

Death and Transfiguration of the State Action Doctrine—*Moose Lodge v. Irvis* to *Runyon v. McCrary*

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Last year the Supreme Court held, in *Runyon v. McCrary*,¹ that federal law² prohibits private schools from discriminating in student admissions on the basis of race. This decision was the latest in a long series of surprises from a Court that still professes to believe that the “state action” doctrine governs its interpretation of the Fourteenth Amendment. Few will argue with the contention that the Supreme Court decisions involving the Thirteenth and Fourteenth Amendments during the last ten years have wrought very drastic changes in the state action doctrine. Indeed, the changes have been so drastic that what the Court now *calls* the “state action” doctrine is actually something else, a “public sphere” doctrine. The public sphere doctrine, strangely enough, was originally presented in a dissent by Justice John Marshall Harlan in the 1883 *Civil Rights Cases*,³ as an alternative to the state action doctrine espoused by the majority in that case.

While the original state action doctrine limited the power of Congress to protect an individual’s civil rights to situations involving state discrimination, the alternative public sphere doctrine would extend that congressional power throughout the public sphere (the sphere of civic life that includes the commercial world of buying and selling) and would limit the extension only at the point where the private sphere (the sphere of private family life and private associations) begins.

While the state action doctrine hinges upon the words “no state . . .” that begin the second sentence of the Fourteenth Amendment, the public sphere doctrine focuses on the affirmative grant of citizenship that comprises the first sentence of the Fourteenth Amendment and on those rights due each citizen that may be inferred therefrom. The author posits that the Court’s unannounced shift to the public sphere doctrine actually began in 1972 in the

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1. 96 S. Ct. 2586 (1976).

2. 42 U.S.C. § 1981 (1970).

3. 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting).

case of *Moose Lodge No. 107 v. Irvis*,⁴ although that shift has gone virtually unnoticed in the legal commentary.⁵ Pursuing this initial proposition, the author argues that the Supreme Court's decision in *Runyon* makes more sense if viewed as a case that exemplifies the developing public sphere doctrine, rather than as a case that recapitulates the defunct state action doctrine. Finally, the author suggests that the Court should enunciate this as yet inarticulated shift in approach⁶ in order to clarify a murky area of constitutional law.

In order to explain the Court's implicit adoption of the public sphere doctrine in 1972, it is necessary to trace the legal developments that produced the need for that shift in approach. By 1972, as a result of a series of Fourteenth Amendment decisions, the Supreme Court had so minimized the degree of governmental involvement needed to qualify as state action—thereby invoking the constitutional mandate prohibiting racial discrimination—that it was hard to imagine any sphere of private life that remained free for the exercise of legitimate associational liberty. The other

4. 407 U.S. 163 (1972).

5. Commentary on the *Moose Lodge* case is almost unanimous in viewing it simply as a further elaboration, narrowing, or clarification of the state action doctrine. See, e.g., Bassett, *The Reemergence of the "State Action" Requirement in Race Relations Cases*, 22 CATH. U. L. REV. 39, 40 (1972); Kurland, *The 1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181, 187-90; Note, *Constitutional Law—The Private Club: Another Reprieve*, 27 ARK. L. REV. 146 (1973); Note, *The Sacred Cow: A Private Club's Right to Discriminate Notwithstanding Its Support and Maintenance by Virtue of a State Granted and Regulated Liquor License—Moose Lodge No. 107 v. Irvis*, 17 HOW. L.J. 693 (1972); Note, *The Scope of Permissible State Interference with Racial Discrimination by Private Fraternal Organizations*, 4 RUT.-CAM. L.J. 338, 341 (1973); Note, *The Rights of Private Clubs to Discriminate Against Black Guests Despite a State-Issued Liquor License*, 26 U. MIAMI L. REV. 833 (1972); 39 BROOKLYN L. REV. 481 (1972); 41 FORDHAM L. REV. 695 (1973); 26 RUTGERS L. REV. 888 (1973); 8 WAKE FOREST L. REV. 598 (1972).

The single comment that noticed the emergence of a public sphere—private sphere doctrine in *Moose Lodge* advocated a return to a genuine state action doctrine. See 22 J. PUB. L. 281, 287, 289 (1973).

6. This is not the first time that the Court has instituted a new constitutional doctrine while claiming to follow an old one. One recent article demonstrated, contrary to the accepted wisdom, that the substantive incorporation of freedom of speech into the due process clause did not explicitly begin in *Gitlow v. New York*, 268 U.S. 652 (1925). Although an unarticulated trend toward that incorporation did begin in *Gitlow*, the fully explicit acknowledgment of incorporation did not come until *Near v. Minnesota*, 283 U.S. 697 (1931). See Heberle, *From Gitlow to Near: Judicial Amendment by Absent-Minded Incrementalism*, 34 J. POL. 458 (1972). The classic description of the phenomenon of the unarticulated precedent was Justice Jackson's sardonic comment in one dissent that the disparity between what the Court claimed to be doing and what it actually was doing reminded him of Byron's Julia who "whispering 'I will ne'er consent,'—consented." *Everson v. Board of Educ.*, 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

wall of the doctrinal corner into which the Court had backed itself by 1972 involved the invigoration of 42 U.S.C. §§ 1981 and 1982.⁷ Based on statutes originally passed in 1866 to effect the policies enunciated in the Thirteenth Amendment,⁸ these statutes prohibited racial discrimination in all contracts, sales, conveyances, and similar transactions. Because the original state action doctrine had been read into the Thirteenth Amendment in 1883,⁹ these statutes had for nearly ninety years been interpreted as forbidding only governmental discrimination. Once the Supreme Court began to enforce these statutes literally in 1968, it became necessary to confront some thorny but nevertheless crucial questions. Just how private did a contractual relationship have to be in order to be protected from the reach of these civil rights provisions? Or are all contracts that involve elements of racial discrimination subject to the sanctions imposed by these statutes?

The shift by the Supreme Court toward the public sphere doctrine was gradual. One can divide it into two phases. In the first phase, in a series of cases involving racial discrimination from *Shelley v. Kraemer*¹⁰ through *Reitman v. Mulkey*,¹¹ the Court increasingly blurred the distinction between private action and state action.¹² This trend became so pronounced that Justice Douglas in 1966 finally advocated the substitution of a modified public sphere doctrine in lieu of the state action concept in *Evans v. Newton*.¹³ His innovative effort went unheeded, however, and Court opinions before and since 1966 continued to employ the state action model¹⁴ in

7. 42 U.S.C. §§ 1981, 1982 (1970).

8. See *Runyon v. McCrary*, 96 S. Ct. 2586, 2593 n.8 (1976); cf. *id.* at 2604 (White, J., dissenting).

9. Civil Rights Cases, 109 U.S. 3, 16-17 (1883). See notes 41-45 and accompanying text *infra*.

10. 334 U.S. 1 (1948).

11. 387 U.S. 369 (1967).

12. This article limits itself to the decline of the state action doctrine in racial discrimination cases. The author believes that such separate treatment is justified because (1) it is universally recognized that the original concern of the Fourteenth Amendment was racial discrimination, and (2) the Court continues to be more generous in finding state action when race discrimination is involved than in other situations. See Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 658-61 (1974). See also *Norwood v. Harrison*, 413 U.S. 455 (1973).

13. 382 U.S. 296 (1966).

14. Justice Douglas' lone concurring opinion in *Reitman* was the only opinion based on the distinction between the public and private domains. See *Reitman v. Mulkey*, 387 U.S. 369, 385 (1967) (Douglas, J., concurring). And only Justice Douglas' dissenting opinion (with Justice Marshall concurring) in *Moose Lodge* refers explicitly to this distinction. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-81 (1972) (Douglas, J., dissenting). For a tracing of the dilution of the state action doctrine during phase one, see Cox, *The Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 102 (1966) [hereinafter cited as

analyzing claims involving such seemingly private racial discrimination as that committed by the manager of a private restaurant leasing a site located on state lands¹⁵ and by landlords renting private apartments while discrimination was permitted by the state constitution.¹⁶

Phase two began with the decision in *United States v. Guest*¹⁷ and was perpetuated by the holdings in *Jones v. Alfred H. Mayer Co.*¹⁸ and *Griffin v. Breckenridge*.¹⁹ In this phase the Court entirely rejected the basic rule established in the *Civil Rights Cases* that

until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment . . . can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.²⁰

Once this rule was rejected, the state action doctrine no longer limited the power of Congress to prohibit racial discrimination. Congress might judge a particular privilege to be part of the universal civil freedom granted by the Thirteenth Amendment or part of the citizenship granted by the Fourteenth Amendment and might then prohibit *private* interference with that privilege. By 1971 the state action doctrine seemed to be viable only for determination of which rights the Fourteenth Amendment created on its own without positive congressional action.²¹

Cox]. See also Black, *The Supreme Court 1966 Term, Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 83-95 (1967) [hereinafter cited as Black].

15. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

16. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

17. 383 U.S. 745 (1966).

18. 392 U.S. 409 (1968).

19. 403 U.S. 88 (1971).

20. 109 U.S. 3, 13 (1883). See also Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964), which suggested before *Guest* that passages such as the one quoted from the *Civil Rights Cases* could be read to cover state inaction.

