tion; and has never relied upon or even sought to invoke public assistance in the conduct of its affairs, whether from the police or the courts. Thus there are not present here any of the varying factors that in every other decision underlay the holding of state action.

B. Examination of other types of state licenses emphasizes the basic error committed below, namely, the confusion between the licensing process, which is state action, and what the licensee does, which is not. The circumstance that licenses are necessary for many activities in today's crowded world does not require the licensee to serve or admit all comers without discrimination. E.g., the state cannot prohibit interracial marriages (*Loving* v. *Virginia,* 388 U.S. 1); but it does not follow that the recipient of a marriage license is therefore constitutionally obliged to accept a spouse of another race.

C. The test of "continuing and pervasive regulation," which was fashioned by the court below to distinguish liquor licenses from all others, is untenable, unsound, and unworkable.

1. "Continuing" regulation is not peculiar to liquor licenses, but applies to other permits equally necessary to a private club's existence, such as the continuous inspection of building, elevators, and restaurants.

2. Nor is "pervasiveness" a sounder distinction, first of all because it provides no test at all—what after all is clearly "pervasive" and what equally clearly is not? —second because it misconceives the applicable law and regulations.

The Pennsylvania Liquor Code imposes fewer restrictions on clubs than on any other dispenser of alcoholic beverages, and virtually all of the restrictions on clubs are designed to insure that commercial establishments do not masquerade as clubs in order to obtain the Pennsylvania law's more generous provisions for hours of sale that are allowed to clubs. Similarly, the Liquor Control Board's Regulation 113 shows on its face that it is designed only to differentiate clubs from places that are not clubs; its terms simply will not support the district court's characterization of "pervasiveness."

A grant of state tax exemption does not involve any establishment of religion (*Walz* v. *Tax Commission,* 397 U.S. 664); neither do Pennsylvania's provisions for sacramental wine licenses, nor that Commonwealth's licensing of those who solicit money for churches. Yet under the rationale below every one of those instances would involve "state action."

D. In actual fact, the operation of the Pennsylvania liquor control system involves, not the grant of a privilege, as the court below erroneously held, but rather the imposition of restrictions, restrictions that are emphasized by the greater power over liquor that states have by reason of the Twenty-first Amendment.

The restrictive nature of Pennsylvania's scheme is shown by the circumstances that all alcohol must be purchased from state stores; that even the more limited hours-of-sale restrictions applicable to clubs are inoperative in private homes; and that the prohibitions against supplying visibly drunk persons are similarly inoperative there. In short, to conclude that every permissible act of dispensing and consuming liquor must

be characterized as a "privilege" is to let semantics distort reason.

E. The exemptions granted by the court below to private clubs having religious and ethnic membership restrictions rather than racial ones additionally expose the utter fallacy of its controlling rationale. For the distinction between religious and ethnic on the one hand, and racial on the other, a distinction clearly drawn by the court below (A. 40), fails utterly on the "state action" approach that it espoused.

The Fourteenth Amendment is not limited to racial discrimination; it equally forbids religious discrimination. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238-239; *Torcaso* v. *Watkins,* 367 U.S. 488. The decision last cited is significant, because if the Moose Lodge's restrictions to Caucasians-only is forbidden state action, then so is its requirement for "belief in a Supreme Being"—and in that event the Knights of Columbus and similar "private clubs which limit participation to those of a shared religious affiliation" (A. 40) must, all of them, lose their liquor licenses also.

Nor does the district court's concept of "a mutual heritage in national origin," a restriction in club membership that it held not to constitute forbidden state action, stand on any sounder footing. For the plain fact of the matter is that any club whose "mutual heritage in national origin" involves any one of a score of European ethnic strains is just as much Caucasians-only in its operation as the Moose Lodge. There are, after all, no non-Caucasian Germans, Swedes, Irish, Scotch, Welsh, French, Italians, Poles etc., etc., etc.

Thus the district court's exceptions establish with unusual eloquence the utter unsoundness of its essential *ratio decidendi.*

F. The least untenable ground taken below was the point that enforcement of Regulation 113.09, requiring that "Every club licensee shall adhere to all of the provisions of its Constitution and By-laws," made the state a participant in the Moose Lodge's racially restrictive membership requirements.

However, when viewed against the background of Pennsylvania's liquor licensing system, under which clubs are under fewer restrictions than other dispensers, it seems plain that, as the appellee Irvis has told this Court (M/A 8), "the primary purpose of this particular regulation is to insure that private clubs are in fact private." Consequently it is not susceptible of the interpretation placed on it below.

But even on the district court's view, the result is still wrong. The regulation can and should be regarded as giving effect to the constitutionally protected rights of privacy and of association that are exemplified by the existence and operation of every private club. Or, as a final "even if" concession, not likely to be reached, a decree could easily be fashioned to enjoin enforcement of Regulation 113.09 but only insofar as it purports to implement discriminatory qualifications for membership, be they racial, ethnic, or religious.

V. We say, "not likely to be reached," because the Congressional exception, in § 201(e) of the Civil Rights Act of 1964, for "a private club or other establishment not in fact open to the public," marks a proper boundary between the competing constitutionally pro-

tected liberties of privacy and of private association on the one hand and of freedom from discriminatory state action on the other.

A. The legislative history of that exception shows, first, that the President asked Congress to enforce the Fourteenth Amendment only in respect of public accommodations.

The first draft of what became the Civil Rights Act of 1964 contained an exception for "a bona fide private club or other establishment not open to the public," and this exception remained through the end, with only one minor modification; in order to make the test of private versus public an objective one, the words "bona fide" were stricken, and "in fact" was inserted after "not," so as to read, "not in fact open to the public."

The legislative history shows that Congress established the private club exemption with minimal debate and universal acceptance; Congress drew a line between competing constitutional rights that is easily susceptible of ascertainment by objective standards; and it drew that line in response to the invitation extended by some members of the Court in *Bell* v. *Maryland,* 378 U.S. 227, 317.

B. The foregoing guideline should be given the same effect as other Congressional enactments enforcing the Civil War Amendments. E.g., *South Carolina* v. *Katzenbach,* 383 U.S. 301; *Katzenbach* v. *Morgan,* 384 U.S. 641; *Gaston County* v. *United States,* 395 U.S. 285; *Perkins* v. *Matthews,* 400 U.S. 379.

The power of Congress under the virtually identical enforcement provisions of those Amendments is plenary, quite as full as its power under the Necessary and

Proper Clause; and accordingly the test of their valid exercise is not wisdom or unwisdom, not whether more or less should have been legislated, but simply whether what was enacted was reasonably appropriate. *M'Culloch* v. *Maryland,* 4 Wheat. 316, 421. Here the end is indeed appropriate, because Congress was drawing a line between competing considerations that actually gives full effect to both. Inasmuch as the Fourteenth Amendment has long since been deemed to incorporate the First, Congress by enacting Section 201(e) has enforced all aspects of the Fourteenth.

The ready acceptance of Section 201(e) by all concerned, the existence of a similar exemption either express or implied in numerous state civil rights statutes, and the identity of inquiry in the administration of both sets of exemptions, federal and state, demonstrate that for this Court now to accord deference to what Congress enacted involves not only respect to a coordinate branch of government, but recognition as well of a virtually unanimous understanding, one that gives effect to all of the competing constitutional contentions involved.

C. The many other provisions of the Civil Rights Act of 1964 that prohibit discrimination on the four stated grounds of "race, color, religion or national origin" emphasize in still another aspect the untenability of the district court's distinction between a private club's membership restrictions that are racial and those that are religious or ethnic.

D. When Congress enacted the provisions directed at "Discrimination in Places of Public Accommodation" in Title II of the Civil Rights Act of 1964, and excepted from those provisions "a private club or

other establishment not in fact open to the public," it was giving effect to the constitutionally protected liberties of privacy and private association that are inherent in the right of every individual to express his likes, his dislikes, his prejudices, and his after-judgments by joining a private club composed of like-minded persons.

It did so because, ultimately, so far as the character of its membership is concerned, every genuinely private organization is to that extent beyond the reach of governmental regulation. Some members of this Court have said as much (*Bell* v. *Maryland,* 378 U.S. 226, 313; *Gibson* v. *Florida Legislative Comm.*, 372 U.S. 539, 565, 570, 575-576), and we are not aware of any expressions here to the contrary. We adopt, not because it is "authority," but because the matter was there so well expressed, the recent formulation of the foregoing principle that appears in *Wright* v. *Cork Club,* 315 F. Supp. 1143, 1156-1157.

ARGUMENT

As required by Rule 16(6), we address ourselves at the outset to the question of jurisdiction that was postponed when the Court set this case for hearing on the merits.

Briefly, it is our position, first, that the complaint set forth a case requiring a three-judge district court because it sought *inter alia* injunctive relief against the operation of a statewide regulatory system on the ground that the state statute and state officials' orders thereunder were unconstitutional as applied, and because those allegations of unconstitutionality were substantial.

However, it is also our view that there now exists neither Case nor Controversy to support an exercise of the judicial power, because the relief granted does not afford the plaintiff Irvis redress for the injury he had alleged. This circumstance is emphasized by two factors. First, he objected to a modification of the final decree that would indeed have prevented any repetition of the incident that precipitated the present litigation. Second, he has since represented to this Court that he is interested neither in joining the Moose Lodge nor in entering on its premises, and that his only concern is "that the Commonwealth of Pennsylvania be removed from participation in appellant's pattern of racial discrimination by revoking appellant's club liquor license." Thus the case is now one where the court below acted punitively against the Moose Lodge and simply abstractly against the official defendants, without any reference whatever to the plaintiff's asserted injury. It follows that jurisdiction in the Article III sense has been lost.

It now remains to articulate the foregoing conclusions in the order just stated.

I. THE COMPLAINT STATED A CASE FOR THE CONVENING OF A THREE-JUDGE COURT PURSUANT TO 28 U.S.C. § 2281, BECAUSE IT SOUGHT INJUNCTIVE RELIEF, ON SUBSTANTIAL ASSERTIONS OF FEDERAL UNCONSTITUTIONALITY, AGAINST THE OPERATION OF A STATE-WIDE REGULATORY SCHEME AS IT WAS BEING APPLIED.

As we have shown (*supra,* p. 15), the complaint herein (A. 3-9) sought *inter alia* injunctive relief against the further operation of the Pennsylvania Liquor Code as applied, on the ground that it authorized and required the members of the Pennsylvania Liquor Control Board to issue liquor licenses to the

appellant Moose Lodge, which admittedly has racial restrictions on its membership.

The theory of the complaint was that insofar as the statute authorized such action it involved the Commonwealth in the discriminatory practices of the Moose Lodge, concededly a *bona fide* private club (Stip., ¶¶ 3, 4(a); A. 23-24), which in consequence became state action prohibited by the Equal Protection Clause of the Fourteenth Amendment (Cmplt., ¶ 13; A. 7).

Properly looking only to the complaint, which indeed is the touchstone (*Moody* v. *Flowers,* 387 U.S. 97, 104), both the district judge as well as the chief judge of the circuit concluded that a three-judge court was required (A. 9, 10). We submit that they were right in so concluding, on the basis of numerous consistent decisions of this Court over many years.

The most recent decisions here are *Turner* v. *Fouche,* 396 U.S. 346, where, as in the present case, the state statute was not unconstitutional on its face, but was unconstitutionally applied, see extensive documentation with full citation of authorities in note 10 at pp. 353-354; and *Flast* v. *Cohen,* 392 U.S. 83, 90-91, where the attack in the complaint was not on the statute but on its administration, and the jurisdiction of the three-judge court was sustained against a strong argument by the Solicitor General to the contrary (Br. for Appellees, No. 416, Oct. T. 1967, Point I, pp. 9-21).

Other cases to the same effect—three-judge court required where operation of a state-wide regulatory scheme is sought to be restrained—are *King* v. *Smith,* 392 U.S. 309; *Zemel* v. *Rusk,* 381 U.S. 1; *United States* v. *Georgia,* 371 U.S. 285; *Paul* v. *United States,* 371

U.S. 245; and, from an earlier date, *Prendergast* v. *New York Telephone Co.,* 262 U.S. 43.

Perhaps it should be recalled that the requirement of a three-judge court to deal with the unconstitutionality of a statute as applied was sustained in *Fleming* v. *Rhodes,* 331 U.S. 100, against articulated dissent that would have required three judges only to consider attacks on the unconstitutionality of the statute as a whole, 331 U.S. at 108-110; and that thereafter, in *F.H.A.* v. *The Darlington, Inc.,* 358 U.S. 84, 87, the Court accepted *Fleming* v. *Rhodes* without further discussion.

It should also be noted in this connection that 28 U.S.C. § 2281, "Injunction against enforcement of State statute," is broader than 28 U.S.C. § 2282, "Injunction against enforcement of Federal statute"; see text of each, *supra,* page 5. That is because the former requires a three-judge court to restrain "an order made by an administrative board or commission acting under State statutes," while there is no such requirement for an injunction against the enforcement of federal officers' orders; this was first pointed out in *Jameson & Co.* v. *Morgenthau,* 307 U.S. 171. Compare, as to the need for three-judge courts to restrain the operation of state orders, particularly rate orders, *Ex parte Northern Pac. R. Co.,* 280 U.S. 142 (and its sequels at 280 U.S. 530 and 281 U.S. 690); *Eichholz* v. *Public Service Comm.,* 306 U.S. 268; and *Driscoll* v. *Edison Light & Power Co.,* 307 U.S. 104.

It remains now to consider other possible objections to the jurisdiction of a three-judge court; all of them are severally inapplicable here.

1. In most of the cases cited, the complaint alleged that a statute fair on its face was being unconstitu-

tionally applied by reason of affirmative discrimination. E.g., *Turner* v. *Fouche,* 396 U.S. 346. Here, however, the discrimination alleged is negative in nature, viz., the state board refuses to withhold licenses from any licensee that discriminated (Cmplt., ¶ 9; A. 6). But we think that the old distinction between "negative" and "affirmative" orders, which was finally laid to rest in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, decided in 1939, should not now be exhumed and resurrected in another context.

