TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-75

MOOSE LODGE No. 107, *Appellant,*

v.

K. LEROY IRVIS, and WILLIAM Z. SCOTT, Chairman, EDWIN WINNER, Member, and GEORGE R. BORTZ, Member, LIQUOR CONTROL BOARD, COMMONWEALTH OF PENNSYLVANIA.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS and ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

The undersigned as counsel for the above named organizations respectfully move this Court for leave to file the accompanying brief *amici curiae.* The B'nai B'rith was founded in 1843 and established its Anti-Defamation League as its educational arm in 1913. The American Jewish Committee was founded in 1907. The American Jewish Congress was founded in 1918. All three of these organizations are concerned with preservation of the security and constitutional rights of Jews in America through preservation of the rights of all Americans. They believe

that the welfare of Jews in the United States is inseparably related to the extension of equal opportunity for all.

This case raises an important issue under the Equal Protection Clause of the Fourteenth Amendment, involving a form of discrimination designed to protect the ultimate bastions of privilege—the private clubs. If it were shown that a particular private club was no more than a gathering place for individuals for social purposes, and that it was devoid of any aspect of government assistance in its operations, it might be beyond the reach of the constitutional prohibition of racial discrimination. But that is not the situation here. Appellant is an institution closely regulated by and benefiting from state action. Its operations are such that it has involved the government in participation in the furtherance of its discriminatory practices.

In the attached brief *amici curiae,* we seek to show that this kind of involvement is offensive to the Equal Protection Clause and its prohibition of discrimination through state action based on race or religion. We discuss specifically the comment of the court below which suggests a difference in application of the Equal Protection Clause to clubs that discriminate on the basis of race and those "which limit participation to those of a shared religious affiliation." *Irvis* v. *Scott,* 318 F. Supp. 1246, 1251 (1970).

In addition, drawing on our knowledge of the economic impact on the Jewish community of discrimination by clubs, we show in the annexed brief that the effects of discrimination by clubs such as Appellant are not confined to their own borders. Exclusion from clubs on the basis

of race or religion results in substantial obstacles to equal opportunity and effective participation in our society.

The arguments on these points in the annexed brief, drawn from the experience of these organizations in combatting discrimination, are offered in the hope that they will make a significant contribution to the resolution of the issues before this Court.

We have sought the consent of the parties to the filing of this brief *amici curiae*. Consent has been withheld by counsel for both Appellant and Appellee. Therefore, pursuant to Rule 42 of the Revised Rules of this Court, we move for leave to file our brief *amici curiae,* which is conditionally attached hereto.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971

No. 70-75

MOOSE LODGE No. 107, *Appellant,*

v.

K. LEROY IRVIS, and WILLIAM Z. SCOTT, Chairman, EDWIN WINNER, Member, and GEORGE R. BORTZ, Member, LIQUOR CONTROL BOARD, COMMONWEALTH OF PENNSYLVANIA.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS and ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

Interest of the *Amici*

The interest of the *amici* is set forth in the attached motion for leave to file.

Statement of the Case

This is an appeal from the final decree of a three-judge District Court, entered on November 13, 1970, which invalidated the club liquor license issued to Appellant by the Liquor Control Board of the Commonwealth of Pennsylvania. The District Court enjoined the Board from issuing such a license to Appellant as long as it pursues a policy of racial discrimination in its membership or operating practices.

The facts in the case are undisputed. On December 29, 1968, a member in good standing of Moose Lodge No. 107 in Harrisburg brought Representative K. Leroy Irvis, a Negro, who is majority leader of the state House of Representatives, to the Lodge's dining room and bar as his guest and requested service of food and beverages. Employees of the Lodge refused service to Irvis solely because of his race.

Moose Lodge No. 107 is a subordinate lodge chartered by the Loyal Order of Moose, a national fraternal, benevolent and charitable organization. One of the numerous objects and purposes of local lodges, as set forth in the Constitution of the Supreme Lodge, is "to encourage tolerance of every kind." This Constitution restricts membership in the Moose to "all acceptable white persons of good character."

