INDEX

Page

II. There is no case or controversy here, not because the appellee Irvis has failed to allege an asserted injury, but because the relief he sought and obtained, as well as the modified relief that he refused, neither afford him redress nor render impossible repetition of the incident that triggered this litigation 2

III. The very basis of the First Amendment right of private association guaranteed by the Federal Constitution is the expression of personal preference, and that preference need not be either rational or reasonable or universal in scope in order to be protected against state efforts to penalize its exercise 6

A. The First Amendment right to the expression of one's personal associational preferences is neither restricted to the advocacy of ideas nor limited to preferences that others would approve 6

B. A private association's benevolent purposes are not rendered less so because restricted to members of a particular racial group 13

C. Exercise of the First Amendment right of private association may not be penalized by a state through withdrawal of licenses or otherwise 14

D. No decision relied on by Irvis except one has ever considered the impact of the liquor-license-equals-state-action theory on the federally granted right of private association, and that one was at pains to point out that the asserted right of freedom from discrimination did not apply to a private club 18

IV. Under no permissible calculus of constitutional interpretation can the issue of a liquor license to

Page

a private club transform that club's acts into state action that is subject to the Fourteenth Amendment 20

A. Irvis's support of the exemptions granted by the court below to private clubs having religious and ethnic rather than racial membership restrictions actually constitutes a rejection of the very "state involvement" concept that is central to his case and that he consistently espouses elsewhere in his argument 20

B. The only decision other than the one now on appeal that up to now has adopted the view that issuance of a liquor license transforms the acts of the licensee into those of the licensor rests on minority views here 25

C. The entire concept of "partnership" between a state and its licensees, which is the essential rationale of the metamorphosis theory that transmutes action of the licensee into action of the licensor, constitutes not only a fictitious attenuation of the very essence of state action, but blurs the Fourteenth Amendment to the extent of rewriting it 32

D. The rise and fall of the doctrine that extended tax immunities to government instrumentalities emphasizes both the dangers of artificial constitutional interpretations as well as the wisdom of starting anew from the Constitution itself 37

V. Congress has marked a reasonable and defensible boundary between apparently competing constitutionally protected liberties that should be respected and not trivialized 42

A. Irvis's construction of Section 201(e) of the Civil Rights Act of 1964 trivializes that enactment 42

B. Every Congressional enactment is an interpretation of the Constitution by the Legislature regardless whether it is specifically labeled as such 43

Page

C. Irvis's belated invocation of the Thirteenth Amendment is contradicted and completely neutralized by what he has elsewhere told this Court 47

D. The reasonableness of the Congressional exemption for private clubs is solidly attested by the widespread existence of such clubs and organizations, whose aggregate membership includes scores of millions of Americans 52

Conclusion 56

AUTHORITIES

CASES:

Adickes v. *Kress & Co.*, 398 U.S. 144 33
American Sugar Refining Co. v. *Louisiana*, 179 U.S. 89 .....22, 55
Atlanta Motel v. *United States*, 379 U.S. 241 53
Bank of Augusta v. *Earle*, 13 Pet. 519 16
Bank of the United States v. *Deveaux*, 5 Cranch 61 .. 16
Bell v. *Maryland*, 378 U.S. 226 .....7, 8, 9, 16, 25, 28, 36, 44, 55
Brush v. *Commissioner*, 300 U.S. 352 .....38, 39
Bullock v. *United States*, 122 F.2d 213 35
Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393 ...37, 39
Burton v. *Wilmington Pkg. Auth.*, 365 U.S. 715 18
Child Labor Tax Case, 259 U.S. 20 56
Collector v. *Day*, 11 Wall. 113 37
Dandridge v. *Williams*, 397 U.S. 471 47
DeCrow v. *Hotel Syracuse Corp.*, 288 F. Supp. 530 .. 31
Dobbins v. *Erie County*, 16 Pet. 435 37
Donald v. *Philadelphia & R. Coal & I. Co.*, 241 U.S. 329 17
Doyle v. *Continental Ins. Co.*, 94 U.S. 535 17
Evans v. *Newton*, 382 U.S. 296 .....7, 8, 9, 52
Everson v. *Board of Education*, 330 U.S. 1 .....22, 54
Federal Trade Comm. v. *Jantzen, Inc.*, 386 U.S. 228.. 45
Fox Film Corp. v. *Doyal*, 286 U.S. 123 39
Garner v. *Louisiana*, 368 U.S. 157 28
Gillespie v. *Oklahoma*, 257 U.S. 501 .....37, 39

Page

Graves v. *O'Keefe,* 306 U.S. 466 .....39, 40
Griffin v. *Breckenridge,* 403 U.S. 88 .....51, 52
Guy v. *Donald,* 203 U.S. 399 35
Harrison v. *St. Louis & S.F. R. Co.,* 232 U.S. 318 ... 17
Helvering v. *Gerhardt,* 304 U.S. 405 .....39, 40
Helvering v. *Mountain Producers Corp.,* 303 U.S. 376 39
Hernandez v. *Texas,* 347 U.S. 475 .....22, 54
Home Ins. Co. of N. Y. v. *Morse,* 20 Wall. 445 17
James v. *Dravo Contracting Co.,* 302 U.S. 134 39
Johnson v. *United States,* 163 Fed. 30 44
Jones v. *Securities & Exch. Comm.,* 298 U.S. 1 49
Keifer & Keifer v. *Reconstruction Finance Corp.,* 306 U.S. 381 45
Lemon v. *Kurtzman,* 403 U.S. 602 .....26, 27, 28
Ex parte Levitt, 302 U.S. 633 5
Lombard v. *Louisiana,* 373 U.S. 267 28
Long v. *Rockwood,* 277 U.S. 142 .....38, 39
Louisville, &c., R.R. v. *Letson,* 2 How. 497 16
Lowden v. *Northwestern National Bank,* 298 U.S. 160 35
M'Culloch v. *Maryland,* 4 Wheat. 316 37
Minnesota Mining v. *New Jersey Wood Co.,* 381 U.S. 311 45
Minor v. *Happersett,* 21 Wall. 162 31
Morley Construction Co. v. *Maryland Casualty Co.,* 300 U.S. 185 47
Muller v. *Oregon,* 208 U.S. 412 53
Panhandle Oil Co. v. *Mississippi,* 277 U.S. 218 38
Perez v. *United States,* 402 U.S. 146 52
Reitman v. *Mulkey,* 387 U.S. 369 28
Rogers v. *Graves,* 299 U.S. 401 38
Schware v. *Board of Bar Examiners,* 353 U.S. 232 .. 22
Seidenberg v. *McSorley's Old Ale House, Inc.,* 308 F. Supp. 1253, 317 F. Supp. 593 .....19, 20, 28, 29, 31
Tilton v. *Richardson,* 403 U.S. 672 .....27, 28
Torcaso v. *Watkins,* 367 U.S. 488 .....22, 54
United Public Workers v. *Mitchell,* 330 U.S. 75 ....22, 55
United States v. *American Ry. Exp. Co.,* 265 U.S. 425 47
United States v. *Carolene Products Co.,* 304 U.S. 144 53
United States v. *Florida,* 363 U.S. 123 .....45, 46
United States v. *Hutcheson,* 312 U.S. 219 45

Page

Vermilya-Brown Co. v. *Connell,* 335 U.S. 377 45
Walz v. *Tax Commission,* 397 U.S. 664 .....27, 28

CONSTITUTION OF THE UNITED STATES:

Article III, § 2 16
First Amendment 6, 7, 8, 9, 11, 14, 15, 17, 27, 51, 55
Thirteenth Amendment 47, 48, 49, 50, 51, 52
Fourteenth Amendment 20, 21, 22, 31, 32, 36, 40, 47, 50, 51, 54
Equal Protection Clause 22, 31, 37, 41, 50, 51, 54
Nineteenth Amendment 31

STATUTES:

U.S. Statutes:

Civil Rights Act of 1964 .....46, 52
Section 201(a) 31
Section 201(e) 20, 42, 43, 44, 56
Title II 42

First Judiciary Act, § 12, 1 Stat. at 79 16
26 U.S.C. § 11 34
28 U.S.C. § 1332(c) 16
42 U.S.C. § 1983 3
42 U.S.C. § 2000a(a) 31

Pennsylvania Statute:
Solicitation of Charitable Funds Act 27

MISCELLANEOUS:

Bradford, *Of Plymouth Plantation* (Morison ed., 1952) 90, 92 11
Carrie Chapman Catt, *Woman Suffrage by federal constitutional amendment* (1917) 31
11 Dict. Amer. Biog. 547-548 11
15 Encyc. Social Sciences 439, 446-447 31
2 Farrand, *Records of the Federal Convention* (1911) 278 41
Holmes, *Natural Law,* 32 Harv. L. Rev. 40 11
H. R. Rep. 914, 88th Cong., 1st sess., Part 2, p. 9 43

Page

Pennsylvania Liquor Control Board Regulations:
Regulation 113 24
Regulation 113.09 30
Regulation 119 ..... 24, 25
1 Pollock & Maitland, *History of English Law* (2d ed., 1898) 468-475 50
Register of the Society of Mayflower Descendants in the District of Columbia, 1970, p. 82 10
Select Pleas, Starrs, &c., of the Exchequer of the Jews (Selden Society vol. 15, 1901) 50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-75

MOOSE LODGE NO. 107, *Appellant,*

v.

K. LEROY IRVIS, *et als.*

On Appeal From the United States District Court for the Middle District of Pennsylvania

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REPLY BRIEF OF APPELLANT MOOSE LODGE NO. 107

This is a reply brief. We shall not attempt either to repeat or to restate the arguments already fully set forth in our brief in chief (Moose Br.), nor shall we indulge in laborious, point-by-point refutation of what the appellee Irvis has adduced in his 111 pages (Irvis Br.). Rather, we shall endeavor to deal, as summarily as possible, both with the basic errors contained in that document, as well as with the specific

matters therein which seem in most urgent need of correction.

We follow below both the outline and the Roman numeral headings of our brief in chief, although the captions of each heading vary in phraseology from those previously employed.