2. It is of course well settled that a prayer for declaratory relief alone does not sustain a three-judge court. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 152-155. Here, however, prayers (c), (d), and (e) requested injunctive relief (A. 8-9), and it is equally well settled that to join with a prayer that requires a three-judge court other prayers that do not—here the request for declaratory judgments (prayers (a) and (b); A. 7-8)—will not oust the three-judge court of jurisdiction. *Zemel* v. *Rusk,* 381 U.S. 1, 5-7, and cases there cited.

3. It is similarly settled that neither the granting nor the refusal of a declaratory judgment without more will support a direct appeal to this Court under 28 U.S.C. § 1253 (*supra,* p. 4). *Mitchell* v. *Donovan,* 398 U.S. 427; *Gunn* v. *University Committee,* 399 U.S. 383. But here injunctive relief was in fact granted by paragraphs 2 and 3 of the final decree (A. 41-42), so that the direct appeal in the present case is specifically authorized by the explicit language of § 1253.

4. This is not a case involving the Supremacy Clause and the doctrine of preemption, which no longer requires—which indeed no longer permits—a district

court of three judges. *Swift & Co.* v. *Wickham,* 382 U.S. 111, overruling *Kesler* v. *Department of Public Safety,* 369 U.S. 153.

5. Nor is this a case where the constitutionality of the state statute is conceded, *Ex parte Hobbs,* 280 U.S. 168, 171-172, or one where the unconstitutionality of a statute is alleged only as an anticipated defense, *International Union* v. *Donnelly Garment Co.,* 304 U.S. 243, 251-252.

6. Moreover, since this is a case brought against state officers that attacks the application of a state-wide regulatory system, it is not subject to the stricture of involving only a local enactment or local rather than state officers. It is only the latter situation that is not within the purview of the three-judge court provision. E.g., *Moody* v. *Flowers,* 387 U.S. 97; *Griffin* v. *School Board,* 377 U.S. 218, 227-228; *Rorick* v. *Everglades Drainage District,* 307 U.S. 208; *Ex parte Collins,* 277 U.S. 565.

7. Finally, this case does not suffer from the infirmity of presenting an insubstantial federal question, which, assuredly, does not call for three judges. *Swift & Co.* v. *Wickham,* 382 U.S. 111, 115, and cases there cited; *Bailey* v. *Patterson,* 369 U.S. 31; *Turner* v. *Memphis,* 369 U.S. 350.

Here the substantiality of the question presented, howsoever viewed, is attested by the circumstances that the plaintiff obtained a judgment below but that his motion to affirm that judgment here without argument did not prevail.

It follows that the complaint—to which alone we may look under the present heading, *Moody* v. *Flowers,*

387 U.S. 97, 104—the complaint stated a case that required a three-judge court; such a court was therefore properly convened (A. 9, 10); and its final judgment, which granted injunctive relief against state officers (¶¶ 2 and 3; A. 41-42), was accordingly reviewable here by direct appeal pursuant to 28 U.S.C. § 1253 (*supra,* p. 4).

II. ALTHOUGH THE COMPLAINT SET OUT A CASE WITHIN THE JURISDICTION OF A THREE-JUDGE COURT, THERE NOW REMAINS NO CASE OR CONTROVERSY ON WHICH THE JUDICIAL POWER CAN OPERATE, INASMUCH AS THE DECREE BELOW GRANTED THE APPELLEE IRVIS NO PERSONAL REDRESS, BUT IS PUNITIVE, ABSTRACT, AND ESSENTIALLY LEGISLATIVE IN ITS OPERATION, A CIRCUMSTANCE EMPHASIZED BY HIS REPRESENTATIONS TO THIS COURT AND BY HIS OPPOSITION TO A MODIFICATION OF THE DECREE THAT WOULD HAVE PREVENTED ANY REPETITION OF THE INCIDENT OUT OF WHICH THE PRESENT LITIGATION AROSE.

Two well-established and unquestioned principles underlie our argument under the foregoing heading.

First. It is clear from numerous decisions of this Court that a three-judge court validly convened by reason of the allegations of the complaint (including the substantiality of the constitutional issue asserted) may lose jurisdiction when it appears that any of the prerequisites for such a court are lacking or have ceased to exist, with the result that further proceedings must be conducted before only a single judge and with the further result that no direct appeal lies to this Court.

Thus, a court of three judges is not required on the final hearing when the application for a preliminary injunction has been abandoned (*Smith* v. *Wilson,* 273 U.S. 388), or when the constitutionality of the state statute originally assailed is later conceded (*Ex*

parte Hobbs, 280 U.S. 168), or when, although the allegations of the complaint are sufficient, it subsequently becomes apparent that there is no basis for relief of any sort against the state officers concerned (*Oklahoma Gas & E. Co.* v. *Oklahoma Packing Co.,* 292 U.S. 386).

Second. It is also clear from numerous decisions of this Court that in order to present a case or controversy, so as "to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." *Ex parte Levitt,* 302 U.S. 633, 634.

Otherwise stated, the litigant must have "some personal and direct interest in the subject of the litigation" (*Newman* v. *United States,* 238 U.S. 537, 550); it is not sufficient simply to assert "the right, possessed by every citizen, to require that the government be administered according to law, and that the public moneys be not wasted" (*Fairchild* v. *Hughes,* 258 U.S. 126, 129-130); and it is likewise insufficient to assert that the plaintiff "suffers in some indefinite way in common with people generally" (*Doremus* v. *Board of Education,* 342 U.S. 429, 434).

We note in passing that the nature of the present action makes it unnecessary to consider numerous aspects of the rules governing standing. Thus, since the appellee Irvis did not sue as a taxpayer, there is no need to examine the present status of a taxpayer's standing. Cf. *Flast* v. *Cohen,* 392 U.S. 83,

with *Frothingham* v. *Mellon,* 262 U.S. 447. Similarly, since he did not sue as a competitor, there is no occasion to inquire into a competitor's standing (cf. *Data Processing Service* v. *Camp,* 397 U.S. 150, and *Investment Co. Institute* v. *Camp,* 401 U.S. 617, with *Alabama Power Co.* v. *Ickes,* 302 U.S. 464). And, since he sued as an individual, the status of an organization to sue on his behalf (e.g., *NAACP* v. *Alabama,* 357 U.S. 449) is irrelevant.

What is relevant here, however, and indeed highly relevant, is the undoubted rule that no litigant has standing to complain of third parties' injuries. "Litigants may challenge the constitutionality of a statute only in so far as it affects them." *Fleming* v. *Rhodes,* 331 U.S. 100, 104; *Granite Falls State Bank* v. *Schneider,* 319 F. Supp. 1346 (W.D. Wash.), affirmed, June 1, 1971 (No. 1394, this Term). Thus, an employer may not obtain relief on the ground of asserted injuries to employees (*Virginian Ry. Co.* v. *Federation,* 300 U.S. 515, 558; *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495, 513), and a doctor has no standing to sue on behalf of alleged infringements suffered by his patients (*Tileston* v. *Ullman,* 318 U.S. 44)—unless he has himself been prosecuted (*Griswold* v. *Connecticut,* 381 U.S. 479, 481).

In our view, it is the latter element, of personal injury or detriment, that underlies the standing aspect of *Griswold* v. *Connecticut,* 381 U.S. 479, as well as of two additional cases that at first glance appear to look the other way, *Barrows* v. *Jackson,* 346 U.S. 249, and *Sullivan* v. *Little Hunting Park,* 396 U.S. 229. In both of the latter decisions, a white citizen was permitted to assert the rights of non-whites under the doctrine of *Shelley* v. *Kraemer,* 334 U.S. 1.

But in the first one, the defendant Jackson had been sued for $11,600 because of her violation of a restrictive covenant, while in the second the plaintiff Sullivan had actually been expelled from Little Hunting Park because he transferred his membership therein to a Negro. Consequently in both cases the party setting up the rights of others was either actually injured, or would have been, had the unlawful restriction been given effect.

Accordingly, without further multiplication of incidents, we deduce the following general rule: An individual invoking the judicial power must show an interest personal to himself, an injury peculiar to himself, and a personal interest or stake in the outcome. That much is plain from decisions over a long period and in widely varying situations. *Tyler* v. *Court of Registration,* 179 U.S. 405, 406; *Baker* v. *Carr,* 369 U.S. 186, 204; *Flast* v. *Cohen,* 392 U.S. 83, 99, 101.

Applying those two principles to the present case, it becomes apparent that the three-judge court lost jurisdiction once the proceedings before it demonstrated that plaintiff was not interested in obtaining personal redress, but sought only a decree that was punitive, abstract, and essentially legislative in nature.

As we have shown under Point I, the complaint set forth a case within the jurisdiction of a three-judge court. Moreover, plaintiff undoubtedly stated an arguable *prima facie* case for redress under 42 U.S.C. § 1983 (*supra,* p. 5), on which he relied: He had been denied service because of his race when brought on the premises of Moose Lodge No. 107 as a guest. But—

1. He sought no damages.

2. He sued as an individual and not as a member of his class.

3. He alleged no desire to become a member of the Moose Lodge.

4. To the contrary, he asserted in a written pleading that "The members of Defendant Moose Lodge are free to associate with whom they please" (A. 46).

5. And when Moose Lodge sought a modification of the decree that would have prevented any repetition of the incident which triggered the present litigation, so that the plaintiff when next brought to the club premises as the guest of a member could not again have been refused service because of his race (A. 42-44), plaintiff vigorously opposed, saying (A. 47):

> "Nothing in Plaintiff's Complaint, nothing in Plaintiff's argument, nothing in the Court's Opinion, nothing in the Court's Decree seeks to prevent Defendant Moose Lodge from engaging in any racially discriminatory activities or to say that such activities are illegal. All that Plaintiff's Complaint, Plaintiff's argument, the Court's Opinion and the Court's Decree state is that it is illegal for the Commonwealth of Pennsylvania to issue a club liquor license to Defendant Moose Lodge as long as Defendant Moose Lodge wishes to continue its discriminatory practices. Thus, the effect of the Decree is to prevent the State from doing something, not to prevent Defendant Moose Lodge from doing anything."

Otherwise stated, the decree as it now stands gives plaintiff no redress whatever for any injury suffered; he has formally refused a modification that would make repetition impossible; he insisted on, and has obtained, a decree that embodies a generalized and abstract con-

stitutional theory, in substance that all actions of a state liquor licensee are automatically transformed into state action; and, while admitting the right of Moose Lodge members to associate with persons of their own choice and hence to discriminate, has insisted on depriving them of a liquor license which, he has stipulated, would result in its loss of membership, and in a serious impairment in consequence of its ability to carry on its own benevolent purposes or to contribute to those of its parent body (Moose Ans., Fourth Affi. Def., ¶ 1, and Fifth Affi. Def., ¶ 1, A. 19, 20; stipulated as true, ¶ B3, A. 25).

In other words, plaintiff has been awarded a decree that punishes the Moose Lodge, that enforces an abstract theory of licensing as to which plaintiff has no more interest than any other of the nearly twelve million inhabitants of the Commonwealth of Pennsylvania, that affords him no personal redress whatever, and that because of his objection contains no provision that would have precluded a recurrence of the incident of which he made complaint.

Thereafter, plaintiff emphasized to this Court that his interest lay only in abstract and essentially legislative declarations. He said (Motion to Affirm 2, 9):

> "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.
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> * * * * *

> "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."

This solemnly asserted position, in the light of plaintiff's repudiation in the district court of personal redress or remedy for any injury he himself claimed to have suffered, is fatal to the continuation of the litigation. The jurisdiction of the district court has been destroyed, in the elemental sense of leaving nothing on which the judicial power can act. For, as this Court has said, "it is not sufficient that he has merely a general interest common to all members of the public." *Ex parte Levitt,* 302 U.S. at 634.

Consequently this cause in its present posture does not constitute a Case or Controversy in the constitutional Article III sense, but, to the contrary, involves only a "difference or dispute of a hypothetical or abstract character." *Ætna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240. From this it follows that the judgment below must be reversed, with directions to dismiss the complaint for lack of Article III jurisdiction.

But even if plaintiff were afforded an opportunity to reconsider his position on the final decree so that it would indeed afford him personal redress, any such step would be unavailing.

Reversal is still required, because, properly viewed, plaintiff has suffered no injury: His civil rights were

not invaded, no state action is involved, and the decision below is substantively erroneous in numerous aspects. We therefore turn to the merits to articulate the foregoing necessarily conclusory assertions.

III. THE RIGHT OF INDIVIDUALS TO CHOOSE THEIR SOCIAL INTIMATES SO AS TO EXPRESS THEIR OWN PREFERENCES AND DISLIKES, AND TO FASHION THEIR PRIVATE LIVES BY FORMING OR JOINING A CLUB, IS AN ASPECT OF THE BASIC CONSTITUTIONAL RIGHT OF PRIVACY AND PRIVATE ASSOCIATION THAT IS PROTECTED BY THE FIRST AMENDMENT AGAINST GOVERNMENTAL INTRUSION OR LIMITATION.

A. THE BASIC CONSTITUTIONAL RIGHT OF PRIVACY AND PRIVATE ASSOCIATION EXTENDS TO MEMBERSHIP IN A PRIVATE CLUB.

The clearest formulation in this Court's reports of the precise constitutional rights that the Moose Lodge and its members assert—and of course the appellant here has standing to assert the rights of its members, e.g., *NAACP* v. *Alabama,* 357 U.S. 449, 458-460—is found in *Bell* v. *Maryland*, 378 U.S. 226, 313, where three members of the Court said (footnote omitted):

> "* * * the Congress that enacted the Fourteenth Amendment was particularly conscious that the 'civil' rights of man should be distinguished from his 'social' 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."

Again, in *Evans* v. *Newton,* 382 U.S. 296, 298-299, the Court gave expression to the same rights, sharply

contrasting in the process private from public accommodations (footnote omitted):

> "There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality, which of course bars a city from acting as trustee under a private will that serves the racial segregation cause. *Pennsylvania* v. *Board of Trust,* 353 U.S. 230. A private golf club, however restricted to either Negro or white membership is one expression of freedom of association. But a municipal golf course that serves only one race is state activity indicating a preference on a matter as to which the State must be neutral."

So far as we are aware, no other decision here has discussed the constitutional right of private association that is reflected in private club membership, although there have been numerous cases, particularly in recent years, devoted to the constitutional protection accorded privacy and freedom of association in varying other contests.