21. There is even some ambiguity on the part of at least three of the justices concerning the potency of the state action doctrine as a limit upon rights created by the Fourteenth Amendment. Justice Brennan's opinion in *Guest* (joined by Chief Justice Warren and Justice Douglas) carefully distinguishes between a right of equal access to privately-owned facilities and a right of equal access to state-run facilities, and it places only the latter behind the shield of the Fourteenth Amendment. 383 U.S. at 774-86 (Brennan, J., concurring in part and dissenting in part). On the question of the source of the right to free interstate travel, however, Justice Brennan gives only three clues to his position: (1) he differs from Justice Stewart's reasoning; (2) he felt he "need not reach the question whether the Constitution of its own force [presumably the force of the privileges and immunities clause of the Fourteenth Amendment] prohibits private interferences" (*id.* at 777 n.3.) with the right of interstate travel; and (3) his view on the interstate travel question

At this point *Moose Lodge No. 107 v. Irvis*²² was decided, and the entire Court, including the dissenters,²³ was again speaking the language of state action. The reason for this approach, and the implications of the justices' discussions for the future of the law in this area, can be explained only after a more complete examination of the impact of the precedents set by *Guest* and *Jones*.

I. United States v. Guest: Frontal Assault on the State Action Limit

According to Justice Stewart, who wrote the opinion for the Court in *United States v. Guest*,²⁴ which arose from an indictment for criminal conspiracy to deprive black citizens of their civil rights, the case involved only the matter of statutory construction; but the concurrences also reached questions of constitutional power.²⁵ The statute at issue in *Guest*, 18 U.S.C. § 241,²⁶ had been found by the Court in *United States v. Williams*²⁷ to protect no Fourteenth Amendment rights because its language clearly applied only to private conspiracies. The implication at that time was clear: the Fourteenth Amendment created rights enforceable by Congress only against state officials.²⁸ The conclusion of the six concurring justices in *Guest* was that section 241 could be constitutionally applied to completely private action that interfered with Fourteenth Amendment rights.²⁹ This assertion

follows reasoning similar to his argument that Congress has the authority to protect rights that emanate from, or find their source in, other rights that the Constitution explicitly establishes. Thus, Justice Brennan seems to be saying approximately the following: maybe the Fourteenth Amendment's privileges and immunities clause protects the right to interstate travel against private interference as well as state interference, but maybe it protects only against the latter. Even if it does only protect against state interference, Congress may legislate to protect against private interference because that type of protection might facilitate the constitutionally mandated protection. *See also* Feuerstein, *Civil Rights Crimes and the Federal Power to Punish Private Individuals for Interference with Federally Secured Rights*, 19 VAND. L. REV. 641, 674-75 (1966).

22. 407 U.S. 163 (1972).

23. Justices Douglas, Brennan, and Marshall.

24. 383 U.S. 745 (1966).

25. 383 U.S. at 781-82 (Brennan, J., concurring in part and dissenting in part); *id.* at 762 (Clark, J., concurring).

26. 18 U.S.C. § 241 (1970).

27. 341 U.S. 70 (1951).

28. For an argument that this reasoning in *Williams* did not constitute a binding precedent because only four of the five justices in the majority adhered to it (the fifth, Justice Black, took no position on this precise issue), see *United States v. Price*, 383 U.S. 787, 797-98 (1966).

29. 383 U.S. at 781-84 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., & Douglas, J.); *id.* at 762 (Clark, J., concurring, joined by Black & Fortas, JJ.).

amounted to overruling, albeit in dicta, the century-old view of the limit on the powers of Congress under the Fourteenth Amendment, which had been reiterated as recently as *Williams*.³⁰ The new rule permitted "Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under [the Fourteenth] Amendment"³¹ and allowed Congress to punish private actions that abridge such a right. The idea that private action *could* violate a Fourteenth Amendment right was a major departure, and it is no accident that Justice Brennan cited as his authority Justice John Marshall Harlan's 1883 dissent in the *Civil Rights Cases*.³²

As a result of this departure, the majority in *Guest* forthrightly announced that the opportunity to travel unimpeded from one part of the country to another was a basic right of citizenship, a civil right that Congress could protect against all interference, governmental or private. This congressional power derived either from the Fourteenth Amendment (according to Chief Justice Warren and Justices Brennan and Douglas),³³ or from a combination of the commerce clause, the necessary and proper clause, and the privileges and immunities clause of article IV (according to Justices Stewart, White, Clark, Black, and Fortas).³⁴ The *Guest* rationale went even further, however. It would permit Congress to regulate all other interactions among private individuals that might reasonably be thought to affect free interstate travel or equal access to public facilities. Into this category might fall open housing legislation (for access to public schools), hiring quotas for racial minorities in wholly private companies (ultimately for access to good public schools by means of access to high priced housing),³⁵ and even access to private clubs (on the theory that discrimination by such clubs might affect cross-sectional migration to localities where racially exclusive private clubs dominate social and economic life).

II. *Jones v. Alfred H. Mayer Co.*: Death by Irrelevance for the State Action Doctrine

Guest still seemed to require that Congress be able to construct a chain of plausibility linking its civil rights legislation governing private actions to the protection of some fundamental right such as the right of interstate

30. The dictum in *Guest* was adopted shortly thereafter as a rule of law in a majority opinion. *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966).

31. 383 U.S. at 782 (Brennan, J., concurring in part and dissenting in part).

32. *Id.* at 783 n.8 (citing 109 U.S. 3, 54 (1883) (Harlan, J., dissenting)).

33. 383 U.S. at 782 (Brennan, J., in an opinion joined by Warren, C.J., & Douglas, J.).

34. *Id.* at 746; *id.* at 761 (Clark, J., concurring, joined by Black & Fortas, JJ.).

35. Archibald Cox pointed this out in his comment on *Guest*. See Cox, *supra* note 14, at 110.

travel. Yet even this minimal requirement was discarded in *Jones v. Alfred H. Mayer Co.*³⁶ This case involved 42 U.S.C. § 1982.³⁷ In effect, the Court held that the statute operated as an open housing law applicable to both private individuals and state officials. Justice Stewart, writing for the Court, found the statute, as interpreted, to be a constitutional exercise of the powers of Congress under the Thirteenth Amendment.³⁸ The Thirteenth Amendment includes no references to state action, but four earlier cases interpreting section 1982 had said that the statute restricted only "governmental action."³⁹ Justice Stewart argued that these earlier statements had all been dicta, that the Court's present interpretation followed more literally the wording of the statute, that historical evidence supported this reading,⁴⁰ and that Congress might rationally conclude that a widespread community practice of refusing to sell high-quality housing to Negroes did constitute a "badge of servitude" within the proscription of the Thirteenth Amendment.⁴¹

The extent to which this decision represented a new departure in the interpretation of the Thirteenth Amendment can be appreciated when it is contrasted with the traditional analysis put forth in the *Civil Rights Cases*.⁴² Justice Bradley's majority opinion in those cases readily acknowledged that the Thirteenth Amendment enabled Congress to legislate directly against private action; the amendment was said to clothe "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."⁴³ Only Justice Bradley's treatment of the question of what constitutes a badge of servitude separates him from the *Jones* majority. Justice Bradley posed the question:

36. 392 U.S. 409 (1968).

37. The section reads as follows: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1970).

38. 392 U.S. at 437-44.

39. *Hurd v. Hodge*, 334 U.S. 24, 31 (1948); *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926); *Civil Rights Cases*, 109 U.S. 3, 16-17 (1883); *Virginia v. Rives*, 100 U.S. 313, 317-18 (1879).

40. For a debate on this contention, compare C. FAIRMAN, *RECONSTRUCTION AND REUNION: 1864-1888, PART ONE* (1971) and Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89 with R. HARRIS, *THE QUEST FOR EQUALITY* 52-56 (1960); Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last*, 55 VA. L. REV. 272 (1969); tenBroek, *The Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 174-99 (1951); and Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1025-33 (1972).

41. 392 U.S. at 417-39.

42. 109 U.S. 3 (1883).

43. *Id.* at 20.

Can the act of a mere individual, the owner of an inn . . . refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, . . . presumably subject to redress by [the] laws [of the State] until the contrary appears?⁴⁴

His response was that individual, private discriminations on the basis of race are not badges of slavery.⁴⁵ For Justice Bradley, the only situation that permitted Thirteenth Amendment redress against discrimination was one in which “the laws *themselves* make any unjust discrimination”; only then might the injured party look to the Civil Rights Acts as a means to counteract unconstitutional state action.⁴⁶ Thus only government-sanctioned racial discrimination could be reached by Congress as a forbidden badge of servitude.

Justice Stewart’s opinion in *Jones* not only eviscerated any traditional state action requirement from the Thirteenth Amendment, but also breathed new vigor into the phrase “badge of servitude.” According to Justice Stewart, “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery.”⁴⁷ Justice Stewart quoted Justice Bradley in support of the idea that the essence of civil freedom included having “the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.”⁴⁸ The difference, of course, was that Justice Bradley meant “right” in the sense of legal

44. *Id.* at 24.

45. *Id.* at 25.

46. *Id.* at 24 (emphasis added). Justice Bradley’s understanding of the manner in which state laws would provide “redress” against these deprivations of rights is illustrated in the following passage: “[C]ivil rights . . . cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, . . . but *if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or juror; he may, by force or fraud, interfere with the enjoyment of a right . . . but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right . . .*” *Id.* at 17 (emphasis added). This passage makes it clear that Justice Bradley did not view the mere peaceful refusal to sell to or to buy from an individual as an “interference with the enjoyment of a right.” Such interference would apparently require force or fraud and only then would he impose on state governments the obligation to protect the rights of the victim. In his view, state complicity in the cheating, beating, robbing, or killing of blacks was prohibited by the Fourteenth Amendment, but tacit governmental toleration of *non-fraudulent* individual refusals to sell property to blacks would not affect the matter of civil rights.

