of purpose with which Irvis, in fact, agrees. As Moose Lodge states on page 84 of its Brief, the purpose of this provision "is purely and simply and plainly the prevention of subterfuge." It goes on to point out that there are several problems attendant upon the existance and operation of a private club with which the Liquor Code is properly concerned. One of these is the concern that the private club be in fact a "private" licensee and not a place open to the public, in view of the special privileges given to private clubs (particularly with respect to hours of sale). The second of these concerns, closely allied to the first, is that the private club truly be a membership organization and not a "one-man club" devote to the generation of profit for a single individual or several individuals. Section 113.09 of the regulations is one of several ways in which the Board seeks to meet these problems; it has no other purpose. For this reason Irvis did not argue that this regulation acts as a direction to a private club to discriminate, and he does not agree with the indication of the court below to this effect.

Second, Moose Lodge contends (Brief, p. 85) that the decree of the lower court should have been fashioned simply to enjoin enforcement of this regulation to the extent that it "purports to implement discriminatory qualifications for membership . . ." In this way, says Moose Lodge, the State would not be in the position of supporting any restrictive membership provision. We take this position of Moose Lodge to mean that it believes the only proper decree which should have been entered by the court below was a decree which simply enjoined the Board from enforcing this regulation to the extent indicated.

This contention of Moose Lodge would be acceptable if, and only if, the court below had based its decision simply on the view that Regulation § 113.09 constituted a State

direction to discriminate. This, however, is a palpably incorrect reading of the decision of the court below. That decision was based upon the extensive regulatory authority exercised by the Board over its licensees and upon the benefits flowing to the licensee from the possession and use of the liquor license. The reference to section 113.09 of the regulations was not necessary to the decision, and a decree which does no more than enjoin the Board from enforcing this provision would do nothing towards effecting the severance of the state action from the racial discrimination found to be present here. If the Board were enjoined only from enforcing this provision, there would still remain the extensive regulatory authority exercised by it over its licensees; and there would still remain the substantial economic benefits enjoined by Moose Lodge from its possession and use of the liquor license, as well as the economic benefit flowing to the Commonwealth of Pennsylvania through the purchases and license fees contributed by Moose Lodge. In short, all of the elements upon which this case is based, elements which the court below found determinative to its finding of state action in the discrimination of Moose Lodge, would remain intact; and the decree would be totally ineffective.

We suggest a counter-proposal. We suggest, simply, that another paragraph should have been *added to the decree which was* actually entered. This paragraph would read as follows:

> "Defendants, the Pennsylvania Liquor Control Board, its members, William Z. Scott, Chairman, Edwin Winter and George R. Bortz, and their successors, are hereby permanently enjoined and restrained from enforcing section 113.09 of regulation 113 of the Pennsylvania Liquor Control Board to the extent that regulation has the effect of requiring any private club retail liquor

licensee to adhere to any racially discriminatory provisions of its Constitution and By-Laws.''

The addition of such a paragraph to the decree would have the effect of removing any problem with respect to the impact of section 113.09, would leave the section intact with respect to all matters not involving racial discrimination and, at the same time, would appropriately not interfere with the required severance of relationship between the State and Moose Lodge as long as the latter followed its policy of racial discrimination. Therefore, even if some action with respect to section 113.09 is considered necessary or desirable, certainly no more than this is required.

B. No Constitutionally Protected Right of Private Association Is Impinged Upon by the Termination of Moose Lodge's Liquor License.

In presenting its argument with respect to the right of private association protected by the Constitution (Brief, pp. 45-59), Moose Lodge has submitted a tripartite argument. First, it contends that the constitutional right of privacy and private association applies to membership in a private club. Second, it states that Moose Lodge is a private club. Third, it argues that to deprive Moose Lodge of a State license ''because its members exercise their constitutional rights of privacy'' (Brief, p. 55) would violate the constitutional rights of the members of Moose Lodge.

We set aside the second of these points since it is a stipulated fact that Moose Lodge is a private club (A. 23). Moreover, we agree with the basic application of the first of these points as it has been expressed in the two cases cited by Moose Lodge (Brief, pp. 45-46), *Bell v. Maryland,* 378 U. S. 226 at 313 and *Evans v. Newton,* 382 U. S. 296 at 298-99. We agree with this right of private association because this right is encompassed in the constitutionally

protected right to freedom of assembly. We agree with it notwithstanding its reflection of an aspect of human nature which debases our national purpose, thwarts full participation of all our citizens in our national life and furthers a sense of inferiority among those excluded.[22]

But, we do not agree that the right of private association asserted here by Moose Lodge includes within its scope the right to retain its liquor license in the face of its racial discrimination or that, assuming for the moment that there is some fragment of such a subordinate right present here, it is unduly infringed upon when balanced against the racial discrimination practiced by Moose Lodge.