Thus it was said in 1886, eighty-five years ago, in the landmark case of *Boyd* v. *United States,* 116 U.S. 616, 630, that the Fourth and Fifth Amendments "apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life."

Some sixty years later, Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U.S. 438, 478, made his

oft-quoted observation about "the right to be let alone —the most comprehensive of rights and the right most valued by civilized men." Since then, by reason of the foregoing comments and, more immediately, based on what was said for the Court in *Wolf* v. *Colorado,* 338 U.S. 25, 27, that what "is at the core of the Fourth Amendment" is "the security of one's privacy against arbitrary intrusion by the police," it is now established doctrine that "the principal object of the Fourth Amendment is the protection of privacy rather than property." *Warden* v. *Hayden,* 387 U.S. 294, 304; *Mapp* v. *Ohio,* 367 U.S. 643, 656.

Similarly, the constitutional right of association protects membership lists from disclosure (*NAACP* v. *Alabama,* 357 U.S. 449; *Bates* v. *Little Rock,* 361 U.S. 516; *Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539), and by parity of reasoning protects the individual against disclosure of his memberships (*Shelton* v. *Tucker,* 364 U.S. 479). The right to associate for the purpose of assisting persons who seek legal redress for infringement of their rights prevails even over a state's power to regulate the practice of law (*NAACP* v. *Button,* 371 U.S. 415). The citizen's right of association likewise underlay the holding that he could not by blanket proscription be denied defense employment because of membership in the Communist Party (*United States* v. *Robel,* 389 U.S. 258). The constitutional right to privacy permits the citizen to possess obscene matter in his own home (*Stanley* v. *Georgia,* 394 U.S. 557), though at this writing it is unclear whether he may import such matter from abroad even for such personalized use (*United States* v. *Thirty-Seven Photographs,* No. 133, this Term, decided May 3, 1971; *United States* v. *Various Articles of "Obscene"*

Merchandise, No. 706, this Term, probable jurisdiction noted, May 17, 1971).

Perhaps the most comprehensive listing of the privacy cases will be found in *Griswold* v. *Connecticut,* 381 U.S. 479, which struck down a statute forbidding use of contraceptives as a violation of the right of marital privacy, "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees" (p. 485). The Court said (pp. 482, 484, 485):

> "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.
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> * * *
>
> "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe* v. *Ullman,* 367 U.S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amend-

ment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

* * *

"We have had many controversies over these penumbral rights of 'privacy and repose.' See, e.g., *Breard* v. *Alexandria,* 341 U.S. 622, 626, 644; *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451; *Monroe* v. *Pape,* 365 U.S. 167; *Lanza* v. *New York,* 370 U.S. 139; *Frank* v. *Maryland,* 359 U.S. 360; *Skinner* v. *Oklahoma,* 316 U.S. 535, 541. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one."

The Fourth Amendment cases, already cited, were also referred to, but no mention was made concerning the right of association as expressed in membership in private clubs.

But what was said in one of the concurring opinions in *Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539, is amply broad enough to reach the club aspect of the right of private association. We quote, omitting footnotes, from pp. 565, 570, and 575-576:

"But the associational rights protected by the First Amendment are in my view much broader and cover the entire spectrum in political ideology as well as in art, in journalism, in teaching, and in religion.

"In my view, government is not only powerless to legislate with respect to membership in a lawful organization; it is also precluded from probing the intimacies of spiritual and intellectual relationships in the myriad of such societies and groups that exist in this country, regardless of the legislative purpose sought to be served.

* * *

> " * * * the views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces and the people he associates with are no concern of government. That article of faith marks indeed the main difference between the Free Society which we espouse and the dictatorships both on the Left and on the Right.
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> * * *
>
> "Where government is the Big Brother, privacy gives way to surveillance. But our commitment is otherwise. By the First Amendment we have staked our security on freedom to promote a multiplicity of ideas, to associate at will with kindred spirits, and to defy governmental intrusion into these precincts."

We think it well at this juncture to recall expressions from some of the decisions already cited that emphasize the fundamental nature of the right of association.

Thus, in *Shelton* v. *Tucker,* 364 U.S. 479, 485, the Court said that "to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. *De Jonge* v. *Oregon,* 299 U.S. 353, 364; *Bates* v. *Little Rock, supra,* [361 U.S.] at 522-523."

And, in *United States* v. *Robel,* 389 U.S. 258, 263, the Court said that "the operative fact upon which the job disability depends is the exercise of an individual's right of association, which is protected by the provisions of the First Amendment. [Footnote 7 in the original: "Our decisions leave little doubt that the right of association is specifically protected

by the First Amendment." (Citing cases.)] Wherever one would place the right to travel on a scale of constitutional values, it is clear that those rights protected by the First Amendment are no less basic in our democratic scheme."

The extent to which the earlier cases upholding statutory restrictions on the right of association have current vitality is unclear. The New York statute that required the Ku Klux Klan to submit its membership lists to the authorities was sustained in *Bryant* v. *Zimmerman,* 278 U.S. 63; but that decision was distinguished in *NAACP* v. *Alabama,* 357 U.S. 449, 465-466, on the grounds that the particular character of the Klan's activities involved unlawful intimidation and violence, and that the Klan, unlike the NAACP in the later case, had not complied with the state regulatory statute in any respect.

A Mississippi statute that forbade students at state operated institutions to belong to fraternities was unanimously upheld in *Waugh* v. *Mississippi University,* 237 U.S. 589. Whether that decision was overruled *sub silentio* in *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503 (see discussion of earlier case in a dissent, 393 U.S. at 522-524), or whether it is still law in its original context (*Passell* v. *Fort Worth Independent School District*, 453 S.W. 2d 888 (Tex. Civ. App.), appeal dismissed and certiorari denied, No. 1538, this Term, May 17, 1971), remains to be seen.

But on the assumption that the *Waugh* case still governs, it is obviously distinguishable. The state, after all, has a vital, continuous, and continuing interest in education, and to hold that it may regulate or even limit the associational freedom of the persons

it educates at public expense is far from saying that it has equal powers over private schools or colleges, or, *a fortiori,* over outside adults who form and belong to private clubs.

Certainly as to outsiders who are *sui juris* and who do not attend state-supported schools or colleges, the situation is vastly different, in kind rather than degree. For the constitutional right of association is a broad one, which constitutes a basic freedom.

That right, assuredly, cannot be narrowly limited to meeting with one's fellows on the street, or simply to withholding membership or membership lists from scrutiny. It is "the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses." *Evans* v. *Newton,* 382 U.S. 296, 298. "* * * 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." *Bell* v. *Maryland,* 378 U.S. 226, 313.

B. MOOSE LODGE NO. 107 IS A PRIVATE CLUB BY EVERY RECOGNIZED TEST, AND THE PARTIES HAVE SO STIPULATED.

We have set out in subpoint B of the Statement, *supra,* pp. 12-15, quoting extensively from the parties' stipulations below, the factors that make Moose Lodge No. 107 a private club, and that underlie the stipulated conclusion (A. 23) that "Defendant Lodge is, in all respects, private in nature and does not appear to have any public characteristics."

A recent decision, *Wright* v. *Cork Club,* 315 F. Supp. 1143, 1153 (S.D. Tex.), sets out the minimum standards for a private club seeking to come within the exemption in § 201(e) of the Civil Rights Act (*supra,* p. 6):

> "(1) An organization which has permanent machinery established to carefully screen applicants for membership and who selects or rejects such applicants on any basis or no basis at all; (2) which limits the use of the facilities and the services of the organization strictly to members and bona fide guests of members in good standing; (3) which organization is controlled by the membership either in the form of general meetings or in some organizational form that would and does permit the members to select and elect those member officers who control and direct the organization; (4) which organization is non-profit and operated solely for the benefit and pleasure of the members; and (5) whose publicity, if any, is directed solely and only to members for their information and guidance."

Moose Lodge No. 107 meets all five of the foregoing criteria.

1. It has a careful screening machinery for membership applicants (Stip., ¶ 3, A. 23).

2. It limits the use of its facilities to members and guests (Stip., ¶ 4 (a) and (b), A. 23-24)—and where it does not, in the case of catering, its own membership restrictions are not applied, so that all comers are in fact served (Stip., ¶ 6, A. 25).

3. It is controlled by its membership (Moose General Laws, §§ 53.1-53.8, pp. 39-41 of Appendix G to J.S., and see generally, Title V, Lodge Organization, *id.* at pp. 38-50).

4. It is a non-profit corporation, and was incorporated accordingly (Supp. Stip., ¶ 2, A. 28).

5. The record reflects no publicity whatever on the part of Moose Lodge No. 107 to attract public patronage.

Accordingly, Moose Lodge No. 107 has none of the indicia that have evoked rulings that the "club" in question was not in fact what it purported to be. We list some representative non-club factors just below.

A. No exclusiveness—open to all comers—white skin the only requirement. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 236; *Stout* v. *YMCA,* 404 F.2d 687 (C.A. 5); *United States* v. *Richberg,* 398 F.2d 523 (C.A. 5); *Nesmith* v. *YMCA,* 397 F.2d 96 (C.A. 4); *Wright* v. *Cork Club,* 315 F. Supp. 1143 (S.D. Tex.); *United States* v. *Jordan,* 302 F. Supp. 370 (E.D. La.); *United States* v. *Clarksdale King & Anderson Co.,* 288 F. Supp. 792 (N.D. Miss.); *United States* v. *Beach Associates, Inc.,* 286 F. Supp. 801 (D. Md.); *United States* v. *Jack Sabin's Private Club,* 265 F. Supp. 90 (E.D. La.); *United States* v. *Northwest Louisiana Restaurant Club,* 256 F. Supp. 151 (W.D. La.); *Lackey* v. *Sacoolas,* 411 Pa. 235, 191 A. 2d 395.

B. Sham because mere change of name following earlier commercial status. *United States* v. *Richberg,* 398 F.2d 523 (C.A. 5); *United States* v. *Clarksdale King & Anderson Co.,* 288 F. Supp. 792 (N.D. Miss.); *United States* v. *Jack Sabin's Private Club,* 265 F. Supp. 90 (E.D. La.); *United States* v. *Northwest Louisiana Restaurant Club,* 256 F. Supp. 151 (W.D. La.); *Castle Hill Beach Club* v. *Arbury,* 2 N.Y. 2d 596, 142 N.E. 2d 186; *Gillespie* v. *Lake Shore Golf Club,* 91 N.E. 2d 290 (Oh. App.).

C. Purely commercial operation. *United States* v. *Richberg,* 398 F.2d 523 (C.A. 5); *Wright* v. *Cork Club,* 315 F. Supp. 1143 (S.D. Tex.); *United States* v. *Johnson Lake, Inc.,* 312 F. Supp. 1376 (S.D. Ala.); *Bell* v. *Kenwood Golf & Country Club,* 312 F. Supp. 753, 757, 758, 759 (D. Md.).

D. Solicitation of public patronage. *Daniel* v. *Paul,* 395 U.S. 298.

See also ch. 6, "Public Accommodations", in M. R. Konvitz and T. Leskes, *A Century of Civil Rights* (N.Y. 1961); J. P. Murphy, Jr., *Public Accommodations: What is a Private Club?,* 30 Mont. L. Rev. 47 (1968); Note, *Public Accommodations Laws and the Private Club,* 54 Geo. L.J. 915 (1966).

There is no need to continue the discussion or to extend the documentation. All concerned—the parties and the court below—are agreed that Moose Lodge No. 107 is a bona fide private club by any test, and that it is not in fact open to the public.

C. TO TAKE AWAY FROM MOOSE LODGE NO. 107 ANY STATE LICENSE WHATEVER BECAUSE ITS MEMBERS EXERCISED THEIR CONSTITUTIONAL RIGHTS OF PRIVACY WOULD UNJUSTIFIABLY IMPINGE UPON THOSE RIGHTS.

Since the members of Moose Lodge No. 107 have in the exercise of their constitutional right of private association indicated their preference and dislikes, they cannot be hampered in such exercise merely because public officials—including the members of the court below—do not share those preferences or entertain different dislikes. A situation in point is the familiar doctrine of unconstitutional conditions. E.g., *Ludwig* v. *Western Union Tel. Co.,* 216 U.S. 146; *Harrison* v. *St. Louis & S.F.R. Co.,* 232 U.S. 318; *Donald* v. *Phila-*

delphia & R. Coal Co., 241 U.S. 329; see c. 8, "The Doctrine of Unconstitutional Conditions," in G. C. Henderson, *The Position of Foreign Corporations in American Constitutional Law* (Cambridge, 1918). No one can lawfully be penalized for exercising constitutionally conferred rights.

So here: Just because other individuals might not agree with the Moose Lodge and prefer other membership restrictions, as the court below indeed did when approving (A. 40) "private clubs which limit participation to those of a shared religious affiliation or a mutual heritage in national origin," is no reason for denying Moose Lodge No. 107 a liquor license, even though that license emanates from the Commonwealth of Pennsylvania.

For a club, necessarily, encompasses facilities for food and drink, else it would be but a barren barracks. A club bar, accordingly, is a social nexus—but it is more: As a realistic matter, it is the bar that offsets the invariable restaurant deficit (growing larger everywhere as labor costs continue their rise), and which makes possible virtually every club's continued existence.[1] Consequently to deny a private club a liquor license is to doom that club to die—and thus substantially to destroy its members' rights of association.

The appellee Irvis's sneer (Motion to Affirm 10), that the foregoing means that "appellant has 'let the cat out of the bag,' so to speak, when it admits that the

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[1] The problem of restaurant deficit in the absence of liquor sales is not restricted to clubs; it affects every non-commercial establishment. See H.R. Rep. 92-205 (May 18, 1971), reporting a deficit of over $269,000 in the operation of the House of Representatives restaurant that was expected to reach $379,000 by end of F.Y. 1971.

sale of liquor is the economic foundation on which appellant's existence rests," overlooks his own stipulated admission that denial of a liquor license to the Moose Lodge would greatly impair not only its membership but also its capacity for carrying forward its own benevolent purposes and for contributing to the purposes of the Supreme Lodge (Moose Ans., Fourth Affi. Def., A. 19; *id.,* Fifth Affi. Def., A. 20; both admitted in ¶ B3, A. 25).