47. 392 U.S. at 440.

48. *Id.* at 441 (citing Civil Rights Cases, 109 U.S. 3, 22 (1883)). See note 46 *supra* for Justice Bradley’s actual position.

permission, whereas Justice Stewart construes "right" to embrace a right to accomplish, assuming that one has the resources, or a right not to be interfered with by any outside agent, public or private. Although Justice Stewart refrained from revealing the outer limits of what incidents of freedom Congress might choose to guarantee, he described the minimum extent of that power: "At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live."⁴⁹ With its decision in *Jones* the Court announced that the Thirteenth Amendment gave Congress the power to eliminate racial discrimination in any area, no matter how local, where buying and selling takes place.

A wide variety of things are bought and sold, including food in private clubs,⁵⁰ membership in private clubs,⁵¹ and education in private schools.⁵² One might suppose that when Justice Stewart said "whatever a white man can buy," he meant only goods and not services. This interpretation might be true if section 1982 stood alone, but it does not. It is accompanied by 42 U.S.C. § 1981, which provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory, to make and enforce contracts. . . ."⁵³ One could not easily maintain that one of these clauses refers only to state action while the other is not so limited.⁵⁴ Indeed, the wording of the two statutes is virtually identical. Not long after the *Jones* decision, the Supreme Court in *Tillman v. Wheaton-Haven Recreation Association*,⁵⁵ which involved suits for declaratory and injunctive

49. 392 U.S. at 443.

50. This implication of the *Jones* decision was noted long before the *Moose Lodge* case arose. See 69 COLUM. L. REV. 1019, 1033 (1969).

51. This implication of *Jones* was also noted before *Moose Lodge*. Comment, *Association, Privacy, and the Private Club: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460, 461-63 (1970). See also Note, *Constitutional Law—Private Club Discrimination*, 1970 WIS. L. REV. 595, 604-05.

52. In addition to the cases consolidated in *Runyon v. McCrary*, 96 S. Ct. 2586 (1976), in which the Court confronted this particular descendent of *Jones*, another case still in the lower courts presents an intriguing variation of the private school question. *Brown v. Dade Christian Schools*, reported in *Tampa Tribune*, May 28, 1975, at 10A, col. 1, rejected the argument that a "religion" of white supremacy can be the basis of a First Amendment exemption for religious private schools from governmental desegregation orders. Whether this decision will be viewed by the Supreme Court as closer to the *Moose Lodge* situation or to that of *Runyon* remains to be determined; the Supreme Court in *Runyon* explicitly left this question open. 96 S. Ct. at 2593 n.6.

53. 42 U.S.C. § 1981 (1970).

54. Justice White, who dissented in *Jones*, makes a valiant effort to distinguish sections 1981 and 1982 with regard to state action in his *Runyon* dissent. See 96 S. Ct. at 2605 (White, J., dissenting).

55. 410 U.S. 431 (1973).

relief against racially discriminatory membership policies by a community recreation association, established that sections 1981 and 1982 are, in fact, to be construed similarly;⁵⁶ a conclusion the court has reaffirmed.⁵⁷

III. The Stage for *Moose Lodge No. 107 v. Irvis*

By 1972 the Court had shown its willingness to breach traditional state action limits on Congress' powers, although its members chose different approaches. Justice Brennan preferred the approach he had enunciated in *Guest*, an approach reiterated in his dissent in *Adickes v. S. H. Kress Co.*,⁵⁸ which dealt with the meaning of the phrase "custom, or usage, of any state" found in 42 U.S.C. § 1983.⁵⁹ Justice Harlan's opinion for the court interpreted the phrase to require at least some connivance on the part of state officials.⁶⁰ Justice Brennan, however, contended that Congress had in that phrase outlawed every widespread community practice that deprived people of civil rights, regardless of governmental involvement in the practice.⁶¹ Justice Douglas agreed with Justice Brennan's conclusion, but he chose the *Jones* rationale as his vehicle for reaching that point.⁶²

The rest of the Court demonstrated in a 1971 case, *Griffin v. Breckenridge*,⁶³ that they, too, preferred to hurdle old state action obstacles by using

56. *Id.* at 440. One commentator argues that this was clearly implied as early as *Jones*. Note, *Section 1981 and Private Groups: The Right to Discriminate versus Freedom from Discrimination*, 84 YALE L.J. 1441, 1447-48 n.36 (1975).

57. See, e.g., *Runyon v. McCrary*, 96 S. Ct. 2586, 2594 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975).

58. 398 U.S. 144 (1970).

59. The full section reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1970). One commentator reads the *Adickes* case as a pre-*Moose Lodge* return to the state action doctrine. Bassett, *The Reemergence of the "State Action" Requirement in Race Relations Cases*, 22 CATH. U.L. REV. 39 (1972). Actually, however, *Adickes* should be read as a matter of statutory interpretation and not as a question of the constitutional power of Congress. It was obvious by 1970 that the entire Court believed Congress *could* choose to permit a civil remedy for private denial of restaurant service on racial grounds. *Kress*, after all, was part of a national chain, and its lunch counter was obviously covered by the 1964 Public Accommodations Act, 42 U.S.C. §§ 2000a to 2000a-6 (1970). The question was simply whether Congress *had* permitted such a remedy in 42 U.S.C. § 1983.

60. 398 U.S. at 167-69, 171-72. Justice Harlan notes explicitly that certain forms of police inaction can constitute state "enforcement" of a "custom." *Id.* at 172.

61. 398 U.S. at 191 (Brennan, J., concurring in part and dissenting in part).

62. *Id.* at 185-86 (Douglas, J., dissenting).

63. 403 U.S. 88 (1971).

the Thirteenth Amendment approach of *Jones*. In *Griffin* the Court reversed a 1951 ruling that the clause in 42 U.S.C. § 1985(3) providing a civil remedy for conspiracies to deprive others "of equal protection of the laws, or of equal privileges and immunities under the laws" was implicitly limited to conspiracies involving governmental authority.⁶⁴ A unanimous Court, speaking through Justice Stewart, held that the Thirteenth Amendment authorized Congress to reach any activities, private or governmental, that "aimed at depriving [Negro citizens] of the *basic rights that the law secures to all free men*."⁶⁵ The decision explicitly added to the constitutional arsenal the weapon of congressional power to protect interstate commerce, a line of reasoning to which Justice Harlan alone took exception. By their concurrence in the argument concerning the basic rights that the law secures to all free citizens, the entire Supreme Court endorsed an approach that was almost word-for-word a recapitulation of the dissent of Justice John Marshall Harlan in the *Civil Rights Cases*.⁶⁶

In a small but portentous passage, the *Griffin* opinion went even further. It had been the general understanding ever since the early interpretations in the *Slaughterhouse Cases*⁶⁷ and the *Civil Rights Cases* that the power of Congress under the Thirteenth Amendment reached only Negroes, as descendants of slaves, and other persons in positions of servitude.⁶⁸ The Fourteenth Amendment's power, by contrast, has been commonly regarded as reaching all invidious, class-based discriminations.⁶⁹ In his opinion for the Court in *Griffin* Justice Stewart suggested that the traditional limitation

64. *Collins v. Hardyman*, 341 U.S. 651 (1951).

65. 403 U.S. at 105 (emphasis added).

66. See 109 U.S. at 26-62 (Harlan, J., dissenting).

67. 83 U.S. 36 (1872).

68. *Id.* at 72.

69. The *Slaughterhouse Cases* viewed even the Fourteenth Amendment's equal protection clause as limited to blacks. See 83 U.S. at 81. But the *Civil Rights Cases* altered the precedent shortly thereafter: "Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. . . . What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of the subjection of one man to another. The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." 109 U.S. at 23-24. For the standard view, see Note, *The Desegregation of Private Schools: Is Section 1981 the Answer?*, 48 N.Y.U. L. REV. 1147, 1166 (1973). See also Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1309 (1969); Note, *Jones v. Mayer: The Thirteenth Amendment and The Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1025-26 (1969).

of the Thirteenth Amendment's reach to protect only blacks might no longer be in effect; he averred that Congress might have a Thirteenth Amendment power to remedy "perhaps otherwise class-based, invidiously discriminatory" actions even without racial motivation.⁷⁰ Thus, the net result of *Jones* and *Griffin* on the civil rights power of Congress was that they transformed the Thirteenth Amendment into a Fourteenth Amendment minus the traditional state action restraint. This was the unanimous position of the early Burger Court before 1972.⁷¹

A number of legal questions now hovered like clouds on the horizon. One hazy area involved the two amendments' own force. *Jones* had not clarified whether the Thirteenth Amendment by itself prohibits badges of slavery as well as actual slavery.⁷² What effect the Fourteenth Amendment has by itself was still subject to interpretive constraints imposed by the state action doctrine. Commentators had been arguing for years that the state action requirement was in one sense too broad: government, through licensing, regulating, enforcing, and funding is involved in virtually every aspect of interpersonal life. But if only minimal government involvement were to be made the test of state action, then no sphere of private life would be free from the mandated equality of the Fourteenth Amendment.⁷³

The second cloud on the legal horizon was the unresolved question of how far into the sphere of private discrimination sections 1981 and 1982 should extend. Did the section 1982 "right to buy and sell" cover the purchase of food and drink in private clubs? Did the section 1981 "right to contract" cover contracts for membership in private clubs or for services in private schools? Did it cover marriage contracts?⁷⁴ Some of these questions

70. 403 U.S. at 102.