II. THERE IS NO CASE OR CONTROVERSY HERE, NOT BECAUSE THE APPELLEE IRVIS HAS FAILED TO ALLEGE AN ASSERTED INJURY, BUT BECAUSE THE RELIEF HE SOUGHT AND OBTAINED, AS WELL AS THE MODIFIED RELIEF THAT HE REFUSED, NEITHER AFFORD HIM REDRESS NOR RENDER IMPOSSIBLE REPETITION OF THE INCIDENT THAT TRIGGERED THIS LITIGATION

The appellee Irvis says (Irvis Br. 34) that we conclude that he "has suffered no personal injury for which he seeks redress," and that (*id.* 42) he "is an injured party with a direct, personal stake in the judicial resolution of his complaint;" in the intervening 8 pages he argues that he did indeed have standing to sue (*id.* 34-42).

All of this completely misapprehends our position. We never said that he lacked standing to sue, we simply demonstrated (Moose Br. 38-44) that the redress he sought and obtained, as well as the modified relief that he refused, neither afforded him redress nor rendered impossible repetition of the incident of which he complained. Consequently it was clear that he sought simply an abstract declaration, legislative in character and obviously punitive in effect.

That conclusion can be set forth in syllogistic fashion.

1. Irvis complained that, when he requested service of food and beverages, Moose Lodge through its agents

and employees refused him service, solely because of his race (Complt., ¶ 11, A. 6; admitted by Moose Ans., ¶ 6, A. 17).

2. This being the asserted injury, how can it be redressed?—assuming as we must under the present heading that the complaint stated a cause of action.

3. It could be redressed by damages under 42 U.S.C. § 1983 (Moose Br. 5)—but Irvis did not seek damages.

4. It could be redressed by striking out the Caucasions-only clause in the Moose Constitution—but Irvis has consistently conceded in this Court the Moose Lodge's right to bar him from membership (Motion to Affirm 9; Irvis Br. 39).

5. It could be redressed by enjoining the Moose Lodge from refusing him admission when accompanying a Lodge member—but Irvis objected to that modification in the district court (A. 44-47; details at Moose Br. 18-19), and still disclaims any desire for guest privileges now (Irvis Br. 35, 41).

6. What Irvis sought (Cmplt., Prayer 2, A. 7-9), what he received (Decree, ¶ 3, A. 41-42), and what he insists on here (Irvis Br. *passim*) is a decree that lifts the Moose Lodge's liquor license if that body does not eliminate its racial membership restriction.

It now remains to test what would happen if the decree below were affirmed and Moose Lodge No. 107 adhered to its membership preferences.

Plainly, it would lose its liquor license.

The immediate consequence of that deprivation, one could reasonably suppose, would be that members bent

on conviviality would operate a locker system. Thus they would use their own bottles, no sales of liquor would take place, and the Moose Lodge would supply only set-ups and mixers. This is the traditional and usual *modus vivendi* in other partially dry states, nor does such a locker system violate the Pennsylvania Liquor Code in any way, just so long as club employees are not paid for the service of or the mixing of drinks.

Suppose, then, another member once more introduced Mr. Irvis into the Lodge as a guest, with a view to entertaining him with dinner and with a drink served from that member's locker.

Once again, the Moose Lodge's agents and employees would refuse him service—and probably admission as well, since he is not now eligible to be a guest—and not a single syllable in the decree now under review would in any manner prevent them from doing so.

For Irvis has not only said that he did not wish to enter either as a member or a guest, but he has argued that the building and elevator and restaurant permits and licenses are wholly unlike the liquor license against which he has massed all of his forensic artillery (Irvis Br. 55-56, 62, 64).

Therefore, Moose Lodge is not required by the decree to vacate its building, shut down its elevator, close its dining facilities, or cease operating a locker system. Moose Lodge will have everything it has now, except a liquor license permitting sale by the Lodge to its members; in every other respect, its situation remains unchanged: Moose Lodge No. 107 maintains its premises and its restaurant; it maintains its membership restrictions, with no injury to Irvis, who does not wish

to join; and it maintains its guest restrictions, a status that Irvis rejects.

In short, full compliance with the decree below does not admit Irvis to the Moose Lodge; in that respect matters remain as before—with the single exception that Moose Lodge members cannot buy drinks at a bar but must bring their own bottles to their club lockers.

That is why we say that that decree affords Irvis no redress; that is why we have articulated the contention that the relief Irvis sought and received is essentially punitive, legislative, and abstract in nature: It does not help him, it only inflicts injury on Moose Lodge, as the parties have stipulated (see Moose Br. 18 and Irvis Br. 6, 61-62).

Consequently, since the thrust of Irvis's demands is that the Commonwealth withdraw its liquor license, since that was the precise relief granted, and since that relief would in no sense effectuate either Irvis's membership in the Moose or his entrance into the Moose premises—both of which he emphatically not to say indignantly rejects—it follows, not only that he has no interest whatever in redress for his asserted injury, but that, to the contrary the record plainly shows that "he has merely a general interest common to all members of the public" (*Ex parte Levitt,* 302 U.S. 633, 634).

Hence, inescapably, there is no longer any Case or Controversy.

III. THE VERY BASIS OF THE FIRST AMENDMENT RIGHT OF PRIVATE ASSOCIATION GUARANTEED BY THE FEDERAL CONSTITUTION IS THE EXPRESSION OF PERSONAL PREFERENCE, AND THAT PREFERENCE NEED NOT BE EITHER RATIONAL OR REASONABLE OR UNIVERSAL IN SCOPE IN ORDER TO BE PROTECTED AGAINST STATE EFFORTS TO PENALIZE ITS EXERCISE

A. The First Amendment Right to the Expression of One's Personal Associational Preferences Is Neither Restricted to the Advocacy of Ideas Nor Limited To Preferences That Others Would Approve

The appellee Irvis's position on the constitutionally protected right of private association invoked by Moose Lodge No. 107 is so grudgingly limited, so uncertain, and ultimately so very contradictory, as to make plain that he either does not understand the scope of that First Amendment right or else is unwilling to give full effect to its breadth.

His discussion commences with this passage (Irvis Br. 92-93):

> "* * * we agree with the basic application of the first of these points as it has been expressed in the two cases cited by Moose Lodge (Brief, pp. 45-46), *Bell* v. *Maryland,* 378 U. S. 226 at 313 and *Evans* v. *Newton,* 382 U. S. 296 at 298-99. We agree with this right of private association because this right is encompassed in the constitutionally protected right to freedom of assembly. We agree with it notwithstanding its reflection of an aspect of human nature which debases our national purpose, thwarts full participation of all our citizens in our national life and furthers a sense of inferiority among those excluded."

A footnote quotes from a work on *The Protestant Establishment—Aristocracy & Caste in America,* to the effect that "the members of minority groups are

keenly sensitive to institutionalized exclusion of members of their own groups regardless of their merits and manners."

Both Irvis's own text as well as the quotation adduced in its support reflect not only misunderstanding but also misstatement.

To begin with, the essence of the First Amendment right of private association is the selection of one's associates—and of course the concomitant of selection is exclusion of those not selected. This is plain from the very excerpts that Irvis purports to approve.

Thus in *Bell* v. *Maryland,* 378 U.S. 226, 313, three members of the Court said (italics added):

> "Prejudice and bigotry in any form are regrettable, but *it is the constitutional right of very 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 said (italics added):

> "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. * * * A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association."*

Two observations are in order at this point.

First, while of course there are obvious differences between homes and clubs, the foregoing excerpts indi-

cate very clearly that the First Amendment right of private association extends equally to both. In the passage from his brief already quoted (Irvis Br. 92-93; *supra* p. 6) Irvis professes agreement with what is said in *Bell* v. *Maryland,* 378 U.S. 226, 313, and in *Evans* v. *Newton,* 382 U.S. 296, 298-299. But later on (Irvis Br. 99) he qualifies that approval by asserting that "The values attendant upon preservation of privacy in the home simply do not apply to the situation involved in an organization like Moose Lodge."

To this it is sufficient to say that the right of associational freedom, which the present case involves, is very obviously broader than Irvis's phrasing, "preservation of privacy." We forego the opportunity to score debating points over the shift in position from unqualified if grudging approval of *Bell* v. *Maryland* and *Evans* v. *Newton* that Irvis's present argument necessarily involves.

Second, Irvis again shifts from approval of those decisions when he seeks to transform—and to limit—the right of private association to one that is related to advocacy. He says (Irvis Br. 98):

> "Where the right of private association is asserted by members of a group seeking to advance ideas and beliefs flowing from their exercise of the right of free speech and the right of free assembly (e.g., political advocacy), then the protection afforded them through granting primacy to the freedom of private association should be recognized; and possible discriminatory consequences flowing from the granting of this protection should be endured. On the other hand, where the right of private association is asserted in order to advance common social or fraternal interests, it should not be given precedence over racially discriminatory actions taken in furtherance of such common interests."

The short answer to the foregoing is that the First Amendment right of private association has never been so limited in any expressions here, but, on the contrary, has been much more broadly delineated. It will clarify matters if, at the risk of repetition, we quote again from the basic decisions that Irvis purports (Irvis Br. 92-93) to accept:

> "* * * 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." *Bell* v. *Maryland,* 378 U.S. at 313.

> "A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association." *Evans* v. *Newton,* 382 U.S. at 299.

Consequently the exercise of personal preferences cannot—recurring to Irvis Br. 93—fairly be characterized as involving a debasement of national purpose. For, necessarily, in a pluralistic society such as ours, virtually every association of like-minded persons excludes others. Therefore "full participation of all our citizens in our national life" (*ibid.*) surely cannot mean that the Republic is morally doomed unless everyone can belong to everything.

And to say (*ibid.*) that every club membership restriction of whatever nature "furthers a sense of inferiority among those excluded," keying that assertion to "the members of minority groups" (*ibid.,* note 22), is to compound misunderstanding with misstatement stemming from unawareness; indeed, it involves repetition of a shopworn stereotype that in many instances simply does not square with the facts.

