on whether an organization supplies goods or services to the public at large, which intuitively is a critical factor in determining whether its association can legitimately be deemed private. Rather than delving into the "quasi-public" elements of the Jaycees or determining that it was "affected with a public

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familiar First Amendment territory of speech, messages, and the like." (emphasis added)). Ultimately, while *Patterson* may have contained a multitude of First-Amendment-type language, the issue actually adjudicated did not seem to hinge on expression at all.

[18] *See* La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1500 (5th Cir. 1995) ("[I]f those clubs must go public, in order to remain private, then their privacy rights ring hollow indeed . . . .").

[19] *See* Shiffrin, *supra* note 3, at 847-48 ("[The analysis] requires judges to engage in fairly detailed, intrusive forms of interpretative review of what an association *really* stands for, what sorts of dissent and difference would *really* threaten that stance, what is *really* entailed by a policy statement, [and, in the case of *Dale*,] what it would *really* mean to be opposed to homosexuality, and how volubly, on what grounds, and in what fora someone who was *really* opposed to homosexuality would speak." (footnote omitted)).

[20] *See, e.g.*, Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 857 (2d Cir. 1996) (holding that after-school Christian group could be forced to accept non-Christians for certain officer positions because, for example, "an agnostic with an understanding of 'Christian Sensibilities' might plan these activities as well as any other student"); Pines v. Tomson, 206 Cal. Rptr. 866, 877-78 (Cal. Ct. App. 1984) (holding that the Christian Yellow Pages company could be forced to include non-Christian advertisers because, in the court's view, the Christians-only requirement likely did not further the organization's interest in providing its customers with opportunities to network with fellow Christian businesses anyway).

[21] 530 U.S. 640 (2000); *see* cases cited *infra* notes 30, 33.

interest" as earlier courts might have,[22] the Court instead averred that Minnesota could constitutionally assert a compelling interest in ensuring public access to intangibles such as leadership skills and business networking.[23] To the Court, the validity of this interest in ensuring access to such intangibles logically followed from the theretofore gradual expansion of public accommodation laws.[24] While it can hardly be said that this aspect of *Roberts* is a "transition" from *Patterson*,[25] it must be reemphasized that *Patterson* did not deal with exclusion or state anti-discrimination measures. It can therefore be argued that the *Roberts* Court relied upon shaky precedent for evaluating associational freedom as a defense to public accommodation law applicability. Just as the court-intrusion analysis would solidify with *Dale*, the level of attention given to the public nature of the groups' activities would deteriorate.

In 2000, the Supreme Court held in *Boy Scouts of America v. Dale* that New Jersey's public accommodation law was unconstitutional as applied to require the Boy Scouts of America (BSA) to retain a Scoutmaster whom the BSA discovered to be a homosexual gay-rights activist.[26] The Court had little difficulty determining that the BSA was an expressive organization,[27] but its majority and minority opinions went much further than

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[22] *See* discussion *infra* Part II.B.

[23] Roberts v. U.S. Jaycees, 468 U.S. 609, 623, 626 (1984).

[24] *Id.* at 626 ("This expansive definition [of public accommodation laws] reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration . . . ." (citations omitted)). To the *Roberts* Court's credit, however, they did evaluate the Jaycees' level of selectivity, which is certainly indicative of its private or public nature, and future courts would fail to fully consider this aspect. *See, e.g.*, State v. Burning Tree Club, Inc., 554 A.2d 366, 379 (Md. 1989); Donaldson v. Farrakhan, 762 N.E.2d 835, 838-39 (Mass. 2002); Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination, 524 N.E.2d 1364, 1367 (Mass. 1988).

[25] The *Patterson* opinion contained little private or public analysis except for one portion, in which Justice Harlan noted that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (citation omitted).

[26] 530 U.S. 640, 656 (2000).

[27] *Id.* at 650.

Roberts in analyzing whether forced inclusion would violate the BSA's expressive associational rights. Reaffirming that this analysis requires courts to determine what an organization believes to be in its best interests, and how best to effectuate those interests, the Court examined BSA policy manuals, handbooks, and memos to determine "the nature of the Boy Scouts' view of homosexuality."[28] Despite Justice Rehnquist's assertions to the contrary,[29] the Court seemingly required there to be a strong showing that BSA sincerely held its views regarding the exclusion of homosexuals.[30] Justice Stevens, speaking for the minority, would have required an even greater display of the BSA's principles, stating that "[a]t a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view."[31] Myriad commentators have recognized the pitfalls of such over-zealous evaluations of organizational goals and messages,[32] but lower courts have nonetheless adhered to this approach.[33]

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[28] *Id.* at 650. The New Jersey Supreme Court had done the same thing, finding that the "exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse . . . membership . . . ." *Id.* at 650-51 (quoting Dale v. Boy Scouts of Am., 734 A.2d 1196, 1226 (N.J. 1999)) (internal quotation marks omitted).

[29] *Id.* at 651 ("[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." (citations omitted)).

[30] There is a certain amount of tension in the opinion. First, Rehnquist asserted that the "inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality." *Id.* at 650. But later, in rejecting the New Jersey Supreme Court's finding that the exclusion of Dale was antithetical to Boy Scouts' philosophy, he stated, "[O]ur cases reject this sort of inquiry . . . ." *Id.* at 651. Perhaps the Court's divergent language can be reconciled as essentially stating that a review of organizations' inner workings was not necessary, but even if it were, the Boy Scouts' inner workings were consistent with its exclusion of Dale. Even so, it is clear that the Court required *some* consistency of message and exclusion, and if lower post-*Dale* courts are any indication, such consistency must be readily apparent. *See, e.g.*, Villegas v. City of Gilroy, 484 F.3d 1136, 1138, 1140 (9th Cir. 2007) (holding that a motorcycle club did not engage in any sort of expressive association in part because its views were internally inconsistent regarding what their insignia represented).

[31] *Id.* at 676 (Stevens, J., dissenting). Further, Justice Stevens disliked Justice Rehnquist's assertion regarding deference, claiming that the Court should not "look[] at what a litigant asserts in his or her brief and inquir[e] no further." *Id.* at 686.

[32] *See, e.g.*, Dale Carpenter, *Expressive Association and Anti-Discrimination Law after* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1542 (2001) (arguing that

Also important, the *Dale* decision represents an abandonment of determining the public extent of private organizational activities. Having no objection to the fact that New Jersey "went a step further" with its public accommodation law by neglecting to link ensured access to a physical place, the Court merely recognized that the expansiveness of such laws creates more potential for conflicts between First Amendment freedoms and state anti-discrimination measures, which shows that the Court clearly viewed expression as the sole barrier to such laws.[34] As such, the Court failed to consider the argument that, in some situations, the First Amendment question should not even be addressed due to the private nature of the activities at issue. In other words, if it cannot be logically said that a public accommodation law ensures access to a certain activity in the first place, the expressiveness of that activity should be irrelevant to its associational integrity.[35]

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unpopular groups and those that encourage internal dissent and radical discussion will suffer the most under *Dale*'s approach of requiring a clearly articulated message); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 120 (2000) ("The fine-spun efforts to shoehorn freedom of association into some ill-defined expressive box will breed only pointless and arcane distinctions."); Brody, *supra* note 3, at 851 (noting that the Court in *Dale* "struggle[d] with the distinction between speech and status" because "membership and message [are] not to be equated" and arguing that the Court treated Dale as walking speech, and that he did not violate any organizational beliefs by simply *being* gay); Shiffrin, *supra* note 3, at 848 ("Such review involves a form of judicial scriptwriting that is antithetical to a thorough-going concern about judicial imposition of content and the free exploration and articulation of ideas." (footnote omitted)).