Shortly after he was refused service, Representative Irvis brought suit under 42 U.S.C. §1983 in the District Court for the Middle District of Pennsylvania against the Liquor Control Board and Moose Lodge No. 107, contending that the grant of a liquor license to the Lodge by Pennsylvania, which strictly regulates the dispensing of alcoholic beverages, constituted state action in aid of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Irvis claimed that Pennsylvania was legally barred from facilitating such discrimination by its grant of a liquor license. A three-judge court was convened under 28 U.S.C. §2281 to rule on the constitutional question thereby presented.

The opinion of the court below is reported at 318 F. Supp. 1246. The court traced the history, through the Eighteenth and Twenty-first Amendments, of governmental prohibition and regulation of intoxicating beverages, concluding that each state now has "absolute power" to deal with the matter "as it sees fit," and that Pennsylvania has exercised this power to the fullest. Therefore, although the court stressed its intent not to interfere with "the right of members of the Moose Lodge to associate among

themselves in harmony with their private predilections,'' it held that the state ''may not confer'' upon the Lodge, through the grant of a license, its own power to dispense alcoholic beverages.

A motion to modify the final decree of the District Court was filed on December 2, 1970 to permit the Lodge to retain its liquor license on the condition that members be allowed to bring guests to the club regardless of race, with the membership exclusion as to race remaining intact. On January 4, 1971, the motion was denied. A notice of appeal to this Court was filed on the same day. On March 29, this Court entered an order noting probable jurisdiction of the appeal.

Question to Which This Brief Is Addressed

This brief is addressed solely to the question whether a private club which discriminates on the basis of race may, consistently with the Equal Protection Clause of the Fourteenth Amendment, be granted a liquor license under the laws of Pennsylvania.

Summary of Argument

I. A. The Equal Protection Clause of the Fourteenth Amendment applies to all action which can be said to be that of the state. Equal protection is denied when the state authorizes or encourages discriminatory action.

B. Here, the state, by granting Appellant a club license, has facilitated its discriminatory operations. It is recog-

nized that the club could not operate effectively without a license. Moreover, the comprehensive regulation of liquor licensees required by Pennsylvania law involves the state in responsibility for the licensee's discrimination.

C. This does not necessarily mean that every holder of a state license is prohibited from engaging in racial discrimination. Whether that is so need not be decided here, since this case involves a high degree of state regulation which may not be present in the case of other licenses.

D. Although the court below suggested that the conclusion it reached might not apply to clubs that limit membership to persons who share a religious affiliation or a national heritage, we here urge that this Court not lend its authority to any suggestion that the Equal Protection Clause applies with less force to religion than it does to race. Although addition of the Fourteenth Amendment to the Constitution arose out of a racial conflict, Congress chose to draft it in a form that bars invidious discrimination generally. Accordingly, this Court has repeatedly recognized that the Equal Protection Clause applies to discrimination based on religion.

II. If there is any conflict here between the constitutional right to freedom of association and the constitutional guarantee of equal protection, it should be resolved in favor of the latter. More is involved here than mere association for social purposes. The discriminatory barriers imposed by many private clubs directly injure members of minority groups in their efforts to obtain equal status in our economy. The impact of exclusion from clubs on upward economic mobility has been documented repeatedly.

This factor must be weighed in assessing Appellant's claim that its right to fredeom of association is paramount here.

ARGUMENT

POINT ONE

The Pennsylvania Liquor Control Board violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by granting a liquor license to Appellant, a social club which engages in discrimination based on race, and in failing to invalidate that license because of the discriminatory action.

