

Private Clubs and Public Values

In a celebrated 1959 law review article, Columbia law professor Herbert Wechsler expressed his misgivings about the Supreme Court's repudiation of "separate but equal" doctrine in racial segregation cases. At the close of the article, Wechsler put what were obviously intended as rhetorical questions: "Is there not a point . . . in the statement that 'if enforced separation stamps the colored race with a badge of inferiority' it is solely because its members chose to put that construction upon it? Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is by judgments predominantly imposed by males?"

A quarter century later, those questions no longer appear either rhetorical or adequate to capture the complexities of gender segregation. Not all women resent all forms of separatism, and American society remains deeply divided over which forms are invidious. To defenders of sex-segregated institutions, the pre-eminent issue is not equality but liberty, and the values of personal identity and cultural diversity that underlie it. Moreover, some feminists have questioned women's focus on getting in, as opposed to doing in, men's clubs. From this perspective, the response to exclusion should be a kind of Groucho Marx stoicism. Any association that bans women is not the kind women should want to join.

For many individuals, however, the issues surrounding access to gender-segregated institutions are not so readily dismissed. As a practical matter, such clubs constitute a declining but still substantial presence on the social landscape. Membership in the associations of Elks, Moose, Lions, and Eagles totals well over five million, and smaller, more elite institutions provide forums for highly significant political and commercial interchanges. As a symbolic matter, exclusion of women, like that of racial or religious minorities, carries a stigma that affects individuals' social status and self-perception. And as a theoretical matter, separatism poses questions that have been at the core of feminist legal struggles for the last century: questions about public and private, sameness and difference, and formal versus substantive equality.

Legal Challenges

Almost all of the legal challenges to sex-segregated associations have been directed at all-male groups. Such challenges have met with only partial success. In general, the membership policies of private organizations are not subject to constitutional scrutiny. Title II

of the federal Civil Rights Act bans discrimination in public accommodations on the grounds of race, religion, or national origin, but not sex. Although many state public accommodations laws include prohibitions on gender discrimination, virtually all of these statutes do not apply to private associations. Accordingly, their effect on sex-segregated clubs has been limited. The most significant progress is likely to come only in jurisdictions willing to give broad construction to the meaning of "public."

In 1984, the Supreme Court gave cautious approval to such an approach, although the terms of its holding do not promise any fundamental assault on sex-segregated associations. *Roberts v. Jaycees* involved a challenge to the Jaycees' policy of permitting full membership status to all males between the ages of eighteen and thirty-five, while granting only "associate" status to females, a status that conferred no power to vote, hold office, or receive awards. Justice Brennan, speaking for the majority, argued that the state's interest in eliminating discrimination outweighed the First Amendment rights of association asserted by Jaycees' members. In so holding, Justice Brennan began by noting that the Court has traditionally protected association in two senses. One line of decisions has shielded certain intimate human relationships against state intrusion in order to preserve fundamental elements of personal liberty. A second line of precedents has recognized rights to associate in order to engage in other constitutionally protected activities—speech, assembly, and religious expression. As to the first interest, the Court concluded that the Jaycees had not exemplified the kind of intimate attachments warranting constitutional protection. So, too, although a "not insubstantial" part of the Jaycees' activities constituted protected expression on political, economic, cultural, and social affairs, the Court found no basis for concluding that the admission of women as full members would alter or interfere with that expression.

A threshold difficulty with this approach lies with the intimate/non-intimate distinction. Under the framework endorsed in *Jaycees*, the ultimate question is whether an association seems more an extension of home or market. That leaves large numbers of affiliations occupying an awkward middle ground, and where any particular one will fall on a particular court's continuum is inevitably indeterminant. Certainly none of the criteria the Supreme Court has identified—size, selectivity, and exclusivity—will yield conclusive distinctions. For example, the Minnesota Supreme

Court labeled the Kiwanis as "private," although that organization's size, functions, and recruiting techniques were comparable to the Jaycees'. Moreover, missing from the *Jaycees'* analysis was any acknowledgment of the values that separatism might serve, independent of an association's size or exclusivity. The dynamics of mixed and single-sex organizations differ, and separatism in some contexts may present opportunities for self-expression and collective exploration that would be inhibited by sexual integration.

Equally disquieting was the Court's ready dismissal of the organization's expressive claims. Throughout the litigation, the Jaycees asserted that women might have different attitudes about various issues on which the organization had taken a public position, particularly its campaign supporting President Reagan's economic policies. Justice Brennan dismissed such claims as "social stereotyping." The problem with that analysis was not simply its failure to acknowledge a wealth of gender-gap studies supporting the Jaycees' argument. A more fundamental difficulty was the implication that access to an all-male institution may depend on whether female members would endorse its existing values. If the price of admission is a promise of assimilation, that strategy is not one all women's rights advocates will be prepared to embrace.

Yet the case for full female participation in associations like the Jaycees does not depend on a denial of sex-based differences or the value of single-sex affiliations. Rather, it entails a more contextual assessment of the significance of those differences and values in various cultural settings. Inclusion of members with a different perspective might enrich, rather than impair, the organization's expressive activities. One can concede that sexual integration might in some measure affect an association's philosophical cast or social dynamics, without conceding that its basic functions would alter. That seems particularly likely in cases like the Jaycees, where female associates were involved in most civic functions. The second-class membership policies at issue appeared more concerned with perpetuating male hierarchies than male sanctuaries.