[33] *See, e.g.*, Mill River Club, Inc. v. N.Y. State Div. of Human Rights, 873 N.Y.S.2d 167, 173 (N.Y. App. Div. 2009) (holding that club's freedom of association was not violated where public accommodation law prevented it from maintaining a membership composed half of Jews and half of Christians in order to promote diverse religious discussion because it did "not prevent the club from excluding applicants who [did] not subscribe to its goal of religious diversity in its membership, . . . [and] because it [did] not prohibit the club from advocating its viewpoint that a religiously diverse membership is vital").

[34] *Dale*, 530 U.S. at 657. *But see* Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937, 946 (Alaska 2004) (stating that implicit in *Dale*'s holding was that New Jersey's public accommodation law simply went too far in the first place, despite the Court's brief gloss over its applicability).

[35] The *Dale* Court's lack of clarity on the permissible scope of public accommodation law applicability to private activities has perhaps framed some of the private-public confusion that lower courts have confronted. *See* Chi. Area Council of Boy Scouts of Am. v. City of Chi. Comm'n on Human Relations, 748 N.E.2d 759, 767-68

The rest of this paper presents evidence of an associational right, deeply rooted in the American tradition of civil liberty, which protects organizational freedom of association on a third level. This right emanates from the firmly established notion that legitimate government control of a private activity requires some showing that the private activity at issue is affected with a public interest. As discussed above, the *Patterson* Court had little cause to consider this notion, and as such, *Patterson* served as questionable precedent for *Roberts*. Therefore, the Court's modern analysis of individual freedom in the face of public accommodation laws is missing a key element. If the Court had instead focused on framers' and past courts' evaluations of public accommodation laws, it would have uncovered a legal tradition, valuing social autonomy, that places an initial safeguard between private organizations and legislative power.

II. HISTORY AND TRADITION

John Inazu argues that the freedom of association emerged from the Court's decisions in *Patterson* and contemporaneous cases.[36] While it is clear that the right was not formally announced until *Patterson*, and I would agree with Inazu that modern freedom of association scholarship errs in claiming that the right originated with *Roberts*, there is evidence that it significantly pre-dates *Patterson*, as it can be discerned from the emphasis unrelentingly placed on private autonomy by framers and courts in anti-discrimination contexts. Given that the Supreme Court's current approach to recognizing substantive due

(Ill. App. Ct. 2001) (remanding for a determination of whether a non-scoutmaster position was sufficiently non-expressive such that a public accommodation law *could* ensure access to it); Donaldson v. Farrakhan, 762 N.E.2d 835, 840 (Mass. 2002) (standing for the notion that a place normally regarded as a public accommodation can become a "non-public enclave" under certain circumstances, thereby precluding public accommodation law applicability).

[36] Inazu, *Strange Origins*, *supra* note 4, at 486, 562. There, Inazu did not consider Fourteenth-Amendment-framing-era material in his analysis. *Id.* In his other extensive work, Inazu analyzed the history of the freedom of assembly, touching upon antebellum abolitionism, women's suffrage movements, New Deal labor movements, the civil rights movements, and the Red Scare, but again did not discuss this time period. *See* Inazu, *Forgotten Freedom*, supra note 4.

process rights hinges upon whether such a right is "deeply rooted in this Nation's history and tradition,"[37] this evidence suggests the existence of a non-expression-based associational right. This tradition of affording associational integrity to activities when they are private is apparent in two key historical and precedential areas: the congressional debates surrounding the Civil Rights Act of 1875, and the prior and subsequent cases limiting the applicability of state public accommodation laws.

A. The Congressional Debates Surrounding the Civil Rights Act of 1875

There is a cavity in freedom of association scholarship due to the absence of works analyzing how the Civil Rights Act of 1875 may frame the modern doctrine. While Alfred Avins examined the significance of this time period as it related to public accommodation laws in 1966, his piece is now severely dated and therefore does not consider any direct relevance between the congressional debates and post-*Roberts* cases.[38] These debates are a valuable resource because they are contemporaneous with the adoption of the Fourteenth Amendment and demonstrate what

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[37] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted). While Fourteenth Amendment framers likely would have considered any such freedom (if stemming from the Fourteenth Amendment) to derive from the privileges or immunities clause, for purposes of this article it is assumed that the historical standard for recognizing privileges and immunities is the same as the one for recognizing substantive due process rights. *See* Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 65-75 (2010) (suggesting that the *Glucksberg* standard could be supported by privileges or immunities clause); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219, 257 n.173 (2009) (same) [hereinafter Green, *(Equal) Protection Clause*]; Christopher R. Green, The Original Sense of "Of" in the Privileges or Immunities Clause 115-32 (Aug. 14, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1658010 (same) [hereinafter Green, Privileges or Immunities Clause].

[38] *See* Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966). However, Avins offers a much more thorough history of the Act, as well as an interesting discussion of the debaters' constitutional bases for approval and disapproval of the Act. *See id.* at 881.

framers were thinking in terms of forced inclusion.[39] In doing so, they illustrate an American tradition of affording associational autonomy to truly private organizations regardless of the intimate or expressive nature of the organizations' activities.

In 1870, Republican Senator Charles Sumner of Massachusetts introduced what would later be known as the Civil Rights Act of 1875.[40] The Act was designed to ensure equal access to public accommodations, including theaters, inns, public schools, churches, and cemeteries.[41] Perhaps the most controversial aspect of the legislation was that it could be enforced against private individuals.[42] As such, what qualified an entity or activity as "private" was bound to be the source of much debate. While struck down as unconstitutional by the Supreme Court's decision in *The Civil Rights Cases* in 1883,[43] the Act has relevance to current freedom of association doctrine due to the arguments surrounding its adoption. Through these arguments, in which private autonomy was highly valued, the framers made clear their belief in a non-expressive associational right applicable to purely private activities.

The Democratic senators opposing the Act thought the federal government should not have the power to regulate "hotel companies, theatrical companies, churches, schools, [etc.]" on such

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[39] As Professor Avins stated, "[T]he Constitution must be interpreted to meet new conditions, but the basic understanding of the framers cannot be discarded . . . ." *Id.* at 874; *see also* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 591 (2006) ("[A]ssessments of constitutional reference, 'while not controlling upon [later interpreters of the Constitution] by reason of their authority, do constitute a body of experience and informed judgment to which [later interpreters] may properly resort for guidance.'" (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

[40] The bill died in the Judiciary Committee several times, and was finally re-introduced as a rider to the amnesty bill authorized by the Fourteenth Amendment. CONG. GLOBE, 42d Cong., 2d Sess. 237 (1871).

[41] *See* CONG. GLOBE, 42d Cong., 2d Sess. 244 (1871).

[42] Indeed, when the Act was "revived" in 1964, this remained the most controversial aspect. *See* Melville B. Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 COLUM. L. REV. 1394, 1396 (1965).

[43] The Civil Rights Cases, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment did not give Congress the authority to regulate private acts).

an intrusive level.[44] At the core of the arguments between Republicans and Democrats concerning access to public accommodations, however, was the private-public distinction. For Democratic senators like Garrett Davis of Kentucky, a corporate charter was not enough to "open[] those associations to every citizen who may choose to force his way into them."[45] Some Republicans agreed,[46] but the Act's supporters believed that public funding, derived from taxation, provided the critical public distinction.[47]

Democratic Senator Allen Thurman of Ohio illustrated countervailing concerns when he spoke of his disdain for the Act's application to cemeteries, which had the potential to render families unable to choose their burial neighbors.[48] When Thurman asked Congress whether it could "thrust into that cemetery . . . the body of any man," Republican Senator Matthew Carpenter reiterated his earlier interruption: "So far as they are supported by taxation."[49] In response to this, Thurman asked, "Is a common inn supported by taxation? . . . Does a common carrier derive his means from taxation?"[50] Sumner then joined in the exchange to further illustrate the ambiguities of formulating any private-public distinction, suggesting that *all* franchises deriving their protection from the laws would be subject to the act.[51] This seems

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[44] CONG. GLOBE, 42d Cong., 2d Sess. 764 (1872).