71. This was the Burger Court before the ascension of Justices Rehnquist, Powell, and Stevens to the Court. Although Justices White and Rehnquist later dissented in *Runyon v. McCrary*, 96 S. Ct. 2586 (1976), they did so on the grounds of statutory interpretation, explicitly acknowledging that Congress does have constitutional power under the Thirteenth Amendment to ban racial discrimination by private schools. *Id.* at 2605 n.2 (White, J., dissenting).

72. 392 U.S. at 439.

73. This point has frequently been made in conjunction with an argument for adopting a public—private test to replace the state—private test. See, e.g., Black, *The Supreme Court 1966 Term*, 81 HARV. L. REV. 69, 100-08 (1967); Carl, *Reflections on the "Sit-ins,"* 46 CORNELL L.Q. 444, 447-48, 454-55 (1961); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 486-505 (1962); Silard, *A Constitutional Forecast: Demise of the State Action Limit on The Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 869-71 (1966); Note, *Constitutional Law—The Private Club: Another Reprieve*, 27 ARK. L. REV. 146, 150 (1973); Note, *Developing Legal Vistas for the Discouragement of Private Club Discrimination*, 58 IOWA L. REV. 108 (1972).

74. Antimiscegenation laws had been struck down on pure Fourteenth Amendment

may seem farfetched, but it was only five years before *Moose Lodge No. 107 v. Irvis*⁷⁵ that a commentator confidently asserted that no black "has ever tried to use constitutional law to get into . . . any private club" and that this pattern would "certainly continue."⁷⁶

IV. Moose Lodge: Rebirth of a Public—Private Sphere Doctrine

After being refused service in the bar and dining room of a Moose Lodge chapter, K. Leroy Irvis, a black guest of a lodge member, sought an injunction against the lodge under 42 U.S.C. § 1983.⁷⁷ The issue presented to the Court was whether Pennsylvania's issuance of a liquor license to the racially discriminatory lodge constituted action "under color of any statute, ordinance, regulation, custom, or usage of [a] state" that caused persons "to be subjected . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws"⁷⁸ The Court, includ-

grounds in *Loving v. Virginia*, 388 U.S. 1 (1967). But the private action, for instance, of a parent trying to prevent a child from marrying into a different race might conceivably be challenged in a court on section 1981 grounds. The original version of section 1981, in the 1866 statute, was attacked on these grounds in Congress, but it is not clear whether the speaker who opposed the bill was deliberately exaggerating its impact. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (remarks of Sen. Johnson).

75. 407 U.S. 163 (1972).

76. Black, *supra* note 14, at 101.

77. The complete section reads as follows: "*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." 42 U.S.C. § 1983 (1970).

78. *Moose Lodge* also presented two other issues, neither of which is treated in detail in this article. One was the question of whether Pennsylvania's Liquor Control Board regulation, 40 LIQ. CONT. BD. ¶ 5.81 (1972), which required that "every club licensee shall adhere to all of the provisions of its constitution and by-laws," could be enjoined with respect to the racial discrimination provisions of 42 U.S.C. § 1983. The Court held that it could be so enjoined because racial discrimination may not be enforced by any agency of the state. 407 U.S. at 177-79.

The second issue was the question of whether Irvis had standing to challenge Moose Lodge membership policies, as well as their guest-serving policies, in light of the fact that he had never applied for membership. The Court's answer was twofold: (1) at the time the district court took the case, Irvis did not have standing as to the membership policy; but (2) by the time the Supreme Court reviewed the case Irvis did have standing to request an injunction against enforcement of the state liquor board rule requiring licensees to follow their own membership rules. The change of standing was due to a change in the lodge's by-laws between the district court decision and the Supreme Court decision. By 1972 the Moose lodge had restricted its guest facilities to "persons who are eligible for

ing the dissenters, treated the case as though the only privilege or immunity potentially at stake was one secured by the equal protection clause of the Fourteenth Amendment. In other words, for purposes of this case, they treated section 1983 as though its reach went no further than the Fourteenth Amendment would by itself. They treated it as a statute that simply created judicial remedies for Fourteenth Amendment violations.⁷⁹

It is true that the privilege of which Irvis claimed deprivation was that of equal protection of the laws.⁸⁰ He indicated additional legal privileges, however, including the Thirteenth Amendment right to be free of badges and incidents of servitude. He alleged that "the invidious social discrimination practiced by private clubs" was such a badge and that such discrimination therefore violated the Constitution.⁸¹ Not only did the Court ignore this claim, but Justice Rehnquist's majority opinion stated exactly the opposite; he characterized Irvis as "conceding the right of private clubs to choose members upon a discriminatory basis."⁸² In fact, Irvis presented two arguments against that so-called right. The first was based solely on a Thirteenth Amendment argument. The second was based on section 1981; Irvis pointed out that the relationship between an individual and his club was a "contractual one (dues exchanged for facilities)" and therefore could "reasonably be argued" to be subject to section 1981.⁸³

While it is true that this discussion of the Thirteenth Amendment and of section 1981 arose tangentially, as a means of rebutting the claim by Moose Lodge that the private club exemption of the 1964 Civil Rights Act⁸⁴ demonstrated the judgment of Congress that private social clubs had a constitutionally protected right to discriminate, the Court's treatment of the issue was unusual. On the one hand, the Court denied the existence of the argu-

membership in the fraternity," thereby combining guest discrimination and membership discrimination into a single policy. 407 U.S. at 165-71, 177-79. For a discussion of the standing issue, see Comment, *Constitutional Law—Equal Protection—State Liquor License Scheme Does not Sufficiently Implicate State in Private Club's Discrimination to Violate the Equal Protection Clause of the Fourteenth Amendment*, 26 RUTGERS L. REV. 888, 890-94 (1973).

79. 407 U.S. at 165, 171-72, 173, 177, 179, 183, 185-86, 190.

80. *Id.* at 165.

81. Brief for Appellee at 109, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Counsel conceded that there might be First Amendment limits to the reach of the Thirteenth Amendment in the matter of associations, but argued that First Amendment exemptions would not apply "where the purposes of the club are fraternal" (presumably as distinguished from political).

82. 407 U.S. at 171.

83. Brief for Appellee at 110, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

84. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000e-15 (1970).

ment, thereby distorting the position of *Irvis*; on the other hand, the Court appeared to be looking ahead to potential legal actions that might arise under section 1981 itself, actions that would not require any finding of state involvement. This was the first case presented to the Court involving discrimination by a bona fide private club, and the section 1981 implications were elaborated in counsel's written briefs. Not only is it obvious that the Court must have been aware of the potential impact of section 1981 on private clubs, but a close examination of its decision reveals that it managed to establish the groundwork for future decisions on the subject without once mentioning the existence of section 1981.

The majority treated the case as presenting no more than a state action question. Justice Rehnquist addressed the question whether the granting of a liquor license to this racially discriminatory private club constituted enough state involvement in private discriminatory conduct to contravene the equal protection clause of the Fourteenth Amendment. His manner of answering that query had a number of significant implications for future section 1981 litigation even though he was silent about that statute.

Rehnquist began his argument by reiterating the traditional state action doctrine: he cited the *Civil Rights Cases*,⁸⁵ *Shelley v. Kraemer*,⁸⁶ and *Burton v. Wilmington Parking Authority*⁸⁷ in support of the principle that the courts recognize an "essential dichotomy" between discriminatory action by a state and discrimination by a private party.⁸⁸ He then devoted five paragraphs, covering almost four full pages of his six-page opinion, to distinguishing the *Moose Lodge* situation from that presented in *Burton*.⁸⁹ Justice Rehnquist reads *Burton* as establishing the rule that unless a state agency "insinuates itself" into the activities of a private entity, the Fourteenth Amendment does not prohibit racial discrimination by the private entity. Accordingly, he examines the indicia of state—private "interdependence" peculiarly present in the discriminatory action of the restaurant in *Burton*, including the facts that (1) it was located on state-owned property, part of which was used to perform "essential governmental functions"; (2) the costs of acquiring, constructing, and maintaining the building were shared by the private restaurant and the governmental agency through a combina-

85. 109 U.S. 3 (1883).

86. 334 U.S. 1 (1948).

87. 365 U.S. 715 (1961).

88. 407 U.S. at 172.