1. *The right of an individual to select his own associates in accordance with his own likes and dislikes and to join whatever group he chooses does not include a right to compel the State to grant his group a license to sell alcoholic beverages to its members.*

Proper consideration of the right to private association requires consideration of the nature of the right and what it protects. In *Bates v. Little Rock,* 361 U. S. 516 at 528, the writers of the concurring opinion note that among those rights protected by the First and Fourteenth Amendments, "one of those rights, freedom of assembly, includes of course freedom of association . . . ." Thus, what confronts us here is an aspect of that right to congregate freely with whatever associates one chooses. The Court has been vigilant in sustaining that right, but nothing it has said in

22. Baltzell makes the following point about exclusionary club admission policies: ". . . in contrast to the dominant majority of Anglo-Saxon Protestants who dismiss the matter as a 'private and personal problem,' the members of minority groups are keenly sensitive to institutionalized exclusion of members of their own groups regardless of their merits and manners." Baltzell, E. Digby, *The Protestant Establishment—Aristocracy & Caste in America* (New York, 1964) p. 368.

doing so applies to the situation presented here. Without exception, application of the right of private association has been sustained to protect a free expression of political beliefs and interests, not to support the right of a private group to realize economic benefits through the sale of alcoholic beverages to its members (see Brief of Moose Lodge, p. 56).

Thus, in *N. A. A. C. P. v. Alabama,* 357 U. S. 449, the Court was confronted with an attempt by the State to compel a private organization to produce its membership lists. The Court stated its concern:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . . Of course, 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." 357 U. S. 449 at 460-61.

In the context of the case before it, the Court stated ". . . Compelled disclosure of affiliation with groups engaged in advocacy" may restrain freedom of association and, further, "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." 357 U. S. 449 at 462. Having

thus delineated the scope of the right of private association, the Court went on to balance the requirements of this right with the interest of the state in compelling disclosure of membership by the organization and found that the state had no such controlling justification for its interest that would override the right of association.

The court has never deviated from this approach. In *Bates v. Little Rock,* 361 U. S. 516, the court dealt with a municipal license tax ordinance requiring the submission of membership lists. Upon objection of a private organization, the court stated "And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States." 361 U. S. 516 at 523. Once again, the Court found no overriding state interest in requiring the disclosure of membership in the context of collecting a local tax which would override the protected right of private association.

In *Williams v. Rhodes,* 393 U. S. 23, certain restrictive provisions of Ohio's election laws were challenged. The court pointed out that ". . . the right of individuals to associate for the advancement of political beliefs . . ." is included in the First Amendment's protection of freedom of association. 393 U. S. 23 at 30.

No other case, including *Gibson v. Florida Legislative Investigation Committee,* 372 U. S. 539, has viewed the right of private association in any different light. Protection of the right to band together for the advancement of jointly-held beliefs and ideas lies at the core of the protected right. The extent of the protection may be broad indeed (including the rights to engage in political advocacy, union organization, and lobbying, see discussion in *N. A. A. C. P. v. Button,* 371 U. S. 415 at 416); but it has

never been extended to protect the right of a private organization to retain a liquor license granted to it by the state.

Possession and use of a liquor license does not result in the advancement of protected ideas and beliefs. It is, purely and simply, a grant by the state of something economically beneficial to the recipient. That it is to be granted at all is something within the determination of the state, and we consider it unarguable that Pennsylvania could amend its Liquor Code to provide that no liquor licenses should be granted to private clubs at all.[23] If it did so, exactly the same consequences would follow for Moose Lodge; but no right of private association would be infringed. True it may be that Moose Lodge may "sustain a loss of membership and its capability of carrying on its benevolent purposes would be seriously impaired" and true it may be that Moose Lodge's "capability of contributing to the purposes of the Supreme Lodge would be seriously impaired." But these would not follow as a result of the State's refusal to grant a liquor license; they would follow from the voluntary decision of the members of the Moose Lodge that their right of private association in furtherance of its benevolent purposes and the purposes of the Supreme Lodge was not really so important to them. In essence, the members are saying that they do not value the purposes behind a right to private association as much as they value the right to obtain alcoholic beverages.

No more is present here. The pleasure of obtaining a drink at the club bar may indeed be a valuable pleasure to the member and a matter of economic necessity to the club. It may even be that without its liquor license Moose Lodge may find itself in financial difficulty, and its mem-

23. By withdrawing all club licenses the State would simply place itself in a neutral position. See *Evans v. Abney,* 396 U. S. 435.

bers may find the club not as attractive as they did when liquor was available at the premises. But the right of the members to assemble together for the expression of ideas and beliefs is not prohibited or thwarted by anything the state has done; it is impeded, as stated above, only by the members' individual decisions not to participate. We submit that extension of the principles announced in the cases upholding the rights of members of the N. A. A. C. P. and other organizations (none of which, to Irvis' knowledge, held liquor licenses granted by the state or, indeed, asserted any right to obtain or hold such a license) to associate for the advancement of their ideas and beliefs is unwarranted.