[45] *Id.*

[46] For Republican Representative Arthur Boreman of West Virginia: "Now, sir, many of the cemetery associations and the numerous benevolent associations that we have in the States, have acts of incorporation; . . . but they are for all practical purposes, and to all practical intent private establishments." CONG. GLOBE, 42d Cong., 2d Sess. 3195 (1872). Republican Senator Lot Morrill of Maine felt similarly, arguing that the privileges or immunities clause did not ensure access to "common schools, . . . churches, . . . benevolent institutions, . . . theaters and places of public amusement." CONG. GLOBE, 42d Cong., 2d Sess. app. 1-4 (1872).

[47] Republican Matthew Carpenter of Wisconsin: "I think the ground upon which this common right of all the citizens of this country to participate in the benefits of benevolent institutions should be based is not whether it happens or not to be incorporated, but whether it is supported at the public expense." CONG. GLOBE, 42d Cong., 2d Sess. 760 (1872).

[48] CONG. GLOBE, 42d Cong., 2d Sess. app. 27-29 (1872).

[49] *Id.* at 27-28.

[50] *Id.* at 28.

[51] *Id.* at 29 ("I submit it to the Senator, the innkeeper, and also the common carrier, has something in the nature of a franchise under the law. Each has peculiar

to have startled Thurman, whose response to Sumner warned of a vast and overreaching regulatory scheme through which the federal government would exercise too much control over private persons.[52]

These exchanges offer a terse preview of the public-private battles that would ensue for years after the enactment of the Fourteenth Amendment. The language employed by Republican Senator Frelinghuysen was particularly prophetic of later cases considering a "quasi-public" realm.[53] These portions of the debates also alluded to subsequent cases concerning the ability of legal and regulatory schemes to transform private into public and subject arguably private organizations to legislative control.[54]

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privileges and prerogatives, and is subject to peculiar responsibilities, the whole being the franchise which he derives from law, and which is regulated by law. The argument follows that in the exercise of that franchise he must conform to the fundamental principles of our institutions.").

[52] Thurman, after averring that law regulates every institution in *some* way, stated:

> It will not do therefore to say, that, because the law regulates inns, common carriers, and the like, therefore Congress has the power to . . . intrude upon the rights of the citizens and make laws that deprive him of that liberty which he ought to possess and which is guarantied [sic] to him. That is not regulation, it is usurpation and tyranny.

Id.

[53] *See* 2 CONG. REC. 3452 (1874) ("As the capital invested in inns, places of amusements, and public conveyances is that of the proprietors, and as they alone can know what minute arrangements their business requires, the discretion as to the particular accommodation to be given to the guest, the traveler, and the visitor is quite wide. But as the employment these proprietors have selected touches the public, the law demands that the accommodation shall be good and suitable, and this bill adds to that requirement the condition that no person shall, in the regulation of these employments, be discriminated against merely because he is an American or an Irishman, a German or a colored man.").

[54] *See* Frost v. R.R. Comm'n, 271 U.S. 583, 592 (1926) ("[C]onsistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command . . . ."); Mich. Pub. Utils. Comm'n v. Duke, 266 U.S. 570, 577-78 (1925) ("[I]t is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility . . . ."). While these two cases concerned railroad and highway regulations respectively, they could be employed for the general principle that, once a state public accommodation law purports to encompass certain activities and it is decided that an arguably private activity is covered, there has been some sort of legislative transformation of a private carrier into a common carrier. Those opinions focused on the argument that states did not have the power to enact such laws more so

While these skirmishes are instructive as to what congressmen considered to fall within the Act's reach, the focus should not *just* be on what exact activities or institutions each congressman thought to be private or public. Rather, another important aspect of these arguments stems from what they agreed upon: there was some private line that the Civil Rights Act of 1875 could not cross.

For example, the Democrats were particularly concerned with the Act's potential effects on clubs and club-like associations. Senators like Thurman thought that benevolent societies, such as Masonic or Odd Fellows lodges, ought to have the right to exclude black people completely.[55] Indeed, it appears Thurman thought that *any* club or group ought to have the right to exclude *anyone* on *any* basis, no matter how arbitrary.[56] And while perhaps not wholly in agreement with Thurman, some Republicans supported weakening the bill's applicability to such associations as well. Senator Roscoe Conkling of New York thought the bill should only cover institutions supported by taxes.[57] Further, Representative Boreman proposed, and Sumner accepted, that the portion of the Act covering benevolent institutions should include the language

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than the argument that citizens had the right not to have such laws applied to them. But they were nonetheless contemplating a private autonomy that hinged upon the public interest. *See Duke*, 266 U.S. at 576 ("He has done nothing to give rise to a duty to carry for others. The public is not dependent on him or the use of his property for service . . . ."); *see also* Donnell v. State, 48 Miss. 661, 682 (1873) (rejecting a Fifth-Amendment-takings-style argument against public accommodation law applicability).

[55] CONG. GLOBE, 42d Cong., 2d Sess. app. 27 (1872).

[56] *Id.* ("If the colored men should see fit to establish a club of black fat men, or fat black men—whichever is the proper expression—I do not see that they ought to be deprived of the privilege of doing it. Nay, more, sir, if the red-headed men in the city of Washington should choose to form a club of red-headed men, and say that nobody but red-headed men should be members of that club, I think they ought to have that privilege . . . .").

[57] CONG. GLOBE, 42d Cong., 2d Sess. 3266 (1872) ("[The term incorporated] is equivalent to 'authorized by law;' but the Senator will observe that he or I, in his State or mine, may under a general act or special charter go on and organize an institution which he and his friends, a little group of individuals, . . . endow. Many such exist in my own State. It is their private property. Nobody else has anything in the world to do with it. It is just a venture of their own . . . . I will take for illustration an institution established for the benefit of those unsound of mind. . . . It is established by private funds, to be sure; but it is established under law. It is not a private institution. It is open to anybody who chooses to go and pay, but is in no sense sustained by taxation. It is a mere voluntary private adventure of humanity, if I may so say, of those engaged in it. . . . Just as if it were a personal establishment.").

"of a public character," and that this public-character requirement should apply even to tax-supported institutions.[58]

However, one of the strongest indicators of the framers' recognition of private organizational autonomy is that they removed the provisions of the Act that applied to churches. While religious freedom under the free exercise clause was well-recognized,[59] theoretically, the presence of black people at a church would not have inhibited any religious expression.[60] As such, it appears the framers contemplated an intrinsic associational right, neither expressive nor intimate, but one largely of privacy, which could allow certain organizations to discriminate, regardless of incorporation.[61] Senators like Republican Oliver P. Morton noted that churches were "purely voluntary organizations."[62] When Senator Carpenter interrupted, "[Even] if they are incorporated?," Morton responded:

> Yes, sir, if they are incorporated. The Senator understands why they are incorporated. It is not for the purpose of affecting their faith. Acts of incorporation are not extended to churches because of the character of their faith. A Mohammedan church would be incorporated as readily as any other under the laws of any State. They are purely voluntary organizations, and they are incorporated as a matter of public convenience to enable them to hold property to carry out the purposes of the private voluntary organization.[63]

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[58] *Id.* at 3267. However, Sumner did not accept the amendment proposed by Democratic Senator George Vickers of Maryland that all institutions authorized by law must be of a public character to be covered. *Id.* Sumner's justification was that some institutions are authorized by law, but not tax-supported, and therefore should not be able to discriminate, giving the example of Harvard College. *Id.*

[59] Indeed, the First Amendment was the basis for the opposition to the churches provision. CONG. GLOBE, 42d Cong., 2d Sess. 896-97 (1872).

[60] That is, unless the religion itself called for segregation.

[61] Admittedly, churches are a far cry from certain benevolent institutions and societies. Many would argue that there is "just something different" about churches when it comes to the right to exclude. That is the point, however. This distinction is inarticulable and perhaps fleeting, but is there nonetheless.