89. *Id.* at 172-75. The remaining two pages of the opinion dealt with the question of Pennsylvania's Liquor Control Board regulations. See note 78 *supra*. There is even an additional paragraph that arguably distinguishes the restaurant in *Burton* from the bar in *Moose Lodge*; it describes the case of *Peterson v. Greenville*, 373 U.S. 244 (1963).

tion of public funds and governmental bonds to be repaid with the income derived from lessees such as the restaurant; (3) the restaurant and parking authority benefitted mutually from the conveniences each afforded the customers of the other; and (4) the restaurant could be expected to reap the benefit of a lower rent as a result of the tax-exempt status of the parking authority building.⁹⁰

Significantly, after summarizing this distinction of *Burton* with a statement concerning the “symbiotic relationship” of mutual benefits that was present there, Justice Rehnquist distinguished with considerable emphasis the private nature of the Moose lodge from the public nature of the restaurant in *Wilmington*:

Unlike *Burton* the Moose Lodge building is located on land owned by it, not by any public authority. Far from apparently holding itself out as a place of *public* accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is *not open to the public at large*. Nor is it located and operated in such surroundings that although private in name, it discharges a function or performs a service that would otherwise in all likelihood be performed by the State. In short, while Eagle was a *public restaurant in a public building*, Moose Lodge is a *private social club in a private building*.⁹¹

While Justice Rehnquist ostensibly based this decision on the state action doctrine that the *Civil Rights Cases* of 1883 established,⁹² nothing similar to the above quotation could have appeared in the 1883 majority opinion. That opinion declared unconstitutional, on the basis of the state action doctrine, a law forbidding racial discrimination in *public* accommodations. The first sentence of the above quotation, in referring to the ownership of the building by a “public authority,” seems to be referring to the material that preceded the quote, which described the symbiotic private—governmental relationship. “Public” there means simply state-owned and state-managed. But Justice Rehnquist shifted to a second meaning for the word “public,” as in “public accommodation,” or “public restaurant.” In those contexts, he obviously means “public” in the sense of “open to the public at large,” or “open to the buying public.” The Fourteenth Amendment covers public accommodations aided by the state in certain ways; it does *not* cover private clubs aided by the state in certain ways.

By virtue of the above-quoted passage from Justice Rehnquist, the new state action doctrine now contains a version of the public sphere doctrine that was advocated by Justice John Marshall Harlan in his dissent in 1883

90. 407 U.S. at 174-75.

91. *Id.* at 175 (emphasis added).

92. *Id.* at 172.

and by Justice Douglas to some extent in his opinion for the Court in *Evans v. Newton*⁹³ in 1966. The Court's new version is as follows: Some kinds of government involvement in racial discrimination by private actors do present sufficient state action to be forbidden by the Fourteenth Amendment. If governmental action substantially benefiting the discriminator takes place in the public sphere, the discrimination is forbidden by the equal protection clause. By "public sphere," the justices mean that the discriminator is either acting in the world of commerce, where his offer to sell or buy is open to the public at large, or he is performing some function or providing some service that the government ordinarily would provide. On the other hand, the state action standard is much more stringent than mere governmental aid if the discriminator is acting in the *private sphere*,⁹⁴ that is, in the realm of private home life, where the state provides such essential services as electricity, water, police and fire protection,⁹⁵ or in the realm of private associational life, where the state provides such essential services as liquor licenses, as in *Moose Lodge*,⁹⁶ or perhaps special hunting or fishing privileges. When the discriminator is acting wholly within the private sphere, for instance, in admitting guests into his home or in selecting members for his club, the

93. 382 U.S. 296 (1966).

94. Justice Rehnquist's comment that the quota system of Pennsylvania "falls far short of conferring upon club licensees a monopoly in the dispensing of liquor" (407 U.S. at 177) may seem to call into question any assertion that the quality or amount of governmental aid is not the state action test for discrimination within the private sphere. He certainly implies that if the state did grant a liquor-dispensing monopoly to private clubs, and if most or all of them excluded blacks, then conferral of the monopoly would be forbidden by the Fourteenth Amendment. His statement and its obvious implication can, however, be reconciled with the author's analysis by the following consideration. According to Anglo-American tradition (with the brief exception of the Prohibition interlude), and by contemporary American practice, liquor is bought and sold in public accommodations. If a state were to mandate that liquor could be bought and sold only in licensed private clubs, the Court might plausibly reason that within the American cultural context such singling out of those clubs imposed on them the function of a public accommodation and thereby rendered them at least quasi-public accommodations. Given the admitted indispensability of liquor licenses to the operation of private social clubs (see note 96 *infra*), this "enforcement" analysis seems to give a better account than a size-of-benefit analysis would give of the distinction Justice Rehnquist is drawing.

95. 407 U.S. at 173. A later case suggests that even in the public sphere (specifically in the case of a private school performing the public function of education) such services as water, electricity, and police protection, although essential, are not to be viewed as substantial government benefits. Perhaps this is because they are indiscriminately available to all persons. The Court distinguishes textbook gifts to racially discriminatory private schools from these generalized services that government provides to all persons. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

96. According to Justice Douglas, "Moose Lodge itself concedes [that] without a liquor license a fraternal organization would be hard pressed to survive." 407 U.S. at 183 (Douglas, J., dissenting).

Supreme Court will permit the Fourteenth Amendment to reach only state action that *forces* him to discriminate on the basis of race.⁹⁷

Moose Lodge is the first case that involved racial discrimination in this private sphere,⁹⁸ and the Court, in effect, accentuated the limits of the private sphere concept by granting an injunction against the enforcement of the Pennsylvania Liquor Board regulation that commands private clubs to obey their own membership requirements.⁹⁹ The Court granted this injunction on the basis of a rule it found in such precedents as *Shelley v. Kraemer*¹⁰⁰ and *Robinson v. Florida*.¹⁰¹ The Court spoke of the rule as though it were a rule against all state enforcement of private discrimination;¹⁰² but it is evident from the context of this case, as well as from his reference to “police protection,”¹⁰³ that Justice Rehnquist did not mean that *Moose Lodge* could not have invoked police aid to eject Irvis as a trespasser. His reference to “state sanctions to enforce” private racial discrimination really meant the use of state sanctions to force someone against his will to discriminate racially. This, evidently, is his reading of *Shelley* regarding the private sphere.¹⁰⁴

How does Justice Rehnquist view the public sphere? He said that the Eagle restaurant in *Burton* was a “public restaurant in a public building.”¹⁰⁵ To be a public restaurant is to belong to the public sphere, and to rent space

97. The Supreme Court did permit the Fourteenth Amendment to reach another form of state involvement in a private club, but it did so only by refraining from undoing the action of a lower court. *Oregon State Elks v. Falkenstein*, 409 U.S. 1099 (1973). In that case the Supreme Court dismissed an appeal from a decision prohibiting tax exemptions to racially discriminatory clubs. The Supreme Court, however, could approve the Oregon decision according to the doctrine of public sphere—private sphere by the following reasoning: the acceptance by a private club of a tax exemption as a charitable, educational, or otherwise eleemosynary institution is an admission by that club that it does perform a public function. This puts the club in the public sphere, and because the tax exemption constitutes significant state aid the club is forbidden to discriminate on the basis of race.

98. See note 78 *supra*. Although *Loving v. Virginia*, 388 U.S. 1 (1967), was treated as an equal protection case, it can also be analyzed along these lines.

99. 407 U.S. at 177-79.

100. 334 U.S. 1 (1948).

101. 378 U.S. 153 (1964). These cases dealt with the public sphere, but Justice Rehnquist emphasized their state-enforcement aspects in applying them to the private sphere. See also *Buchanan v. Warley*, 245 U.S. 60 (1917).

102. 407 U.S. at 179.

103. *Id.* at 173.

104. See note 98 *supra*. Justice Rehnquist’s approach to the enforcement of membership rules of private clubs and to police protection (against, presumably, the crimes of trespass, burglary, and so on) directly follows the dissent of Justice Black in *Bell v. Maryland*, 378 U.S. 226, 318 (1964) (Black, J., dissenting, joined by Harlan & White, JJ.). But Justice Rehnquist expressly limited his ruling to a private club, as distinguished from a public restaurant. 407 U.S. at 172, 175.

105. 407 U.S. at 175.

in a public building is to receive certain benefits from the government. But there are other possible ways for public accommodations to receive benefits from the government besides renting space in a state-owned building that contains a parking lot. Those other forms of benefits from the government are both more ubiquitous and more essential to the survival of the public accommodations than the benefits cited by Justice Rehnquist. Significantly, Justice Rehnquist simply stressed the number and value of mutual benefits in describing the forbidden symbiotic relationship of *Burton*. He omitted another aspect that had been stressed in *Burton*: symptoms of governmental entwinement in the operations of the restaurant—for example, the fact that the state ownership of the building was visibly and prominently displayed by the flying of a state flag from the roof.¹⁰⁶ In other words, the *Burton* opinion had relied on two rather separate arguments: (1) the interdependence of the restaurant and the state parking facility, on which Justice Rehnquist focused in *Moose Lodge*, and (2) the fact that the state had placed its “power, property and prestige”¹⁰⁷ behind this racially discriminatory restaurant, which Justice Rehnquist ignored. Justice Rehnquist’s summarizing remark regarding a “public restaurant in a public building” implies that the state action test for the public sphere relies simply on the quantity and quality of benefits the public accommodation is receiving from the state. On the surface this does not seem very different from the state action tests of the past. Any attempt to apply this test, however, leads to rather non-traditional results.

Exploration of the possible distinctions that Justice Rehnquist might have been drawing between “the benefit of locating in a building owned by the state-created parking authority”¹⁰⁸ and the usual benefits that public accommodations receive from the government—*e.g.*, police and fire protection, water, electricity, and a license to operate—yield very frustrating results.¹⁰⁹ Are the benefits of lowered rent and an increased number of customers any more valuable to a restaurant than such ordinary benefits as police and fire protection, water, and electricity? Clearly not. Were the benefits in *Burton* any more essential to the character of a restaurant’s operation than the ordinary government benefit of a license to operate?