For one thing, minority groups frequently exclude overwhelmingly large majority groups; for another, "institutionalized exclusion of members * * * regardless of their merits and manners" is consistently directed at members, frequently distinguished members, of what current sociological prattle sneeringly denigrates as The Protestant Establishment or further compartmentalizes as Aristocracy or Caste.

Take the Society of Mayflower Decendants: In order to join that group, the applicant must prove descent from a miniscule body of just 23 male passengers who sailed in the *Mayflower* on the voyage that terminated at Plymouth in December 1620.[1]

No one else can join this organization. This then, is an "institutionalized exclusion," not of minority groups, but of the overwhelming majority of American citizens, "regardless of their merits and manners." But surely it is not an exclusion which, in Irvis's extravagant phrase, "debases our national purpose."

Indeed, many eminent and admirable individuals who would on any footing earn inclusion in "The Protestant Establishment," and whose ancestry on these shores is almost equally long, could not qualify for memberhip in the Society of Mayflower Descendants. Thus, persons whose forebears landed at Plymouth just a year later, via the *Fortune* in November

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[1] "There were 102 passengers on that voyage, but many left no proven descendants. To preclude argument or misunderstanding as to which of these passengers the General Society [of Mayflower Descendants] recognizes as having proven descendants, it provides on the Application for Membership Form a list of 23 male passengers and prescribes that the lineage on each Application must begin with one of them." *Register of the Society of Mayflower Descendants in the District of Columbia, 1970,* p. 82.

1621 (Bradford, *Of Plymouth Plantation* [Morison ed., 1952] 90, 92), would be wholly ineligible for membership (barring of course subsequent intermarriage) —and this "regardless of their merits and manners."

Social exclusion, then, is not a cross borne only by "minority groups." It is experienced daily by other individuals, even by those whom the devotees of labeling categorize as "aristocracy."

Thus, when Mr. Ward McAllister selected the guests for Mrs. Astor's ball on the footing that there were only 400 persons in New York City who counted (11 DICT. AMER. BIOG. 547-548, *s.v.* Samuel Ward McAllister), a good many gracious and well born couples who rated only, say, between numbers 425 and 475 on the McAllister list, undoubtedly experienced exquisite anguish, not to say torment of soul. But then, the "full participation of all our citizens in our national life" (Irvis Br. 93) that Mr. Irvis so ardently espouses did not require Mrs. Astor to turn her function into a huge "At home" that every inhabitant of the city would be invited to attend.

The constitutional right of private association in home or club—we are of course at pains to exclude places of public accommodation—the First Amendment right of private association in home or club is an expression of personal preferences, and preferences of course need not be either rational or reasonable or even commendable. As Mr. Justice Holmes once said, "Deep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer." *Natural Law,* 32 Harv. L. Rev. 40, 41 (1918).

Indeed, to impose on one man's preferences the standards of rationality espoused by another man is,

in fact, to deny the first individual's right to entertain any preferences at all. If the only preferences that we are permitted to exercise are those that will pass muster with our neighbors, then we are effectually prevented from having or giving expression to our own.

Finally, and this needs to be reemphasized, the appellee Irvis is on notably unsound ground with his consistent implication that club membership restrictions invariably involve the impact of "The Protestant Establishment" on "minority groups."

The fact is quite otherwise. As the Benevolent and Protective Order of Elks has shown, in its valuable brief *amicus curiae* now pending on motion for leave to file, many, many, "minority groups" belong to private clubs and associations from which they exclude not only members of other minority groups but members of majority groups as well, and this by the same process (Irvis Br. 93 note 22) of "institutionalized exclusion" that Irvis so strongly deplores.

Blacks, American Indians, Orientals—all of them have their own clubs and associations that are restricted to members of their own race, just as white citizens do. All of these groups are exercising their constitutional liberty of private association; all of them, far from frustrating American's national purposes, are enriching the associational values of America's uniquely pluralistic society.

The widespread nature of this manifestation is underscored by the circumstance that, according to the Elks' calculations, private associations with racial restrictions (whether or not combined with other restrictive provisions) have an aggregate membership running into the scores of millions—and the number would

be substantially larger if ethnic restrictions, which of course are inescapably racial also, were included.

To urge, as the appellee Irvis does in support of the judgment below (Irvis Br. 93), that all this "debases our national purpose, thwarts full participation of all our citizens in our national life and furthers a sense of inferiority among those excuded," is—to put it most mildly and charitably—completely, utterly, and demonstrably mistaken.

B. A Private Association's Benevolent Purposes Are Not Rendered Less So Because Restricted to Members of a Particular Racial Group

Irvis's brief contains an intimation—perhaps "innuendo" would be a more accurate description—that Moose Lodge's benevolent purposes have somehow taken on a malevolent tinge because restricted to whites. He says (Irvis Br. 4-5):

> "These purposes [of the Moose Lodge] encompass a variety of praiseworthy objectives of a fraternal nature, including the objective 'to encourage tolerance of every kind' (A. 22). The accomplishment of these objectives by common action is limited to white persons (A. 22)."

Remarks of similar tenor appear at pp. 81-82.

We content ourselves with the comment that it has not hitherto been ground for impugning the motives of benevolent associations that their benevolence is limited by racial restrictions.

Take the National Association for the Advancement of Colored People: That organization has won notable victories on behalf of black Americans, as the pages of this Court's reports testify. There may well be citizens

throughout the country who still question the desirability of every NAACP success. But surely no one has ever faulted that body because its objectives were limited to the advancement of colored people, and thus did not include the advancement of American Indians, or of Americans of Japanese ancestry, or of Mexican-American people.

Why then should Moose Lodge be looked at askance simply because it limits itself to the advancement of white people?

Benevolence, like charity, begins at home, nor is it in any degree unnatural to restrict to one's own kind the extension of one's bounty.

C. Exercise of the First Amendment Right of Private Association May Not Be Penalized by a State Through Withdrawal of Licenses or Otherwise

Irvis then makes two further arguments, which can be considered together.

First, he urges (Irvis Br. 93-97), the individual's constitutional right of private association "does not include a right to compel the State to grant his group a license to sell alcoholic beverages to its members."

The short answer to that contention is an obvious one: Far from being under compulsion to issue such a license, the state has already granted one, on the footing that the Liquor Control Board has no authority to refuse a license to a club that exercises its constitutional right to impose associational restrictions on its membership (Cmplt., ¶ 9, A. 6; admitted, Stip. ¶ B(1), A. 25). What the present litigation involves is, not an effort by Moose Lodge to compel issuance of a club liquor license, but rather only the campaign of

the appellee Irvis—successful up to now—to lift that license.

Second, Irvis argues (Irvis Br. 97-99), even if the constitutional right is deemed to include the right to obtain a liquor license, that right must give way "when balanced against Irvis' right to be free from State-supported racial discrimination."

Of course the last clause of the quoted formulation begs one of the vital issues of the case, which is whether issuance of a liquor license does indeed transform the acts of the licensee into those of the governmental licensor (Moose Br., Point IV, pp. 59-86; *infra,* pp. 20-42).

But, assuming that issue in Irvis's favor for purposes of the discussion under the present heading, such an assumption still does not help him.

That is because once it is conceded, as it must be, that the Moose Lodge may exercise its First Amendment right of private association by excluding Mr. Irvis and other non-Caucasians—and Irvis has repeatedly indicated in this very case and in submissions to this Court that the Moose Lodge does indeed have that right (A. 46, A. 47; Motion to Affirm 2, 9; Irvis Br. 39)—then it necessarily follows on familiar and long-established principles that the Moose Lodge cannot be penalized for exercising that federally granted constitutional right. As applied here, the result is that the Commonwealth of Pennsylvania was right in refusing to withhold a liquor license because of the Moose Lodge's membership restrictions (Cmplt., ¶ 9, A. 6; Stip., ¶ B (1), A. 25); that the Commonwealth therefore could not constitutionally withdraw such a license because the Moose Lodge enforced its restrictions; and that the

district court erred when it required the Commonwealth to do so (Decree, ¶¶ 2, 3; A. 41-42).

The precedents compelling the foregoing conclusions involve state anti-removal statutes and the doctrine of unconstitutional conditions; inasmuch as this is a question that has not arisen for nearly 60 years, a short exposition may be in order.

The Constitution confers a grant of diversity jurisdiction (Art. III, § 2), and the First Judiciary Act of 1789 provided for the removal to a federal court of an action brought in a state court against a citizen of another state, given the requisite jurisdictional amount (Sec. 12, 1 Stat. at 79). Then, in *Louisville, Cincinnati & Charleston R. R.* v. *Letson,* 2 How. 497 (1844), it was held, qualifying the earlier decision in *Bank of the United States* v. *Deveaux,* 5 Cranch 61, that a corporation was a citizen of the state in which it was incorporated; cf. 28 U.S.C. § 1332(c) as amended in 1958 (corporation is also a citizen of the state in which it has its principal place of business).

Thus, from 1844 until 1958, if a sufficient amount was in controversy, every corporation could remove to a federal court actions for which it was sued in the courts of every state other than the one in which it was incorporated.

Meanwhile, in 1839, it was held in *Bank of Augusta* v. *Earle,* 13 Pet. 519, that a state had the power to exclude foreign corporations from doing business within its borders.

That doctrine, while the right of removal was still very broad, induced some states to enact legislation providing that, when a foreign corporation once admitted to do business within the state undertook to

remove to the federal court any action brought against it in the state court, its permission to do such business would be terminated forthwith.

Such statutes were uniformly held unconstitutional, on the footing that a state could not impose a penalty on the exercise of a right granted by the Constitution of the United States. *Home Ins. Co. of N. Y.* v. *Morse,* 20 Wall. 445; *Doyle* v. *Continental Ins. Co.,* 94 U.S. 535; *Harrison* v. *St. Louis & S. F. R. Co.,* 232 U.S. 318; *Donald* v. *Philadelphia & R. Coal & I. Co.,* 241 U.S. 329.