[62] CONG. GLOBE, 42d Cong., 2d Sess. 898 (1872); *see also* CONG. GLOBE, 42d Cong., 2d Sess. app. 43 (1872) (Senator Vickers asserting no federal "right to interfere . . . with the churches in the States . . . .").

[63] CONG. GLOBE, 42d Cong., 2d Sess. 898 (1872).

Not only did the framers not rely on expression in their arguments that certain activities fell outside the Act's reach, the language above suggests that in their view, the level of an organization's expression was completely divorced from the question of whether the state could enforce public accommodation laws against it.

There are also numerous examples that senators on both sides of the debate felt that it was not within federal power to enforce or accelerate social equality, but rather that egalitarian social norms had to develop gradually and naturally.[64] While Democrats employed such arguments in opposition to the Act,[65] Republicans like Senator Frelinghuysen employed them in attempt to ensure the Act's limited reach, stating:

> Again let me say that this measure does not touch the subject of social equality. That is not an element of citizenship. The law which regulates that is found only in the tastes and affinities of the mind; its law is the arbitrary, uncontrolled human will. You cannot enact it.[66]

This general disdain for the enforcement of social equality would recur in cases both contemporaneous and remote, and be one of

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[64] CONG. GLOBE, 42d Cong., 2d Sess. app. 29 (1872) (Senator Thurman: "No one pretends that a colored man should not have accommodation at an inn . . . . What his bill aims to accomplish—disguise it as you may—is social equality in the inn."); *id.* at 217 (Representative Henry McHenry of Kentucky: "If a man sees proper to associate with negroes, . . . I would not abridge his right to do so; but that is a very different thing from compulsory social equality and association with those whose company is distasteful to him."). Also, concerning the social repercussions of such an Act, Democrats believed it would inspire in blacks contempt for their state governments and dependency on the federal government. 2 CONG. REC. app. 4 (1874) (Representative John Glover of Missouri: "I would not eternally parade him before Congress and the nation, and thus teach him to despise the State government under which he lives . . . .").

[65] For example, Eli Saulsbury of Delaware stated: "Disguise it as you may, it is nothing more nor less than an attempt on the part of the American Congress to enforce association and companionship between the races in this country." 2 CONG. REC. 4157 (1874).

[66] 2 CONG. REC. 3451 (1874).

the strongest arguments against state anti-discrimination measures.[67]

At the end of the day, "Sumner could afford to ignore the protests of a Democrat" to the Act.[68] But fellow Republican Senators' protests, like Lot Morrill's, attacked Sumner's asserted constitutional bases for the bill.[69] In response, Sumner pleaded:

> Why, sir, the Constitution is full of power; it is overrunning with power. I find it not in one place or in two places or three places, but I find it almost everywhere, from the preamble to the last line of the last amendment. . . . I find it, still further, in that great rule of interpretation conquered at Appomattox . . . . I say a new rule of interpretation for the Constitution, according to which, in every clause and every line and every word, it is to be interpreted uniformly for human rights.[70]

As such, seven Republicans did not vote for the Act, and it passed with a vote of only 38 to 26. Sumner died in 1874, and only a truncated version of his bill passed, lacking such provisions as the ones that covered schools and cemeteries.[71] The Act would be

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[67] *See, e.g.*, Ferguson v. Gies, 46 N.W. 718, 720-21 (Mich. 1890) ("Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction. . . . The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears.").

[68] Avins, *supra* note 38, at 883.

[69] Namely, Morrill attacked Sumner's reliance on the Declaration of Independence. CONG. GLOBE, 42d Cong., 2d Sess. app. 3 (1872).

[70] CONG. GLOBE, 42d Cong., 2d Sess. 727 (1872).

[71] In its final form, the Act provided:

> Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

overruled in 1883, but in the debates surrounding its adoption, a consensus amongst the framers emerges—one valuing private associational integrity. The true disagreement, then, regarded merely what activities *were private* and therefore entitled to such autonomy.[72] Even Sumner himself recognized that such purely

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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.
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> SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby . . . ; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year . . . .
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> . . .
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> SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act . . . .
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> SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.
>
> SEC. 5. That all cases arising under the provisions of this act . . . shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy . . . .

Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

[72] *See* Green, Privileges or Immunities Clause, *supra* note 37, at 118-20 nn.32-36. Green recognizes this Republican acknowledgment that Democratic arguments as to associational freedom were not unfounded, but that they simply did not apply in the opinion of Republican supporters, stating:

private associational autonomy precluded intrusion by law, stating:

> Now, there is no question of society here. The Senator may choose his associates as he pleases. They may be white or black, or between the two. That is simply a social question, and nobody proposes to interfere with it. That taste which the Senator has now declared belongs to him he will have free liberty to exercise always, selecting always his associates; but when it comes to rights, there the Senator must obey the law, and I insist that by the law of the land all persons without distinction of color shall be equal before the law.[73]

Ultimately, this unanimity amongst the framers—that associational autonomy should block the intrusion of government anti-discrimination measures at some threshold of privacy—shows that the framers believed in the existence of some non-expressive and non-intimate associational right.[74] This is inferable because the institutions at issue—theaters, hotels, trains, cemeteries, schools, churches, etc.—arguably lost nothing in the way of intimacy or expression by being forced to include black people,[75] yet the framers still valued their social impenetrability. Also important, First Amendment arguments arose only in religious

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> My point here is not to adjudicate whether the Republicans or the Democrats were right about where to draw the line between private social association and the realm of public privileges and civil rights . . . but simply that Republicans did acknowledge the existence of a social realm—*somewhere*—in which (a) moral rights against racial insult were invaded, but (b) constitutional rights to equal citizenship were not.

Id. at 157-58 n.220.

[73] CONG. GLOBE, 42d Cong., 2d Sess. 242 (1872). Not to be repetitive, but Sumner's language at this point then circled back around to the private versus public distinction, expressing that which made the bill unsupportable in the eyes of its opponents: "Show me, therefore, a legal institution, anything created or regulated by law, and I will show you what must be opened equally to all without distinction of color." *Id.*

[74] Note, however, that there is no right to *social* association. City of Dallas v. Stanglin, 490 U.S. 19, 23-25 (1989) (holding that social events like dances do not entail "intimate human relationships" protected by the First Amendment).

[75] Of course, arguments could be made that institutions like theaters would lose *something* in the way of expression and that cemeteries would lose *something* in the way of intimacy, but it cannot be genuinely argued that such institutions faced the same sort of potential interference as the Jaycees in *Roberts* or the Boy Scouts in *Dale.*

contexts, and in essence, it appears that the framers could not have foreseen the necessity of invoking expression or intimacy in order to substantiate the claim of a private organization that it has the right to exclude others. Rather, to them, public-accommodation-law enforceability depended on the public nature of activities (i.e. to what degree it could be said that members of the public should be ensured access to those goods or services) and differentiating civil and social rights.

B. Older Courts & Public Accommodation Laws

The legal history of America is replete with instances of judicial insulation of the private sphere from the legislative branch.[76] The Supreme Court delved into such matters as early as 1819 when it decided in *Trustees of Dartmouth College v. Woodward* that, under the contracts clause of the Constitution, the New Hampshire Legislature could not transform Dartmouth College into a public institution.[77] There, legal notions as to what was private or public were much simpler; government control of an institution appeared to be the dispositive factor in such determinations, as the concept of "quasi-public" did not seem to play into the Court's analysis:

> When the corporation is said, at the bar, to be public, it is not merely meant, that the whole community may be the proper objects of the bounty, but that the government have the sole

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[76] *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424-25 (1982) ("Although one can find the origins of the idea of a distinctively private realm in the natural-rights liberalism of Locke and his successors, only in the nineteenth century was the public-private distinction brought to the center of the stage in American legal and political theory. Before this could occur, it was necessary to undermine an earlier tradition of republican thought that had closely identified private virtue and public interest. . . . Above all was the effort of orthodox judges and jurists to create a legal science that would sharply separate law from politics. By creating a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics, legal thinkers hoped to temper the problem of 'tyranny of the majority.'" (footnote omitted)).

