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## Constitutional Law-Private Discrimination Remains Intact

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## RECENT DECISIONS

### Constitutional Law—PRIVATE DISCRIMINATION REMAINS INTACT—*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

As a result of the decision of the Supreme Court in the *Civil Rights Cases* in 1883,<sup>1</sup> the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the fourteenth amendment<sup>2</sup> is only such action as may fairly be said to be that of the states.<sup>3</sup> "The amendment erects no shield against merely private conduct, however discriminatory or wrongful."<sup>4</sup> Thus private conduct, no matter how discriminatory, in no way violates the equal protection clause of the fourteenth amendment unless the state, to some significant extent,<sup>5</sup> becomes involved in this conduct.<sup>6</sup> As a result, what is now recognized as the "state action" doctrine<sup>7</sup> has developed<sup>8</sup> and expanded<sup>9</sup> to the point that it is now difficult

<sup>1</sup> 109 U.S. 3 (1883).

<sup>2</sup> U.S. Consr. amend. XIV, § 1:

No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>3</sup> Justice Bradley reasoned in the *Civil Rights Cases*, 109 U.S. 3, 8 (1883), that if the first section of the fourteenth amendment were not limited to state action, then the effect of the amendment would be to destroy the federal system.

<sup>4</sup> *Shelley v. Kraemer*, 334 U.S. 1, at 13 (1948); *U.S. v. Cruikshank*, 92 U.S. 542 (1875).

<sup>5</sup> *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). See also *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (S.D.N.Y. 1970). "Accordingly the issue has usually been resolved—almost always in favor of finding state action—by reference to the *kind* and *degree* of state involvement alleged. The issue has been posed in terms of whether 'to some *significant extent* the State in any of its manifestations' has become involved in the discriminatory practice under attack." *Id.* at 596-97.

<sup>6</sup> See *U.S. v. Williams*, 341 U.S. 70, 92 (1951) (Douglas, J., dissenting): "The fourteenth amendment protects the individual against *state action*, not against wrongs done by *individuals*." This had been the Court's early view, see e.g., *Hodges v. U.S.*, 203 U.S. 1 (1906); *U.S. v. Harris*, 106 U.S. 629 (1882); and remains the Court's view today, see e.g., *U.S. v. Price*, 383 U.S. 787 (1966); *Evans v. Newton*, 382 U.S. 296 (1966); *Paynes v. Lee*, 239 F. Supp. 1019 (E.D.La. 1965).

<sup>7</sup> E.g., *Brown v. City of Richmond*, 204 Va. 471, 132 S.E.2d 495, (1963):

Private action is action taken voluntarily and not by state compulsion. State action is action taken by the state or a political subdivision, or by a person or persons acting for the state or political subdivision, or pursuant to their authority or direction, or in obedience to their requirement. *Id.* at 479, 132 S.E.2d at 500.

Cf. *Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>8</sup> The doctrine grew out of the fourteenth amendment. For discussion of the history of the doctrine, see Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966).

<sup>9</sup> The decade of the fifties experienced school desegregation, while the sixties saw the

to conceive of situations in which the state is not involved to some extent.<sup>10</sup> Nevertheless, the United States Supreme Court decided in *Moose Lodge No. 107 v. Irvis*<sup>11</sup> that the State of Pennsylvania was not significantly involved in the discriminatory conduct of the Moose Lodge so as to render its conduct "state action," conflicting with the fourteenth amendment.<sup>12</sup>

Irvis, a black, accompanied by a member of the Lodge, sought service in the dining room of the Lodge. Defendant Moose Lodge in accordance with its by-laws<sup>13</sup> refused service to the plaintiff. As a result, Irvis brought a civil action in the Pennsylvania District Court claiming a deprivation of his rights,<sup>14</sup> asserting that because the Pennsylvania liquor board had issued the Moose Lodge a private club liquor license,<sup>15</sup> the refusal of service to him was "state action" for the purposes of the equal protection clause of the fourteenth amendment. However, the United States Supreme Court decided on a factual basis that such action did not constitute significant "state action."<sup>16</sup>

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sit-in movement shine additional light on the unequal position of blacks. One can see in these past two decades a general improvement in the plight of blacks, and the expansion of state action in four areas:

- (1) The individual acting under "color of law."
- (2) The non-official individual or group action so much under governmental authority as to be viewed as engaging in state action.
- (3) The concept of governmental refusal or fashion to act as fulfilling the requirement of state action.
- (4) State action found in judicial enforcement of private agreements and the supervision of private relationships.

See Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963) [herein cited as Williams].

<sup>10</sup> Williams, *supra* note 9: "While in the past it has been possible to use the finding of state action as the determining factor in deciding whether constitutional rights have been violated, we are now substantially at the end of this road." *Id.* at 367.

<sup>11</sup> 407 U.S. 163 (1972).