So here: Moose Lodge has the right under the First Amendment to limit or restrict its membership as it chooses. Irvis admits that right (A. 46, 47; Motion to Affirm 9; Irvis Br. 39). Irvis moreover stipulated (Stip. ¶ B(3), A. 25, admitting Moose Ans., Fourth & Fifth Affi. Def., A. 19, 20), and indeed several times asserts here (Irvis Br. 6, 61-62), that loss of the Moose Lodge's liquor license would be an injury in fact. Therefore withdrawal of its state liquor license would penalize the Moose Lodge's exercise of its constitutional right, and would do so in violation of the rule that a state may not impose a penalty on a legal entity that does what the Constitution of the United States entitles it to do.

Consequently Irvis is quite wrong in asserting (Irvis Br. 97) that "Given the reason for the right of private association and the scope which has been afforded it by the decisions of the Court, we find no invasion of this right by the withholding or withdrawal of a state-granted liquor license."

It also follows in consequence that the decree below, which, without paying any heed whatever to the well-

settled and indeed unquestioned doctrine of unconstitutional conditions, required the Pennsylvania Liquor Control Board to lift the Moose Lodge's license, is erroneous, and must be reversed.

We think that, on identical reasoning, the Maine statute cited by us (Moose Br. 104), and sought to be cited by the Elks (Elks Br. A. C. 4-5), is similarly invalid. But that is matter for another day.

D. No Decision Relied on by Irvis Except One Has Ever Considered the Impact of the Liquor-License-Equals-State-Action Theory on the Federally Granted Right of Private Association, and That One Was at Pains To Point Out That the Asserted Right of Freedom from Discrimination Did Not Apply to a Private Club

We pass for the moment all of Irvis's efforts to transform into state action by reason of possession of a state liquor license every act done by licensee Moose Lodge, and direct our attention to the impact, on the Moose Lodge's federally granted right of private association, of the state-action involvement doctrine put forward by him.

Burton v. *Wilmington Pkg. Auth.*, 365 U.S. 715, Irvis's most frequently cited authority, plainly did not reflect any such impact, and to say that this case involved "a private restauranteur's refusal to serve a Negro customer" (Irvis Br. 67) blurs the circumstance that the "private restauranteur's" establishment was one that in fact sought public patronage and that it therefore was in no sense a private club—nor did its owner even colorably contend that it was.

We can assert categorically, with complete accuracy, that the only decision squarely raising the conflict even by way of dictum is a single unappealed district court

case. *Seidenberg* v. *McSorley's Old Ale House, Inc.*, 317 F. Supp. 593 (S.D. N.Y.). This, to our knowledge, is the only litigation other than the present one (see also s.c., 308 F. Supp. 1253) that up to now has espoused Irvis's central liquor-license-equals-state-involvement theory. But even that decision was at pains to differentiate a private club from a place of public accommodation (317 F. Supp. at 604):

> "Any one of the male sex who is over 18 and neither drunk nor disorderly may enter and purchase a drink. The success of the business depends, in fact, upon large numbers of individuals doing precisely that, and a continuing invitation is extended to as many males as can, consistent with fire regulations, be served on the premises. *In this significant respect defendant differs from a private men's club, which does not purport, and is not required, to serve the public.*" (Italics added.)

Thus the single decision put forward by Irvis to support his "state involvement" theory is actually authority against him in the present case's context of an admittedly private club.

We point out below, pp. 28-31, substantial infirmities in the *McSorley Ale House* ruling; sufficient for present purposes to show that, by its terms, it is contrary to the opinion below, and rejects Irvis's arguments on the very balancing issue that he tenders: Even on the overly attenuated and indeed utterly artificial notion that possession of a liquor license transforms licensee into licensor, the privacy of a private club still prevails.

And, as we have already shown (Moose Br., Point V, pp. 86-107) and will hereafter additionally demonstrate (*infra,* pp. 42-56), to the extent that a balancing of rights is called for to resolve the situation in the pres-

ent case, Congress has effected that balancing in § 201 (e) of the Civil Rights Act of 1964 by exempting from the duty of serving all comers "a private club or other establishment not in fact open to the public."

On that issue, no decision other than the one now on appeal supports Irvis, and *McSorley,* which he several times invokes (Irvis Br. 29, 41, 74, 86), squarely rejects his position.

IV. UNDER NO PERMISSIBLE CALCULUS OF CONSTITUTIONAL INTERPRETATION CAN THE ISSUANCE OF A LIQUOR LICENSE TO A PRIVATE CLUB TRANSFORM THAT CLUB'S ACTS INTO STATE ACTION THAT IS SUBJECT TO THE FOURTEENTH AMENDMENT

We shall not repeat what we have said under the substance of this heading, our original Point IV (Moose Br. 59-86); rather, we concentrate on such of Irvis's present arguments as were not fully anticipated in our brief in chief.

A. Irvis's Support of the Exemptions Granted by the Court Below to Private Clubs Having Religious and Ethnic Rather Than Racial Membership Restrictions Actually Constitutes a Rejection of the Very "State Involvement" Concept That Is Central to His Case and That He Consistently Espouses Elsewhere in His Argument

As we have indicated (Moose Br. 77-83), the court below embraced a weird dichotomy that struck at private clubs having racial membership restrictions but wholly approved similar membership restrictions "which limit participation to those of a shared religious affiliation or a mutual heritage in national origin."

Irvis now argues (Irvis Br. 80-84) that this distinction "is a sound one if the limitation is reasonably related to the otherwise valid purposes of the organization."

We have already (*supra,* pp. 6-13) disposed of the notion that personal preferences must, as a prerequisite to their valid exercise, conform to other individuals' notions of rationality and reasonableness.

The additional point to be made here is that Irvis's effort to defend what is clearly the most indefensible portion of the ruling below actually constitutes a rejection of the very "state involvement" concept that is central to his case, and to which he therefore devotes the major portion of his printed argument (Irvis Br. 43-92).

That additional point of ours can also be shown in syllogistic form, by simply setting forth Irvis's contentions as they follow each other in his brief.

1. A state may not discriminate between citizens on a racial basis. XIV Amendment.

2. By granting a liquor license to the Moose Lodge, Pennsylvania has become involved in the racial discrimination practiced by that Lodge. Irvis Br. 43-63.

3. Pennsylvania's involvement is so significant that Moose Lodge's racial discrimination has become state action. Irvis Br. 64-84.

Therefore, 4, the decree below directing revocation of Moose Lodge's liquor license was proper. Irvis Br. 85-92.

Thus the core of Irvis's fundamental position is that, since the state was involved in what Moose Lodge did, it follows inevitably that the admitted racial discrimination practiced by the Moose Lodge became state action prohibited by the Fourteenth Amendment.

But what Irvis completely overlooks in undertaking to support the district court's racial versus religious

or ethnic distinctions is that religious or ethnic discrimination practiced by other clubs would, similarly and inescapably, also become state action under his own core argument—and that the Fourteenth Amendment equally prohibits religious discrimination (*Torcaso* v. *Watkins,* 367 U.S. 488; *Everson* v. *Board of Education,* 330 U.S. 1, 16), political discrimination (*Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238-239), ethnic discrimination (*Hernandez* v. *Texas,* 347 U.S. 475), or a combination of several or all of them (*United Public Workers* v. *Mitchell,* 330 U.S. 75, 100; *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89, 92).

What Irvis thus overlooks, and, much more importantly, what the court below failed utterly to recognize (A. 40), is that the Equal Protection Clause simply does not sanction religious or ethnic distinctions directly emanating from a state.

And this is no recent revelation suddenly vouchsafed to the faithful while heretofore totally concealed from those uninitiated or unenlightened. In the case last cited, decided in 1900, this Court sustained a state statute that imposed a license tax on manufacturers engaged in the business of refining sugar, while exempting from the tax those who refined the products of their own plantation. Then the Court went on to say (179 U.S. at 92):

> "Of course, *if such discrimination were* purely arbitrary, oppressive, or capricious, and *made to depend upon differences of color, race, nativity, religious opinions, political affiliations,* or other considerations having no possible connection with the duties of citizens as taxpayers, *such exemption would be* pure favoritism, and *a denial of the equal*

> *protection of the laws* to the less favored classes." (Italics added.)

Thus, if Moose Lodge No. 107 must lose its liquor license because it limits membership to Caucasians, it is equally vulnerable for requiring of its members belief in a Supreme Being; and, by parity of reasoning, every Knights of Columbus council, whose membership is restricted to Catholics, and every element of the Polish National Alliance and of the Sons of Italy, whose respective exclusions are based on nativity, must similarly, every one of them, give up their present licenses to dispense alcoholic beverages in all their several places of meeting and association.

In this connection, it is interesting to note the position on the present point of the members of the Pennsylvania Liquor Control Board.

Those members, defendants below, moved first to dismiss the complaint and then opposed Irvis's motion for summary judgment (Moose Br. 15). Thereafter they did not appeal, after which they notified the Clerk of this Court that they did not desire to participate further in the litigation (Moose Br. 19). Now, however, following some six additional months of cogitation—except for the happenstance that April through September are not a part of winter in the northern hemisphere, we would be tempted to say, "six additional months of hibernation"—now the Liquor Control Board members completely reverse their position, and return to the lists—on Irvis's side.

Even so, they gag at the district court's racial versus religious or ethnic distinction (A.G. Br. 11-12), and desert Irvis on that issue.

Whether those Board members are in consequence similarly prepared to deprive, for example, every Knights of Columbus council of its liquor license, they do not say. They have ample opportunity to test their own logic, if they so desire, right in the Harrisburg area; the telephone directory there lists the Knights of Columbus, a religiously restrictive private club, and the following private clubs that have ethnic restrictions on membership: German-American Friendship Society, Royal Italian Social Club, Steelton Italian Club.

On the views now espoused by the members of the Liquor Control Board, that (A.G. Br. 11) "it is clear 'state action' exists in violation of the equal protection clause by the continued licensing of Appellant, Moose Lodge," and that (*id.* 12) "it is clear from numerous rulings of this Court that 'state action' which discriminates on the basis of religious affiliation or national origin is as equally invidious as racial discrimination," these other organizations, also, cannot hope for continued licensing.

It may well be doubted whether all of the foregoing consequences have been fully considered by the Board's members. And it might be particularly unkind to suggest that they should be called on for answers before the passing of another six months' period for reflection.