[77] 17 U.S. (4 Wheat.) 518 (1819) (holding that the charter granted by the British crown to the trustees of Dartmouth College in 1769 was a contract within the meaning of the contracts clause and would be unconstitutionally breached by New Hampshire's legislative interference).

> right, as trustees of the public interests, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure. Now, such an authority does not exist in the government, except where the corporation, is in the strictest sense, public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself.[78]

With the increasing ubiquity of railroads and industry, however, judicial recognition was inevitable that some private enterprises were intertwined with the public interest and, therefore, should not be completely immune to legislative control. In *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, the Court weighed in on these concerns, stating that such entities are "in the exercise of a sort of public office, and ha[ve] public duties to perform."[79] States followed suit. In 1858, for example, the Wisconsin Supreme Court held that the Milwaukee Gas Light Company was of a public character due to the type of commodity it provided and distinguished it from enterprises that sold such things as "soap, candles or hats."[80]

After the Civil War, the enactment of the Fourteenth Amendment, and the advent of public accommodation laws,[81] considerations of private and public would become germane in

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[78] *Id.* at 671-72.

[79] 47 U.S. (6 How.) 344, 382 (1848); *see also* Olcott v. Supervisors, 83 U.S. (16 Wall.) 678, 694 (1872) ("That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence.").

[80] Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 545 (1858). Notably, an important factor in the court's determination that the company was of a public character was the fact that it had the exclusive right to sell gas. *Id.* at 547 ("[As such,] how can it be urged that this is a mere private corporation for the manufacture and sale of a commercial commodity."). In the early twentieth century, Bruce Wyman recognized this to be a pattern amongst courts asserting private corporations' public character. Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 161 (1904) ("Upon the whole the circumstances surrounding these cases suggest this as the characterizing thing; that in the private calling the situation is that of virtual competition, while in the public calling the situation is that of virtual monopoly.").

[81] Some states had public accommodation laws prior to the *Civil Rights Cases*, but most state public accommodation laws developed after the Supreme Court held such laws unconstitutional on the federal level.

social and civil senses rather than just economic ones. We have seen such arguments fleshed out on the legislative level with the adoption of the Civil Rights Act of 1875, but ultimately, it was the courts that would have to determine what institutions would be affected by public accommodation laws. Even before the Supreme Court solidified "quasi-public" as the standard for legislative regulation of private enterprises in economic contexts in *Munn v. Illinois*,[82] lower courts were acknowledging that the activities of private entities had to be of a public character before public accommodation laws could be enforced against them.

For some courts, showings of public interest simply hinged upon whether the private entity in question was licensed. In *Commonwealth v. Sylvester*, the Massachusetts Supreme Court held that the state public accommodation law could not be enforced against the owner of an unlicensed, private billiards hall.[83] The court held such despite arguments from the Massachusetts attorney general that the establishment was of sufficient public character to be regulated irrespective of any formal license.[84] Licensing would play into other courts' analyses,[85] but some would focus less on licensing and other explicit incorporation elements and concentrate more on the public interest at stake.

In *Donnell v. State*, for instance, the Mississippi Supreme Court found that a theater violated the state public

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[82] 94 U.S. 113 (1876).

[83] 95 Mass. 247, 247-48 (1866).

[84] *Id.* at 247.

[85] *See, e.g.*, Bowlin v. Lyon, 25 N.W. 766 (Iowa 1885). There, the court was willing to consider the overall nature of the establishment in determining whether it was private or public, but obviously considered the absence of a state license to strongly suggest that it was private. *Id.* at 768 ("[Licensed establishments carry out] business under an authority conferred by the public, the presumption is that the intention was that whatever of advantage or benefit should result to the public under it should be enjoyed by all its members alike. . . . [But because the defendant was not licensed,] [t]he public had assumed no control of it, and it does not appear that it is a business in which the public have a concern."); *see also* Faulkner v. Solazzi, 65 A. 947, 948 (Conn. 1907) (holding that although barbers are licensed for the public welfare, proprietors and building-owners that house barbers may not be licensed, and the barber shop was therefore not a public accommodation); Hargo v. Meyers & Ludecke, 2 Ohio Cir. Dec. 543 (1889) (noting that just because defendant restaurant was licensed did not make them public and obligated to accommodate everyone).

accommodation law by refusing to sell a ticket to a black man.[86] The court rejected a Fifth-Amendment-takings-style argument that the law appropriated private property for the public use,[87] instead finding the theater to be quasi-public, and as such, among those "subjects which have always been under legal control."[88] The Pennsylvania Supreme Court noted in *West Chester & Philadelphia Railroad Co. v. Miles* that "[c]ourts of justice may interpose to compel those who perform a business concerning the public, by the use of private means, to fulfil [sic] their duty to the public,—but not a whit beyond."[89] As such, it is apparent that these courts were well aware of the quasi-public standard and had been utilizing it in their analysis of public accommodation laws.

As mentioned earlier, in 1876 the Supreme Court endorsed the quasi-public standard for evaluating legislative regulation of commercial activity in *Munn v. Illinois*.[90] It seems that post-*Munn* courts then amplified their evaluations of institutions' public characters in public accommodation contexts. In deciding whether a skating rink was a public accommodation in *Bowlin v. Lyon*, the Iowa Supreme Court employed such language extensively,[91] but found the lack of public control and presence of exclusive control by the business owner to be the most significant factor.[92] The New York Court of Appeals came to the opposite conclusion in *People v. King*, noting that, although "[t]he line of demarkation [sic] between [public accommodation laws'] lawful and unlawful exercise is often difficult to trace," the principles of *Munn* required it to hold that "the *quasi* public use to which the owner . . .

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[86] 48 Miss. 661 (1873).

[87] *Id.* at 682 ("The assertion of a right in all persons to be admitted to a theat[er] . . . in no sense appropriates the private property of the lessee, owner or manager, to the public use.").

[88] *Id.* at 681.

[89] 55 Pa. 209, 212 (1867).

[90] 94 U.S. 113 (1876).

[91] 25 N.W. 766, 767 (Iowa 1885) ("In all matters of mere private concern he is left free to deal with whom he pleases . . . . There are, however, classes of business in the conduct and management of which, notwithstanding they may be conducted by private parties . . . , the general public has such interest as that they are properly the subject of regulation by law . . . ."); *id.* at 768 ("The ground upon which these restrictions are imposed is that persons engaged in these vocations are in some sense servants of the public . . . .").

[92] *Id.*

devoted his property [gave] the legislature a right to interfere."[93] Similar analyses produced a wide variety of results.[94]

Another indicator that public character was the threshold issue for nineteenth and early-twentieth-century courts can be found in recurring assertions that wrongfully excluded plaintiffs were not denied social rights, but contractual, property, and civil

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[93] People v. King, 18 N.E. 245, 247, 249 (N.Y. 1888).