A. The Requirement of "State Action"

It is "commonplace" that rights under the Equal Protection Clause arise only where there has been involvement of the state or one acting under the color of its authority. *United States* v. *Guest,* 383 U. S. 745, 755 (1966). In a frequently quoted passage (*Shelley* v. *Kraemer,* 334 U. S. 1, 13 (1948)), this Court said:

> Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

To bring the Fourteenth Amendment into play, it is not necessary that the state official or state organ engage direct-

ly in discriminatory action. The involvement of the state need not be "either exclusive or direct." *United States* v. *Guest, supra,* 383 U. S. at 755. It is sufficient if there is a causal relationship of sufficient intensity between the state action and the discriminatory action by private persons. Obviously, if the state mandates discrimination by private persons, the Fourteenth Amendment is violated. *Peterson* v. *City of Greenville,* 373 U. S. 244 (1963); *Lombard* v. *State of Louisiana,* 373 U. S. 267 (1963); *Robinson* v. *State of Florida,* 378 U. S. 153 (1964).

The state involvement prohibited by the Fourteenth Amendment may be less than a command. It has been repeatedly held that the state violates the Equal Protection Clause if it authorizes and encourages discriminatory action. *Reitman* v. *Mulkey,* 387 U. S. 369, 375, 376, 381 (1967). In other words, discrimination by a private party violates the Fourteenth Amendment if that party acts "against a backdrop of state compulsion or *involvement.*" *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 169 (1970) (emphasis added).

Another set of circumstances which may result in discriminatory state action outlawed by the Equal Protection Clause arises when the state is "entwined in the management or control" of the private enterprise which discriminates. *Evans* v. *Newton,* 382 U. S. 296, 301 (1966). Or, as is stated in a leading case involving school desegregation, responsibility for discrimination arises upon "state participation through any arrangement, management, funds or property." *Cooper* v. *Aaron,* 358 U. S. 1, 4 (1958).

No "precise formula" for recognition of state responsibility under the Equal Protection Clause exists. To try to develop such a formula would be an "impossible task." *Kotch* v. *Board of River Port Pilot Com'rs,* 330 U. S. 552, 556 (1947). The criterion for finding discriminatory state action barred by the Equal Protection Clause is involvement of the state "to some significant extent" in any of the manifestations of discrimination. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722 (1961). This Court said in that case (*ibid*): "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

The *Burton* case is of particular interest because of certain similarities to the facts in the case at bar. The issue in that case was whether the Equal Protection Clause was violated by discriminatory action of a restaurant which had leased its premises from the Wilmington Parking Authority, a public agency. The state court had held that the restaurant was acting in "a purely private capacity" under its lease, that its action was not that of the Parking Authority and was not therefore state action within the contemplation of the prohibitions contained in the Fourteenth Amendment. This Court disagreed. After discussing the various activities, obligations and responsibilities of the Parking Authority with respect to the restaurant, the Court found "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn" (365 U. S. at 724). It observed that the Parking Authority could have affirmatively required the restaurant to dis-

charge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. The Court noted that the Authority had abdicated its responsibility in this respect. It added: "By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination" (*Id.* at 725). The Court concluded that the involvement of the state in the discriminatory action of the restaurant was significant enough to warrant the conclusion that the Authority had violated the Equal Protection Clause of the Fourteenth Amendment.

Justice Stewart, concurring, arrived at the same result through different argument. He concluded that the Delaware courts had construed state legislation dealing with the rights of the proprietor of a restaurant as "authorizing discriminatory classification based exclusively on color" (*Id.* at 727) and that a law authorizing discrimination by private persons was a clear violation of the Fourteenth Amendment.

B. The "State Action" Here

If we apply the principles reviewed above to the facts of the present case, the conclusion is inescapable that the Pennsylvania Liquor Control Board, by granting Appellant a club license, has directly facilitated the discriminatory operation of Appellant. In effect, the Board has told the club: We grant you the liquor license and thus assist you in your operations, which you are free to carry on in a manner that discriminates against persons of the black race.