In any event, these organizations are public in a sense that conventional legal frameworks fail to acknowledge. The exclusion of women from spheres conventionally classified as private contributes to women's exclusion from spheres unquestionably understood as public.

The perpetuation of all-male clubs has worked to women's disadvantage on several levels. The most direct harms involve lost opportunities for social status, informal interchanges, and personal contacts that such associations have traditionally provided. In a society where men obtain almost one third of their jobs through personal contacts, and probably a higher percentage of prestigious positions, the commercial role of social affiliations should not be undervalued. Nor should their political significance be overlooked. Elite all-male associations such as the Bohemian or Cosmos clubs have often been the locus for private discussions that later emerged as public policy. Moreover, sex dis-

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The Cosmos Club

crimination by private institutions carries substantial symbolic freight. Relegating women to separate dining rooms, separate entrances, or separate organizations is an affront to individuals' dignity and sense of self-worth.

In responding to this line of argument, defenders of all-male institutions frequently maintain that women do not, in fact, experience separatism as degrading, but rather enjoy having their own clubs or dining facilities. Such rejoinders, which resemble explanations often given for excluding racial or religious minorities, obscure a fundamental distinction. Separatism imposed by empowered groups carries a different social stigma and instrumental significance from separatism chosen by subordinate groups. Exclusivity of the latter kind does not convey inferiority or serve to perpetuate existing disparities in political and economic power. By contrast, the forms of institutional separatism chosen by dominant groups tend to reinforce their privileged position and the stereotypes underlying it.

The explanations that private club members commonly advance for excluding women leave little doubt about the lingering potency of such stereotypes. It is variously claimed that a female presence would alter club demeanor and decor. As one representative club manager argued, "If a man has a business deal to discuss, he doesn't want to sit next to a woman fussing about how much mayonnaise is in her chicken salad." Yet when sexist stereotypes dictate association policy, they tend to become self-reinforcing. No women are present to counteract the assumption that males' luncheon conversation focuses on mergers while females' fixates on mayonnaise. Men who are uncomfortable associating with women in such social settings

will never become less so if discomfort remains a valid justification for exclusivity. And the males who have trouble treating women as equals at clubhouse lunches are unlikely to be free of such difficulties in corporate suites. As long as women do not "fit in" in the private worlds where friendships form and power congregates, they will never fully fit in in the public sectors with which the state is justifiably concerned.

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The boundary between public and private is fluid in still another sense: most "private" clubs depend heavily on public support, largely in the form of tax subsidies and municipal services. Clubs gain tax exemptions by claiming to be private organizations in which "substantially all" activities are for pleasure, recreation, and other non-profit purposes, while members (or their employers) deduct dues and fees as "ordinary and necessary business expenses." This privileged status points up the difficulties of seeking to dichotomize organizations as either commercial or non-commercial, public or private.

An Alternative Framework

An alternative approach to single-sex organizations will require a reconceptualization of public and private. The focus ought not simply to be on an organization's intimate or expressive character, but also on the totality of its public subsidies and public consequences. Rather than focusing on any single nexus of state involvement, courts and legislatures should consider the aggregate of governmental and commercial entanglements. Grants, licenses, and tax subsidies by the state, as well as reimbursement of expenses by employers, could serve as legitimate bases for governmental prohibitions. The state could also withdraw support in the form of tax exemptions and deductions for sex-segregated organizations, both public and private. Since employers provide an estimated 1.6 billion dollars in annual support to private clubs, and 40 to 50 percent of the revenues of certain elite men's associations, the cumulative effect of such strategies might be substantial.

The more categorical the approach, however, the more over- and under-inclusive it is likely to prove. Withdrawal of support for any single-sex association comes at a price. Subjecting associational policies to state oversight increases the risk of harassing litigation and narrows the range of private choice. We have,

however, managed to prohibit racial discrimination by private association without the disabling social consequences that critics often envision. The issue is not simply whether single-sex associations are beneficial, but whether experiences of commensurate value are available in mixed environments with fewer social costs.

The implications of categorical policies for women's groups present a harder case. It would, of course, be possible to create exemptions for all-female clubs. Such a framework would be asymmetrical with respect to sex but not with respect to power. And from the perspective of reducing gender inequality, it is power that matters. From a prudential perspective, however, it is risky to argue for a policy that explicitly declares the value of female but not male bonding.

Yet even if a categorical approach works to encourage more women's groups to adopt formal postures of gender neutrality, it is by no means clear that their composition would in fact change. As women are more fully integrated into male organizations, the need for some all-female associations also may diminish. Moreover, one advantage of denying favorable tax treatment for single sex associations rather than prohibiting them outright, is that women's organizations would be less adversely affected than men's institutions; fewer are as dependent on business expense deductions.

A final problem with legal strategies lies in their inevitable under-inclusiveness. The law is too crude and intrusive an instrument to reach many of the most influential separatist networks. Poker games, golfing groups, and luncheon cliques that form along gender lines doubtless play a more substantial role in limiting women's opportunities than any one of the organized entities susceptible to legal intervention. Even in those

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organized affiliations, access does not necessarily ensure acceptance. Getting women into the right clubs is far easier than getting them to the right tables. But access is a necessary first step. While we cannot eliminate social segregation by legal fiat, we can at least seek to minimize its crudest form and the social legitimacy that underlies it.

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