106. 365 U.S. at 720. The entwinement argument is made explicit in Justice Douglas’ opinion for the Court in *Evans v. Newton*, 382 U.S. 296, 299 (1966). In *Moose Lodge*, only Justice Brennan’s dissent (joined by Justice Marshall) focused on this governmental entwinement argument. 407 U.S. at 184. Justice Douglas’ dissent, on the other hand, essentially followed Justice Rehnquist’s approach but simply applied the degree-of-government-benefit test more strictly than did the majority. *Id.* at 179-83.

107. 365 U.S. at 725.

108. 407 U.S. at 175.

109. *Id.* at 172-73.

Hardly. Should the essential distinction be between the government's reciprocal dependence on the restaurant on the one hand or simply the restaurant's dependence on the parking facility on the other? Perhaps, but in so doing one ignores a whole body of law beginning with the Court's decision in *Munn v. Illinois*.¹¹⁰ It is a firmly entrenched legal principle that government depends upon a wide variety of private business to carry out important public interest functions. Consequently, the world of commerce has been subjected to government regulation from the time of the adoption of the Constitution.¹¹¹

Is it a crucial distinction that the restaurant in *Burton* was being uniquely favored by the government, singled out by the state from among similar public accommodations to receive special benefits? Although this suggestion has some plausibility, momentary reflection yields the conclusion that a great many public accommodations receive benefits quite similar to those received by the Eagle restaurant. Any store, restaurant, or place of employment within convenient walking distance of the Wilmington Parking Authority received the benefit of extra customers (or extra potential employees) that the proximity of the parking facility conferred on the Eagle restaurant. Every restaurant or other public accommodation that rents space on tax-exempt property belonging to churches, art museums, historical associations, hospitals, charitable associations, and so on, receives the presumed lower rent benefit that the Eagle restaurant received.¹¹²

The interdependence of government and public businesses, and of government and institutions performing a public function, is so thorough that Justice Rehnquist's attempt to portray certain governmentally conferred benefits as more special and therefore more significant than others simply breaks down in practice. In effect, after *Moose Lodge*, all businesses that are open to the public must abide by the Fourteenth Amendment's prohibition of racial discrimination.

V. *Runyon v. McCrary* and its Immediate Predecessors: Adolescence of the Public—Private Sphere Doctrine

A. Predecessors

As the Supreme Court began to deal with the question of racially

110. 94 U.S. 113 (1877). See also *Nebbia v. New York*, 291 U.S. 502 (1934).

111. U.S. CONST. art. 1, § 8, cl. 3. Judicial roots of the doctrine that the world of commerce is part of the sphere of civic rights reach back at least as far as *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

112. Some federal courts have declared that direct tax-exemptions to racially discriminatory private clubs violate the Fourteenth Amendment. See note 97 *supra*.

discriminatory private schools, the Court's state action framework of analysis became increasingly strained. Although in the private school cases of 1973 and 1974¹¹³ the Court continued to follow the ostensible *Moose Lodge* approach of maintaining a distinction between general governmental benefits and special ones, what actually transpired in the decisions belies the Court's state action language. In *Norwood v. Harrison*,¹¹⁴ on the basis of the Fourteenth Amendment alone, the Court declared unconstitutional a system of state grants of free textbooks to all children in accredited schools, as applied to schools that practice racial discrimination. The majority denied that it was reading the Fourteenth Amendment to prohibit "any form of state service that benefits private schools said to be racially discriminatory."¹¹⁵ It singled out as areas not covered by its ruling the "generalized services government might provide to schools in common with others" such as the necessities of electricity, water, and police and fire protection.¹¹⁶ Nevertheless, the Court made it clear that it was concerned with the public function being served by private schools for it characterized the private schools as a potential route back to the segregationist dual school system: "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."¹¹⁷ The Court warned that "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."¹¹⁸

Unfortunately, it is virtually impossible to locate the line that the Court attempted to draw between generalized governmental services and special governmental aid to a discriminatory public function institution. In *Norwood*, the state was not favoring discriminatory schools any more than non-discriminatory schools. The textbook aid program was no less generalized than the state's program for licensing accredited schools. Yet the Court did not go so far as to forbid the accrediting of racially discriminatory schools. Why is accreditation a less significant aid to the discriminatory school than the grant of free textbooks? When textbooks were given as freely to non-discriminatory schools as to discriminatory ones, how was the Court able to argue that the aid had "a significant tendency to facilitate, reinforce, and support private discrimination"?¹¹⁹ Surely the

113. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974); *Norwood v. Harrison*, 413 U.S. 455 (1973).

114. 413 U.S. 455 (1973).

115. *Id.* at 465.

116. *Id.*

117. *Id.* at 467.

118. *Id.* at 465.

119. *Id.* at 466.

textbooks helped the discriminatory schools no less than the liquor license had helped Moose Lodge; and in neither case did the governmental aid promote discrimination as such. The pivotal difference between the two cases seems to be that the Court viewed Moose Lodge as genuinely within the private sphere, whereas it viewed the racially segregated private schools as performing an important public function.

In 1974, in *Gilmore v. City of Montgomery*,¹²⁰ the Court again claimed it was distinguishing between special government favors and generalized government services to racially segregated private schools. The Court held that the granting of exclusive use of government owned recreational facilities to such schools, even for limited time periods, was properly enjoined on Fourteenth Amendment grounds. The Court was not prepared to concede, however, on the meager factual record before it that access by racially discriminatory groups to governmental recreational facilities on a non-exclusive basis, in company with the general public, should immediately be enjoined.¹²¹ As a result of this case, persons who are affiliated with discriminatory private groups can have the ordinary access that is available to members of the general public to such municipal facilities as parks, playgrounds, athletic facilities, amphitheatres, museums, and zoos,¹²² just as they can be provided with electricity, water, and police and fire protection without a violation of the Fourteenth Amendment.¹²³ The Court reserved judgment on specific situations involving non-exclusive access to city recreational facilities by discriminatory private schools on an organized basis. The Court suggested that participation in athletic tournaments by segregated private schools in conjunction with desegregated public and private schools might violate the Fourteenth Amendment.¹²⁴ How can this be reconciled with the Court's belief that allowing student groups from segregated private schools to tour zoos or museums, as other groups do, would not violate the Fourteenth Amendment? The Court seemed to find a distinction between access that would be permitted to schools *qua* schools, which would be forbidden to a discriminatory school, and access that would be available to any group, school or otherwise, which would not be forbidden. One cannot be certain of this, however, because the justices explicitly reserved judgment until a more concrete case came before them.¹²⁵

120. 417 U.S. 566 (1974).

121. *Id.* at 570.

122. *Id.* at 574.

123. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).

124. 417 U.S. at 569-72.

125. *Id.* at 570. Justice Brennan would create a principle separating those facilities that "enable private segregated schools to duplicate public school operations at public ex-

The Court drew an important distinction in *Gilmore* by pointedly observing that private schools were to be treated differently from other private organizations, such as social clubs, for the purposes of the Fourteenth Amendment.¹²⁶ Although the Court itemized a number of hypothetical situations in which allowing private schools to use city facilities would be forbidden, it hesitated to be specific about private clubs, saying: "The problem of private group use is much more complex."¹²⁷ Thus, although the Court in *Norwood* and *Gilmore* spoke in terms of the state action doctrine and claimed that it was forbidding the granting of significant state aid, as distinguished from generalized governmental services, to racial discriminators, the Court was in fact paying considerable attention to the public nature of the function being performed by those discriminators who were receiving the services.

The ubiquity of state regulation, the abundance of governmentally conferred benefits upon private enterprises, and the many instances of interdependence of governmental and non-governmental activity all render the state action test both impractical and obsolete. Aware of these difficulties, and yet concerned with protecting the spheres of private home life and private associational life from the powerful, leveling sweep of the equal protection clause, Justice Rehnquist and the rest of the *Moose Lodge* majority cut the state action doctrine in two. The first half of the doctrine applies to public accommodations or to entities carrying on "a function or . . . service that would otherwise in all likelihood be performed by the State."¹²⁸ This part of the doctrine appears in the mutual benefits test of *Burton* and reaches, in practice, virtually *all* public accommodations. This interpretation, although a novel view of the equal protection clause, is essentially a moot one be-

pense" (e.g., playgrounds) from those facilities that "private schools are not likely to maintain" (e.g., zoos or museums). *Id.* at 577-78 (Brennan, J., dissenting). Justices Marshall, White, and Douglas would flatly bar use of city-owned recreational facilities by segregated schools on an organized basis, as part of the school's own program. *Id.* at 576-77 (Marshall, J., concurring in part and dissenting in part); *id.* at 581-82 (White & Douglas, JJ., concurring).

126. 417 U.S. at 572-74.

127. *Id.* at 572. It is worth noting that the one hypothetical example the Court gave of probably unconstitutional use of recreational facilities by a private group was one that could be said to constitute "a vestige of the type of state-sponsored racial segregation in public recreation facilities" that is traditionally forbidden. *See id.* at 572, 574. Only Justice Brennan (who dissented in *Moose Lodge*) made an unequivocal statement regarding the use of city facilities by segregated non-school private groups. He asserted that the " 'exclusive use' of recreational facilities by such groups" must be enjoined. *Id.* at 580. The majority went so far as to say that such use would present a stronger case for injunction than if the facilities were "simply available to all comers." *Id.* at 574.