It is generally agreed, and conceded by Appellant (Brief, pp. 56-58), that it is difficult if not impossible for a club of Appellant's kind to operate without a club license. Hence, by granting Appellant such a license, the Board, in effect, put Appellant in position to discriminate against members of the black race, just as the Eagle restaurant in the *Burton* case was placed in position to discriminate on racial grounds by obtaining a lease from the Parking Authority.

The Pennsylvania Liquor Control Board became "significantly" involved in the operation of Appellant by a "pervasive regulation of the licensee by the state to an unparalleled extent," as the court below found. 318 F. Supp. at 1250. Without going into the details of that court's findings, it is sufficient to note that, not only does the Liquor Control Board have the power to grant clubs such as Appellant a liquor license but it also exercises "a certain supervisory power over the conduct of the licensee after a license has been granted." In addition, the Board has the power to revoke or suspend the club license for any "sufficient cause shown." 47 Purdon's Pa. Stat. Annot., Sec. 4-471.

This power to suspend and revoke club licenses for "sufficient cause shown" is of particular importance in an examination of the involvement of the Board in the discriminatory conduct of Appellant. The Liquor Code requires that it should be liberally construed for the accomplishment of its purpose which is "the protection of the public welfare, health, peace and morals of the people of the Commonwealth * * *" 47 Purdon's Pa. Stat. Annot., Sec. 1-104. There is no question that the practice of racial

discrimination is diametrically opposed to the interest of public welfare. This has been eloquently expressed in the preamble to the Pennsylvania Human Relations Act. 43 Purdon's Pa. Stat. Annot., Section 952. Hence, the discriminatory practices of Appellant constitute a "sufficient cause" for a suspension or revocation of Appellant's license. By its failure to exercise this authority, the Liquor Control Board acquiesced in discriminatory practices under circumstances where it could and should have put an end to them by action authorized under the law it administers.

The situation is similar to the one involved in *Burton, supra,* where this Court held that the Parking Authority could have prevented the restaurant owner from acting in a discriminatory manner by including a clause to that effect in the lease. In both instances, the Authority, by failing to prevent racial discrimination or put such discrimination to an end—in one case by including the necessary clause in the lease and in the other case by suspending or revoking the liquor license—must accept responsibility for the discrimination carried on by the private party with which it dealt.[1]

1. It cannot be said that the state was not in a position to act because of lack of state law providing a basis for revocation. This defense is invalid, in any case, because of the Supremacy Clause. In fact, however, as shown above, there is no such lack of state law. Under Section 4-471, liquor licenses may be revoked or suspended for any "sufficient cause shown," which includes discriminatory practices.

It is noteworthy that the Massachusetts Liquor Authority recently took action against a discriminatory club in a similar situation. Finding that local chapters of the Elks and Moose had limited membership to Caucasians or white persons, it refused to renew their applications and revoked their licenses. *In re Proceedings against Benevolent and Protective Order of Elks, Loyal Order of Moose and Fraternal Order of Eagles.* Decision of April 7, 1971.

There is another factor in this case independent of the deep involvement of the Pennsylvania Liquor Control Board in all phases of the operation of Appellant. As the court below pointed out, the regulations of the Liquor Control Board requiring the club to abide by its own bylaws, which exclude black persons from club membership, actually amount to an encouragement of such discrimination. *Irvis* v. *Scott, supra,* at 1250. The reference is to that portion of the regulations of the Liquor Control Board which requires that "Every club licensee shall adhere to all the provisions of its constitution and bylaws." Regulations, Section 133.09.