Pointing to the bar's proceeds as economically vital is far from even suggesting that bar sales constitute the Moose Lodge's primary purpose. For one thing, that Lodge could never have received a license on any such footing; liquor sales by statute must "be only secondary" to permit the licensee to qualify as a club (Pa. Liquor Code, § 102; pp. 7-8 of Appendix F to J.S.). For another, the parties stipulated (¶ 2, A. 21-22), and the court below found as a fact (A. 31, note 2), that the basic objects and purposes of Moose Lodge No. 107 were exclusively fraternal and eleemosynary.

If the state must withdraw liquor licenses from admittedly private clubs having racial restrictions (though not from those with religious or ethnic distinctions), then why must not the state (or its municipalities, which are of course simply arms of the state, e.g., *Trenton* v. *New Jersey,* 262 U.S. 182), similarly withdraw other licenses covering elements that are a part of and indeed necessary to the very concept of private association, such as shelter, food, and water?

Every club needs an occupancy permit for its clubhouse, a health permit for its restaurant, water supply for sanitation (apart from serving as mixer for drinks), and, necessarily, heat and light for simple

habitation. Where utilities are publicly owned, water and power are of course supplied only by subdivisions of the state. And that is actually the situation here: It is the City of Harrisburg that supplies Moose Lodge No. 107 with water, with steam for heat, and with trash collection services.

We show below, pp. 66-69, that the test of "pervasiveness" espoused by the court below (A. 34) is in truth no test at all, and we show also, pp. 70-71, that the Liquor Control Board's Regulation 113 relating to clubs (pp. 147-149 of Appendix F to J.S.) is not pervasive by any rational standard, but has as its sole purpose the prevention of precisely the kinds of evasion that we have catalogued above (pp. 54-55), under which commercial enterprises by sham and subterfuge seek shelter under the private club umbrella—a point that our adversary concedes (Motion to Affirm 8).

We do not contend for a moment that a state must regard private clubs as extraterritorial enclaves into which it cannot enter for any purpose. Of course a state or its subdivisions may close club premises if they are unsafe or if they become the locus of palpably illegal activity. Of course the health inspector can shut down a club restaurant if the kitchen is unsanitary. Of course the city can shut off power and water if the club fails to pay its bills for such services.

But, even on the violent assumption that the issuance of any license essential to the club's functioning constitutes state action—and under the next Point we demonstrate the utter untenability of that assumption —even a state-action license, however, may not be withheld or revoked because of the nature of the simon pure private club's membership restrictions—because

the imposition of those restrictions, see *Bell* v. *Maryland,* 378 U.S. 226, 313, is itself an exercise of the constitutionally protected liberties of privacy and private association.

IV. THE ISSUANCE OF A LIQUOR LICENSE TO A PRIVATE CLUB DOES NOT TRANSFORM THAT CLUB'S ACTS INTO STATE ACTION SO AS TO BE SUBJECT TO THE FOURTEENTH AMENDMENT.

In the present case, the court below rewrote the Equal Protection Clause to reach purely private action, drawing in the process a wholly unsupportable distinction between racial and religious discrimination. The court below admitted that (A. 33) "This case presents a situation which is one of first impression," and it is such because the court's holding and reasoning are plainly contrary to principle and are moreover wholly without support in the authorities. Indeed, we might with justice characterize the result reached as a classic instance of invention—because that result would not have been obvious to those skilled in the art. *Graham* v. *John Deere Co.,* 383 U.S. 1.

After all, the Equal Protection Clause provides—and here as elsewhere in constitutional interpretation it is well to start with the text (*supra,* p. 4)—the Equal Protection Clause provides that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The Constitution says "No State," not "No club," and not "No group of private individuals."

Accordingly, three members of the Court have emphatically rejected the concept that underlies the decision below (*Bell* v. *Maryland,* 378 U.S. 226, 333):

> "It is true that the State and city regulate the restaurants—but not by compelling restaurants to

> deny service to customers because of their race. License fees are collected, but this licensing has no relationship to race. Under such circumstances, to hold that a State must be held to have participated in prejudicial conduct of its licensees is too big a jump for us to take. Businesses owned by private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices."

What was said there had application to businesses catering to the public. *A fortiori,* the state does not participate in the actions of a private club to whom it has issued a license, where such club is not in fact open to the public.

We now proceed to document and expand the foregoing conclusion.

A. THE ACTIVITIES OF A STATE LICENSEE WITHOUT ANY PUBLIC ASPECTS WHATEVER DO NOT CONSTITUTE STATE ACTION FALLING WITHIN THE FOURTEENTH AMENDMENT.

At the heart of this case are the stipulated facts showing that the Moose Lodge is so completely private in its every aspect as to render completely inapplicable all of the decisions relied on by the court below in its effort to transform the Moose Lodge's actions into state action. By way of summary, "Defendant Lodge is, in all respects, private in nature, and does not appear to have any public character" (Stip., ¶ 4(a); A. 23); supporting details, drawn from the stipulation, appear at large in part B of the Statement, *supra,* pp. 12-15.

Those stipulated facts distinguish the present case from every one of the decisions invoked by the court below or adduced in the Motion to Affirm.

1. "Defendant Moose Lodge conducts all of its activities in and from a building which is owned by it" (Stip., ¶ 5, A. 24). Contrariwise, operation on publicly owned property was the basis for finding state action in *Burton* v. *Wilmington Pkg. Auth.,* 365 U.S. 715; *Turner* v. *City of Memphis,* 369 U.S. 350; *Wimbish* v. *Pinellas County,* 342 F.2d 804 (C.A. 5); *McQueen* v. *Druker,* 438 F.2d 781 (C.A. 1); *Wesley* v. *City of Savannah,* 294 F. Supp. 698 (S.D. Ga.); and *Statom* v. *Prince George's County,* 233 Md. 57, 195 A. 2d 41; cf. *Palmer* v. *Thompson,* No. 107, decided June 14, 1971.

2. "Defendant Moose Lodge does not conduct any function or activity in conjunction with any public or community group. It does not hold itself out as conducting any community or public activity." (Stip., ¶ 5, A. 24-25.) Contrariwise, the performance of a public function was the basis for finding state action in *Evans* v. *Newton,* 382 U.S. 296 (maintenance of a park); *Public Utilities Comm.* v. *Pollak,* 343 U.S. 451 (operation of transit line); *Terry* v. *Adams,* 345 U.S. 461 (conduct of primary election); *Commonwealth of Pennsylvania* v. *Brown,* 392 F.2d 120 (C.A. 3), certiorari denied, 391 U.S. 921 (operation of college); *Hawkins* v. *North Carolina Dental Society,* 355 F.2d 718 (C.A. 4) (conduct of examinations for admission to practice; participation in health regulation).

3. "Defendant Moose Lodge * * * has never been the recipient of any public funds. None of its activities, including but not limited to, the acquisition of the building site, the construction of its building or any phase of its operation, was or is financed by public funds or obligations." (Stip., ¶ 5, A. 24.) Contrariwise, the receipt of public funds was the basis for finding state

action in, e.g., *Smith* v. *Hampton Training School for Nurses,* 360 F.2d 577 (C.A. 4); *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 959 (C.A. 4), certiorari denied, 376 U.S. 938; and *Smith* v. *Holiday Inns of America,* 336 F.2d 630 (C.A. 6).

4. The only suggestion that the Moose Lodge is pursuing the common calling of an innkeeper, a matter much discussed in the sit-in cases that came before the Court at the 1962 and 1963 Terms, before enactment of the Public Accommodations Title of the Civil Rights Act of 1964, concerns the Lodge's minimal catering activities; and as to those the parties' stipulation establishes (¶ 6, A. 25) that "When it does so, Defendant Moose Lodge imposes no restrictions on the race or color of persons belonging to the outside group so using its facilities."

5. Finally, there is not the slightest suggestion in the present case, from any source, that the Moose Lodge has ever relied upon or even sought to invoke public assistance in the conduct of its affairs, the basis for finding state action on the footing of police assistance in, e.g., *Peterson* v. *Greenville,* 373 U.S. 244; *Lombard* v. *Louisiana,* 373 U.S. 267, and *Robinson* v. *Florida,* 378 U.S. 153; on the footing of judicial assistance in *Shelley* v. *Kraemer,* 334 U.S. 1; on the footing of collaborative conspiratorial conduct in *United States* v. *Guest,* 383 U.S. 745; and on the footing of a state-enforced custom in *Adickes* v. *Kress & Co.,* 398 U.S. 144.

Otherwise stated, we are not dealing here with the situation of the courts undertaking to enforce an agreement that legislators would be unable to enact on their own, nor is there involved private action in a particular direction where the state, to a greater or lesser degree, has in any way influenced the direction of private choice.

Thus, there cannot be found here even a single one of the various indicia of state action that was present in any other decided case. From this it necessarily follows that the court below fell into demonstrable error in holding that the Moose Lodge's membership requirements took on the character of state action within the Fourteenth Amendment.

(We have not overlooked *Griffin* v. *Breckenridge,* No. 144, decided on June 7, 1971, as this brief was going to press. That case sustained 42 U.S.C. § 1985(3) under the Thirteenth Amendment as an enforcement of the petitioners' rights of national citizenship. The Court was at pains (Part VB, pp. 18-19 of slip opinion) not to rest its decision on the scope of the Fourteenth Amendment.)

B. EXAMINATION OF OTHER TYPES OF STATE LICENSES EMPHASIZES THE BASIC ERROR OF THE COURT BELOW, WHICH CONFUSED THE LICENSING PROCESS, WHICH IS CLEARLY STATE ACTION, WITH THE LICENSEE'S DOINGS, WHICH EQUALLY CLEARLY ARE NOT.

The basis for state action in this case that was found by the court below, or, as the appellee Irvis now prefers to characterize it (Motion to Affirm 8), "State involvement," is that the Moose Lodge, an indubitably bona fide private club, has been issued a liquor license by the Commonwealth of Pennsylvania.

No decision cited in the opinion below, no decision of which we are independently aware, has ever considered that circumstance to constitute state action. That is because such a transformation involves a fundamental fallacy, that of confusing the licensing process, which is state action and which therefore must be non-discriminatory, with the actions of the licensee, which in a whole spectrum of activities have nothing whatever

to do with the state and in consequence do not involve state action.

Many activities in today's complex and crowded world require licenses before they can lawfully be undertaken, but that circumstance has never before—at least until the decision below—been deemed to transform individual into state action.

Every individual building his own house, or driving a car, or practicing law, requires a license. But the house-owner has absolute liberty to exclude, so does the private automobilist, and a lawyer in America (like the solicitor in England) has always enjoyed complete freedom to refuse to represent particular clients on any ground whatever, good or bad, sound or unsound, praiseworthy or otherwise.[2]

Other instances of state licensing will readily occur to everyone familiar with his local statute book and with the cognizant collection of municipal ordinances; there seems no need to set forth additional illustrative situations.

But surely the clearest example of the underlying fallacy of the decision below will be found in the issuance of a marriage license.

The operation of any system of marriage licensing is of course state action, and as such it is subject to the prohibitions and limitations of the Fourteenth Amendment. Thus neither Pennsylvania nor any other state

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[2] In this respect there is a vast gulf between the English solicitor, who has complete freedom to refuse instructions as he chooses (Sir Thomas Lund, *A Guide to the Professional Conduct and Etiquette of Solicitors* (1960) 82), and the English barrister, who must serve any client whatever (F.A.R. Bennion, *Professional Ethics* (1969) 62).

can prohibit interracial marriages (*Loving* v. *Virginia,* 388 U.S. 1), and, by parity of reasoning, it can not prohibit interfaith marriages.

But it plainly does not follow that persons who receive marriage licenses must accept all comers as spouses, without any discrimination whatever, whether on grounds of race, color, religion, or national origin. Yet under the reasoning of the court below, once a person has accepted and enjoyed the benefits of a marriage license, such person could not refuse to marry one who belonged to a different race.

There, in essence, is the *reductio ad absurdum* of the ruling below.[3]

C. THE TEST OF "CONTINUING AND PERVASIVE REGULATION," FASHIONED BY THE COURT BELOW TO DISTINGUISH LIQUOR LICENSES FROM ALL OTHERS, IS UNTENABLE, UNSOUND, AND UNWORKABLE.

The court below undertook to distinguish the instances we have just enumerated, saying (A. 37) that "The state's concern in such cases is minimal and once the conditions it has exacted are met the customary operations of the enterprise are free from further encroachment. Here by contrast beyond the act of licensing is the continuing and pervasive regulation of the licensees by the state to an unparalleled extent."

Examination of the proposed distinctions shows that they are, both of them, utterly untenable.

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[3] We have not leaned very heavily on the Pennsylvania Marriage Law of 1953 (48 Purdon's Pa. Stat. Ann. §§ 1-1 to 1-25), for the reasons that Pennsylvania recognizes common law marriages (e.g., *Burados* v. *General Cement Products Co.,* 356 Pa. 349, 52 A. 2d 205), and that the statute expressly provides that it makes no change in common law marriages (48:§ 1-23).

1. "Continuing" regulation is not peculiar to liquor licenses, but applies to other permits that are necessary to a private club's continued existence.

The concept of continuing regulation as a distinction simply will not withstand analysis once one considers the minimal matters that are essential to any club's existence. These are a place for meeting, facilities for meals, and facilities for beverages.

As to those three, state regulation is equally a continuous process; the bar is not regulated any more continuously than the restaurant or the physical clubhouse. The building inspector does not become *functus officio* once an occupancy permit has been issued; to the contrary, he inspects the clubhouse as long as it stands lest it become too dangerous to serve as a habitation or a place of resort. If the clubhouse has an elevator, that too is subject to periodic examination to guard against its becoming unsafe. And, similarly, a club's kitchen will be continuously—and carefully—regulated, otherwise carelessness resulting in unsanitary conditions would spread disease and endanger health.

"Continuing * * * regulation" (A. 37) being unavailing, we turn to see whether "pervasiveness" on fair inquiry will serve better. We can show, without any difficulty whatever, that it is equally unavailing as a foundation for the result reached below, viz., the transformation of licensee into licensor.