We cannot forbear to remark that, if the issuance of a club liquor license under the Pennsylvania Liquor Control Board's Regulation 113, Clubs (App. F to J.S., pp. 147-149) turns a private club's membership restrictions into state action, then that Board's Regulation 119, Wines (*id.*, pp. 169-171) similarly turns into state action the religious restrictions of the church, syna-

gogue, or temple concerned in the purchase of the sacramental wines to which Regulation 119 is addressed.

We called attention to Regulation 119 at Moose Br. 72; Irvis responds with a silence so complete as to be deafening—and the Attorney General of Pennsylvania does not deign to mention it either.

But, here again, we refrain from debating trivia. Our significant point under the present heading is that, by his espousal of the exemption for religious and ethnic discrimination sanctioned by the court below (A.40), Irvis has effectually undercut—and destroyed—every vestige of doctrinal basis for the judgment now on appeal.

Of course, when we speak of "doctrinal basis," we mean constitutional doctrine, not sociological hypothesizing.

B. The Only Decision Other Than the One Now on Appeal That Up To Now Has Adopted the View That Issuance of a Liquor License Transforms the Acts of the Licensee Into Those of the Licensor Rests on Minority Views Here

Three members of the Court vigorously rejected the state-action concept on which the ruling below rests (*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."

No decision here on which Irvis relies, or of which we are aware, has held that a completely private club such as Moose Lodge, which does not operate on state property, which does not hold itself out as conducting any community or public activity, which has never been the recipient of public funds or of public assistance of any kind, which does not pursue the common calling of an innkeeper, and which has never relied upon or even sought to invoke public assistance in the conduct of its affairs, is so far involved with the state or with state instrumentalities as to turn what it does into state action. We have classified the decisions here —and elsewhere—at Moose Br. 60-63; repetition of what there appears would serve no purpose.[2]

Irvis puts a number of purely hypothetical (not to say rhetorical) questions in the course of his argument. E.g., "Suppose, instead of granting Moose Lodge a liquor license, Pennsylvania simply appropriated $50,000 a year to it?" The answer, which should be sufficient, is that Pennsylvania has made no such appropriation, nor indeed any other grant of funds, and Irvis has so stipulated (Stip., ¶ 5, A. 24).

Recent decisions here emphasize the significance of an actual grant of money in determining whether particular action involves a state government in forbidden action. Thus, in *Lemon* v. *Kurtzman,* 403 U.S. 602,

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[2] At Moose Br. 14-15, 53, 62, and 102, we referred briefly to Moose Lodge's catering activities, under which it imposed no restrictions on any member of the group using its facilities (Stip., ¶ A(6), A. 25).

We deem it appropriate to advise the Court that, on August 9, 1971, Moose Lodge No. 107 formally resolved to discontinue catering operations, and that this step was made known in the Harrisburg papers for August 17, 1971.

state monetary contributions to religiously controlled schools were struck down as violative of the First Amendment, distinguishing *Walz* v. *Tax Commission,* 397 U.S. 664, which upheld State tax exemptions for religious bodies against the contention that a similar violation was involved. In each instance, stress was laid on the decisive factor of a direct money subsidy. *Walz* at 675, *Lemon* at 621 and 643.

Contrariwise, the furnishing to religious colleges of buildings financed by federal funds was upheld, as not involving excessive entanglements between government and religion, in *Tilton* v. *Richardson,* 403 U.S. 672, striking down however the provision for reversion of the buildings to full college control after twenty years.

Reading those decisions together, we think it necessarily follows that, where no funds change hands, and where the state's essential concern is simply that "liquor licensees holding 'club' licenses are *bona fide* clubs and not in fact taprooms or bars having the appearance of a club" (A.G. Br. 2; *accord,* Moose Br. 83-86 and Irvis Br. 89-92), the grant of a state liquor license can no more turn operations thereunder into state action than the at least equally "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 transforms that measure into state support of religion. (Although previously cited by us, Moose Br. 72, neither Irvis nor the members of the Liquor Control Board have seen fit to comment on that Pennsylvania statute.)

The touchstone, we submit, is direct and tangible state aid—which plainly Moose Lodge does not receive

when it is granted a club liquor license. That, we submit, is the rationale of the decisions classified at Moose Br. 60-63 and just summarized above, p. 26. That, we submit, is the rationale of the *Walz, Lemon,* and *Tilton* cases (of which the third was deemed by Irvis not to warrant citation, much less discussion).

Once past a direct money subsidy, we submit, all talk of "state action" shades into verbalization and, as in both briefs opposing us here, ultimately becomes purest fiction.

Apart from the decision under review, only a single case supports what we may call the metamorphosis theory, the view that possession of a liquor license transmutes private action into state action, and that is the *McSorley's Old Ale House* litigation, first on motion to dismiss (308 F. Supp. 1253) and then on motion for summary judgment (317 F. Supp. 593).

The first opinion reflects no awareness whatsoever of what three members of this Court said in the passage from *Bell* v. *Maryland,* 378 U.S. at 333, that is quoted above at p. 25. The second opinion, no doubt misled by the running head in the official report (which simply said "Black, J., dissenting" when in fact Harlan and White, J.J., joined in that dissent), incorrectly read the foregoing excerpt as reflecting the view of only a single justice—"The Supreme Court has never passed upon a licensing theory of state action, although two Justices have expressed conflicting views on the matter" (317 F. Supp. at 598)—and then proceeded to follow the views of the one rather than the views of the three justices, citing *Garner* v. *Louisiana,* 368 U.S. 157, 184-185; *Lombard* v. *Louisiana,* 373 U.S. 267, 281-283; and *Reitman* v. *Mulkey,* 387 U.S. 369, 384-386.

Thus the metamorphosis or transmutation theory rests on a minority view, one that stood outvoted 3-1 in this Court. Yet it is this minority view that underlies the decisions both in *McSorley's Old Ale House* and in the present case below.

Moreover, as applied to liquor licenses, *McSorley* suffers from infirmities over and beyond its lack of authority.

The first of these is the unworkability of the asserted touchstone of "pervasiveness," the label applied to liquor licenses both there and below and now enthusiastically espoused by Irvis (Irvis Br. 43-79).

Irvis several times argues that a building permit is wholly different from a liquor license (Irvis Br. 55-56, 62, 64). But if he had troubled to examine an actual building code, such as the one drafted by the Building Officials Conference of America, Inc., which extends to 434 pages and which has been adopted by many communities, including the City of Aurora, Illinois, where one of us resides, he would have seen in the elaborate provisions of that enactment a degree of "pervasiveness" perhaps even more far-reaching than those of the Pennsylvania Liquor Code.

That is one reason why "pervasiveness," which is really not a test at all, is unworkable.

Another reason underlying unworkability has already been adduced (Moose Br. 65-77): The regulations applicable to clubs in Pennsylvania are in actual fact minimal, being designed solely to prevent commercial enterprises from masquerading as private clubs in order to sell liquor for more hours every day. See A.G. Br. 2, quoted above at p. 27, *accord.*

Nonetheless, the court below found in the Pennsylvania Liquor Control Board's Regulation 113.09 (p. 148 of Appendix F to J.S.), which requires that "Every club licensee shall adhere to all of the provisions of its Constitution and By-laws," state action that affirmatively directs discrimination (A. 37-38).

Significantly enough, Irvis has advisedly refused to follow the district court in respect of that holding. His Motion to Affirm (p. 8) indicated that he "agrees with appellant that the primary purpose of this particular provision is to insure that private clubs are in fact private," and in his brief he adheres to that position (Irvis Br. 90): "Irvis did not argue that this regulation acts as a direction to a private club to discriminate, and he does not agree with the indication of the court below to this effect."

Yet, with complete inconsistency, Irvis then executes a perfect about-face, and goes on to suggest the inclusion in a decree in his favor of a paragraph that would, in opposition to his own twice-expressed views, enjoin the operation of Regulation 113.09 (Irvis Br. 91-92)!

In our view, changes in position so quickly effected simply underscore the artificiality of the metamorphosis or transmutation theory of state action that infects with fundamental error the entire judgment now being reviewed.

Moreover, as we have already pointed out (Moose Br. 66-73), if the test of what is or what is not state action is made to turn on the "pervasiveness" or otherwise of liquor laws and regulations, then the codes of all the remaining 49 states must be compared with those of Pennsylvania. And, if "pervasiveness" is to be the controlling criterion, then a private club with

membership restrictions can keep its premises and its restaurant (Irvis Br. 55-56, 62, 64), and, depending on the varying liquor codes throughout the nation, shift from sales of liquor to its membership to a locker system under which only ice and mixers will be sold.

All of these matters must be litigated—and the resultant diversities will then be enshrined on the footing that they are required or permitted, as the case may be, by the Constitution of the United States.

The second infirmity in *McSorley* is the notion that, although nothing in § 201(a) Civil Rights Act of 1964 (42 U.S.C. § 2000a (a)) prohibits places of public accommodation from discriminating between customers on the basis of sex (*accord, DeCrow* v. *Hotel Syracuse Corp.,* 288 F. Supp. 530 (N.D. N.Y.)), such discrimination is forbidden by the Fourteenth Amendment *eo nomine.*

How that conclusion, which indeed was made explicit in both *McSorley* opinions, can square with *Minor* v. *Happersett,* 21 Wall. 162, which plainly held the Equal Protection Clause unavailing to strike down a claim of obvious discrimination on grounds of sex, or with the fifty-year campaign for the Nineteenth Amendment (e.g., 15 ENCYC. SOCIAL SCIENCES 439, 446-447 (Woman, Position in Society); Carrie Chapman Catt, *Woman Suffrage by Federal Constitutional Amendment* (N.Y. 1917)), is assuredly not explained by anything in either *McSorley* case.

But a more basic infirmity in *McSorley,* and indeed in Irvis's central argument here, is the essential fiction involved in transforming the acts of an individual into those of a state and in the consequent blurring the clearly written limitations of the Fourteenth Amendment. To that we turn.