Appellant seeks to limit the scope of this regulation. It claims that the only provision of a club's constitution and bylaws in which the Liquor Control Board is interested is that determining its nature as a club. But there is nothing in the language of the regulation to support such a limited interpretation. The Board could easily have placed such a limitation in its regulation if it had intended a restrictive meaning. Moreover, the provision of Appellant's bylaws excluding blacks from membership is, after all, directly related to the club nature of Appellant. Obviously in an activity of less private nature than a club, as for example a place of public accommodation, such a restriction would be clearly contrary to Federal requirements. See *Daniel* v. *Paul,* 395 U. S. 298 (1969). In sum, the restrictive policy of Appellant has been given the fiat of the Liquor Control Board, which thus has placed its powers and prestige behind Appellant's discriminatory practices. *Burton, supra,* 365 U. S. at 725.

C. Application to Licensees Generally

Appellant makes the point that not every license granted by the state makes action by the licensee state action within the reach of the Fourteenth Amendment (Brief, pp. 59 ff.). The court below did not say that it does.[2] It derived its conclusion that the granting of the liquor license to Appellant constituted state action subject to the provisions of the Fourteenth Amendment from the "uniqueness and the all-pervasiveness of the regulation by the Commonwealth of Pennsylvania of the dispensing of liquor under the licenses granted by the state." *Irvis* v. *Scott, supra,* at 1248. Appellant asks rhetorically where the line should be drawn between ordinary licenses and licenses which by nature of the pervasiveness and uniqueness of state regulation makes a state responsible for discrimination by licensees. At what point, Appellant asks, does the degree and intensity of state regulation of a license become so pervasive as to make the state responsible for discriminatory action by the licensee?

This Court has repeatedly acknowledged that precise answers cannot be given to questions of this kind. *Burton, supra,* 365 U. S. at 722; *Evans* v. *Newton, supra,* 382 U. S. at 299. Appellant might have a point if we were dealing here with a question of mathematics or physics. But there are no precise distinctions in the body of law. Only recently, Chief Justice Burger stated that "it is an essential

2. But see the concurring opinions of Justice Douglas in *Garner* v. *Louisiana,* 368 U. S. 157, 184-185 (1961); *Lombard* v. *Louisiana, supra,* 373 U. S. at 281-283; and *Reitman* v. *Mulkey, supra,* 387 U. S. at 384-386, in which the Justice took the position that a state cannot constitutionally exercise its licensing power in a manner which either in terms or in effect results in racial discrimination.

part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution." *Walz* v. *Tax Commission,* 379 U. S. 664, 679 (1970).

The answer to Appellant's question here is that the Court has drawn a line by requiring "significant" involvement of the state in private operation to make the state responsible for the private person's action. There is nothing wrong in drawing lines. In the words of Justice Frankfurter: "Lines are not the worse for being narrow if they are drawn on rational considerations." *10 East 49th Street* v. *Callus,* 325 U. S. 578, 584 (1945).

There is no question that the criterion of "significant involvement," laid down in *Burton,* is one based on rational considerations. If the state gets significantly involved in private operations by any of the ways and means discussed above, it assumes responsibility for the operations of private persons and should not escape responsibility for violations of the Constitution only because the act of discrimination looked upon in isolation is done by a private person. The term "significant" is as acceptable a criterion as the word "reasonable," a criterion frequently occurring in the jurisprudence of this Court. *Walz* v. *Tax Commission, supra,* 397 U. S. at 679.

D. Discrimination on the Basis of Religion

The court below, near the end of its decision, said (318 F. Supp. at 1251):

> Nothing in what we here say implies a judgment on private clubs which limit participation to those of a shared religious affiliation or a mutual heritage in na-

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

We express the hope that this Court will not lend its authority to this dictum on the part of the District Court. Recognizing that there is no need for this Court to repudiate it specifically, since this case does not involve discrimination based on religion, we believe that it would be unfortunate for this Court to suggest that the barriers imposed by the Equal Protection Clause apply with less force to religion then they do to race.

The application of the Equal Protection Clause to discrimination based on religion was recognized by this Court at least as far back as 1900. In *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89 (1900), in discussing the scope of the Equal Protection Clause, it said (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.[3]

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3. Even earlier, in *Ho Ah Kow* v. *Nunan,* 12 F. Cas. 252 (C.C.D. Cal. 1879), Mr. Justice Field expressed the view that the equal protection concept bars discrimination on the basis of religion, specifically with respect to Jews.