128. 407 U.S. at 175.

cause of recent re-interpretations of sections 1981 and 1982.¹²⁹ Those statutes prohibit discrimination in the public sphere of buying, selling, and contracting; Justice Rehnquist's so-called state action rule seems to require the same, but does so on the basis of the equal protection clause. What is far from moot, however, is what Justice Rehnquist's *Moose Lodge* decision did to the second half of the state action doctrine that applies to the sphere of private life. The licensing of home incinerators, automobiles, or guns, for example, indicates that the government that regulates, grants benefits, and even creates situations of interdependence is almost as omnipresent in the private sphere as it is in the public sphere. But the amount of governmental involvement, even when it is as detailed as the daily supervision of a liquor licensee, is not to be the test for invoking the equal protection clause if the private sphere is concerned. There the Fourteenth Amendment can be invoked only to prevent governmental compulsion of racial discrimination.¹³⁰ Thus, the court's application of the amount-of-government-benefits test to private school discrimination in 1973 and 1974 was an indication that such schools were to be treated as part of the public rather than the private sphere. Those cases foreshadowed the Court's decision in *Runyon v. McCrary*.¹³¹

Runyon provides a new and important link in the public sphere—private sphere analysis. By delineating a private realm in which the liberty of the Fourteenth Amendment would prevail over the same amendment's equal protection elements, the *Moose Lodge* case had charted the limits of recent decisions extending the command of racial equality explicit in the Fourteenth Amendment. A comparable statement was needed to pinpoint the limits of sections 1981 and 1982 in light of the fact that the reach of those statutes had been so greatly extended by the Court in *Jones v. Alfred H. Mayer Co.*¹³² and *Tillman v. Wheaton-Haven Recreation Association*.¹³³ That comparable statement was provided in *Runyon*.

129. Justice Rehnquist, when he dissented with Justice White in *Runyon*, did not apply the implications of his own *Moose Lodge* reasoning. Even following his assumption in *Runyon* that section 1981 does not apply to genuinely private actors, he nonetheless could have argued that so-called private schools are not free of the state action taint. In fact, many of them are public accommodations; they receive important governmental benefits in the form of accreditation and compulsory school attendance laws and they perform important governmental functions. By ignoring the relevance of his own *Moose Lodge* interpretation of the *Burton* and *Evans* precedents, Justice Rehnquist ignored some pressing questions. By contrast, Justice Stewart's majority opinion stressed that these schools avertise to the public and are open to the public. 96 S. Ct. 2586, 2595 (1976).

130. 407 U.S. at 177-79.

131. 96 S. Ct. 2586 (1976).

132. 392 U.S. 409 (1968).

133. 410 U.S. 431 (1973).

B. *Runyon v. McCrary*

Mr. and Mrs. Runyon operated Bobbe's Private School, located in the state of Virginia. Michael McCrary, a black child denied admission to the school solely on racial grounds, sued on the basis of section 1981 guarantees protecting his parents' right to contract. In holding that section 1981 encompassed private schools by mandating that "all persons shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," the Supreme Court had two choices vis-à-vis, the precedent of *Moose Lodge*. The Court could have said nothing, leaving room for the assumption that Mr. Irvis had simply relied on the wrong statute for his claim and thereby opening the floodgates for new torrents of litigation against discriminatory private clubs. Or the Court could have attempted to distinguish the situation of a genuinely private social club from that of a so-called private school. The latter course required some explication of the limits a private sphere—public sphere analysis places on the powers of Congress under the Thirteenth Amendment, and the Court provided such an explication. Instead of examining the question of what degree of governmental involvement supported the challenged discrimination, the Court in *Runyon* focused on the new question, whether so-called private schools are really private.

While neither Justice Stewart in his majority opinion nor Justice Powell in his concurring opinion openly argued that the public sphere—private sphere analysis must replace the state action doctrine, each did attempt to distinguish two kinds of private, that is, non-governmental areas: those private areas into which the duties of Congress under the Thirteenth Amendment do extend (the public sphere), and those private areas into which Congress should not intrude (the private sphere). Justice Stewart's opinion focused more narrowly on the precedents shaping those constitutional rights that create the private sphere (the First Amendment right of association, and the familial right of privacy) while Justice Powell chose to explicate just what constitutes the sphere of private life. Both opinions mark important advances from the initial steps taken in the *Moose Lodge* decision; both discard the misleading terminology of state action and instead focus on the crucial decision of where to draw the line separating private from public life.

Justice Stewart's opinion for the Court firmly established some basic premises implicit in the budding public—private sphere doctrine. First, the Court reiterated the established principle that an organization operating in the world of commerce, open to all members of the public who can pay, is operating in the public sphere that Congress may regulate under the Thir-

teenth Amendment.¹³⁴ Neither the lack of governmental involvement in those organizations nor the fact that those organizations are selective merely on the basis of race exempts them from the reach either of the Thirteenth Amendment or of sections 1981 and 1982.¹³⁵ Second, Justice Stewart outlined a number of examples of the private sphere that would be placed by constitutional guarantee beyond the reach of congressional power to enforce

134. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1976); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1974); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Certain anomalies may appear to arise out of the fact that this author refers to the public sphere as the realm of citizen life; the reader may object that the Thirteenth Amendment gave blacks only freedom, not citizenship. While it is true that blacks did not receive a formal national grant of citizenship until the Fourteenth Amendment, it is also true that the kinds of rights Congress granted to blacks as free persons in 1866—the rights to buy, sell, and lease property, to make and enforce contracts, and the equal right to operate freely within the commercial realm—are precisely the kinds of rights the federal courts have been calling the privileges and immunities of citizens since at least 1823. In that year, federal Circuit Judge Washington propounded the first, and still authoritative, definition of those privileges: “Protection by the government, with the right to *acquire and possess property* of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good.” *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (No. 3230) (C.C.E.D. Pa. 1823) (emphasis added). See also *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

Although in our day, given the Fifteenth and Nineteenth Amendments, the prevailing concept of civil rights is more closely tied to political than to economic rights, modern American jurisprudence has not yet substantially improved upon the nineteenth century fuzziness in the concept of citizen rights. To take one example, the reapportionment and voting right cases assert that the right to vote is a fundamental right of citizens. See generally *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Harper v. Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965). But the clause in which the Court finds protection for voting rights is the equal protection clause, which applies to all persons, not just to citizens. Surely that clause does not require giving the vote to aliens, but the Court never deals with this anomaly. *But see* Justice Harlan’s passing mention of the issue in *Reynolds v. Sims*, 377 U.S. 533, 611-13 (1964) (Harlan, J., dissenting).

Political philosophers as far back as Aristotle (*Politics, Book III*) have wrestled with the difficulties of defining citizenship. Perhaps the best we can do is to admit that the modern viewpoint linking citizenship to voting rights does somehow articulate the essence of citizenship, but that there exists a widespread awareness that “citizen” also has a broader, less technical meaning. That broader meaning would be something like “member of society,” or “one who participates in the societal interactions that constitute community life.” It is this broader sense of citizen that the nineteenth century cases express. It is also this sense that is expressed in the title, Civil Rights Act, given to the 1964 statute barring discrimination within the commercial realm of buying, selling and hiring. 42 U.S.C. §§ 2000a to 2000e-15 (1970). This is the sense of the term to which this essay refers in its claim that the sphere of public life is the sphere of citizen rights.

135. 96 S. Ct. at 2594-95.

the Thirteenth, and presumably even the Fourteenth Amendment.¹³⁶ His first example involved those associations formed for the sake of “effective advocacy of both public and private points of view”¹³⁷ that are protected by a right of association implied in the First Amendment. It may be significant that Justice Stewart’s explanation of the First Amendment right of association mentioned only associations that aim at the advancement of some idea or belief. While this would seem to shield religious and political groups from governmental control of their membership, it does seem to leave open the question of whether private social clubs may discriminate on the basis of race. Justice Stewart explicitly reserved any comment on that question, but he did cite the *Moose Lodge* precedent with apparent approval.¹³⁸ All one can definitely conclude is that Justice Stewart and those who concurred with him, except Justice Powell, probably did not believe that truly private social clubs were restricted by sections 1981 or 1982, although it is impossible to say with certainty upon what principle Justice Stewart relied for that conclusion.¹³⁹

136. 96 S. Ct. at 2596-98.

137. 96 S. Ct. at 2596 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1963)). The Court’s position is that while schools are free to teach that the government is wrong to ban segregation, they are not free to defy that ban by their practices. Freedom of speech includes the freedom to criticize the laws but not the freedom to disobey them. *Cf. Reynolds v. United States*, 98 U.S. 145, 166 (1878).

138. 96 S. Ct. at 2592 n.5. There are, in fact, precedents asserting that *social* association is part of the constitutional right of association. *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). Justice Stewart joined in the *Gilmore* majority that asserted a constitutional right to associate freely and to form “all white, all black, all brown, and all yellow clubs.” 417 U.S. at 575.

139. Justice Stewart’s various comments in regard to private clubs do provide at least some grounds for speculation about the principle he has in mind. Justice Stewart argues that so-called private schools remain outside the reach of the private club exemption of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000e-15 (1970). His concern, however, is evidently broader than the need to refute the claim that the private club exemption of the 1964 Civil Rights Act implicitly repealed those aspects of sections 1981 and 1982 that might otherwise have applied to private clubs and schools. In the course of his discussion he asserts that regardless of the public—private question, the private club exception of the 1964 Civil Rights Act could never properly apply to privately operated schools because what they are selling is not covered by the general terms of the 1964 Civil Rights Act in the first place. 96 S. Ct. at 2595 n.10. In this light, his argument that these private schools are in fact public accommodations seems intended to do more than merely answer the implied repeal argument. That something more may well be the beginning of an explanation of why sections 1981 and 1982 would not apply to a truly private social club such as the *Moose Lodge*.