2. The test of "pervasiveness" is alike unsound and unworkable.

It is argued in the decision below (A. 34) that "the decisive factor is the uniqueness and the all-pervasiveness of the regulation by the Commonwealth of Pennsylvania of the dispensing of liquor under licenses granted by the state. The regulation inherent in the

grant of a state liquor license is so different in nature and extent from the ordinary licenses issued by the state that it is different in quality."

Such an approach only compounds the essential fallacy of confusing licensee with licensor, because the test suggested is actually no test at all.

When is a scheme of regulation pervasive or all-pervasive? At what point does regulation or licensing by the state reach the point where the licensee falls under a constitutional limitation that in terms is directed only at the licensing authority? And how can the degree of regulation have the effect of turning the regulated individual into a public officer or agent?

Actually, the district court's reliance on pervasiveness as the touchstone for its novel result is deficient on the face of its opinion—and on the face of the governing Liquor Code and implementing regulations.

To begin with, virtually all of the instances relied on by the court below, in order to document its discovery that liquor regulation in Pennsylvania is extensive, involved restrictions, not on private clubs, but only on commercial establishments that are open to the public (A. 34-36).

Next, a fair appraisal of the statutes and regulations governing clubs undercuts the touchstone of the opinion below.

a. Analysis of the Pennsylvania Liquor Code relating to clubs.

The Pennsylvania Liquor Code, while indeed comprehensive, does not unduly restrict the bona fide private club, as many of the statutory provisions are designed primarily to separate the genuine private club

from the commercial enterprise merely masquerading as one.

1. Mention has already been made (*supra,* p. 57) of Sec. 102 (pp. 7-8),[4] defining a club.

2. Sec. 403 (pp. 21-23) deals with applications for hotel, restaurant and club liquor licenses. Subsection (e) at p. 22 requires a club applicant to file a club membership list, while subsection (f) at p. 22 (which is repeated in § 437(b) at p. 44) directs denial of licenses when it appears that the license would enure to the benefit of individual officers, etc., rather than to the benefit of the entire membership.[5]

3. Section 439 (p. 45) prescribes license fees; a club pays only $25, retail dispensers between $100 and $300 depending on the size of the municipality in which they operate—a solid reason for scrutinizing the genuineness of asserted clubs.

4. Section 404 (pp. 23-24) deals with the issuance of licenses, Section 406 (p. 25) with restrictions on hours of sales, as follows:

The Liquor Code permits sales of liquor by private clubs at times and on days when such sales cannot be made by hotels or commercial establishments. The only hours during which a club may not sell alcoholic beverages are those between 3 A.M. and 7 A.M. In addition,

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[4] In order to avoid a proliferation and repetition of references, we note here once for all that all page numbers under the present heading refer to Appendix F to the J.S.

[5] Sec. 403(b), p. 22, has a two-year residence requirement in Pennsylvania if the applicant is a natural person. *Quaere,* is this an unconstitutional limitation in the light of *Shapiro* v. *Thompson,* 394 U.S. 618?

it may not sell to non-members on Sunday. A hotel, on the other hand, must stop selling at 2 A.M. and may not sell on Sundays thereafter except between 1 P.M. and 10 P.M. See Sections 406(a), 492(5), and 492(7); pp. 25-26, 67, and 68. And only clubs may dispense liquor on election days during hours when the polls are still open. Section 406(a), pp. 25, 26; Section 492(6), p. 68.

5. The Liquor Code also provides numerous exemptions for clubs apart from the more liberal hours of sale just noted. They may by implication sell to members for off-premise consumption (§ 442(a), p. 46); they may transfer their license to a location outside their municipality of origin if their original premises have been taken by eminent domain (§ 468(a), p. 56); they may make sales of liquor on credit to members (§ 493(2), p. 70); they are expressly exempted from the statutory quotas limiting the number of retail licenses that may be issued in a single locality until the particular quota is filled (§ 461, pp. 50-52; *Pine Grove Hose, Hook & Ladder Co. Liquor License Case,* 167 Pa. Super. 194, 75 A.2d 15; *DeAngelis Liquor License Case,* 183 Pa. Super. 388, 133 A.2d 266; *Carver Community Center Liquor License Case,* 200 Pa. Super. 17, 189 A.2d 914); and they are specifically exempted from the restrictions governing other licensees' on-premise entertainment (§ 493(10), p. 72).

We should note here that the subsection last cited, whose heading plainly—and accurately—reads "(Except Clubs)," was none the less relied on by the court below in support of its theme of "pervasive" regulation of clubs (A. 35-36)!

b. Analysis of the Board's Regulation relating to clubs.

Regulation 113 of the Liquor Control Board—"Clubs; Records Required; Catering"—(pp. 147-149) is, like the basic statutory provisions that it implements, far from "pervasive" if words are used in their dictionary sense. It shows on its face that it is designed only to differentiate clubs from places that are not clubs.

Thus, it requires the keeping of a membership record (§ 113.02), of a minute book (§ 113.06), and of corporate or association documents (§ 113.07)—all of them indicia of a bona fide private club that is not in fact open to the public.[6] See pp. 53-55, *supra,* and cases there cited. See also M. R. Konvitz and T. Leskes, *A Century of Civil Rights* (N. Y., 1961) 189: "An enterprise cannot be a 'distinctly private club' if it exercises no real control over membership." See also *id.* at 189-190.

The other sections of Regulation 113 deal primarily with accounts (§§ 113.03-113.05), but also cover food concessions (§ 113.10) and catering (§ 113.11). Finally, barricaded doors are forbidden (§ 113.12)—an echo of speakeasy days?—and the Board's personnel must be immediately admitted to the premises upon presentation of credentials (*ibid.*).

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[6] Section 113.08 requires that "All club records shall be maintained in English." The court below did not consider whether that provision ran counter to its exemption (A. 40) for "private clubs which limit participation to those of * * * a mutual heritage in national origin," or whether, since obviously the regulation itself constitutes state action, it runs afoul of *Meyer* v. *Nebraska,* 262 U.S. 390, which held unconstitutional under the Fourteenth Amendment a state statute requiring all school instruction to be in the English language.

None of the foregoing restrictions, as we have said, are "pervasive"; they simply implement the basic definition of "club" in § 102 of the Pennsylvania Liquor Code (pp. 7-8) and facilitate enforcement of the statutory limitations that are designed to prevent colorable evasion of club restrictions by essentially commercial enterprises.

It follows, therefore, that the assertion of "pervasiveness" does not accurately describe the Pennsylvania system of regulating the dispensing of liquor by clubs.

And, in any event, the notion that state regulation of a particular enterprise somehow transforms what that enterprise does into state action is completely fallacious, as recent decisions here and elsewhere demonstrate.

The Seventh Circuit recently—and rightly—rejected a similar contention, to the effect that a state's regulation of and grants of exemption to newspapers so far made them arms of the state as to forbid their rejection of editorial advertisements. *Chicago Joint Board* v. *Chicago Tribune Co.,* 435 F.2d 470, certiorari denied, May 17, 1971 (No. 1477, this Term).

Earlier, the Tenth Circuit had likewise rejected an argument that a state's tax exemption granted to a private college turned that college's dealings with its students into state action. *Browns* v. *Mitchell,* 409 F.2d 593.

And, similarly, this Court held at its last Term that the grant by a state of tax exemption to a religious body does not involve any establishment of religion. *Walz* v. *Tax Commission,* 397 U.S. 664.

By parity of reasoning, therefore, neither the provision in Pennsylvania's Liquor Code for "Sacramental Wine Licenses" (§ 409, pp. 31-32), nor the implementing Regulation 119 (pp. 169-171)—neither one, significantly enough, mentioned by the court below—qualifies as a "law respecting an establishment of religion," to use the language of the First Amendment. Similarly, the "pervasive" licensing by Pennsylvania under its Solicitation of Charitable Funds Act (of August 9, 1963, P.L. 628, 10 Purdon's Pa. Stat. Annot. §§ 160-1 *et seq.*) of those who solicit money for churches does not and can not transform that measure into state support of religion.

Yet, were one to follow literally the rationale of the court below, all of those several instances would involve "state action."

The contentions in the present case that are based on the circumstances of Pennsylvania's "monopoly" system of dealing with alcoholic beverages (A. 34-37; Motion to Affirm 4-6, Point *First*) are equally unhelpful, because of their necessary implications that a different result might follow where clubs could obtain their alcoholic beverage requirements from private retailers or wholesalers, rather than being restricted to state-owned stores.

Again, no workable test is available.

Indeed, it can confidently be predicted that acceptance of the "pervasiveness"-"monopoly" guideline for finding state action where none in fact is present will lead to a further litigation explosion in the Federal

courts. For then every form of activity that is licensed by any state will be subject to judicial examination in the courts of the United States, first to ascertain the degree of "pervasiveness" that the licensing in question involves, and, second, if liquor licensing is in issue, to ascertain in addition how far the particular system under examination resembles, and how far and in what respects it differs from, the Pennsylvania system considered here.

There is no need to impose such a crushing burden on an already badly overworked Federal judiciary—because there is no justification for so distorting the Federal Constitution.

Law and fact unite in denying that a state licensee automatically becomes an agent of the state once he accepts its license.

D. IN ACTUAL FACT, THE OPERATION OF THE PENNSYLVANIA LIQUOR CONTROL SYSTEM INVOLVES, NOT THE GRANT OF A PRIVILEGE, AS THE COURT BELOW ERRONEOUSLY HELD AND THE APPELLEE IRVIS ARGUES HERE, BUT RATHER THE IMPOSITION OF RESTRICTIONS.

A second fundamental error underlying the ruling below is the proposition that the Pennsylvania liquor control system involves the grant of a privilege, or, as stated by the district court (A. 36), "the privilege of dispensing liquor which a licensee holds at the sufferance of the state."

The appellee Irvis, invoking an esoteric biological adjective, has stressed the same thought (Motion to Affirm 5): "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."[7]

Actually, the Pennsylvania liquor control system is one of restrictions rather than privileges, and those restrictions are emphasized rather than otherwise by the cases construing the Twenty-first Amendment that the court below cited in its opinion (A. 34 note 10): *Seagram & Sons* v. *Hostetter,* 384 U.S. 35, 42; *Hostetter* v. *Idlewild Liquor Corp.,* 377 U.S. 324, 330; *Ziffrin* v. *Reeves,* 308 U.S. 132, 138; *State Board* v. *Young's Market Co.,* 299 U.S. 59. For those decisions emphasize that since adoption of the Twenty-first Amendment many Commerce Clause concepts no longer limit a state's power over the liquor traffic. Hence we repeat that Pennsylvania's scheme is one that imposes restrictions rather than one that grants privileges.

We are aware that the complaint herein alleged that "The receipt and ownership of such a [liquor] license is a valuable privilege granted to a club by the Commonwealth of Pennsylvania through Defendant [Liquor Control] Board" (¶ 4, A. 4), and that this averment was admitted in the parties' stipulation (¶ B1, A. 25).

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[7] "**Symbiosis,** Biol. the living together of two species of organisms: a term usually restricted to cases in which the union of the two animals or plants is not disadvantageous to either, or is advantageous or necessary to both, as the case of the fungus and alga which together make up the lichen. **Symbiotic,** *adj.*" The American College Dictionary.

"**Symbiosis.** Association of two different organisms (usually two plants, or an animal or a plant) which live attached to each other, or one as a tenant of the other, and contribute to each other's support. * * * distinguished from parasitism, in which one organism preys upon the other.

"**Symbiotic.** Associated or living in symbosis, related to or involving symbiosis." Oxford English Dictionary.

But whether or not a particular relationship involves a privilege or something different is a matter of law rather than of fact, and a stipulation as to questions of law is not controlling, cannot foreclose legal questions, and must be treated as a nullity. *Swift & Co.* v. *Hocking Valley R. Co.,* 243 U.S. 281, 289; *Estate of Sanford* v. *Commissioner,* 308 U.S. 39, 51; *Case* v. *Los Angeles Lumber Co.,* 308 U.S. 106, 114; *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148, 152.

Accordingly we approach the nature of a liquor license as an original proposition.

A state monopoly system such as Pennsylvania has adopted demonstrates clearly its restrictive nature.

First, Pennsylvania is a "monopoly" state (Op. 34-35); its Liquor Code provides for state liquor stores (§§ 301-306, pp. 17-19), which are the sole sources of alcoholic beverages, subject to certain permitted activities on the part of distributors (§ 431, pp. 35-38). Thus there are in Pennsylvania no such privately-owned liquor stores as exist in the District of Columbia and in many, many other states.

Second, Pennsylvania clubs can make sales only on particular days and at particular times, and the Commonwealth indeed imposes fewer restrictions of other kinds on clubs than on hotels or commercial enterprises. *Supra,* pp. 68-69. But the cited provisions there set out are still more restrictive than those obtaining in a private home, whose occupants are free to imbibe at every hour of the day or night.

Third, a club, like any other licensee, is forbidden by Pennsylvania law to furnish or give any liquor to any

person visibly intoxicated (Sec. 493(1), pp. 69-70). But at home the host can ply himself and guests with drink until all are sodden or worse. (The supplying of liquor to minors of course stands on a different footing. Pa. Penal Code, § 675.1, pp. 277-278.)

It follows, therefore, that the regulation of the liquor traffic involves restrictions and prohibitions—by common usage we still speak of the years 1919-1933 as the era of *Prohibition*—and that to approach the matter of lawful dispensing and ingestion of alcoholic beverages in terms of a privilege is to becloud—and distort—the legal issues that the present case involves.

Of course a state under the Twenty-first Amendment can forbid all traffic in liquor. But how many still do? Certainly it is not realistic to consider Pennsylvania's power to ban all alcohol when everyone knows that no such step is within the bounds of possibility. What Pennsylvania does in its Liquor Code, what every state and every political subdivision of a state does in its own particular plan for coming to grips with a problem that has been with mankind ever since the process of fermentation was discovered and that will continue to be present as long as life continues to exist on our planet, is to arrive at a workable *ad hoc* adjustment in respect of a matter for which there never was and never will be any single "approved solution" in the back of the book.

Absolute prohibition having been proved unworkable during a searing period of our national life, most of the adjustments accordingly simply regulate and restrict. But to conclude from this circumstance that every permissible act of dispensing and consuming liquor is to be characterized as a "privilege"—preceded by a suit-

able adjective as one warms up towards a peroration—to call every distribution of liquor for consumption a "privilege" is to allow semantics to distort reason.