[94] *Compare* Fruchey v. Eagleson, 43 N.E. 146 (Ind. App. 1896) (holding that an inn was a public accommodation due to its dictionary definition, which contained the word "public"), Ferguson v. Gies, 46 N.W. 718 (Mich. 1890) (holding a restaurant to be a public accommodation), Messenger v. State, 41 N.W. 638, 639 (Neb. 1889) (holding a barber shop to be a public accommodation because "[a] barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours"), Fowler v. Benner, 13 Ohio N.P. (n.s.) 313 (1912) (holding that an ice cream parlor was a public accommodation), Johnson v. Humphrey Pop Corn Co., 14 Ohio Cir. Dec. 135 (1902) (holding that a bowling alley was a public accommodation, although not statutorily mentioned), *and* Babb v. Elsinger, 147 N.Y.S. 98, 100 (N.Y. App. Div. 1914) (holding that a saloon was a public accommodation because "[d]rinking places have been, from time immemorial, subject to legislative control"), *with* Cecil v. Green, 43 N.E. 1105 (Ill. 1896) (holding that a soda fountain in a drug store was not a public accommodation), Brown v. J.H. Bell Co., 123 N.W. 231 (Iowa 1909) (holding that a coffee booth at a food show, though rented from grocers' association, was not a public accommodation because the merchant had no interest in and did not affect association as a whole), Rhone v. Loomis, 77 N.W. 31 (Minn. 1898) (holding that a saloon was not public accommodation because the statute did not name such establishments specifically), Burks v. Bosso, 73 N.E. 58 (N.Y. 1905) (holding that a bootblacking stand was not a public accommodation), *and* Kellar v. Koerber, 55 N.E. 1002 (Ohio 1899) (holding that a saloon was not a public accommodation because doing so would violate public policy by encouraging liquor trafficking and the frequenting of such establishments). *But see Brown*, 123 N.W. at 237 (Evans, C.J., dissenting) ("[Despite any contractual relationship between the merchant and the association,] [s]o far as the public was concerned the pure food show was one enterprise. The fact that many persons representing many lines of goods participated in the enterprise did not in any sense destroy its unity."); *Rhone*, 77 N.W. at 33 (Start, C.J., dissenting) (responding to the majority by claiming it to be clear that the legislature intended the law to encompass such establishments due to their public nature despite a lack of express recognition by the legislature). The converse can also be used to illustrate that an organization's public character was the starting point for the courts: where a black man was denied admission to an orchestra and there was no public accommodation law, the Supreme Court of Missouri noted that "it is not necessary to a proper disposition of this case to say how far or to what extent theaters are to be regarded as public places . . . ." Younger v. Judah, 19 S.W. 1109, 1111 (Mo. 1892); *see also* Grannan v. Westchester Racing Ass'n, 47 N.E. 896 (N.Y. 1897) (holding that a race track did not violate public accommodation law by excluding a man that attempted to bribe a jockey, as that man was not part of the "public" to which the law ensured access, even assuming the law could be said to apply to race track).

rights.[95] Presumably, in a perfectly egalitarian legal system, only private institutions are capable of denying social rights because true *social* status can only be conferred by private entities. Conversely, only public institutions are capable of denying civil rights because only those institutions provide services generally regarded as afforded to all persons.[96] Following this logic, the courts' continued explicit statements that plaintiffs were not being denied social rights in those circumstances shows that the courts' analyses first required resolution of the public-private issue and that social rights were not considered public benefits.

Thus, the question then becomes what actual *rights* did lawyers assert to shield defendants from public accommodation

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[95] *See Brown*, 123 N.W. at 233 ("These civil rights acts do not confer equality of social rights or privileges, nor could they enforce social intercourse, and it is doubtful, to say the least, if they could be made to apply to purely private business."); Coger v. Nw. Union Packet Co., 37 Iowa 145, 157 (1873) ("Without doubting that social rights and privileges are not within the protection of the laws . . . , we are satisfied that the rights and privileges which were denied plaintiff are not within that class. . . . Her money would not purchase for her that which the same sum would entitle a white passenger . . . . In these matters her rights of property were invaded . . . ."); *Ferguson*, 46 N.W. at 720 ("Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction."); People v. King, 18 N.E. 245, 248 (N.Y. 1888) ("It is of course impossible to enforce social equality by law. But the law in question simply insures to colored citizens the right to admission, on equal terms with others, to public resorts, and to equal enjoyment of privileges of a *quasi* public character."); *Johnson*, 14 Ohio Cir. Dec. at 138 ("A man is at liberty to select for his associates whom he will, provided only that the party whom he selects is willing to be his associate. . . . [B]ut this does not give [him] . . . the right to say who shall be admitted to the privileges of the public places . . . ."). *But see Brown*, 123 N.W. at 237 (Evans, C.J., dissenting) ("It does not attempt to deal with social rights, nor is there any question of social rights involved in this case, nor was the humiliation of the plaintiff a mere 'social humiliation,' as indicated in the majority opinion.").

[96] *See* Bell v. Maryland, 378 U.S. 226, 293 (1964) ("A review of the relevant congressional debates reveals that the concept of civil rights which lay at the heart of both of the contemporary legislative proposals and of the Fourteenth Amendment encompassed the right to equal treatment in public places—a right explicitly recognized to be a 'civil' rather than a 'social' right."); *id.* at 294 ("Although it was commonly recognized that in some areas the civil-social distinction was misty, the critical fact is that it was generally understood that 'civil rights' certainly included the right of access to places of public accommodation for these were most clearly places and areas of life where the relations of men were traditionally regulated by governments." (footnote omitted)).

law applicability? Generally speaking, they argued in terms of "property" and "individual liberty" and relied upon the notion that they should be able to autonomously conduct their businesses.[97] The language employed by the Illinois Supreme Court in *Cecil v. Green* is particularly suggestive of a contractual-type liberty:

> The personal liberty of an individual in his business transactions, and his freedom from restrictions, is a question of the utmost moment; and no construction can be adopted by which an individual right of action will be included as controlled within a legislative enactment, unless clearly expressed in such enactment, and certainly included within the constitutional limitation on the power of the legislature.[98]

While this language does allude to contractual rights, *Munn* had recently made it *relatively* clear that economic liberties were not considered fundamental rights in the face of legislative regulation.[99] As such, it seems that courts recognized a separate, non-economic right of persons to associate on an immediate level, and the related right of those persons to be free from legislation affecting those aspects of their affairs that did not touch on the public interest.

Further, if one accepts the proposition discussed above that legislatures extend *social* rights to plaintiffs by forcing their

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[97] *See, e.g.*, Donnell v. State, 48 Miss. 661, 682 (1873) ("[C]ounsel for the appellant has [argued] . . . that private property shall not be taken for public use unless compensation be first made.").

[98] 43 N.E. at 1106.

[99] Munn v. Illinois, 94 U.S. 113, 125 (1876) ("From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law."). If courts *were* basing any associational autonomy purely on contractual liberty (which is unlikely due to (1) the holding in *Munn*, and (2) the courts' continual reiterations of the evils of enforcing social equality), then the constitutional basis for such autonomy would run headlong into later Supreme Court cases such as *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (holding that a Kansas statute did not violate substantive due process by requiring debt-adjusters to be lawyers). However, it must be noted that the Court *has* approved economic fundamental rights in the area of commercial speech. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding that statutory bans on advertising prescription drug prices violated the First and Fourteenth Amendments). Perhaps a commercial freedom of association right is not so attenuated from a commercial free speech right.

access to private institutions, it follows that by doing so, they infringe upon the social rights of defendants. Therefore, at least in cases where the organization at issue was genuinely private, courts had to be recognizing *some* associational right. This right may have included within it contractual liberty, but it did not at all depend on expression or intimacy. And, whether defendants ultimately prevailed or not, courts were recognizing this right as an initial matter, as evidenced by their persistent practice of first analyzing the public character of defendant organizations.