C. The Entire Concept of "Partnership" Between a State and Its Licensees, Which Is the Essential Rationale of the Metamorphosis Theory That Transmutes Action of the Licensee Into Action of the Licensor, Constitutes Not Only a Wholly Fictitious Attenuation of the Very Essence of State Action, But Blurs the Fourteenth Amendment to the Extent of Rewritting It

In his endeavor to establish state action, Irvis resorts to similes and figures of speech which, when analyzed, demonstrate the essentially fictitious character of the central "state involvement" view adopted by the court below.

It will doubtless be more convenient to consider seriatim his assertions and contentions on this subject:

1. "This denial [of the equal protection of the laws] was caused by Moose Lodge *and the Board* acting under color of the Liquor Code of Pennsylvania through the grant (by the Board) and use (by Moose Lodge) of a liquor license in conjunction with Moose Lodge's admitted racially discriminatory policies." Irvis Br. 27-28; italics added.

We can properly ask, without the slightest injection of captiousness, just how the refusal of service of food apart from beverages, an essential factor in the incident asserted in the complaint (¶ 11, A. 6) and admitted by Moose Lodge (¶ 6, A. 17), can have had anything in the world to do with Moose Lodge's liquor license, or with the Board's grant, or for that matter with anything in the Liquor Code of the Commonwealth of Pennsylvania.

Perhaps it is unusual in today's climate of loose pleading to look to the terms of a complaint, sufficiently unusual indeed to seem even slightly unfair, but at least doing so helps to separate fact from fiction.

For in his complaint, Irvis never once embraced the metamorphosis theory on which he now rests his arguments. In his complaint, Irvis never for a moment said what now appears in his brief (Irvis Br. 27-28), that "this denial was caused by Moose Lodge *and the Board.*" (Our italics.)

No, in his complaint Irvis simply stated the fact, viz. (¶ 11, A. 6), that "Solely on account of Plaintiff's being a Negro, Defendant Lodge, through its agents and employees, refused service to Plaintiff"—and there is not even a scintilla of evidence in the record to the contrary.

2. "Clearly, even under this 'narrower' view [*Adickes v. Kress & Co.*, 398 U.S. 144, 209-212, *per* Brennan, J.], the act of discrimination practiced by Moose Lodge was done under color of the statute." Irvis Br. 28-29.

We repeat, what had the Liquor Code of Pennsylvania to do with the refusal to serve food to Mr. Irvis?

3. "Irvis has been injured. He has been injured by a conjunction of actions taken *by the Board* and by Moose Lodge, his adversaries here." Irvis Br. 40; italics added.

Here again there is a departure from the complaint, which attributes the refusal of service solely to the Moose Lodge through its agents and employees (¶ 11, A. 6), and the same failure to explain how the refusal to serve food could possibly have emanated from the Board.

4. (a) "In Pennsylvania's alcoholic beverage control system every licensee has a 'partner,' the State, which participates daily in its affairs." Irvis Br. 55.

(b) "In the field of alcoholic beverage control the system produces major and indispensable support for a club licensee's financial and organizational stability and reciprocal financial benefits to the State." Irvis Br. 63.

Surely it cannot be seriously contended that reciprocal benefit between citizens and sovereign constitutes a partnership. For reciprocal benefit underlies the very structure of social organization, ancient as well as modern. In feudal times the vassal gave service to the lord in return for protection; today the citizen pays taxes, still in return for protection. Of course the relationship is reciprocal; in a phrase attributed to Mr. Justice Holmes, "Taxes are the price that I pay for civilization." But this kind of reciprocity obviously does not automatically create a partnership.

Frequently the price paid for civilization is a high one; the normal Federal tax rate on corporate income stands today at 48 per cent. 26 U.S.C. § 11. This is far more than Pennsylvania through its Liquor Board can possibly obtain from Moose Lodge No. 107. Thus on Irvis's view every corporation today is a "partner" of the United States, because the United States gives each corporation "indispensable support" and obtains "reciprocal financial benefits." Certainly, the Internal Revenue Code and its awesome volume of implementing regulations are far more "pervasive" than the state liquor laws here involved.

Our most distinguished judges have warned against the dangers stemming from similar analogies that depart from reality.

> "As long as the matter to be considered is debated in artificial terms there is a danger of being led

> by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied." *Guy* v. *Donald,* 203 U.S. 399, 406, *per* Holmes, J.
>
> "When things are called by the same name it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning." *Lowden* v. *Northwestern National Bank,* 298 U.S. 160, 165, *per* Cardozo, J.

An example of the foregoing kind of verbal elision, one not only striking but actually frightening in its impact, is the blurring of the distinction between first degree murder, a planned killing that involves premeditation and is normally a capital offense, and second degree murder, which is a killing in the sudden heat of passion and hence not deemed deserving of the extreme penalty.

That is a distinction perfectly clear on its face—and yet it can be and has been blurred through the verbal device of shortening the interval of premeditation that marks the difference between the two offenses, so that eventually, through use of the words "instantaneous premeditation," the two become quite identical, with the result that an unplanned killing resulting from heat of anger is transformed into a capital offense. Fortunately the District of Columbia Circuit, which once actually espoused the blurring technique, later retreated from that aberration. See *Bullock* v. *United States,* 122 F.2d 213, 213-214 (D.C. Cir.) (footnotes omitted):

> "This appeal is from a conviction of murder in the first degree. The trial judge instructed the

> jury that, though 'deliberate and premeditated malice' involves turning over in the mind an intention to kill, 'it does not take any appreciable length of time to turn a thought of that kind over in your mind.' In 1931, this court said as much. But in 1937 we approved the opposite rule, that 'some appreciable time must elapse.' We adhere to the latter rule. To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second degree murder."

Of course the conviction in question was reversed.

We think that the same improper verbalism infects the judgment now under review, when the district court lost sight of the Constitutional provision and glossed it so as to rewrite its meaning.

The Fourteenth Amendment provides that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

The verbalized fictions relied on by the court below, which are now expounded in even more fictitious terms in Irvis's brief, rewrite that part of our fundamental law to make it read, "No licensee from any State shall * * * deny to any person within that State's jurisdiction the equal protection of the laws."

We urge the Court to adopt what three of its members said in *Bell* v. *Maryland,* 378 U.S. at 333:

> "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."

We urge the Court to reject the metamorphosis theory that underlies the judgment below, and which transforms and transmutes into state action so many purely private actions that are in no realistic sense a reflection of what the state itself has done.

Or, otherwise stated, we urge the Court to reaffirm the language of the Equal Protection Clause as it was written.

D. The Rise and Fall of the Doctrine That Extended Tax Immunities to Government Instrumentalties Emphasizes Both the Dangers of Artificial Constitutional Interpretations as Well as the Wisdom of Starting Anew from the Constitution Itself

When members of the bench and bar who are now over 65 years of age were first exposed to the rules of their profession, no constitutional principle was better settled than the reciprocal immunity from taxation by one government of instrumentalities of another government, the basis of which was that neither government should impede or burden the operations of the other. Thus, salaries of federal officers could not be taxed by the states (*Dobbins* v. *Erie County,* 16 Pet. 435), while, reciprocally, salaries of state officers were not subject to federal taxation (*Collector* v. *Day,* 11 Wall. 113).

But this immunity, resting on Chief Justice Marshall's famous dictum that "the power to tax involves the power to destroy" (*M'Culloch* v. *Maryland,* 4 Wheat. 316, 431), was expanded and extended over the years, so that, for example, income derived from federal leases was declared exempt from state taxation (*Gillespie* v. *Oklahoma,* 257 U.S. 501; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393), income derived from sales of gasoline to federal institutions was similarily

held untaxable by a state (*Panhandle Oil Co.* v. *Mississippi*, 277 U.S. 218), royalty income from a patent issued by the United States was likewise decided to be beyond the taxing power of a state (*Long* v. *Rockwood,* 277 U.S. 142), the salary of the general counsel of the Panama Railroad Company, a corporation that was a wholly owned instrumentality of the United States, was also held exempt from state tax (*Rogers* v. *Graves,* 299 U.S. 401), and, by parity of reasoning, the chief engineer of New York City's Board of Water Supply was adjudged to be under no obligation to pay federal income tax on his municipal salary (*Brush* v. *Commissioner,* 300 U.S. 352).

The sum-total of these decisions, far from strengthening either federal or state governments, served actually to hinder both, and to render each of them less able to perform its allotted task. Analytically, that result flowed from two decisional techniques, one an artificial exaggeration of the concept of "governmental instrumentality" to the point of fictitiousness, the other a similarly artificial attenuation of what constituted an actual "interference."

It became plain to the Court in the early 1930s, as indeed it had been to some of its members in the 1920s, that the whole immunity doctrine needed to be reappraised and reconsidered, essentially because its extreme and indeed extravagant manifestations could not fairly be said to flow inexorably from what was written in the Constitution.

The first steps at disengagement, understandably enough, involved not reexamination of fundamentals but only a pruning of excrescenses, as the immunity doctrine was, by gradual changes, somewhat curtailed.

Thus, copyright royalties were held subject to state taxation in *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, overruling *Long* v. *Rockwood,* 277 U.S. 142; income from federal leases was restored to the states' power to tax in *Helvering* v. *Mountain Producers Corp.,* 303 U.S. 376, overruling *Gillespie* v. *Oklahoma,* 257 U.S. 501, and *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393; and, by distinguishing and limiting over half a dozen cases that on their face looked the other way, there was upheld a state tax on the gross receipts of a federal contractor. *James* v. *Dravo Contracting Co.,* 302 U.S. 134.

The next case requiring decision involved the imposition of federal income tax on three officers of the Port of New York Authority; this Court held, notwithstanding the earlier declared immunity of the New York City's water supply engineer (*Brush* v. *Commissioner,* 300 U.S. 352), that these individuals were taxable. *Helvering* v. *Gerhardt,* 304 U.S. 405. Mr. Justice Black was of opinion (p. 425) "that we should review and reexamine the rule based upon *Collector* v. *Day,*" but the Court was not yet ready for that step—at least not at that Term.