Unhappily, that is just exactly what the court below did.

E. THE EXEMPTIONS GRANTED BY THE COURT BELOW TO PRIVATE CLUBS HAVING RELIGIOUS AND ETHNIC MEMBERSHIP RESTRICTIONS RATHER THAN RACIAL ONES ADDITIONALLY EXPOSE THE UTTER FALLACY OF ITS CONTROLLING RATIONALE.

But the most egregious error committed by the court below was its ruling that, while racial restrictions in private clubs were unconstitutional, similar religious or ethnic restrictions were entirely acceptable. To avoid any possible suggestion that we are seeking to parody the decision under review, we quote its ruling on this point verbatim (A. 40):

> "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. Such cases are not the same as the present one where discrimination is practiced solely on racial grounds and therefore collides head-on against the 'clear and central purpose of the Fourteenth Amendment . . . to eliminate all official state sources of invidious racial discrimination in the States.' *Loving* v. *Virginia,* 388 U.S. 1, 10 (1967); and cases there cited."

Loving v. *Virginia,* 388 U.S. 1, will not support for a moment the distinction between racial discrimination and religious or ethnic discrimination that the court below sought to find therein. That case involved a state statute prohibiting marriages between different races, a statute that did not prohibit marriages between per-

sons of different religious affiliations, or between persons of the same race having however different ethnic backgrounds.

Consequently to deduce from *Loving* v. *Virginia* that while private clubs may not draw racial lines they may nonetheless and consistently with the Constitution "limit participation to those of a shared religious affiliation or a mutual heritage in national origin" (A. 40) is once again to demonstrate that judges quite as much as counsel need periodically to be reminded that the language of this Court's opinions must be read in the light of the facts of the case under discussion. *Cohens* v. *Virginia,* 6 Wheat. 264, 399; *Humphrey's Executor* v. *United States,* 295 U.S. 602, 626-627; *Armour & Co.* v. *Wantock,* 323 U.S. 126, 132-133; *Green* v. *United States,* 355 U.S. 184, 197.

The distinction between religious and ethnic on the one hand, and racial on the other, a distinction clearly drawn by the court below, fails utterly on that court's own "state action" approach.

The court below passes as perfectly legitimate and constitutional the actions of (A. 40) "private clubs which limit participation to those of a shared religious affiliation." But once we accept the district court's proposition that possession of a state liquor license transforms a private club's restrictive membership provisions into state action, then, very obviously, to "limit participation to those of a shared religious affiliation" (A. 40) becomes unconstitutional; the Fourteenth Amendment, which is not at all limited to racial matters as the court below mistakenly supposed, forbids. The controlling ruling here is *Schware* v. *Board of Bar Ex-*

aminers, 353 U.S. 232, 238-239 (footnote and citations omitted; italics added):

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Obviously an applicant could not be excluded merely *because he was a Republican or a Negro or a member of a particular church.* Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

Consequently, if a private club's racial membership restrictions constitute state action, and that rationale is the core of the decision below, then the Knights of Columbus, the Knights of Pythias, the B'nai B'rith, the National Capital Democratic Club (of Washington), and the Women's National Republican Club (of New York), must all lose their liquor licenses along with the Loyal Order of Moose wherever the latter has Lodges.

Let us examine a little further the district court's curious dichotomy.

The Loyal Order of Moose not only has a membership qualification that is racial, to which alone the opinion below was directed, it also has a religious qualification: No one can be a Moose who does not "profess a belief in a Supreme Being" (Stip., A.21; Moose Constitution, Sec. 71.1, p. 59 of Appendix G to J.S.).

The court below said nothing about the clause just quoted. Yet if the Moose Constitution is metamorphosed into state action once a Moose Lodge receives a liquor license, then this provision, which obviously excludes atheists from Moose membership, is similarly invalid. A state, after all, may not bar an atheist from public office. *Torcaso* v. *Watkins,* 367 U.S. 488.

We suggested in our Jurisdictional Statement, by way of underscoring the absurdity of the racial versus religious-and-ethnic distinction, and "absurdity" is really the only accurate characterization possible, the not-at-all imaginary case of the black citizen who professes Judaism (p. 14 note 2). Under the ruling below, he can not be excluded because of his color but he may be barred because of his religion—an obviously nonsensical and thoroughly illogical result, certainly if that result derives from exegesis of the Fourteenth Amendment, as the ruling below purportedly does.

We could similarly suggest the equally non-imaginary case of the Jewish citizen who does not practice the faith of his fathers or who indeed has renounced it for another. How is such an individual, and his numbers run into thousands, perhaps hundreds of thousands, to be classified? This inquiry in turn presents the age-old question, whether Jewishness is a matter of race, or nationality, or religion—or perhaps a combination in varying proportions of all three. Nazi Germany, it is true, had less difficulty in determining "What is a Jew?" than (see, e.g., R. Slovenko, *Brother Daniel and Jewish Identity,* 9 St. Louis Univ. L. J. 1 [1964]), is currently being experienced by the Supreme Court of Israel, whose expertise in that particular area is at least arguably greater than was possessed by Hitler, Himmler, and Eichmann.

We have embarked on the foregoing discussion, not to engage in sociological speculation, but only to demonstrate the delusiveness of the district court's dichotomy: If Jews constitute a race, then the Fourteenth Amendment forbids a private club from adopting a policy of "No Jews allowed." But if Jews are to be regarded as "those of a shared religious affiliation" (A. 40), then the identical club policy is constitutionally unexceptionable.

When we turn to the ethnic aspect of the district court's strange distinction, we encounter similar difficulties. Indeed, the appellee Irvis's attempt to rationalize that portion of the decision below is deficient on its face. He says (Motion to Affirm 6-7) that "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.*"

The latter italics in the foregoing quotation are ours: Where could one possibly find an American of Italian origin who was a Negro or an Asiatic or a Polynesian?

The fact is that once there is accepted the district court's concept of "a mutual heritage in national origin" (A. 40) as a legitimate and thoroughly constitutional restriction, there follows, necessarily, full acceptance of the precise racial distinction that the district court professed to reject. For if an individual's "heritage in national origin" is European, and the private club is limited to members descended from any one of a score of European nationalities, then it is, necessarily and inevitably, precisely the kind of Cauca-

sians-only organization that the court below deprived of its liquor license. Similarly, if the "heritage in national origin" is Japanese, then the private club so limited excludes impartially all whites, all blacks, and, presumably—depending on the ultimate solution of what is still an arcane anthropological mystery—all American Indians.

Thus, actually, there would be included among those losing their liquor licenses—our list is illustrative rather than inclusive—the Sons of Italy, the Polish National Alliance, the Friendly Sons of St. Patrick, the United Acadian Federation, the American Latvian Association, the Sons of Norway, St. Andrew's Society, and the Steuben Society of America. For the hard ethnic fact of the matter is that every American organization whose "mutual heritage in national origin" (A. 40) is European, must of necessity be a whites-only organization. (Possibly, having in mind the many former Cape Verde Islanders in New England, the Portuguese Continental Union of the U.S.A. stands on a different footing. But it is far outnumbered by the others just listed and by those who fall in the broader category.)

It is unnecessary to dwell further on the theme. The quotation from the opinions below with which the present subsection commenced (A. 40; *supra,* p. 77) carries within itself irrefutable proof of the utter unsoundness of the ruling below. That portion of the opinion establishes beyond all question that a private club's membership restrictions of any kind are either unconstitutional in their entirety—which would involve, as a practical matter, the destruction of the great majority of private clubs in the entire nation—or else, and we are convinced that this is the only correct view

—that none of those restrictions, whatever they are, involve state action regardless of how many state licenses such a club needs. Liquor licenses, building permits, occupancy permits, zoning adjustments, elevator certificates, restaurant licenses—all of these emanate from the state mediately or immediately, and all of these are necessary to the private club's continued operation. But none turns what the club does into state action.

F. EVEN IF STATE ACTION BE ASSUMED FOR PURPOSES OF ARGUMENT, THE PROPER REMEDY FOR GIVING EFFECT TO THE COMPETING CONSTITUTIONAL RIGHTS INVOLVED WOULD HAVE BEEN AN INJUNCTION PREVENTING THE LIQUOR CONTROL BOARD FROM REQUIRING THE MOOSE LODGE TO ENFORCE ITS OWN RESTRICTIVE MEMBERSHIP REGULATIONS.

The least untenable ground taken in the opinion below was its proposition that enforcement of the Pennsylvania Liquor Control Board's Regulation 113.09 (p. 148 of Appendix F to J.S.), which affirmatively requires that "Every club licensee shall adhere to all of the provisions of its Constitution and By-laws," when read together with the Supreme Lodge's exclusion of non-Caucasian members—and, although not mentioned in the opinion, of the exclusion of atheists and (presumably) agnostics as well—amounts to state action that not only fosters but indeed directs discrimination. The court below said (A. 37-38; footnotes omitted):

> "In addition to this, the regulations of the Liquor Control Board adopted pursuant to the statute affirmatively require that 'every club licensee shall adhere to all the provisions of its constitution and by-laws.' As applied to the present case this regulation requires the local Lodge to adhere to the constitution of the Supreme Lodge and thus to exclude non-Caucasians from membership in its licensed club. The state therefore has

> been far from neutral. It had declared that the local Lodge must adhere to the discriminatory provision under penalty of loss of its license. It would be difficult in any event to consider the state neutral in an area which is so permeated with state regulation and control, but any vestige of neutrality disappears when the state's regulation specifically exacts compliance by the licensee with an approved provision for discrimination, especially where the exaction holds the threat of loss of the license."

Closer examination of Pennsylvania's liquor laws, however, shows that the Commonwealth's purpose is wholly different. That purpose is not the enforcement of racial membership restrictions, it is purely and simply and plainly the prevention of subterfuge.

As we have already shown in detail, pp. 68-69, *supra,* the Pennsylvania Liquor Code imposes many fewer restrictions on private clubs than on commercial establishments, notably with reference to hours of sale. This means, of course, that to the extent that a commercial dispenser of alcoholic beverages can somehow qualify as a private club, he stands to profit—because he can then sell more of such beverages than his competitors.

Consequently, unless private clubs are required strictly to enforce their constitutions and by-laws, the closing hour requirements of the Pennsylvania Liquor Code will inevitably be evaded through subterfuge, through the familiar ploy of places of public accommodation masquerading as clubs while in fact having no membership requirements whatever. See the numerous illustrative decisions cited and classified at pp. 54-55, above.

It follows that, fairly construed, the regulation seized upon by the court below as a touchstone of state action

is in reality only an appropriate means of enforcing Pennsylvania's differentiation between places of public accommodation and bona fide private clubs. Indeed, the appellee Irvis "agrees with appellant that the primary purpose of this particular provision [Regulation 113.09; p. 148] is to insure that private clubs are in fact private" (Motion to Affirm 8).

But, he adds (Motion to Affirm 9), "even the most critical reading of [the district court's] opinion will confirm that its decision would have been the same even were this regulation not present."

Even so, even assuming that the requirement in Regulation 113.09 that all clubs adhere to their constitutions and by-laws is to be given the transforming effect of turning such by-laws, etc., into state action, the result is still wrong, on either of two additional grounds.

First, the regulation can and in our view must be regarded as giving effect to the constitutionally protected rights of privacy and of association that are exemplified by the existence and operation of every private club; those are the rights already expounded above, pp. 45-52.

Or, second, a decree can and should be fashioned so as to enjoin enforcement of Regulation 113.09 insofar as it purports to implement discriminatory qualifications for membership, be they racial, ethnic, or religious. Then the state is not even arguably in the position of supporting any restrictive membership provision of any kind in even the most private of private associations.

This last, however, is an ultimate "even if" concession, not likely to be reached. Because, as we shall

now show, Congress in the Civil Rights Act of 1964, enacted to enforce the Fourteenth Amendment in the exercise of its constitutional power to do so, has exempted from the public accommodations title of that act "a private club or other establishment not in fact open to the public."

V. THE CONGRESSIONAL EXCEPTION FOR "A PRIVATE CLUB OR OTHER ESTABLISHMENT NOT IN FACT OPEN TO THE PUBLIC" MARKS A PROPER BOUNDARY BETWEEN THE COMPETING CONSTITUTIONALLY PROTECTED LIBERTIES OF PRIVACY AND PRIVATE ASSOCIATION ON THE ONE HAND AND OF FREEDOM FROM DISCRIMINATORY STATE ACTION ON THE OTHER, AND THAT BOUNDARY SHOULD BE RESPECTED AND REAFFIRMED HERE.

Under the two preceding points, we have shown, first, that the Moose Lodge's members were exercising their constitutionally protected liberties of privacy and of private association in limiting the qualifications of those who would be permitted to join them in that fellowship, and, second, that when the Moose Lodge was issued a liquor license that circumstance did not transform their membership restrictions into state action so as to be subject to the limitations of the Fourteenth Amendment. It followed on either ground that the judgment below was erroneous.

We now show that the same result also flows from an alternative approach, namely, that the Congressional exemption for private clubs in the Civil Rights Act of 1964, a measure passed to enforce the Fourteenth Amendment, demonstrates the Congressional understanding that such clubs when not in fact open to the public were beyond the scope of that Amendment's limitations.

A. WHEN CONGRESS IN THE CIVIL RIGHTS ACT OF 1964 PROVIDED FOR RELIEF AGAINST DISCRIMINATION IN PUBLIC ACCOMMODATIONS, IT SPECIFICALLY EXCEPTED "A PRIVATE CLUB OR OTHER ESTABLISHMENT NOT IN FACT OPEN TO THE PUBLIC".

1. President's message; House action.

The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 42 U.S.C. §§ 2000a *et seq.,* had its genesis in President Kennedy's message to Congress of June 1963 (H.R. Doc. 124, 88th Cong., 1st sess.). The first head of that message was entitled "Equal Accommodations in Public Facilities." We would be justified in italicizing *Public,* because nothing that the President urged on the Congress in his extensive remarks under that caption (*id.,* pp. 3-5), too long to quote verbatim here, even by faintest implication suggested opening up private clubs on a non-discriminatory basis.