<sup>12</sup> *Id.* The Moose Lodge's refusal to serve food and beverages to a guest because he was a black does not, under the circumstances here presented, violate the fourteenth amendment.

<sup>13</sup> General Laws of the Loyal Order of Moose, § 92.1: *To Prevent Admission of Non-Members*. This section grants guest privileges only to those eligible for membership which in essence eliminates any black guest, as membership is limited to male caucasians.

<sup>14</sup> Civil Rights Act of 1964, 42 U.S.C. § 1983 (1970).

<sup>15</sup> REGULATIONS OF PENNSYLVANIA LIQUOR CONTROL BOARD, § 113.09 (June 1970 ed.). The case turns on the fact that the Court did not feel the license granted under this regulation was significant state action.

<sup>16</sup> *Irvis v. Scott*, 318 F. Supp. 1246 (M.D.Penn. 1970). This case appeared before the United States Supreme Court on appeal from the District Court where it was decided that the license granted the club governed by its constitution restricting membership and entry on premises was invalid as violative of equal protection of the laws, particularly in view of regulations requiring every licensed club "to adhere to all the provisions of its constitution and by-laws." See note 15 *supra*.

Although "state action" has been much discussed since its inception, "only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance."<sup>17</sup> However, as increasing numbers of cases have been decided, incidences of "state action" have been increasingly found.<sup>18</sup>

To understand the Court's reasoning and failure to find significant "state action," one must factually distinguish the principal case from previous cases to determine that a practical solution was reached. One cannot compare the constitutional rights of a private club to those of a lessee of public property,<sup>19</sup> to those of a public eating facility,<sup>20</sup> or to the law governing land transactions,<sup>21</sup> because these areas are public, whereas the overriding purpose of the Moose Lodge is to maintain its position of selectivity and privacy.<sup>22</sup> Although the principal case is obviously distinguishable from these others, this is in no way an adequate explanation of the failure to find significant "state action," or an explanation of what may be the reversal of a trend.

The clause in the liquor license that Irvis contended to be significant "state action" stated that every licensed club must "adhere to all of the provisions of its constitution and by-laws."<sup>23</sup> The Court justified this clause in part, noting that it was inserted to prevent any subterfuge<sup>24</sup> on the part of club owners wishing to come under the private club exception to the

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<sup>17</sup> See *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, at 596 (S.D.N.Y. 1970): "No simple or precise test for distinguishing between state action and private action has, however, yet been devised, in spite of 'eight decades of meta-physical writhing around the state action doctrine.'"

<sup>18</sup> E.g., *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, at 202 (1970) (separate opinion of Brennan, J.); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Newton*, 382 U.S. 296 (1966); *Robinson v. Florida*, 378 U.S. 153 (1964); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *McCabe v. Atcheson, Topeka, & S.F. Ry.*, 235 U.S. 151 (1914).

<sup>19</sup> *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

<sup>20</sup> *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

<sup>21</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948). See also *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 413 (1968).

<sup>22</sup> There is no contention on either side concerning the private nature of the Lodge as the Constitution of the Supreme Lodge states: "[M]embership of lodges shall be composed of male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone of any other than the Caucasian or White race, who are of good moral character, physically and mentally normal, and who shall profess a belief in a Supreme Being."

<sup>23</sup> See note 15 *supra*.

<sup>24</sup> *Daniel v. Paul*, 395 U.S. 298 (1969). Often the label "private club" is used to evade regulations of liquor authorities and statutes concerning public accommodations that must serve all persons. See also *Annot.*, 8 A.L.R. Fed. 634 (1971).

Civil Rights Act of 1964.<sup>25</sup> Despite the purpose of the regulation, it does not explain the Court's refusal to find any significant "state action."<sup>26</sup>

Nor can one explain the decision by the fact that the state was not directly exerting any control, "as 'state action,' for purposes of the equal protection clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action."<sup>27</sup> Perhaps no explanation exists why the Supreme Court could find no significant "state action,"<sup>28</sup> but there is strong precedent for the ultimate decision.<sup>29</sup>

Present reasoning of the "state action" theory has developed considerably from the traditional approach that has been relied on in so many previous cases, and that seems to have been relied on in the principal case. Closer analysis will better explain why the United States Supreme Court decided as it did in *Moose Lodge*.

The "state action" concept has expanded to such an extent that numerous authorities contend that the search for "state action" is a "misleading search,"<sup>30</sup> that a form of "state action" can always be found, and that the Supreme Court should analyze the problem in a different manner.<sup>31</sup> One who pleads that such interference is not "state action" may have little on

<sup>25</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.* (1970).

<sup>26</sup> See 1970 WISC. L. REV. 595 (1970). Because the license is the extent of the state's involvement, the emphasis should not fall upon the nature of the enterprise but upon the nature of the license granted to that enterprise. This relates to further arguments concerning the idea of whether the license is a right or a privilege.