Protection of the associational rights of individuals in order to advance mutually-held rights and ideas which the state may seek to suppress, either directly or indirectly, has been granted by this court in a variety of situations, as noted above. Never, however, has this court gone as far as it is being asked to go here. Given the reason for the right of private association and the scope which has been afforded it by the decisions of the Court, we find no invasion of this right by the withholding or withdrawal of a state-granted liquor license.

2. *Even if such a right might be deemed to include the right to possess and use a liquor license, it must give way when balanced against Irvis' right to be free from State-supported racial discrimination.*

Assuming for the moment, however, that there does exist within the scope of the right of private association some subsidiary element which protects Moose Lodge in the possession and use of its liquor license, the essential facts remain that it practices racial discrimination and receives the support of the State in doing so. The issue then be-

comes one of balancing the right of Moose Lodge to retain the license against the right of Irvis not to be discriminated against in a way which has the support of the State. This is the approach which the Court has followed in all of the above-cited cases involving the right of private association, for in each case it has balanced the right of the organization to be free from harassment against the right of the State to inquire legitimately into the affairs of the organization. We consider this approach a valid one, notwithstanding the fact that we do not have here a balancing of group versus state, but rather a balancing of group versus individual.

How, then, should this balancing be accomplished in any given situation? We suggest the following approach as a valid one. Where the right of private association is asserted by members of a group seeking to advance ideas and beliefs flowing from their exercise of the right of free speech and the right of free assembly (e.g., political advocacy), then the protection afforded them through granting primacy to the freedom of private association should be recognized; and possible discriminatory consequences flowing from the granting of this protection should be endured. On the other hand, where the right of private association is asserted in order to advance common social or fraternal interests, it should not be given precedence over racially discriminatory actions taken in furtherance of such common interests. We believe this approach would give adequate protection to the competing rights involved and afford proper deference to the statement of principles set forth in *N. A. A. C. P. v. Alabama,* 357 U. S. 449 at 460-61, quoted above (p. 94).

If this approach is a sound one, its application to the present case inevitably leads to subordinating any right enjoyed by members of the Moose Lodge to associate together in social and fraternal activities to the right of Irvis

not to be subjected to discrimination because he is a Negro. We believe this approach is sound, does give proper effect to whatever competing constitutional considerations are involved here and should be adopted by the Court if it finds any validity to the claim made by Moose Lodge in this respect.

Finally, we offer one more factor which bears upon this balancing process. Without denying the right of individuals to associate freely with whomever they please and to enjoy privacy within the confines of their private clubs, we suggest that the analogy between private club and private home drawn by Moose Lodge in its reference (Brief, p. 48) to *Griswold v. Connecticut,* 381 U. S. 479, is a doubtful one. It becomes even more doubtful when the private club is a large one, national in scope, like the Moose. The values attendant upon preservation of privacy in the home simply do not apply to the situation involved in an organization like Moose Lodge. In this we agree with the statement of Justice Harlan, dissenting in *Poe v. Ullman,* 367 U. S. 497 at 551-52:

> "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."

Can the same be said of the relationship between individual member and Moose Lodge? We believe that to ask the question answers it.

IV. This Case Is Not Affected by Congressional Passage of the Civil Rights Act of 1964 Providing in Title II for Injunctive Relief Against Discrimination in Places of Public Accommodation and Excepting Private Clubs.

In passing the Civil Rights Act of 1964 Congress responded to a Presidential call for civil rights legislation and produced an Act dealing with a number of areas in which discrimination prevailed. One of these areas was concerned with eliminating barriers to equal access to places of public accommodation, and Congress' determination of what to do and how far it should go in so doing is embodied in Title II of the Act. One limitation it did make explicit was contained in § 201(e) which provided an exemption for private clubs.

Other limitations also exist with respect to Title II. It neither purports to be nor is a legislative enactment fully exercising Congress' powers with respect to the matters dealt with; nor is it a Congressional expression of constitutional line-drawing between rights of privacy and private association, on the one hand, and the right to be free from discriminatory state action, on the other. The specific exception for private clubs can best be understood simply as expressing Congress' view that application of the provisions and remedies of Title II of the Civil Rights Act of 1964 was not there appropriate and that discriminatory actions by private clubs are to be redressed by other means.

We believe the history of the Act, as reflected in executive comment, legislative discussion and judicial review, support these conclusions and that determination of the present case depends upon resolution of the matters previously discussed.

A. The Legislative History and Judicial Treatment of Title II Support the Conclusions That No Constitutional Limits Were Drawn by Congress in Excepting Private Clubs From Its Coverage and That Private Racial Discrimination Constituting State Action Remains Subject to Redress as It Did Prior to Passage of Title II.