Contemporaneously, the "separate but equal" line of cases, though they espouse a now-debunked doctrine, illustrate that the presence of public interest was the key concern in discrimination contexts. While relying on antiquated notions of racial inferiority, those courts determined that, just as some establishments were so affected with the public interest that they could not exclude, some establishments furthered the public interest *by* segregation.[100] Of course, at the center of these cases is *Plessy v. Ferguson*.[101] There,

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[100] *See, e.g.*, Chiles v. Chesapeake & Ohio Ry. Co., 218 U.S. 71, 77 (1910) ("The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it."); The Sue, 22 F. 843, 846 (D. Md. 1885) ("This discrimination on account of race or color is one which it must be conceded goes to the very limit of the right of a carrier to regulate the privileges of his passengers, and it can only be exercised when the carrier has it in his power to provide for the passenger, who is excluded from a place to which another person, paying the same fare, is admitted, accommodations equally safe, convenient, and pleasant."); *Coger*, 37 Iowa at 150 ("The defendant, as a common carrier of passengers, had the legal right . . . to adopt *reasonable rules* and regulations concerning the convenience, comfort, and safety of its passengers . . . ."); Roberts v. City of Boston, 59 Mass. 198, 208 (1849) ("The power of general superintendence vests a plenary authority . . . to arrange, classify, and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare."); People *ex rel.* Cisco v. Sch. Bd., 61 N.Y.S. 330, 331 (N.Y. App. Div. 1899) ("[T]he school authorities have power, when in their opinion the interests of education will be promoted thereby, to establish schools for the exclusive education of colored children . . . ."); W. Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 212 (1867) ("The right of the carrier to separate his passengers is founded upon two grounds—his right of private property in the means of conveyance, and the public interest. . . . to preserve order and decorum . . . ."); Commonwealth v. George, 61 Pa. Super. 412, 422 (1915) ("The defendant was permitted to make reasonable regulations for the comfort and convenience of his patrons, such regulations as the established usages, customs and traditions of the people, and the preservation of the public peace and good order demand.").

[101] 163 U.S. 537 (1896).

while the Supreme Court considered then-prevailing public interests in upholding Louisiana's railroad segregation law,[102] Harlan's famous dissent disagreed with the Court's asserted balance of such interests, but most importantly, in asserting that balancing those interests should yield the opposite result, Harlan continually reiterated the public nature of the discrimination at issue.[103] Further, because Louisiana's law prevented blacks and whites from sitting together even if they wanted to, it certainly infringed upon associational freedom, and Harlan's language indicated that he was contemplating this sort of freedom in his dissent:

> If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each. . . . If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other?[104]

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[102] *Id.* at 544 ("[The Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.").

[103] Harlan belabored the point that railroads are quasi-public entities. *Id.* at 553-54 (Harlan, J., dissenting) (citing Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 676 (1874); Olcott v. Supervisors, 83 U.S. (16 Wall.) 678, 694 (1872); N.J. Steam Nav. Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344, 382 (1848)). Then, he stated:

> In respect of civil rights, common to all citizens, the [C]onstitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race.

Id. at 554, 562. This shows that Harlan recognized (1) that Plessy had been denied *civil* rights, and (2) that civil rights pertain to public activities, not private ones.

[104] *Id.* at 557.

In 1907, the Supreme Court would pass upon the validity of a California public accommodation law in *Western Turf Association v. Greenberg*.[105] Writing for an undivided Court, Harlan echoed the sentiments of the state courts discussed above by noting that the establishment at issue was "so far affected with a public interest that the state may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public . . . ."[106] Fifty-seven years later, Justices Douglas and Goldberg in *Bell v. Maryland* would indicate that these historical notions of association in the face of public accommodation had stuck: associational rights are not violated by such laws when the establishment is sufficiently public.[107] The opinion is brimming with language contemplating associational freedom in the context of public accommodation laws,[108] but Justice Goldberg's concurrence perhaps says it best:

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[105] 204 U.S. 359 (1907).

[106] *Id.* at 364. It is interesting to note that as far as the establishment's defense, Harlan would only consider whether the public accommodation law deprived it of property without due process of law. *Id.* at 363. The Court would not consider whether the law deprived the establishment of liberty without due process of law because it was a corporation, as Harlan noted that "the liberty guaranteed by the 14th Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons." *Id.* If the general consensus was that only individual liberty was protected by the Fourteenth Amendment, this explains the practice discussed above of defendants stating their defenses in terms of property and contractual liberty (i.e., not relying so much on liberty provision of the Fourteenth Amendment), and courts recognizing them as such. This does not mean, however, that concerns of individual liberty were not implicit in the courts' analyses.

[107] 378 U.S. 226, 242, 255 (Douglas, J., concurring) (1964) ("Are they not as much affected with a public interest? Is the right of a person to eat less basic than his right to travel . . . ?"); *id.* at 286 (Goldberg, J., concurring).

[108] *Id.* at 252 (Douglas, J., concurring) ("Private property is involved, but it is property that is serving the public. As my Brother GOLDBERG says, it is a 'civil' right, not a 'social' right, with which we deal."); *id.* at 253 ("Some businesses, like the classical country store . . . make the store an extension, so to speak, of the home. But such is not this case."); *id.* at 261-62 ("So far as the corporate owner is concerned, what constitutional right is vindicated? It is said that ownership of property carries the right to use it in association with such people as the owner chooses. The corporate owners in these cases—the stockholders—are unidentified members of the public at large, who probably never saw these petitioners, who may never have frequented these restaurants. What personal rights of theirs would be vindicated by affirmance? Why should a stockholder in Kress, Woolworth, Howard Johnson, or any other corporate owner in the restaurant field have standing to say that any associational rights

> Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.
>
> We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests . . . .[109]

The importance of *Bell* is that, with minimal reference to *Patterson*,[110] the Court evaluated the associational freedoms of establishments affected by public accommodation laws according to the degree to which those establishments' activities were public. The *Bell* opinion itself also relied upon historical sources,[111] and as such, it indicates that the *Roberts* Court had a historical basis from which it could have determined that passing upon the validity of any public accommodation law should require a determination of whether the activity at issue is truly public and an evaluation of whether plaintiffs are litigating social or civil rights.

The above material tends to show that there is a historical basis, deeply rooted in the American tradition of civil liberty, for a non-expressive and non-intimate associational right based on privacy. This right is apparent from the tendency of courts to first determine the public extent of an organization's activities when deciding on public-accommodation-law enforceability. It is further evidenced by courts' acknowledgments that the purely social rights of plaintiffs could not be vindicated outside a civic realm,

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personal to him are involved? Why should his interests—*his associational rights*—make it possible to send these Negroes to jail?") (emphasis added).

[109] *Id.* at 313 (Goldberg, J., concurring).

[110] The Court considered *Patterson* in the context of whether an organization had standing to assert the constitutional rights of its individual members. *Id.* at 267 (Douglas, J., concurring).

[111] *Id.* at 291-300 (Goldberg, J., concurring) (discussing the debates surrounding the adoption of the Fourteenth Amendment and the Civil Rights Acts of 1866 and 1875); *id.* at 299 (citing Donnell v. State, 48 Miss. 661 (1873)); *id.* at 313 (citing Ferguson v. Gies, 46 N.W. 718 (Mich. 1890)).

which implicitly recognizes the rights of defendants in purely social settings. Finally, it is clear that the *Patterson* Court did not carve the freedom of association out of whole cloth and that modern courts therefore have a deeper historical basis on which to recognize a third level of associational autonomy—one that would require considering organizations' public degree before inquiring into their intimacy or expression.

III. A NEW APPROACH FROM THE HISTORICAL TRADITION

The evidence presented outlines a historical tradition of valuing organizations' private autonomy that began with the inception of the Fourteenth Amendment and continued as courts ruled on public accommodation suits. For an acknowledgment of this tradition to have any practical use, two questions must be answered. First, which methods of determining an organization's private nature have the firmest historical and precedential support? Second, how would those methods alter the modern freedom of association analysis?

One can glean three approaches from the congressional debates surrounding the Civil Rights Act of 1875. First, there is the view of Thurman, who seemed to think that state anti-discrimination measures could not be constitutionally imposed on any non-state actor.[112] At the other extreme is Sumner's initial approach, which presumed that any institution receiving the benefits of incorporation, even churches and cemeteries, could not claim the freedom of association in the face of state anti-discrimination measures.[113] Finally, there is Carpenter's analysis, which would constitute the ultimate approach of the Civil Rights

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[112] *See* discussion *supra* Part II.A; *see also supra* notes 52, 55, 56 and accompanying text.