Again, in *United Public Workers* v. *Mitchell,* 330 U.S. 75, 100 (1947), this Court said:

> Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on Congressional power. * * *

In *Niemotko* v. *Maryland,* 340 U.S. 268 (1951), this Court found that use of a public park, normally open to religious groups, had been discriminatorily denied to a particular religious group although other religious activities had been allowed. It concluded that "the completely arbitrary and discriminatory refusal to grant the permit was a denial of equal protection" (at 273).

The constitutional concept of equal protection is not confined to the Equal Protection Clause. It is embedded likewise in the Establishment Clause of the First Amendment which, this Court has held, prohibits state action discriminating among religious groups. Thus, this Court said in *Everson* v. *Board of Education,* 330 U.S. 1, 15 (1947), that, under the Establishment Clause, "Neither a state nor the Federal Government can * * * pass laws which aid one religion, aid all religions, or prefer one religion over another." The Court went on to say (at 16):

> [The State] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.

The condemnation of discrimination among religions in the *Niemotko* case was rested on freedom of religion as well as equal protection concepts (340 U.S. at 272). This double basis is even clearer in *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953), which reached the same result on similar facts. Indeed, in that case, the Court emphasized the guarantees of the First Amendment as made applicable to the states by the Fourteenth. This caused Justice Frankfurter to note that he concurred in the opinion of the Court, except to the extent that it relied upon the First Amendment. He said that, for him, "it is the Equal-Protection-of-the-Laws Clause of the Fourteenth Amendment that condemns the Pawtucket ordinance as applied in this case" (at 70).

In its recent decision on the validity of government aid to religiously affiliated schools, *Lemon* v. *Kurtzman,* 39 LW 4844, decided June 28, 1971, this Court stated that it did not reach the question whether schools receiving such aid may discriminate on the basis of religion or race (Slip Opinion, p. 6n). However, Justice White, in his dissenting opinion, expressed the view that, if there had been evidence that any of the schools "restricted entry on racial or religious grounds, * * * the legislation would to that extent be unconstitutional" (Slip Opinion, p. 11n). The same view was suggested by Justice Brennan in his concurring opinion (Slip Opinion, p. 11).

It would be contrary to the public policy manifested in many recent Federal and state statutes to bar discrimination based on race and allow discrimination based on religion. Thus, the prohibition of discrimination in places of

public accommodation and employment in Titles II and VII respectively of the Civil Rights Act of 1964 (42 U.S.C. Secs. 2000a to 2000a-6 and Secs. 2000e to 2000e-15) and the prohibition of discrimination in housing in Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Secs. 3601 to 3619) all apply to discrimination based on race, religion and national origin. Virtually all of the antidiscrimination laws enacted in the past 25 years in the various states have used the same formula.

The court below said in its dictum that the primary purpose of the Equal Protection Clause was the elimination of government-sponsored racial discrimination. We have no doubt that this was the central purpose and generating cause of the adoption of the Fourteenth Amendment. Nevertheless, the Congress that proposed that Amendment chose not to couch it in terms of racial discrimination but rather to bar oppressive discrimination generally. And it was on that basis that the Amendment was approved by the requisite number of states.

Certainly there is nothing in the *Loving* case, the single decision cited by the court below, to warrant the conclusion that the Equal Protection Clause applies with modified force to discrimination based on religion. On the contrary, that case invalidated a state statute barring interracial marriages. There is little doubt that, under both the Equal Protection Clause and the religious guarantees of the First Amendment, a law purporting to bar interreligious marriages would be unconstitutional.