For further discussion on the disagreement over this distinction, see Reich, *The New Property*, 73 YALE L. J. 733, 740-41 (1964).

<sup>27</sup> *Robinson v. Florida*, 378 U.S. 153, 156 (1964).

<sup>28</sup> *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (opinion of Brennan, J., dissenting):

Our prior decisions leave no doubt that the mere existence of efforts by the State, through legislation or otherwise, to authorize, encourage, or otherwise support racial discrimination in a particular facet of life constitutes illegal state involvement in those pertinent private acts of discrimination that subsequently occur." *Id.* at 190.

<sup>29</sup> *E.g.*, *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) *affirmed* 352 U.S. 903 (1956):

In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the fourteenth amendment. . . . Indeed, we think that such liberty is guaranteed by the due process clause of that Amendment. *Id.* at 715.

<sup>30</sup> See Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957).

<sup>31</sup> St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, at 389-90 (1963). Williams contends that the better test would determine whether the private club has so moved into the area of public

which to rely other than the *Civil Rights Cases*, while "his opponent, on the other hand, has a whole quiverful of modern cases, out of which he can develop more or less appealing analogies."<sup>32</sup> Thus, the real determination should not be a consideration of whether the state has acted, but rather a balancing of two complimentary principles: the right of the individual to pick his own associates in order to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses, versus the constitutional ban in the equal protection clause of the fourteenth amendment against state-sponsored racial inequality.<sup>33</sup> This balancing process would eliminate an overly rigid doctrine, and such a "rule of reason" would render adequate protection to the authentic private life which does not fall under application of the equal protection clause.<sup>34</sup>

Private clubs have been spared the attacks inflicted upon other discriminatory bodies,<sup>35</sup> even in this era in which minority groups have been accorded increased recognition of their constitutional rights. Indeed, the private club, as long as it does not move out into the area of public concern as have the labor unions, should face no constitutional inhibition prohibiting discrimination. Some have suggested that the private club can turn away a black non-member solely because it can turn away the white non-member.<sup>36</sup> This view exemplifies the error of the traditional "state action" analysis because "[i]t fails to recognize the valuable right of the person or truly private group to engage in all manner of discriminations, except as they may be specifically outlawed by affirmative state regulations."<sup>37</sup>

While the pervasive nature of the liquor license initially places the label of "state action" upon the discriminatory policies of the Moose Lodge, closer analysis in light of the "balancing test" suggests that the Court has decided correctly in protecting the private rights of the individual. In determining

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concern that the public's interest in eliminating the particular discrimination must outweigh the personal right to discriminate.

<sup>32</sup> Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, at 89 (1967-68): "The only thing settled and clear is that 'state action' or relevant 'state action' is necessary, in some quantity or kind, to the invocation of the equal protection clause."

<sup>33</sup> E.g., *Evans v. Newton*, 382 U.S. 296 (1966). See also Silard, *supra* note 8; Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

<sup>34</sup> See Henkin, *Shelley v. Kraemer: Note For a Revised Opinion*, 110 U. PA. L. REV. 473, 483 n. 20 (1962). The article discusses the limitation of the fourteenth amendment when it collides with another constitutional guarantee.

<sup>35</sup> 1970 Wisc. L. Rev. 595 (1970). However, this may soon be a myth, as *Moose Lodge* may only be the first step in an all out attack upon the discriminatory action of the private club. See also *Wall Street Journal*, Sept. 10, 1969, at 14, col. 1.

<sup>36</sup> Schwelb, *The Sit-In Demonstration: Criminal Trespass or Constitutional Right?* 36 N. Y. U. L. REV. 779, 799 (1961).

<sup>37</sup> Williams, *supra* note 9, at 381.

whether there was significant "state action," the Court did not intend to reverse the trend of the sixties, but to establish the point at which the constitutional right of the private individual or club to discriminate should be protected.

Various articles have evaluated the concept of "state action" resulting in an omission of the consideration of the valid right of individuals and private groups to engage in a multitude of discrimination in our society.<sup>38</sup> Indeed, courts considering this problem on the traditional basis of a finding of "state action" have often ignored this significant competing consideration. Nevertheless, one should look beyond the traditional approach of locating "state action" and deal with the merits of the constitutional issue. In so doing, the government will be able to protect purely private discrimination while at the same time prevent any state-involved discriminatory practice.<sup>39</sup>

W. D. B.

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<sup>38</sup> E.g., St. Antoine, *supra* note 31; Shanks, "State Action" and the Girard Estate Case, 105 U. PA. L. REV. 213 (1956); Schwelb, *supra* note 36. One may note that the few who do recognize the freedom to discriminate do so sparingly. Compare also Van Alstyne & Karst, *supra* note 31; Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

<sup>39</sup> E.g., 46 N. C. L. REV. 149 (1967); Williams, *supra* note 9.