[113] *See* discussion *supra* Part II.A; *see also supra* note 51. But see, for example, *Faulkner v. Solazzi*, which illustrates the primary counter-concern to Sumner's position, stating:

> In a sense, every business which has a promise of success within it is one which appeals to a public need, and in the sense that it supplies a need it is for the public accommodation. But the term 'public accommodation,' as descriptive of places within the purview of the act, clearly was not chosen as one to be interpreted in any such all-embracing sense.

65 A. 947, 949 (Conn. 1907).

Act of 1875 and have the most resilience amongst the state courts. This approach maintained that state anti-discrimination measures could be imposed on private entities as long as they were common carriers or other entities traditionally regarded as "affected with the public interest."[114]

However, even within the prevailing approach, two sub-methodologies for determining public accommodation law applicability and validity emerge. First, there are those courts and justices that attempted to interpret such laws liberally, and sought ultimately to further the "spirit" of anti-discrimination.[115] Second, there are those that endeavored to apply principles of statutory interpretation to such laws, and in doing so they also pondered what activities and institutions could logically be encompassed by such laws based on how public those activities and institutions were.[116]

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[114] *See* discussion *supra* Part II.A; *see also supra* notes 47, 53 (Frelinghuysen arguing similarly), 57 (Conkling), 58 (Boreman) and accompanying text.

[115] *See, e.g.*, Brown v. J.H. Bell Co., 123 N.W. 231, 237 (Iowa 1909) (Evans, C.J., dissenting) ("[Inasmuch as the plaintiff was refused service because she was black,] it seems to me that the case comes fairly within the letter of the statute, and clearly within its spirit. . . . The majority opinion is professedly 'divorced from sentiment'; but the statute is a statute of sentiment."); Rhone v. Loomis, 77 N.W. 31, 33 (Minn. 1898) (Start, C.J., dissenting) ("[Despite the fact that the statute does not mention saloons,] its meaning is clear, and it is manifest that the legislature intended to place saloons within the statute . . . ."); Grannan v. Westchester Racing Ass'n, 47 N.E. 896 (N.Y. 1897) (relying heavily upon legislative goals by holding that plaintiff was not entitled to recover because he was white and was not excluded based on his color); Johnson v. Humphrey Pop Corn Co., 14 Ohio Cir. Dec. 135, 137-38 (1902) ("Surely if these statutes are to accomplish the purposes declared . . . , the word 'person' must be held to include artificial persons, that is, private corporations . . . . It was without doubt the intention of the legislature to enact into positive law what has come to be recognized as justice . . . .").

[116] *See, e.g.*, *Faulkner*, 65 A. at 949 ("In a sense, every business which has a promise of success within it is one which appeals to a public need, and in the sense that it supplies a need it is for the public accommodation. But the term 'public accommodation,' as descriptive of places within the purview of the act, clearly was not chosen as one to be interpreted in any such all-embracing sense."); *Brown*, 123 N.W. at 233 ("[T]he statute under consideration was not made to, nor does it, apply to every private business, even if the Legislature had the power to make it so read, and the enumeration of places in the nature of inns . . . , of public conveyances . . . , and places of amusements, necessarily excludes all other places of business or places of amusement not of the kind enumerated."); *Rhone*, 77 N.W. at 32 ("In this act . . . the legislature specifically enumerates the places and things to which its provisions should apply at great length and with great particularity . . . but nowhere mentions saloons, or

This historically-based, non-expressive, and non-intimate freedom of association would protect private organizations to the degree that they are not affected with a public interest. Because "affected with a public interest" essentially means providing a benefit to which the public should be entitled, on a practical level, this right would function by limiting the range of activities, institutions, and ultimately, benefits that public accommodation laws could reach according to the approaches discussed above. Regardless of which approach is followed, it is likely that neither would deem intangibles such as "business contacts" and "leadership skills" as public benefits, at least not as far as they are gleaned from private functions. These are the sorts of things that the Court presumed to be encompassed by Minnesota and New Jersey public accommodation laws in *Roberts* and *Dale* respectively, and as such, that presumption is the aspect of modern freedom of association doctrine that would be altered by the historical right.

Under the first approach, ensured access to such benefits is conceivable but unlikely. For the framers and older courts, even liberal interpretations of public accommodation laws and furtherance of anti-discrimination goals pertained to covering a wider range of *physical* places. Admittedly, as concepts of social equality (and social mobility) evolved, state legislatures probably discerned an interest in ensuring access to more intangible benefits. Therein lies the point, however; such goals pertain to

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places where intoxicating drinks are sold."); Burks v. Bosso, 73 N.E. 58, 59 (N.Y. 1905) ("[I]f bootblacking stands are to be brought within the purview of the statute . . . , it will require no great stretch of the imagination to apply this statute to innumerable places and callings that have never been, and probably never will be, regarded as subject to legislative control . . . ."); Babb v. Elsinger, 147 N.Y.S. 98, 100 (N.Y. App. Div. 1914) ("Drinking places have been, from time immemorial, subject to legislative control. . . . If an inn is a place of public accommodation, why not a place where intoxicating liquors are sold in which the public has, from the earliest times, shown greater solicitude than in inns? It is of the greatest significance that in England the equivalent of the word 'saloon' as used in this country is the word 'public house.'"); People *ex rel.* Cisco v. Sch. Bd., 61 N.Y.S. 330, 332 (N.Y. App. Div. 1899) ("The entertainment offered in one of such places is no equivalent to that offered in another. . . . Places of public amusement are for the furnishing of particular entertainment. Each differs from all others. Each is sui generis."); Fowler v. Benner, 13 Ohio N.P. (n.s.) 313, 320 (1912) ("The duty of the court, in this instance, is wholly that of interpretation and construction . . . .").

social equality, not civil equality. And, as discussed in Part II, when the state confers purely social rights outside the civic realm to the public through an unwilling private party, that private party's associational freedoms are infringed.

Applying the second approach, ensured access to intangible benefits becomes even more unlikely. Strict interpretation of statutes ensuring access to "business establishments" and "public places" cannot readily yield the conclusion that the legislature has created a public gate to social benefits. Even though legislatures are probably capable of enumerating every conceivable locale, event, or organization in their laws, the framers and courts would have rejected such wide latitude, at least to the extent that they deemed the benefits conferred to be of a social character.

CONCLUSION

Modern freedom of association doctrine examines the intimate or expressive nature of organizations to determine whether they may exclude persons in the face of state public accommodation laws. Commentators have recognized the flaws of this approach, which stemmed from the Court's decision in *Roberts* and its questionable reliance upon *Patterson*. John Inazu argues that the freedom of association emerged in *Patterson* and that historical sources largely suggest that the freedom of assembly was traded for the modern freedom of association in *Patterson*. In response, this article argues that a freedom of association (distinct from the freedom of assembly) pre-dates *Patterson*, as it is discernable from the debates amongst Fourteenth Amendment framers and the opinions of contemporaneous courts. These sources reveal an associational right, deeply rooted in the American tradition of civil liberty, that protects the associational autonomy of activities and institutions to the extent that they are not affected with a public interest.

This historically-based approach inquires first into what public interests, if any, are affected by an organization's activities and, therefore, places sensible (and often tangible) limits on public accommodation laws. While older courts ranged in their analyses from construing such laws liberally to viewing them through the lens of strict statutory interpretation, one pattern is evident: to the extent that plaintiffs sought to have their *social* rights

vindicated they were denied relief, and courts continually recognized that purely social functions were not encompassed by public accommodation laws. In the end, the compass for locating the line between public and private may remain imprecise and inconsistent, but it is clear that under a historically-based approach to freedom of association, the position of that line is the threshold inquiry, and ultimately, the vindication of purely social rights does not traverse it.

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