The same may be said of the cases cited in the *Loving* case (388 U.S. at 10). *Ex parte Virginia,* 100 U.S. 339

(1880), dealt with discrimination in the selection of juries. *Shelley* v. *Kraemer,* 334 U.S. 1 (1948), dealt with judicial enforcement of restrictive covenants. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961), dealt with discrimination by a restaurant in a public building. It would surely not be suggested that the decision in any of these cases would have been different if the discrimination in question had been based on religion.[4]

POINT TWO

The impairment, if any, of the constitutional right to freedom of association by prohibiting discrimination on the part of private clubs is outweighed by the destructive effect of such discrimination on the right to equal protection of the laws.

Appellant asserts that the constitutional right to freedom of association gives private clubs the right to discriminate on the basis of race (Brief, pp. 45-52). We submit that, if the lower court was correct, as we argue in Point I, that the grant of a liquor license to a discriminatory club violates the Equal Protection Clause, the question of freedom of association simply does not arise. It can hardly be urged that the freedoms guaranteed by the First Amendment can be exercised in a manner that conflicts with the Equal Protection Clause of the Fourteenth Amendment. *Evans* v. *Newton,* 382 U.S. 296 (1966).

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4. Covenants that placed restrictions on religious as well as racial grounds were in wide use at the time of the *Shelley* decision. See Abrams, *Forbidden Neighbors,* pp. 170-172 (1955). As far as we know, no one has attempted to enforce religious clauses in such covenants since that decision was issued.

Assuming, *arguendo,* that there is such a conflict, it would have to be resolved by weighing the gravity of the invasion of each of the rights. Appellant in effect argues that all that is involved here is purely private conduct having no ramifications beyond the doors of the club. We urge, on the contrary, that discrimination by private clubs directly impairs the economic status of the minority group members who are its victims. This effect, we believe, requires resolution of any conflict here between the right to freedom of association and the right to equal protection in favor of the latter.

Private clubs, whether they are golf and tennis clubs, city luncheon clubs, or fraternal organizations such as the Loyal Order of Moose, are not merely places of sociability and friendly companionship. They should rather be regarded as economic tools. There is abundant evidence that club membership is closely linked to business and executive job opportunities and, conversely, that exclusion from club membership results in denial of such opportunities. Where such exclusion is rooted in race or religion, as is so frequently the case, economic disadvantage necessarily follows.

In a study conducted by the Survey Research Center of the Institute for Social Research at the University of Michigan, 58% of the management respondents replied that a man's promotional opportunities were affected beneficially by his belonging to the "right" club or lodge. *Discrimination Without Prejudice, a Study of Promotion Practices in Industry,* p. 14 (1964).

The role of social clubs in facilitating executive promotion was documented in 1969 by Professor Reed M.

Powell of Ohio State University in *"Race, Religion, and the Promotion of the American Executive."* According to Professor Powell, a substantial majority of corporation executives perceive the private club as a vital cog in their business machinery. For these executives, the club provides an environment where information important to the firm is obtained, valuable business contacts are made and customers are entertained. At the club, friendships can be cultivated which may lead to promotion within the firm or to better positions in other companies. Finally, and most importantly, status in the community is acquired simply from the fact of club membership. Thus the club is not only a social nexus but also an extremely important economic nexus. It affords access to the market place.

The economic function of the club structure is recognized by corporate enterprise, which heavily underwrites club costs. As noted in *Forbes,* March 15, 1971, pp. 42-43:

> There is one other major group supporting the country club—big business. Perhaps 15% to 20% of the U. S. 1.5 million club members are subsidized by their employers for business entertaining. Such spending isn't limited to giants like IBM, Armstrong Cork or Corning Glass. Little Rubbermaid, the $80 million housewares maker, pays a good part of 40 executives' expenses at the Wooster (Ohio) Country Club.