No review of Title II is complete which fails to consider all aspects of its enactment and review as well as the bases for Congressional authority to proceed. We say "bases" because, contrary to the statement in Moose Lodge's brief (p. 86) that the Civil Rights Act of 1964 was "a measure passed to enforce the Fourteenth Amendment," it is quite clear that another purpose existed with respect to Title II and that this other purpose was not only paramount but provides a key to the extent of the power exercised by Congress in passing Title II. We turn, first, to the history of Title II and then to its scope and application.

1. *President Kennedy's message.*

President Kennedy's message to Congress in June, 1963, requesting enactment of civil rights legislation is printed as House of Representatives Document 124, 88th Congress, 1st Session. It contains (pp. 3-5) a lengthy plea for passage of legislation providing for equal accommodations in public facilities. It contains not a word about private clubs.

Near the end of this section, however, President Kennedy clearly expressed the dual Constitutional foundation on which his recommendations rested:

> "Clearly the Federal Government has both the power and the obligation to eliminate these discriminatory practices: first, because they adversely affect the

national economy and the flow of interstate commerce; and secondly, because Congress has been specifically empowered under the 14th Amendment to enact legislation making certain that no State law permits or sanctions the unequal protection or treatment of any of its citizens." (H. R. Doc. 124, 88th Cong., 1st Sess., p. 5).

2. *Congressional response.*

H. R. 7152 was introduced in the House to implement the President's proposals and was referred to the Judiciary Committee. A Subcommittee (known as Subcommittee No. 5) of the Judiciary Committee held hearings on the bill. Among those testifying was the Attorney General who stated that Title II was based "primarily" on the Commerce Clause and also on the Fourteenth Amendment. Hearings before Subcommittee No. 5, House Judiciary Committee, 88th Cong., 1st Sess., 1375-1376, 1388, 1396, 1410, 1417-1419.

Subcommittee No. 5 reported a broader Title II. It included in the coverage of establishments supported by State action (comparable to the enacted § 201(d), 42 U. S. C. § 2000a(d)) all businesses operating under State "authorization, permission, or license." Hearings, House Judiciary Committee on H. R. 7152, as amended by Subcommittee No. 5, 88th Cong., 1st Sess., 2656. The Attorney General, again testifying, objected to this and urged that Congress not rely on the Fourteenth Amendment generally but specify what establishments would be covered. Hearings, pp. 2656, 2675-2676, 2726.

All this time the private club exception remained intact. If nothing else, therefore, it is reasonably arguable that in light of the action of Subcommittee No. 5 in referring to a "State license," the private club exception provided an ex-

pression of legislative intent not to extend coverage to private clubs but did not reflect any constitutional considerations.

H. R. 7152 was reported to the full House accompanied by a Report of the Judiciary Committee, H. R. Rep. 914, 88th Cong., 1st Sess. As clearly illustrated by Part 2 (pp. 9-15) of that Report, containing the joint views of supporting Republican Committee members, the Commerce Clause formed a substantial basis of Constitutional support for Title II.

The Committee Report itself, at p. 18, explicitly reveals the not unlimited scope of Title II:

> "No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities . . . .
>
> It is, however, possible and necessary for Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination."

Additional views were appended to the Committee Report by Representative Meader. He discussed the Subcommittee proposal, referring (at p. 51) to the "license" language and to the Attorney General's reaction that such an addition "represents an effort to go the full limits of the constitutional power contained in the 14th Amendment." He noted the Attorney General's comment that this language could cause Title II to apply even to law firms. Once again, the lack of reference to the private club exception may at least be viewed as indicating a legislative determination that Congress' constitutional powers should not be extended to private clubs even though this could be done.

Debate on the House floor was not lengthy. It further supports the position that Title II was limited in scope.

That it covered neither all places of public accommodation nor all establishments in which discrimination may be "supported" by the State, but rather aimed at the specific categories defined in § 201(b), is evident in the comments of Congressman Cellar, one of its chief supporters, and in one of the memoranda appended by him to his comments (110 Cong. Rec. 1520, 1525).

The lurking concern about the now-removed "State license" language reappears, however, in the comment of Congressman Tuck who charged that proponents of Title II would make licensing a sufficient indication of State support to constitute State action (110 Cong. Rec. 1586). Once again, there is at least an indication that legislative policy, not constitutional inhibitions, lay behind these decisions and that both the elimination of "licensing" and the still-untouched exception for private clubs simply reflect Congressional intent to leave these areas to other means of redress.

H. R. 7152 went directly to the Senate floor where it was debated for 83 days (see comment of Representative Madden at 110 Cong. Rec. 15869). Moose Lodge has accurately reported (Brief, pp. 89-97) the extent of the discussion on private clubs. While we agree that the private club exception was established with little or no debate or opposition, we find nothing in this reported material which suggests any more than Congress, as a matter of legislative policy, decided not to extend Title II to private clubs.