Responsive to the President's message, the bill that was introduced immediately thereafter (H.R. 7152, 88th Cong., 1st sess.) covered only public accommodations, and in its § 202(b) made an exception for private clubs, as follows:

> "The provisions of this title shall not apply to a bona fide private club or other establishment not open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (a)."

As the bill was reported to the House on November 20, 1963, the text of the foregoing provision was not altered, only renumbered; former § 202(b) became new § 201(e); and, in the process of renumbering, the cross-reference to the basic coverage provision was changed to read "subsection (b)."

The limited amount of committee comment on the private club exception emphasizes its self-evident nature.

The House Judiciary Committee simply said (H.R. Rep. 914, 88th Cong., 1st sess., p. 21):

> "*Section 201(e)* exempts bona fide private clubs or other places not open to the public, except to the extent that their facilities are made available to customers or patrons of a covered establishment."

Other members of that Committee (McCulloch of Ohio, Lindsay of New York, Cahill of New Jersey, Shriver of Kansas, MacGregor of Minnesota, Mathias of Maryland, and Bromwell of Iowa, had this to say (*id.*, Part 2, p. 9):

> "Turning to the 'freedom of association' contention, there is little basis for urging this principle in behalf of owners of business who regularly serve the public in general. This 'freedom' can only be claimed by the party of interest—the owner, not the customer; and the owner of a public establishment, as above mentioned, is hardly in a position to raise it. Moreover, where freedom of association might logically come into play as in cases of private organizations, title II quite properly exempts bona fide private clubs and other establishments. Finally, it must be said that even if freedom of association is considered to be affected to some degree by the application of title II, there is no question that the courts will uphold the principle that the right to be free from racial discrimination outweighs the interest to associate freely where those making the claim of free association have knowingly and for profit opened their doors to the public."

Or, by way of summary, while all concerned recognized the need for opening up places of public accommodation, all concerned equally recognized the need for continued privacy on the part of genuinely private establishments.

Section 201(e) was not further changed in the House, which passed H.R. 7152 on February 10, 1964.

2. Senate discussion and amendment.

On March 23, Senator Smathers read a newspaper column written by David Lawrence, the headline of which was, "Private Clubs Face Rights Fight—Facilities Open to Members' Guests Are Not Exempt in Proposed Law" (110 Cong. Rec. 6006-07). Accordingly, Senator Smathers put this question to Senator Humphrey, in charge of the bill (*id.* 6006):

> "I should like to ask the Senator from Minnesota what is his understanding with regard to the bill as it pertains to so-called private clubs?"

A colloquy ensued, in the course of which the participants agreed to "make some legislative history" (*id.* 6007-08), and Senator Humphrey undertook to expound the meaning of the private club exemption. Here are representative passages from his remarks, showing that he did not consider that the introduction of guests by a member turned such a club into one serving the public (*id.* 6008):

> " 'Which serves the public'—that is the controlling phrase, and is the controlling language that relates to subsection (e) when a private club loses its identity as a private club and becomes a public facility.
>
> "To put it more precisely, the Army and Navy Club which the Senator mentioned is well known

in this community. It has a fine golf club, recreational facilities, swimming pools, dining rooms, recreational halls. It is a membership club. It is a private club and has within its by-laws provisions for members to bring in guests. It is not open to the public.

"Not everyone can stop by and say, 'Hello, my name is John Jones, and I would like to come in and have dinner,' because he would be asked for his membership card. Each membership card generally carries a number.

"If, however, a member of the club called up the manager and said, 'My friend, John Jones, is coming out to the club, and I want you to see that John Jones, his wife, and family have a nice dinner, and put it on my club card.' That means John Jones would be a guest, enjoying the hospitality of a member of the club. There is nothing in the bill that applies to such a club, except that it would be exempt.

"However, if on Saturday night, let us say, the Army and Navy Club decided it did not have enough income from its membership, and that once a week it had to open its facilities to anyone and everyone around the District of Columbia, Maryland, and Virginia, or anyone that came through; in other words, suppose it put up a big neon sign out at the gate which read, 'Tonight these facilities are open to one and all. Come one, come all. Reasonable rates, good dinner, lots of fun, dancing, and pretty girls, swimming pools, and so forth,' the club would give the whole treatment when that sign went up. But it would cease to be a private club, it would take on the character of a public facility or a public business under which it would become an institution or a facility serving the public.

"It is that simple.

"Whenever a private club loses its identity for whatever purpose it may be and becomes a facility

that readily serves the public, then it is a public facility, and the effect of the proposed statute would apply.

* * * * * * * * *

"A private club is a fraternal, civic body. It has a purpose for existing. It has a charter, it has bylaws, and its members agree to live up to those bylaws.

"MR. SMATHERS. I agree with the Senator from Minnesota. I am frankly pleased to hear his explanation. I gather Mr. Lawrence is concerned about the phrase in section (e), subparagraph (e), which reads 'except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).'

"MR. HUMPHREY. The Senator is correct.

"MR. SMATHERS. Subsection (b) has only to do with the public, and he apparently has overlooked that. What he thought was—

"MR. HUMPHREY. The Senator is correct.

"MR. SMATHERS. Because one had restaurants—

"MR. HUMPHREY. The Senator is correct.

"MR. SMATHERS. Because one had restaurants there, and people came in and guests were admitted. Thereafter it would lose the characteristics of a private club, because there was a restaurant serving a guest and, therefore, the whole thing would be opened up and the Federal Government would be able to take it over.

"MR. HUMPHREY. Exactly. My view is that that is not the case. I might go further. The Senator from Florida is a very generous, hospitable man. He likes to entertain his friends. I can well imagine that the Senator from Florida would have membership in a private club—let us take the

Army and Navy Club as an example—and might decide that in the next week or two he would like to take to dinner about 15 of his colleagues in the Senate and their wives, for a little friendly get-together. Personally I would hope that he would bring along a few other people, to liven up the party.

"MR. SMATHERS. If the Senator from Minnesota were among the guests, we would not need anyone else.

"MR. HUMPHREY. That might be true. I was trying to wangle an invitation. If the Senator were to do that, even though not one of those 15 persons was a member of the club, inasmuch as the Senator picked up the tab—because it was the Senator's evening, so to speak—that little party would not make the club take on public characteristics. It would still be a private club, because those people would be there because the Senator from Florida had invited them.

"However, if the club were trying to make ends meet—and that is not unusual these days—and the board of directors decided that a substantial section of the club's facilities should be open to the public, it would then take on the characteristic of a public place, and it thereby would lose its special exemption. That is all that is provided in the bill. I do not believe that Mr. Lawrence's worry is justified.

"If a club were established as a way of bypassing or avoiding the effect of the law, and it was not really a club—I am sure the Senator knows what I mean—and there are clubs like that in existence, where anyone can step up and pay $2 and in that way become a member, with the $2 being used as a kind of cover charge, that kind of club would come under the language of the bill.

"However, the kind of club Mr. Lawrence is worried about would be exempt. If the proposed

> statute is not adequate to give that kind of club an exemption, and to make it crystal clear that it would be exempt, I would favor writing in clarifying language to that effect."

On April 9, 1964, Senator Magnuson, another supporter of the bill, turned to the subject of private clubs. First he read the summary of Section 201(e) already quoted (*supra,* p. 88) from the House report (110 Cong. Rec. 7404). Then he elaborated (*id.* 7407):

> "Let us take a closer look at the provisions of the bill concerning private clubs and other establishments not open to the public generally. Local fraternal organizations, private country clubs, and the like are outside the reach of title II by reason of the bona fide private club exclusion.
>
> "However, the exemption for private clubs does not apply to the extent that they open their facilities to the customers or patrons of a coverage establishment, that is, to the extent they cease to be a private club. For example, if a hotel which is covered by title II has arrangements with a private golf club whereby the hotel's guests can use the club's golf course, the club must make the course available to the hotel guests without racial discrimination. On the other hand, the club could continue to discriminate with respect to its other facilities not subject to its agreement with the hotel. It could discriminate even as to its golf course with respect to other than hotel guests, and could make its facilities available to organizations not covered by title II without conforming to the nondiscrimination requirements of the title.
>
> "The following questions have been raised about this section of the bill:
>
> "First. Suppose a covered motel contains a so-called private club for the recreation of its guests and makes it available to all white guests

upon the payment of a nominal fee. May it refuse to admit a Negro guest?

"No. An arrangement of this sort does not create a bona fide private club within the meaning of title II. The fact that the so-called club admits white persons who can pay the purported membership fee indicates that it is not really a private club at all.

"The clubs exempted by section 201(e) are bona fide social, fraternal, civic, and other organizations which select their own members. No doubt attempts at subterfuge or camouflage may be made to give a place of public accommodation the appearance of a private organization, but there would seem to be no difficulty in showing a lack of bona fides in these cases.

* * * * * * * * *

"Fourth. May a private club sponsor a segregated benefit concert or other performance to which the public is invited?

"The answer is 'Yes' unless the performance is to take place in a hall which customarily presents entertainment moving in interstate commerce, including such a hall owned by the club. On the other hand, if the public is not invited to the performance, but it is presented for club members only, then segregation may occur no matter what kind of hall is used."

More than two months later, on June 13, 1964, Section 201(e) was slightly modified. On that day (110 Cong. Rec. 13697), Senator Long proposed an amendment to change the words "bona fide private club not open to the public" to read "private club not in fact open to the public," saying that

"Its purpose is to make it clear that the test of a private club, or an establishment not open to

> the public, is exempt from title II, relates to whether it is, in fact, a private club, or whether it is, in fact, an establishment not open to the public. It does not relate to whatever purpose or animus the organizers may have had in mind when they originally brought the organization or establishment into existence."

Senator Humphrey, in charge of the bill, accepted the Long amendment:

> "The modification is, I believe, a good one, and the language is more precise.
>
> "The test as to whether a private club is really a private club, or whether it is an establishment, really not open to the public, is a factual one. The language of the proposed amendment reflects that objective.
>
> "It is not our intention to permit this section to be used to evade the prohibitions of the title by the creation of sham establishments which are in fact open to the white public and not to Negroes. We intend only to protect the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis.
>
> * * * * * * * * *
>
> "I believe it tightens up the language, and makes it mean what we said it meant, rather than what someone else might feel was the intent."

After the Long amendment was then agreed to, Senator Hill proposed his Amendment No. 680, to make the bill inapplicable to "homes, churches, cemeteries or to private clubs of any kind or to fraternities or other organizations of any kind membership in which is selective." He modified his proposal, in view of the adoption of the Long amendment, to strike therefrom

the words "or to private clubs of any kind" (110 Cong. Rec. 13697).

After mentioning homes, churches and cemeteries, Senator Hill continued (*id.* at 13697-13698):

> "As to fraternities, does any Senator believe that the Federal Government should intrude upon or interfere with the membership of the fraternity, whether Masonic, Knights of Columbus, Knights of Pythias, or any other fraternal order. That is what this amendment would do, protect the fraternity from any such aggression or intrusion on the part of the Government.
>
> "This is the purpose of my amendment. Where we have privacy, where we have sanctity, where we have sacredness today, this amendment would insure that the privacy, the sanctity, and the sacredness would be honored and would be observed and there could be and would be no Government interference or intrusion."

Senator Hart objected (p. 13698):

> "Section 202 prescribes discrimination or segregation if it is required by a State or local law. Amendment No. 680 would specifically exclude the following from the application of section 202: homes, churches, cemeteries, private clubs, fraternities and organizations of any kind, membership in which is selective.
>
> "Since, so far as appears, there are no State or local laws requiring segregation in places enumerated in amendment No. 680, the amendment would seem to have no practical effect. At any rate, such laws would obviously be unconstitutional.
>
> "Presumably, amendment No. 680 is intended primarily as a congressional expression favorable to the maintenance of segregation in all of the

> places to which it would apply. If the amendment were adopted, some State and local legislative bodies might enact laws requiring discrimination in these places if only to have legislation on the books reflecting a segregationist public policy. With justification, they could point to this amendment as support for such legislation.
>
> "Clearly, therefore, this amendment should be rejected."

On a roll-call vote, the Hill amendment was rejected, 26-58 (*ibid.*).

Thereafter Section 201(e) of the Civil Rights Act of 1964 was not further changed, and it became law with the modification that the Long amendment involved.

The foregoing summary of the legislative history of the private club exemption in § 201(e) establishes in our view three significant points.

First, Congress established that exemption with a minimum of debate and obviously universal acceptance.

Second, Congress drew a line, easily susceptible of ascertainment by objective standards, to mark the boundary between the constitutionally protected right of freedom of private association on the one hand and the right to be free from discriminatory state action on the other.

Third, in fixing that boundary, the Congress responded to the invitation earlier extended by some members of this Court (*Bell* v. *Maryland,* 378 U.S. 226, 317):

> "In the give-and-take of the legislative process, Congress can fashion a law drawing the guidelines necessary and appropriate to facilitate practical

administration and to distinguish between genuinely public and private accommodations. In contrast, we can pass only on justiciable issues coming here on a case-to-case basis."

B. THE FOREGOING GUIDELINE SHOULD BE GIVEN THE SAME EFFECT AS OTHER CONGRESSIONAL ENACTMENTS ENFORCING THE CIVIL WAR AMENDMENTS.

Congress enacted the Civil Rights Act of 1964 in response to President Kennedy's urging that it "assert its specific constitutional authority to implement the 14th amendment" (H.R. Doc. 124, 8th Cong., 1st sess., p. 6), that authority being Section 5 of the same amendment, declaring (*supra,* p. 4) that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Accordingly, this Court has consistently supported every Congressional determination in the civil rights enforcement area—and we cite cases from all three post-Civil War Amendments interchangeably, since all three have virtually identical enforcement provisions. *South Carolina* v. *Katzenbach,* 383 U.S. 301; *Katzenbach* v. *Morgan,* 384 U.S. 641; *Cardona* v. *Power,* 384 U.S. 672; *Jones* v. *Mayer Co.,* 392 U.S. 409; *Gaston County* v. *United States,* 395 U.S. 285; *Perkins* v. *Matthews,* 400 U.S. 379; cf. *Oregon* v. *Mitchell,* 400 U.S. 112.[8]

Briefly to summarize those recent landmarks, in *South Carolina* v. *Katzenbach,* 383 U.S. 301, the Court sustained the provisions of the Voting Rights Act of 1965 that establish elaborate Federal machinery to

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[8] Thirteenth Amendment, Section 2: "Congress shall have power to enforce this article by appropriate legislation."