The invidious exclusion of minority group persons from clubs always has been the handmaiden of other forms and manifestations of discrimination. With specific reference to Jews, the following extract depicts this interrelatedness (Kiester, *The Case of the Missing Executive,* p. 8 (1968)):

> For many years, discrimination in the world of work was accompanied and reinforced by discrimination in other areas of American life. Beginning about 1880, Jews were excluded from high-status residential neighborhoods, apartment buildings, *city and country clubs* and vacation resorts. Thus, even outside their corporate offices, the captains of industry mingled only with persons like themselves. Having grown up in "restricted" communities, having belonged to "restricted" fraternities, they seldom could have gotten to know a minority group member well. The result was that managers were confirmed in their tendency to hire and promote only persons with a background like their own—the people whom they knew best and with whom they were most comfortable.
>
> From a business standpoint, the most significant area of exclusion was the prestige social club, where the giants of corporate life gathered. The Duquesne Club in Pittsburgh, the Chicago Club, the Pacific Union Club in San Francisco and many others—including some which had Jews among their founders—limited themselves to Christian members. For persons of minority origin, exclusion from the clubs, where much high-level business was and is informally transacted, automatically spelled exclusion from executive careers. (Emphasis added.)

The same point is underscored, and extended to other minority groups, in a recent publication (Morris, *"Better Than You"—Social Discrimination Against Minorities in America,* p. 45 (1971)):

> A Jew seeking advancement in big business is barred from social clubs because of prejudice—then shut out from promotion because he does not belong to the "right" clubs. And of course blacks, Mexicans and Orientals find this even more true; their prestige and

> acceptance in the world of big business, and therefore their chances for elite club membership and status jobs, are minimal.

E. Digby Baltzell of the University of Pennsylvania, in *The Protestant Establishment—Aristocracy & Caste in America* (1964), has similarly traced the role of the private club in the drive for power, wealth and prestige. In a sub-chapter entitled "The Club and the Corporate Elite: The Tail That Wags the Dog," he observed (pp. 366-367):

> It is not, of course, that the values of the gentile gentlemen who dominate the admissions policies of the Duquesne are out of the ordinary. On the contrary, they mirror the mores of most of the leading metropolitan men's clubs in the nation. In city after city, the admissions policies of the top clubs are increasingly causing our national corporations to bar some of their best-qualified men from top leadership positions. Recently, for example, a leading executive in a nationally prominent corporation was forced to resign because of the caste policies followed by a leading club in Chicago, where the company's head offices are located. This man of Jewish origins was an executive vice president and next in line for the presidency of this famous firm, which was, incidentally, founded and built by Jews. But when the president retired, the executive vice president was informed that he had not been chosen for the presidency because of the so-called "religious" barriers at the leading men's club where top executives meet for lunch.

The deleterious consequences of private club discrimination are not confined to the area of employment. In 1969, during the campaign for Mayor of Atlanta, Georgia, a Jewish candidate, Sam Massell, Jr., was moved to charge,

"The same men who don't want me to sit in their clubs don't want me to sit in the Mayor's seat either."

In short, bigotry cannot be contained within the sanctuary of the private club. It is a contagious malady. In the eyes of many, it is still quite fashionable to discriminate within the club environment. By affording discrimination this patina of respectability, these persons inevitably stimulate seepage of its poison into the entire body politic.

We submit that the impact of club discrimination on our society conflicts with the principle of equal protection embedded in our Constitution. It conflicts also with the principle of equal opportunity in employment which became the policy of the Federal Government with the adoption of Title VII of the Civil Rights Act of 1964, 42 U.S.C., Secs. 2000e-2(a)(1)(2).

Three years ago, the National Advisory (Kerner) Commission on Civil Disorders (Report (1968), p. 24) called on the Federal Government to "take new and vigorous action to remove artificial barriers to employment and promotion, including * * * racial discrimination * * *." We have sought to show that racial, as well as religious, discrimination by private clubs is one such barrier. This, we believe, is a compelling reason why this Court should reject Appellant's claim that the constitutional right to freedom of association lends protection to its discriminatory practices.

Conclusion

It is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

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