Despite this seeming clarity, an occasional question arose. Senator Russell charged that Title II would "open every private club in this country to any person who is a member of one of the minority groups covered by this bill" (110 Cong. Rec. 4744). Senators Javits and Humphrey hastened to correct him by referring to § 201(e) but not mentioning any constitutional impediments (110 Cong. Rec. 4755, 6534).

Fairly read, we believe the unusually extended and comprehensive legislative history of H. R. 7152 provides only two clear conclusions for present purposes. First, the primary constitutional authority relied upon by Congress to sustain passage of Title II was Art. I, § 8, cl. 3, of the Constitution, the Commerce Clause. Second, nothing in the hearings, committee reports or debates justify a contention that in providing an exception for private clubs Congress was doing any more than evidencing its decision on a matter of legislative policy rather than constitutional authority. Judicial treatment of Title II supports these conclusions.

3. *Judicial review.*

Title II came before the Court promptly following enactment. It was sustained by a unanimous Court in *Heart of Atlanta Motel, Inc. v. United States,* 379 U. S. 241, as a proper exercise by Congress of the power given Congress under the Commerce Clause. The opinion of the Court expresses several conclusions pertinent here.

First, the Court expressly determined that Title II was based both on the Commerce Clause and the Fourteenth Amendment, that Congress "possessed ample power" to proceed under the former and that it was not necessary for the Court to pass upon Congress' power under the latter. 379 U. S. 241 at 249-250.

Second, nothing in the *Civil Right Cases,* 109 U. S. 3, purported to deal with Congress' power under the Commerce Clause; consequently, those cases are irrelevant to the issue of Congress' authority to pass Title II. 379 U. S. 241 at 252. Nevertheless, as the opinion in those cases pointed out, Congressional power to deal with matters affecting interstate commerce is plenary; and in exercising such power Congress may "pass laws for regulating the subjects specified in every detail, and the conduct and

transactions of individuals in respect thereof.'' 379 U. S. 241 at 251-52.

Third, in exercising its powers under the Commerce Clause, Congress may legislate against moral and social wrongs such as racial discrimination. 379 U. S. 241 at 257.

This opinion unquestionably supports the position stated above that Title II was not just an enactment designed to enforce the Fourteenth Amendment. To the contrary, its paramount source of authority was the Commerce Clause. In addition, the opinion, like President Kennedy's message and the legislative history which preceded it, is devoid of any indications that Congress either was intent upon drawing or actually did draw a fine constitutional line between rights of privacy and private association and the right to be free from state-supported racial discrimination. In view of Congressional reliance on the primary authority of the Commerce Clause, it would be difficult, if not impossible, to reach any other conclusion.

Finally, and most significant, is the indisputably valid fact that given Congress' plenary power to take whatever action is appropriate to achieve its legitimate purpose of ending the obstructions which racial discrimination poses to the free flow of commerce, Congress certainly has the power to deal with and to regulate purely private actions in its furtherance of this end. This being so, Congress, had it so wished, could have included private clubs within the boundaries of Title II. That it chose not to do so can only be considered an expression of policy by it and not an indication of constitutional limits.

A further indication that the Court does not view Title II as limiting any right of action which an individual had, prior to Title II's passage, to redress a deprivation of his Constitutional rights appears in note 5 of the Court's opinion in *Adickes v. S. H. Kress and Company,* 398 U. S. 144 at 150. Miss Adickes' claim, like Irvis' here, was

brought under 42 U. S. C. § 1983. The Court noted that the violation complained of would also support an allegation that Kress and Company had violated Title II. However, the Court concluded that the two provisions were entirely separate and that "there can be recovery under § 1983 for conduct that violates the Fourteenth Amendment even though the same conduct might also violate the Public Accommodations Title . . . ." We take this to mean, at least, that private racial discrimination constituting state action is subject to redress under § 1983 as it has always been and that if this is so with respect to conduct also covered by Title II, it must be so with respect to conduct not covered by Title II. Irvis' action here, therefore, seeking only to enjoin further State support for discrimination and not to end Moose Lodge's privately-chosen segregation, is not precluded by anything contained in Title II, including the exception for private clubs.

B. The Existence of Alternative Constitutional and Statutory Bases for Attacking Racial Discrimination by Private Clubs Makes It Unlikely That Congress, in Adopting Title II, Would Have Been Concerned With Marking a Boundary Between the Right of Private Association and the Fourteenth Amendment Right to Be Free From State-Supported Racial Discrimination.

For Congress to have been sufficiently preoccupied with the rights of privacy and private association arising from private club membership to have marked a constitutional barrier in its adoption of § 201(e) of the Civil Rights Act of 1964 requires, at least, acceptance of the view that Congress would hardly do such a thing unless its action were meaningful. We have seen above that, first, it does not appear Congress did draw a constitutional line and, second, Con-

gressional power under the Commerce Clause is sufficiently extensive to permit it to act against discrimination by private clubs wholly apart from considerations affecting its powers under the Fourteenth Amendment. We conceive of Congressional authority in this respect as being limited only by the proper boundaries of its Commerce Clause power; and if its actions thereunder are justified, any resulting impingement on associational rights would have to give way.