Ten months later, however, the entire immunity concept was rejected, in a case involving state taxation of an employee of the Home Owners' Loan Corporation, *Graves* v. *O'Keefe,* 306 U.S. 466, and the whole concept of reciprocally tax exempt salaries of state and federal employees was disapproved, some old cases being overruled expressly, some by necessary implication; not a single one ever came to life again. This drastic step was taken because, on open-minded reconsideration of the entire immunity problem, the original assumption, that to tax an employee meant a burden on the em-

ployer, simply did not square with reality, and so was rejected by this Court.

Thus Mr. Justice Black's approach in *Helvering* v. *Gerhardt,* 304 U.S. 405, 424-427, was vindicated.

And Mr. Justice Frankfurter made this observation, one that is particularly significant in the present context; he said (306 U.S. at 491-492, footnote omitted):

> "The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."

Therefore, since "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it," it seems appropriate that, on full reconsideration of the realities, this Court should now abandon resort to similes and verbalism, and, eschewing fictions that distort, return to the clear and explicit words of the Fourteenth Amendment:

> "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

Not "No club," not "No group of private individuals," not "No State licensee," nor even "No State licensee that is pervasively regulated"; the Constitution says—"No State."

We urge, therefore, that the Court return to the language of the Constitution, by declaring that the prohibition of the Equal Protection Clause, which is aimed solely at a state, should not be blurred and hence rewritten by being made to reach the licensee of a state, regardless of the pervasiveness or otherwise of the state's licensing process.

Significantly, such a result would not involve, as indeed it did in the course of the rise and fall of the immunity doctrine, the overruling of a single decision. No earlier decision here needs to be overruled in such reaffirmation of the Constitution; all that is necessary at this point is to refuse further to extend the attenuation of the state action at which alone the Constitution is directed. For the Court has never undertaken to decide the licensing issue, on which, as we have shown, those of its members who have expressed themselves have been aligned 3 to 1 in our favor, in support of the proposition that one who is licensed by a state does not simply by reason of such licensing become either the agent or an agency of that state.

In the Constitutional Convention, John Dickinson of Delaware declared that "Experience must be our only guide. Reason may mislead us." 2 Farrand, *Records of the Federal Convention* (1911) 278.

Decades of experience with the immunity doctrine finally taught us that the salary paid a municipal waterworks engineer does not constitute such a manifestation of state action that it should be exempted from federal taxation. We should therefore be at pains lest the processes of reasoning through means of verbal symbols lead us to conclude that the membership restrictions of a purely private club to which has been issued a liquor license thereby become such a manifes-

tation of state action as to impair the full exercise of the club members' federal constitutional right of private association.

V. CONGRESS HAS MARKED A REASONABLE AND DEFENSIBLE BOUNDARY BETWEEN APPARENTLY COMPETING CONSTITUTIONALLY PROTECTED LIBERTIES THAT SHOULD BE RESPECTED AND NOT TRIVIALIZED

Faced with the terms of Section 201(e) of the Civil Rights Act of 1964, which plainly protect the truly private club, Irvis resorts first to trivialization, then to minimization, and finally to unsupported—and inconsistent—hyperbole.

A. Irvis's Construction of Section 201(e) of the Civil Rights Act of 1964 Trivializes That Enactment

Irvis agrees (Irvis Br. 104) that "Moose Lodge has accurately reported (Brief, pp. 89-97) the extent of the [Senatorial] discussion on private clubs." But he concludes (Irvis Br. 111) that "Section 201(e) is simply an expression of a legislative decision that private clubs (like unmentioned private homes) were not to be considered places of public accommodation."

This conclusion imputes to Congress the doing of a perfectly nugatory act, as the language of § 201(e) plainly shows. That subsection makes Title II inapplicable to "a private club or other establishment not in fact open to the public."

Thus Irvis's argument comes to this, that when Congress speaks of "a private club or other establishment not in fact open to the public," it is simply deciding that "private clubs * * * were not to be considered places of public accommodation." Or, perhaps even more clearly expressed, places "not in fact open to the

public'' are ''not to be considered places of public accommodation.''

Irvis's argument, therefore, is that Congress did not enact more than the truism that a place not in fact open to the public is not a place of public accommodation.

Gertrude Stein may well have applauded such an embrace of her ''a rose is a rose is a rose'' technique of literary expression. But the obvious trivialization involved in Irvis's suggested construction can hardly pass muster as a serious effort at either statutory or constitutional interpretation.

B. Every Congressional Enactment Is an Interpretation of the Constitution by the Legislature Regardless Whether It Is Specifically Labeled as Such

Much of Irvis's argument on the private club exemption is devoted to the proposition that Congress did not purport to draw a line, that Congress was establishing legislative policy rather than constitutional authority (Irvis Br. 100, 101, 104, 105, 106, 107, 110).

That contention is inaccurate in several respects.

1. First, several members of the House Judiciary Committee did indeed indicate that constitutional limitations had been considered (H.R. Rep. 914, 88th Cong., 1st sess., Part 2, p. 9):

> ''* * * 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.''

2. Second, by enacting Section 201(e), Congress responded to the invitation earlier extended by some

members of this Court in *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."

We do not understand that Congress was required to include that citation in Section 201(e) or to drop a footnote in order to signalize that its enactment constituted acceptance of the judicial invitation previously tendered.

3. Finally, there is not a line throughout the very extensive discussions in either House of Congress, in committee or on the floor—at least none of which we are aware or which has been adduced against us—that suggests even in passing that any Senator or Representative ever seriously considered that Congress had the power to control the membership or conduct of truly private clubs but refrained from doing so on mere considerations of expediency.

4. Far more significant, however, is the overriding principle that, whenever Congress passes any act, it is to that extent construing the Constitution in the exercise of the legislative power granted it by that instrument, and that no label need be attached to any legislation as a prerequisite to having such legislation reflect constitutional construction.

Mr. Justice Holmes, sitting on circuit, long ago pointed out the wrongheadedness of imposing any such requirement. He said (*Johnson* v. *United States,* 163 Fed. 30, 32 [C.A. 1, 1908]):

> "The major premise of the conclusion expressed in a statute, the change of policy that induces the

> enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

That passage has on numerous occasions been quoted with approval by this Court. *Federal Trade Comm.* v. *Jantzen, Inc.,* 386 U.S. 228, 235; *Minnesota Mining* v. *New Jersey Wood Co.,* 381 U.S. 311, 321; *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377, 388; *United States* v. *Hutcheson,* 312 U.S. 219, 235; *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 391.

Another example of the same approach is *United States* v. *Florida,* 363 U.S. 121, which gave effect to Florida's claim to a three-league belt of land seaward from its coastline, as described in Florida's 1868 Constitution, because that instrument was approved by Congress when Florida was readmitted to congressional representation after the Civil War.

Seven members of the Court participated in the decision, six members finding a ratification by the Congress of every portion of Florida's 1868 Constitution (363 U.S. at 125-127), the seventh member dissenting because unable to discern in Florida's readmission any Congressional purpose to fix that state's boundaries (363 U.S. at 132-142).

However, four of the six Justices who concurred in the majority opinion—a majority of the Court considering the case—put their concurrence on a broader ground.

Mr. Justice Frankfurter, for himself, and Brennan, Whittaker, and Stewart, JJ., pointed out first (363 U.S. at 131) that "Insofar as the perplexing and re-

calcitrant problems of Reconstruction involved legal solutions, the evolution of constitutional doctrine was an indispensable element in the process of healing the wounds of the sanguinary conflict."

Therefore, he said for himself and his three colleagues (363 U.S. at 132), "in these matters we are dealing with great acts of State, not with fine writing in an insurance policy."

Consequently (*ibid.*):

> "Florida was directed to submit a new constitution for congressional approval as a prerequisite for the exercise of her full rights in the Union of States and the resumption of her responsibilities. In this context it would attribute deceptive subtlety to the Congresses of 1867-1868 to hold that it is necessary to find a formal, explicit statement by them, whether in statutory text or history, that the boundary claim, as submitted in Florida's new constitution, was duly considered and sanctioned, in order to find 'approval' of that claim."

In our view, the enactment of the Civil Rights Act of 1964 was a further "element in the process of healing the wounds of the sanguinary conflict" of 1861-1865. Consequently that enactment, also, should be treated as a great act of State; and, thus treated, the conclusion necessarily follows that, in legislating on the subject of public accommodations, Congress by exempting truly private clubs necessarily proceeded on the footing that it lacked power to reach the latter.

Irvis's contrary suggestion, to the effect that Congress indeed had the power to reach farther but advisedly chose not to do so, was not only not given expression by any member of the Congress that enacted the Civil Rights Act of 1964, it is a notion easily shown to be entirely untenable on its own.

C. Irvis's Belated Invocation of the Thirteenth Amendment Is Contradicted and Completely Neutralized by What He Has Elsewhere Told This Court

Nowhere in his complaint (A. 3-9) did Irvis invoke the Thirteenth Amendment, and his failure to adduce that provision in the district court is reflected by its non-appearance anywhere in the opinion below (A. 30-40).

Now, however, Irvis makes an all-out appeal, not to the Fourteenth Amendment, on which alone he rested his case below, and on which he fashions his major argument in this Court (Point II, Irvis Br. 43-84), but on the Thirteenth. He now says (Irvis Br. 109):

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

We recognize—indeed it is hornbook law—that a litigant is entitled to rely on any ground, whether or not made below, whether or not rejected below, to support a judgment in his favor. E.g., *Dandridge* v. *Williams*, 397 U.S. 471, 475; *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185; *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425.

Therefore, even a revelation belatedly vouchsafed may be put forward on appeal to salvage what was won below; *tabula in naufragio* is a doctrine available to appellees and respondents quite as much as to equitable suitors in courts of first instance.

But Irvis's Thirteenth Amendment contentions are not so much additional to his other contentions, they suffer from the more essential infirmity that they are wholly inconsistent with what he has repeatedly adduced in this very case, not only in the court below, but also in this Court in his Motion to Affirm and indeed in this Court in the very brief now in question.