Fifteenth Amendment, Section 2: "The Congress shall have power to enforce this article by appropriate legislation."

strike down discriminatory voting practices, machinery resting on formulas too detailed to permit of summary here; in *Katzenbach* v. *Morgan,* 384 U.S. 641, the Court sustained other provisions of the same Act, overriding a state statute requiring literacy in the English language as a prerequisite to voting, and followed that decision in *Cardona* v. *Power,* 384 U.S. 672; in *Jones* v. *Mayer Co.,* 392 U.S. 409, the Court held that under the Thirteenth Amendment (which unlike the Fourteenth is not limited to state action) Congress could provide in 42 U.S.C. § 1982 that private individuals could not refuse to sell a house on the sole ground that the purchaser is a Negro; in *Gaston County* v. *United States,* 395 U.S. 285, the Court sustained still another portion of the Voting Rights Act of 1965 that suspended enforcement of a state literacy test because of prior educational discrimination; in *Perkins* v. *Matthews,* 400 U.S. 379, the Court sustained yet another provision of the Voting Rights Act of 1965, which had the effect of setting aside a municipal election because of changes in election procedures; while in *Oregon* v. *Mitchell,* 400 U.S. 112, the Court sustained the power of Congress to lower the voting age in Federal elections while denying Congress such power in respect of state elections.[9]

We have brushed over the particulars of those decisions because of the overriding significance of the principle that they illustrate: The power of Congress under the enforcement provisions of the Civil War Amendments is plenary, quite as full indeed as its power under the Necessary and Proper Clause, and the test is not whether Congress was wise or unwise, not whether

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[9] See also *Griffin* v. *Breckenridge,* No. 144, decided on June 7, 1971, which sustained 42 U.S.C. § 1985(3) as appropriate action to enforce the Thirteenth Amendment.

more or less should have been legislated, but simply whether, fairly construed, what was enacted was reasonably appropriate. The test, in short, is that laid down by the Great Chief Justice more than a century and a half ago (*M'Culloch* v. *Maryland,* 4 Wheat. 316, 421):

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Here the end is indeed appropriate, because Congress is drawing a line between competing considerations, the right of some citizens to be free to associate with only those with whom they desire to associate on private premises not offered for public accommodation, and the countervailing right of other citizens to be free from discriminatory state action. That line, which excepts "a private club or other establishment not in fact open to the public" from the operation of Title II of the Civil Rights Act of 1964, actually gives full effect to both sides of constitutionally protected liberties.

There is no question here of granting Congress power to restrict, abrogate, or dilute the guarantees of equal protection and of due process. Cf. *Katzenbach* v. *Morgan,* 384 U.S. 641, 651 n. 10, 668. Here the substantive guarantees of the Fourteenth Amendment are neither diluted nor denied, first because Section 201(e), by giving effect to the constitutionally protected liberties of privacy and private association, actually enforces First Amendment rights; and, second because, as we have shown in Point IV, *supra,* pp. 59-85, there

is here no state action—at which of course the Fourteenth Amendment is alone directed.

Thus, bearing in mind that the Fourteenth Amendment has long since been deemed to incorporate the First (e.g., *Gitlow* v. *New York,* 268 U.S. 652; *Stromberg* v. *California,* 283 U.S. 359; *DeJonge* v. *Oregon,* 299 U.S. 353; *Hague* v. *CIO,* 307 U.S. 496), Congress by enacting Section 201(e) has given full effect to all aspects of the Fourteenth Amendment.

The ready acceptance of Section 201(e) by all concerned, in a series of debates prior to enactment whose length and thoroughness have been equalled in few if any instances in recent history, reflects a well-nigh universal consensus in support of the legislative determination. For the Court now to accord deference to what Congress said in this area accordingly involves not only respect to a coordinate branch of the government, but recognition as well of a virtually unanimous understanding.

That understanding is emphasized by the circumstance that many state civil rights laws similarly exempt private clubs, some impliedly because they deal in terms with *public* accommodations, some specifically: According to a recent study, sixteen of these state enactments expressly exempt private clubs. See 54 Geo. L.J. 915, 922-923, 939 (1966).

And, as the numerous cases cited by us at pp. 54-55, above, show, the problems encountered in administering the state private club exception are identical with those arising in judicial interpretation of Section 201(e). That is why we cited there both sets of decisions without differentiation.

Actually, even to speak of "problems" is to inflate unduly what several years of litigating experience have shown to be no problem at all. That is because the ascertainment of whether a given undertaking is or is not "a private club or other establishment not in fact open to the public" is a purely factual inquiry, far easier of determination than at least three-quarters of the normal grist that falls to trial courts every day.

Consequently, by accepting the demarcation since drawn by Congress, the Court will be enabled to assure a resolution between competing constitutional claims that is workable, that is perfectly clear, that in consequence will not spawn a new and further litigation explosion, and that gives full effect to both sets of contentions in the traditional manner of reading together every provision of our fundamental law.

It bears reiteration that, as is shown in full detail in part B of the Statement (*supra,* pp. 12-15), the completely private nature of Moose Lodge No. 107 was stipulated by the parties, recognized by the court below, and once again admitted by the appellee Irvis here (Motion to Affirm 8): "Appellant is a private club."

Indeed, insofar as the Moose Lodge's activities extend to catering, they comply with the second clause of Section 201(e), viz., "except to the extent that the facilities of such establishment are made available to customers or patrons of an establishment within the scope of subsection (b)," the general enforcement provision. For, the parties have stipulated, when the Moose Lodge engages in catering, it "imposes no restrictions on the race or color of persons belonging to the outside group so using its facilities" (Stip., ¶ 6, A. 25).

This interpretation is in exact accord with the views expressed by the Senate supporters of the Act (*supra,* pp. 89-94).

C. THE PROVISIONS OF THE CIVIL RIGHTS ACT OF 1964 THAT PROHIBIT DISCRIMINATION ON THE FOUR STATED GROUNDS OF "RACE, COLOR, RELIGION OR NATIONAL ORIGIN" EMPHASIZE IN STILL ANOTHER ASPECT THE UNTENABILITY OF THE DISTRICT COURT'S DISTINCTION BETWEEN A PRIVATE CLUB'S MEMBERSHIP RESTRICTIONS THAT ARE RACIAL AND THOSE THAT ARE RELIGIOUS OR ETHNIC.

The Congressional standard for equal treatment, set forth no less than eight times in four titles of the Civil Rights Act of 1964, forbids discrimination on four stated grounds: "race, color, religion or national origin." See Sections 201(a), 202, 301(a), 401(b), 402, 407(a)(2), 410, and 504(a), the last cited amending three subdivisions of § 104(a) of the Civil Rights Act of 1957; for the codified references, see 42 U.S.C. §§ 2000a(a), 2000a-1, 2000b(a), 2000c(b), 2000c-1 [listed but not codified], 2000c-6(a)(2), 2000c-9, 1975c (a)(1)-(3).

"Sex" was named in Title VII, Equal Employment Opportunity, as an additional area of forbidden discrimination. See Section 703 (eight subdivisions) and § 704(b)(2); the codified references are 42 U.S.C. §§ 2000e-2 and 2000e-3(b); see *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542.

"Religion" as an improper differentiation was omitted in Section 601 (42 U.S.C. §§ 2000d), an omission of course reflecting only the parochial school and sectarian college problem. Cf. *Flast* v. *Cohen,* 392 U.S. 83; *Board of Education* v. *Allen,* 392 U.S. 236; *Pierce* v. *Society of Sisters,* 268 U.S. 510.

Finally Section 801 (42 U.S.C. § 2000f), prescribing the duty of the Secretary of Commerce to conduct "a

survey to compile registration and voting statistics in such geographic areas as may be recommended by the Commission on Civil Rights," though it similarly omits "religion," adds as forbidden subjects of inquiry "his political party affiliation, how he voted, or the reasons therefor."

Yet despite these readily accessible indicia of Congressional enforcement of the Fourteenth Amendment, the court below, without once speaking of or even intimating reliance on the statutory omissions that seek an adjustment in respect of sectarian education, found a distinction between racial and religious or ethnic discrimination in a wholly secular fraternal body, striking down the first but supporting the latter two (A. 40).

Once again, though in a different context and on a different approach, the untenability of that distinction is starkly demonstrated by the terms of the Civil Rights Act of 1964.

We are not unaware, of course, of the recent Maine statute, which, though nowhere cited by the district court, anticipated the identical distinction that was made below. The operative part of Chapter 371, Maine Laws of 1969, provides as follows:

> "No person, firm or corporation holding a license under the State of Maine or any of its subdivisions for the dispensing of food, liquor or for any service or being a State of Maine corporation or a corporation authorized to do business in the State shall withhold membership, its facilities or services to any person on account of race, religion or national origin, except such organizations which are oriented to a particular religion or which are ethnic in character."

It seems sufficient at this juncture simply to remark that, in the light of the several considerations already

canvassed in the earlier portions of the present brief, the quoted statute bristles with constitutional problems right on its face. But it will be time to discuss those problems—and the infirmities to which they give rise—if and when they are presented here in actual litigation.

D. ANY GENUINELY PRIVATE ORGANIZATION IS, IN RESPECT OF THE CHARACTER OF ITS MEMBERSHIP, BEYOND THE POWER OF GOVERNMENT TO REGULATE.

When Congress enacted the provisions directed at "Discrimination in Places of Public Accommodation," contained in Title II of the Civil Rights Act of 1964, and excepted from those provisions "a private club or other establishment not in fact open to the public," it was giving effect to the constitutionally protected liberties of privacy and private association that are inherent in the right of every individual to express his likes, his dislikes, his prejudices, and his after-judgments by joining a private club composed of like-minded persons.

Not only that, but in thus drawing the line, Congress very properly stopped short of finding state action in a situation where, both conceptually as well as realistically, no arm of the state in fact participated.

The obvious way for this Court to give full effect not only to the reach of the First Amendment but also to the limitations of the Fourteenth is to respect and reaffirm the Congressionally drawn boundary between those apparently conflicting constitutional rights—a step that, necessarily, requires reversal of the judgment below.

We conclude with a formulation of the constitutionally guaranteed right to privacy and to private association inherent in club membership, one expressing the view that, so far as the character of its membership is concerned, every genuinely private organization is to

that extent beyond the reach of governmental regulation. That formulation is not "authority" here, since it is not only the expression of a single District Judge but is dictum as well, inasmuch as the club there under consideration was held to be, in fact, a place of public accommodation. But the basic constitutional principle was there so fully and so convincingly delineated that we adopt it here as our own—and of course it would be indefensible plagiarism were we to set it forth without attribution.

Judge Singleton of the Southern District of Texas said in *Wright* v. *Cork Club,* 315 F. Supp. 1143, 1156-1157:

> "In conclusion, to make it perfectly clear, the Court wishes to reiterate that any truly private organization or association, such as a country club, a social club, a business partnership, or a political association would be beyond the bounds of government regulation with regard to membership. More often than not the resolution of constitutional disputes is accomplished, not by the application of absolute rules, but by a balancing process. The cause of racial integration is a laudable one indeed. But to allow the government to intrude into the essentially private affairs of men, even in the name of integration, would work a greater injustice to all citizens, no matter what may be their race, creed, or religion.
>
> "To allow such a governmental intrusion would violate not only the First Amendment, but the very essence of the Bill of Rights. The Bill of Rights stands for the proposition that there are bounds beyond which the government cannot go in interfering with individual rights. The Supreme Court in numerous past decisions has drawn the lines establishing the metes and bounds of governmental authority. [Citing *Griswold* v. *Connecticut,* 381 U.S. 479, for privacy of marriage; *Katz* v.

> *United States,* 389 U.S. 347, for privacy of conversations; *Mapp* v. *Ohio,* 367 U.S. 643, for privacy of home; and *NAACP* v. *Alabama,* 357 U.S. 449, for privacy of association.] Foremost among the protected areas is the privacy of the individual, in his home, in his private associations, and even in the very words which he utters in private. The Bill of Rights, though it does not say it in so many words, guarantees to every individual the basic right of privacy. In essence, when the courts protect the individual from governmental interference with his right of assembly or freedom of speech and press, protect him from unreasonable searches and seizures or from being forced to incriminate himself, they are protecting his integrity and privacy as an individual. Underlying the specific guarantees of the Bill of Rights is a basic concern for the integrity and privacy of the individual.

[After quoting from *Griswold* v. *Connecticut,* 381 U.S. 479, 483:]

> "Thus, before Title II of the Civil Rights Act can be applied to a so-called 'private club,' a Court must determine, as this Court has done, that the organization is not in fact a private club. In this Court's view, governmental regulation of the membership of private clubs is beyond the pale of governmental authority. If the government were allowed to regulate the membership of truly private clubs, private organizations, or private associations, then it could determine for each citizen who would be his personal friends and what would be his private associations, and the Bill of Rights would be for naught."

It is not without significance that similar formulations have been made by members of this Court (*Bell* v. *Maryland,* 378 U.S. 226, 313, quoted at p. 45, *supra; Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539, 565, 570, 575-576, quoted at pp. 49-50, *supra*).

CONCLUSION

The judgment below is palpably erroneous and must be reversed.

If the Court is of opinion that the appellee Irvis has lost standing to sue by reason of rejecting the only form of decree that would have given him personal redress, then such reversal should include a direction to dismiss the complaint for lack of Article III jurisdiction, since it now appears that no Case or Controversy presently exists.

If however the Court is of opinion that jurisdiction was not lost, then such direction to dismiss should rest on the failure of the complaint to state a claim on which relief could be granted.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N. W.,
Washington, D. C. 20006,
Counsel for the Appellant.

CLARENCE J. RUDDY,
111 West Downer Place,
Aurora, Illinois 60504,

ROBERT E. WOODSIDE,
Two North Market Square,
Harrisburg, Pennsylvania 17101,

THOMAS D. CALDWELL, JR.,
123 Walnut Street,
Harrisburg, Pennsylvania 17108,

Of Counsel.

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