Similarly, we believe other authority also exists for attacking private club discrimination.

The Thirteenth Amendment provides that slavery shall not exist within the United States and that Congress shall have power to enact legislation to enforce this provision.

This extinction of slavery was absolute and self-executing. "By its own unaided force and effect," the Thirteenth Amendment "abolished slavery and established universal freedom." *Civil Rights Cases,* 109 U. S. 3 at 20. The Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Ibid.

Congress' power to implement this Amendment allows it "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Ibid. This includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." Id. at 23. And the "varieties of private conduct which [Congress] may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery . . . ." *Griffin v. Breckenridge,* 91 S. Ct. 1790 at 1799-1800.

All of these pronouncements of the meaning of the Thirteenth Amendment, made in an 1883 decision, remain valid as ever today. *Jones v. Mayer Co.,* 392 U. S. 409 at 438-39.

We know of no case directly construing the Thirteenth Amendment which has explicitly equated its self-executing scope with Congress' power to enforce it. That is, the Court has not specifically declared that the Amendment itself not only abolished slavery but also abolished all "badges and incidents" of slavery. Nevertheless, it is no great step from what already has been declared to this position; and it would be consistent with the breadth and purpose of the Thirteenth Amendment so to hold.

We have no hesitancy in declaring that the invidious racial discrimination practiced by private clubs is a "badge and incident" of slavery. It is demeaning to our Negro citizens and represents a contemporary prolongation of the pre-Thirteenth Amendment white attitude toward the Negro. We also believe that the intent and scope of this Amendment is such that it must be given overriding significance when it conflicts with other constitutional guarantees. Even allowing, however, for possible balancing when First Amendment rights of free speech and free assembly are involved, we find nothing in this case, where the purposes of the private club are fraternal, to warrant giving the Thirteenth Amendment any narrower effect.

But we go one more step. Even apart from any self-executing effect of the Thirteenth Amendment, we have shown that Congress' power to enact legislation abolishing all "badges and incidents" of slavery is unqualified. From this, two comments follow.

First, Congress is unlikely to have engaged in a delicate constitutional effort by inserting § 201(e) into the Civil Rights Act of 1964, even were (as it is not) Title II based solely upon Fourteenth Amendment considerations, since it has the power under the Thirteenth Amendment to pass legislation affecting private interests, individual and group, without feeling such concern. We state this,

assuming for the moment that Congress has not actually pursued its Thirteenth Amendment powers.

But, second, this is only a temporary assumption. Title 42 U. S. C. § 1981 has been part of our statutory law since 1866 when it was enacted as part of the Civil Rights Act of 1866 in substantially the same language as it now contains. See *U. S. v. Wong Kim Ark,* 169 U. S. 649. It states:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

This provision applies to private parties; no state action need be shown. See *Jones v. Mayer Co.,* 392 U. S. 409. It can reasonably be argued that the relationship between an individual and his club is a contractual one (dues exchanged for facilities); that, being so, it is subject to § 1981; and that racial discrimination in such contract is prohibited by § 1981.

We see, therefore, that Congress itself has ample power to act directly aganist racial discrimination in private clubs. Not only the Commerce Clause, but the Thirteenth Amendment, gives it this power. As already stated, whatever judicial balancing of rights is required in such circumstances, the associational interests present here do not entail objects and purposes which should prevail over the purpose of ending racial discrimination.

We suggest, therefore, that not only did Congress not in fact draw a constitutional boundary in excepting private

clubs from Title II of the Civil Rights Act of 1964 but that the existence of these other constituitonal and statutory bases for action against discrimination negate any conclusion that it was attempting to do so. Section 201(e) is simply an expression of a legislative decision that private clubs (like unmentioned private homes) were not to be considered places of public accommodation.

CONCLUSION.

The court below correctly determined that there was State action in the invidious racial discrimination practiced by Moose Lodge, and its judgment should be affirmed.

Respectfully submitted,

HARRY J. RUBIN,
LIVERANT, SENFT AND COHEN,
15 South Duke Street,
York, Pennsylvania 17401,
Counsel for the Appellee.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970
No. 1292

Moose Lodge No. 107, Appellant

v.

K. Leroy Irvis, and William Z. Scott, Chairman, Edwin Winner, Member, and George R. Bortz, Member, Liquor Control Board, Commonwealth of Pennsylvania

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MOTION TO AFFIRM

K. Leroy Irvis, an appellee in the above-captioned case, moves to affirm on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the final decree of a three-judge District Court declaring invalid the club liquor license issued to appellant by the Pennsylvania Liquor Control Board pursuant to the Pennsylvania Liquor Code and enjoining the Board from issuing any club liquor license to appellant as long as it follows a policy of racial discrimination in its membership or operating policies or practices.