1. Opposing Moose Lodge's motion to amend the decree below, so as to entitle him to guest privileges, Irvis said:

> "The members of Defendant Moose Lodge are free to associate with whom they please." (A. 46).
>
> "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.*" (A. 47; italics added)

2. In his Motion to Affirm, Irvis adhered to that position:

> "*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." (M/A 2; italics added.)
>
> "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.''* (M/A 9; italics added.)

3. In his present brief, Irvis says:

> "Clearly, the injury suffered by Irvis was not just that a private organization barred him because he was black. *This, it was entitled to do.''* (Irvis Br. 39; italics added.)

Now, however, just 70 pages later (Irvis Br. 109), Irvis says he has "no hesitancy in declaring that the invidious racial discrimination practiced by private clubs is a 'badge and incident' of slavery."

It seems appropriate, in the face of this final quotation, to recall what Mr. Justice Cardozo said in *Jones* v. *Securities & Exch. Comm.,* 298 U.S. 1, 29, 33:

> "Historians may find hyperbole in the sanguinary simile."

Sufficient now however to remark that Irvis's present Thirteenth Amendment argument is so extreme, so late in surfacing, and so completely at variance with his earlier position—not only in the court below, not only in his Motion to Affirm filed here just six months ago, but also in an earlier portion of his present brief—that its insubstantiality has become virtually self-established.

But it may not be amiss to test Irvis's belated suggestion that the Thirteenth Amendment strikes down racial restrictions in purely private organizations—because, after all, such restrictions cut both ways.

Thus, the Knights of Peter Claver (Elks Br. A.C. 12) have a membership restricted to male, black, Roman Catholics, precluding admission of white males

who profess Roman Catholicism. Is such exclusion a badge and incident of slavery? Or is it really Irvis's position that while the exclusion of blacks from a whites-only private club violates both the Thirteenth and Fourteenth Amendments, similar exclusion of whites from a blacks-only private association violates neither? And if that is indeed his position, how can he square it with his continuous invocation of Equal Protection of the Laws—or with this Court's statement in *Evans* v. *Newton,* 382 U.S. 296, 299, that "A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association"?

Another example, also, will serve to emphasize the infirmities of Irvis's afterthought contentions.

Membership in B'nai B'rith (Elks Br. A.C. 31) is restricted to Jewish men, women, and youth. Non-Jews of every denomination (whether Christians, Moslems, Confucians, or Bhuddists) and of every race (whether white, black, brown, yellow, or red), are impartially excluded. Again, is such exclusion a badge or incident of slavery? This particular example is not at all far-fetched, since by the common law of Angevin England all Jews were subject to a relative servility similar to villeinage; they and all they possessed belonged to the King. 1 Pollock & Maitland, *History of English Law* (2d ed. 1898) 468-475; *Select Pleas, Starrs, &c., of the Exchequer of the Jews* (Selden Society vol. 15, 1901), *passim.*

We submit that inquiries such as those just put go far to demonstrate the inutility of invoking similes so vastly inflated and exaggerated that they shade into fighting words. For to speak of membership restrictions imposed by private clubs as badges and incidents

of chattel slavery is to arouse emotions that can, unfortunately but inevitably, distort reason.

The central issue in the present case concerns the scope of the First Amendment right of private association, and the respect to be accorded the statutory delineation of that right which the Congress has fashioned.

The parties are at issue whether that right is qualified—or even reached—by the Fourteenth Amendment.

But on no rational view can this case possibly be said to be concerned with anything in the Thirteenth Amendment, since membership restrictions in private clubs, restrictions that cut across every community grouping and that exclude majorities as well as minorities, plainly have nothing whatsoever to do with human servitude or with the badges or the incidents of that long since abolished status.

In so concluding, we neither overlook the circumstance that the Thirteenth Amendment, unlike the Fourteenth, is not limited to State action, nor are we unaware of *Griffin* v. *Breckenridge,* 403 U.S. 88, decided last June.

That decision involved a complaint, the vital part of which was the defendants' interference, by blocking the highway and by beatings, with the plaintiffs' rights, *inter alia,* to freedom of association. 403 U.S. at 90 and 103. And the holding was couched (p. 105) in terms of "racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men."

We may admit the basic quality of "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). But that basic right has as its inherent concomitant the right to exclude others from one's private fellowship. Indeed, the next sentence but one of the same opinion (p. 299) goes on to say that "A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association."

Consequently, when the Knights of Columbus restricts its membership to those professing the Roman Catholic faith, non-Catholics are not being deprived of any basic right; the same follows as to non-Jews denied entry into B'nai B'rith, or as to the progeny of those who founded Massachusetts Bay or Maryland excluded from the Society of Mayflower Descendants, or as to the whites or American Indians ineligible for the Knights of Peter Claver—or as to non-Caucasians or atheists refused admission to the Loyal Order of Moose.

That is why we say that the Thirteenth Amendment has nothing to do with this case—although *Griffin* v. *Breckenridge,* 403 U.S. 88, does indeed attest to the respect properly accorded by this Court to Congressional implementation of the post-Civil War Amendments.

D. The Reasonableness of the Congressional Exemption for Private Clubs Is Solidly Attested by the Widespread Existence of Such Clubs and Organizations, Whose Aggregate Membership Includes Scores of Millions of Americans

The first case in which this Court sustained the public accommodations title of the Civil Rights Act of 1964 makes it clear that Congressional legislation need not be buttressed by findings of fact (e.g., *Perez* v. *United States,* 402 U.S. 146) as a prerequisite to its

validity. *Atlanta Motel* v. *United States,* 379 U.S. 241, 252-253. Indeed, even in the absence of such aids, the existence of facts supporting the legislative judgment is presumed, *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152; and that such facts may be adduced outside of the narrow court record has been unquestioned ever since Mr. Louis D. Brandeis (as he then was) undertook to do just that in the celebrated case of *Muller* v. *Oregon,* 208 U.S. 412, 419, decided in 1908.

In the present case, we need not rely on presumption, because here the factual underpinning on which the Congressional exemption rests is the circumstance that, as the brief *amicus curiae* sought to be filed by the Elks shows, over 56 million persons—56,555,000 people—belong to organizations that have either racial, religious, ethnic, or sex restrictions on their membership. Elks Br. A.C. 69.

This calculation does not include golf or country or athletic clubs, nor does it include Greek letter fraternities or sororities; if the latter categories were added, then nearly 73,000,000 Americans in fact belong to purely private organizations having membership restrictions of some kind. *Ibid.*

Irvis's objection to the filing of this extremely informative document rests on two thoroughgoing misconceptions, both of which have already been exposed above. He says (Objection to Motion of Elks, p. 2) that—

> "the extensive listing of organizations in the proposed brief of the Elks is unaccompanied by any statements of organizational purposes, thus making the list totally unhelpful in considering the present case."

Such cavalier dismissal of highly significant factual information simply reflects—and further emphasizes—some basic fallacies inherent in Irvis's position.

The first of these is his view (Irvis Br. 4-5, 80-81) that club membership provisions must be rationally connected to membership purposes. The all-permeating error here is the idea that social gatherings must be either rational or reasonable, that the personal preferences of one group of individuals must as a prerequisite to their valid exercise satisfy the counterpreferences of some other group. We have already exposed at length this wholly mistaken notion (*supra,* pp. 6-13).

The second basic fallacy is found in Irvis's support (Irvis Br. 80-84) of the fantastic line drawn by the district court between racial restrictions in club membership, which it held unconstitutional, and religious and ethnic restrictions in club membership, to which it gave its blessing (A. 40).

Irvis, who seeks in asserted rationality a rationalization of that preposterous duality, completely overlooks the circumstance that the very transmutation theory that turns the liquor-license-holding-private-club's racial restrictions into state action forbidden by the Fourteenth Amendment would necessarily apply in full measure to religious and to ethnic distinctions. For, when discriminations of the latter variety are indeed the result of true state action, they also encounter the constitutional ban: The Equal Protection Clause tolerates neither religious discrimination (*Torcaso* v. *Watkins,* 367 U.S. 488; *Everson* v. *Board of Education,* 330 U.S. 1, 16), nor ethnic discrimination (*Hernandez* v. *Texas,* 347 U.S. 475), nor the two in combi-

nation (*United Public Workers* v. *Mitchell,* 330 U.S. 75, 100; *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89, 92).

Thus Irvis's substantive objection to the data gathered by the Elks is wholly untenable.

What the Elks' figures show, what indeed they dramatically demonstrate, is the pervasiveness of the pluralistic factor in American life.

Can it fairly be supposed that Congress could be unaware of that factor? Of course not. It is therefore far more reasonable to conclude that, being fully aware of it, being at least familiar with the doctrine that the power to express and to enforce one's preferences in homes and clubs is itself an exercise of the constitutional First Amendment right of private association, being also not unaware of the invitation extended by some members of this Court to "fashion a law drawing the guidelines necessary and appropriate to facilitate practical administration and to distinguish between genuinely public and private accommodations" (*Bell* v. *Maryland,* 378 U.S. at 317), Congress did indeed draw a line, one which effectuated that distinction, and which in the process protected the private club activities of nearly 80,000,000 American of both sexes, of all ages, creeds, and races, and of every ethnic strain as well.

On any other supposition none of those millions of citizens could constitutionally gather together in their several groupings and still enjoy the benefit of grape or grain, fermented, brewed, or distilled, as the case might be. Yet if the decision below is affirmed, it must necessarily follow that the asociational freedom of all those scores of millions of individuals stands to be to that extent impaired.

Denied a liquor license, every one of the restrictive membership groups would suffer, just as it is stipulated here that Moose Lodge No. 107 will suffer (Moose Br. 57); it is after all common knowledge that profits from the bar make possible virtually every private club's continued existence. "All others can see and understand this. How can we properly shut our minds to it?" *Child Labor Tax Case,* 259 U.S. 20, 37.

We conclude, therefore, that Congress drew the line where it did in order to insure the continued, unhampered, and unpenalized existence of every "private club or other establishment not in fact open to the public." There would really be no other reason for thus framing and enacting Section 201(e) of the Civil Rights Act of 1964.

CONCLUSION

For the foregoing additional reasons, the judgment below must be reversed.

Respectfully submitted.

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