Appellee Irvis brought this action following appellant's refusal to serve him on its premises solely because he is a Negro. Irvis, majority leader of the Pennsylvania House of Representatives, had been taken to appellant's premises as the guest of a member. Pointing to the extensive alcoholic beverage regulatory scheme established by the Commonwealth of Pennsylvania by and under the Pennsylvania Liquor Code, Irvis asserted that the racial discrimination practiced by appellant necessarily bore the attributes of state action. While agreeing that appellant was otherwise a purely private organization and free to engage in such discrimination if it so desired, Irvis contended appellant could not simultaneously enjoy the privilege of holding and using to its benefit a Pennsylvania club liquor license. Accordingly, Irvis asked that the Commonwealth of Pennsylvania be removed from participation in appellant's pattern of racial discrimination by revoking appellant's club liquor license.

The court below agreed with Irvis' characterization of the Pennsylvania alcoholic beverage control system as

one necessarily involving the State in a pattern of discrimination practiced by a club licensee. Dealing with the single question thus presented—whether the State's involvement constituted state action forbidden by the Equal Protection clause of the Fourteenth Amendment—the court below held that it did and granted appropriate relief which eliminated this involvement and left appellant free to adhere to its policy of racial discrimination unencumbered by possession of a liquor license.

ARGUMENT

Apart from the factual context in which this case arises, it presents no novel or substantial feature. For decades this Court has acted to strike down state involvement in racially discriminatory actions of private parties, be the State's participation direct or indirect, central or peripheral. *Shelley v. Kraemer*, 334 U.S. 1; *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *United States v. Guest*, 383 U.S. 745. Appellant's attempt to portray the case as one involving only purely private action is not supported by the facts, and its characterizations of the opinion of the court below as doing "irreparable damage to the constitionally protected rights of privacy and of private association while drawing in the process a wholly unsupportable distinction between racial and religious discrimination" and also as disregarding congressionally established limits to discrimination are misplaced and legally unsupportable.

First: Contrary to appellant's assertion, this case does not involve the question of whether the mere issuance of a liquor license to a private club constitutes "state action." Licensure of private clubs by the Liquor Control Board is part of an intensive and extensive complex liquor control and regulatory system whereby Pennsylvania has chosen to exercise to the fullest its authority in this field.[1] The summary of this system recited by the

[1] Pennsylvania is one of the states in the group known as "monopoly" states. It not only has established an extensive

court below (Appendix to appellant's Jurisdictional Statement, pages A5 to A7) provides only a verbal skeleton to a full-blown State operation which injects the State into every aspect of the conduct and operations of those who deal with it. Less than this was sufficient for this Court to find forbidden governmental involvement in *Public Utilities Commission v. Pollak,* 343 U.S. 451.

Further, the grant of a club liquor license by Pennsylvania to appellant involves more than an administrative grant of authority to perform acts and to enjoy benefits available to the public in general. The relationship between State and licensee can be described as "symbiotic," for the latter thereby obtains a valuable privilege not freely available and the former obtains a source of funds not otherwise present. In so doing, the State has also superimposed a quota on the licensing system so that club licenses are not freely available in localities once the quotas are filled.

These unique features make Pennsylvania's alcoholic beverage control system substantially different from licensing procedures and practices involved in the issuing of a building permit or a driver's license. These, as well as most other governmental licensing activities, apply to the general public, not just to a privileged segment of it, and have been imposed solely for the protection of the general public, not for the benefit of a private organization. Appellant seems to have missed this distinction in its attempt

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regulatory and enforcement system, it also has reserved to itself all aspects of the sale of liquor to the public through a network of State Stores. It has left little to private enterprise and decision.

to cover all regulatory activity under a single principle that excludes the presence of state action. In delineating this distinction, the court below was clearly correct.

Second: In taking out of context a statement by the court below whereby that court attempted to draw an even finer line between what is forbidden and what is not, appellant has certainly distorted what was said and meant. The court said: "Nothing in what we here say implies a judgment on private clubs which limit participation to those of a shared religious affiliation or a mutual heritage in national origin." From this appellant argues the court was sanctioning religious discrimination in a context where it was striking down racial discrimination.

Nothing could be less accurate. The court's statement is a brief conclusion to an issue discussed extensively both in briefs and at oral arguments below, and at no time was it ever even remotely discussed in the context of permitting invidious discrimination by private clubs on religious grounds.

The issue was whether it was constitutionally permissible for a private club, whose good faith *raison d'etre* necessarily involved exclusion of certain religious or ethnic groups, to receive and enjoy a liquor license from the State. Thus, club A, formed for the purpose of promoting and enhancing knowledge and pride in Catholic religious traditions and practices, could validly limit participation to Catholics—*not* just white Catholics or Italian Catholics, but Catholics in general. Thus, club B, formed for the purpose of promoting and enhancing knowledge and pride in Italian traditions and history among Americans of Italian origin, could validly limit participation to

such persons—*not* just white Americans of Italian origin or Catholic Americans of Italian origin, but Americans of Italian origin in general.

This distinction is rooted in what might be termed a reasonable relationship test. If the practiced discrimination is reasonably related to the otherwise valid purposes of the organization, the discrimination itself is valid. Contrast the examples given with appellant's case. Its purposes are set forth in Appendix G (first page of the Constitution) to appellant's Jurisdictional Statement:

> "The objects and purposes of said fraternal and charitable lodges, chapters, and other units are to unite in the bonds of fraternity, benevolence, and charity all acceptable white persons of good character; to educate and improve their members and the families of their members, socially, morally and intellectually; . . . to encourage tolerance of every kind . . .," etc.

Irvis has asked from the outset, and continues to ask, what conceivably valid purpose is served by excluding non-whites from an organization devoted to fraternal, benevolent and charitable activities in a spirit of tolerance of every kind. No answer has been forthcoming, as indeed there is none; and all the court below has done is to contrast appellant's case with those different and valid ones.

Third: Appellant apparently wishes to cover itself with the "private club" exemption contained in section 201(e) of the Civil Rights Act of 1964 although at no time in the history of this case has Irvis relied on this statute or has the issue itself been raised.

There is no such question involved here. The 1964 Act forbids places of public accommodation from discriminating. Private clubs are not places of public accommodation. Appellant is a private club. Hence, it may discriminate. Irvis has never urged otherwise; unlike Congress, which said places of public accommodation must *not* discriminate, Irvis has said only that private clubs in Pennsylvania cannot be aided in their discrimination by the State.

Irvis knows of no case, nor has he ever heard it implied, that Congress, in enacting section 201(e), thereby abrogated a long history of constitutional doctrine forbidding the states (or federal government) from aiding and abetting private invidious racial discrimination. Indeed, it would be a novel position to argue that Congress may legislatively terminate constitutionally required Equal Protection principles.

The Civil Rights Act of 1964 and section 201(e) of that Act, in fact, did nothing in this respect. It left the private club and the state action doctrine exactly where they always were prior to its passage. Private clubs may continue, as always, to discriminate; the state may not be involved directly or indirectly. This case involves no more or less than that; and the 1964 Act is irrelevant.

Fourth: At no time did Irvis point to the particular regulatory provision of the Liquor Control Board (Regulation 113.09, Appendix F, page 148) requiring adherence by a private club to its Constitution and by-laws as a major indication of State involvement here; and he agrees with appellant that the primary purpose of this particular provision is to insure that private clubs are in fact private.

However, the court below did not arrive at its conclusion in this case by relying on this single regulation; and even the most critical reading of its opinion will confirm that its decision would have been the same even were this regulation not present.

Appellant weaves a further argument from this issue and argues that the appropriate remedy would have been to enjoin the Liquor Control Board from enforcing this particular regulation. This argument, unfortunately for appellant, depends upon the regulation's being exactly what it is not—the sole basis for finding state action in the discrimination practiced here. Were the regulation invalidated, all else would remain the same: the appellant would continue to exclude non-whites; and the State would continue to be deeply involved in the discrimination through its licensing, regulatory and monopoly system. Obviously, the same decree would and should issue.

Fifth: Irvis has not sought to limit the right of association of anyone. If individuals, as individuals or in groups, wish to exclude him from their private associations because he is a Negro, he recognizes their right to do so. But a constitutionally protected right of association does not extend its scope to the obtaining of alcoholic beverages within the confines of a racially discriminating private club.

Certainly, Pennsylvania, had it so wished, could have chosen not to permit the purchase and sale of alcoholic beverages within private clubs at all. The consequences for appellant would have been no different. Just as barren a barracks it might be; but the right of association, were

it indeed a valued one to appellant's members, would remain as intact as it remains here in fact. It would be only the voluntary decision of these members that they value the right less than they do the obtaining of a drink that would create any problems for appellant; and Irvis suspects that appellant has "let the cat out of the bag," so to speak, when it admits that the sale of liquor is the economic foundation on which appellant's existence rests (Jurisdictional Statement, page 18). How more involved can Pennsylvania be in appellant's discrimination under these circumstances; how less important can any right of association thus be.

CONCLUSION

The decision of the court below was clearly correct, and appellant has presented no substantial question for the decision of this Court. The judgment and decree of the District Court should be affirmed.

Respectfully submitted,

HARRY J. RUBIN,
LIVERANT, SENFT AND COHEN,
15 South Duke Street,
York, Pennsylvania 17401,
Counsel for Appellee Irvis.

GERALD GOLDBERG,
Harrisburg, Pennsylvania,
Of Counsel.

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