On the surface those statutes seem to reach private clubs because they sell food, drink, and access to recreational facilities, and because members contract to acquire recreational and social privileges therein. Justice Stewart’s dicta in *Runyon*, however, seems to

Justice Stewart's opinion in *Runyon* noted a second example of private life protected by the Constitution from the Thirteenth Amendment power of Congress: the private matters of personal family life—control over the decision whether to bear children and power to supervise their education, including the right to send them to private schools. Justice Stewart noted repeatedly that these parental privacy rights are subject to the power of the state reasonably to regulate its schools.¹⁴⁰ This regulation banning racial segregation in private schools, he indicated, is reasonable because it furthers objectives compatible with the Thirteenth Amendment's goal of full civil freedom for all, regardless of race.¹⁴¹ In delineating the outer boundaries of reasonable regulations, Justice Stewart tied parental control over education to the First Amendment right to inculcate beliefs.

Justice Powell went beyond merely itemizing the specific constitutional rights that would circumscribe section 1981 and attempted to provide a principle that would limit the reach of that section. He presented this principle in a strange light. First, he granted that on the basis of history he "might be inclined" to believe that section 1981 never reaches beyond state action to the field of private contracts, but he explained that on the grounds of *stare decisis* he concurred with the majority because recent precedents were on their side.¹⁴² He then concluded that the principle he explicated demarcates those exceptionally private areas of private life that "certainly were never

indicate that sections 1981 and 1982 would not apply to such associations because those statutes forbid racial discrimination in buying, selling, and contracting only when one is dealing with the general buying public. Apparently Congress only has a Thirteenth Amendment power to assure equality of membership within that general buying public. This analysis is compatible with the reasoning of the *Jones* case: To be treated as a second-class person within the general buying public can plausibly be viewed as a badge or incident of slavery, but to be excluded from someone's private circle of friends is something to which everyone is subject, and can hardly be said to be related to slavery.

140. 96 S. Ct. at 2597-98. In contrast, the decision whether to bear a child may not be limited by merely reasonable regulations. The justification must be more compelling. *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). The same high standard would apply to any regulation touching upon religious as distinguished from secular aspects of private education. See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). In *Yoder*, the Court evidently separated the familial right of privacy in controlling a child's secular education from the right to free exercise of religion in controlling a child's religious education. The former may be limited by regulations having merely reasonable justification, while the latter may be limited only by regulations that present compelling justification. This combination of procreation and education precedents creates a strangely bifurcated right of familial privacy, but even if the compelling interest test were standard for regulating private secular education, section 1981 would meet it easily. The protection of Thirteenth Amendment rights presents a clearly compelling national interest.

141. See 96 S. Ct. at 2598.

142. *Id.* at 2602 (Powell, J., concurring).

intended to be restricted by the Nineteenth Century Civil Rights Acts.”¹⁴³ What he did not explain was why he was “certain” that the personal-private sphere that he so carefully delineated was not in the minds of the 1866 Congress, while he was only “inclined” to think that no private action at all was in their minds. The only reasonable explanation is that he believed that some activities are so private that no plausible case can be made for including them among the privileges of civil freedom conferred by the Thirteenth Amendment. What is missing from Justice Powell’s significant contribution to the development of a private sphere—public sphere doctrine is a discussion of just what was implied by the promise of civil freedom announced in the Thirteenth Amendment or by the grant of citizenship in the first clause of the Fourteenth Amendment. In other words, Justice Powell focused on the question of what constitutes the private sphere, paying virtually no attention to what comprises the public sphere.

What Justice Powell did attempt was to characterize those agreements and associations between private persons that are “so personal” that they are not properly treated as part of the public world of contracts governed by section 1981. In place of the term “private sphere” he used the phrases “personal invitations,” “purposes of exclusiveness,” and “associational rights.”¹⁴⁴ For the term “public sphere,” he substituted the phrases “constituency more public than private,” “commercial relationship offered generally or widely,” and “open offer to the public.”¹⁴⁵ In short, Justice Powell’s rule for delineating the private sphere¹⁴⁶ would allow freedom of association to prevail “where the offerer selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association (such as, for example, that between an employer and a private tutor, babysitter, or housekeeper).¹⁴⁷

Before leaving the *Runyon* case, it is appropriate to consider briefly the dissent of Justice White, joined by Justice Rehnquist.¹⁴⁸ A strong case exists for limiting their dissent to its express concern: the question of accurate statutory construction. But two pieces of evidence support the view that Justice White would not object to the view that private schools are, in fact,

143. *Id.* at 2603.

144. *Id.* at 2602-03.

145. *Id.*

146. It should be noted that he is speaking here of the reach of the particular statute, 42 U.S.C. § 1981 (1970), while we are using the term to limit the constitutional reach of Congress’ civil rights powers. The latter may, of course, be the basis of Justice Powell’s conclusions regarding the former.

147. 96 S. Ct. at 2602 (Powell, J., concurring).

148. *Id.* at 2604-15 (White, J., dissenting, joined by Rehnquist, J.).

part of the public sphere and therefore subject to a congressional ban on race discrimination. First, there is his express statement: "I do not question at this point the power of Congress or a state legislature to ban racial discrimination in private school admissions decisions. But as I see it Congress has not yet chosen to exercise that power."¹⁴⁹ Secondly, both Justices White and Rehnquist joined the Court's decisions in *Norwood v. Harrison*¹⁵⁰ and *Gilmore v. City of Montgomery*¹⁵¹ to forbid, solely on Fourteenth Amendment grounds, the grant by state governments to discriminatory private schools of benefits conferred upon all accredited schools,¹⁵² decisions that took the Court to the brink of declaring that the Fourteenth Amendment itself prohibits racial discrimination by privately-operated schools. Because both Justices White and Rehnquist were willing to go that far, it seems clear that once they became convinced on the question of statutory construction they would be willing to have private schools fall within the Thirteenth Amendment reach of Congress.

VI. Conclusions: The Advantages of the Public—Private Distinction

By 1971 the Supreme Court had converted the Thirteenth and Fourteenth Amendments into weapons strong enough to remove the state action shackles from the power of Congress to protect what it reasonably deems to be the basic rights of American citizens. But once those shackles were removed, the reach both of these new Thirteenth and Fourteenth Amendment weapons and the new interpretations given to sections 1981 and 1982 remained to be delineated. Both questions involved the underlying query of how far into the sphere of private life these new weapons penetrated.

The Court in *Moose Lodge* took its first step toward a new approach for answering those questions, and in *Runyon* took its second. In *Moose Lodge* the Court indicated that in the search for "state action" public accommodations and institutions that perform a normally governmental function will be deemed to be covered by the Fourteenth Amendment if racial discrimination is involved. On the other hand, if the truly private life of the home or of personal association is involved, the Fourteenth Amendment forbids only governmental compulsion to discriminate; it cannot reach truly private discrimination.

Although these distinctions were developed in applications of the Fourteenth Amendment, they were adapted in *Runyon* to clarify the outer bounds

149. *Id.* at 2605 n.2.

150. 413 U.S. 455 (1973).

151. 417 U.S. 566 (1974).

152. See text accompanying notes 114-31 *supra*.

of the Thirteenth Amendment enforcement statutes, sections 1981 and 1982. Those statutes were held not to negate the rights of association created by the First Amendment. The idea that there is a right to discriminate within a sphere of private life¹⁵³ is thereby intertwined with the concept of First Amendment rights.¹⁵⁴ Thus, the prohibitions of discrimination contained in sections 1981 and 1982 will reach as far as the sphere of civic life itself, certainly including the whole world of essentially commercial transactions, but will not extend into the protected sphere of truly private life, even though there may be some contracting or some buying and selling in that private sphere.¹⁵⁵

The developments in the civil rights cases of the last five years outlined here are fully compatible with two lines of doctrinal development extending over the past fifteen years that have more clearly distinguished the public sphere from the private. Racial discrimination was prohibited by Congress in the public spheres of service by private hotels and restaurants involved in interstate commerce, of employment practices by certain private commercial establishments, and of the private sale and rental of real estate under many

153. The Court is quite ambiguous on the question whether the right to discriminate is actually protected. The Court cites Justice Douglas' dissent in *Moose Lodge*: "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. . . . Government may not tell a man or woman who his or her associates must be. . . . The freedom to associate applies to the beliefs we share, and to those we consider reprehensible." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (Douglas & Marshall, JJ., dissenting), cited in *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). But the justices also qualify the point with a reminder that "the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate. . . ." *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). See also *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973).

154. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965); *NAACP v. Button*, 371 U.S. 415, 430-31 (1963); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

155. Various versions of this idea were developed in legal commentary even before *Runyon*, although no one tied it to the *Moose Lodge* development. Buchanan, *Federal Regulation of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 IOWA L. REV. 473, 507 (1971); Note, *Federal Power to Regulate Private Discrimination: The Revival of the Endorsement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 487 (1974); Note, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 1970 DUKE L.J. 1181, 1208, 1214-17; Comment, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460, 469-70 (1970); Note, *Developing Legal Vistas for the Discouragement of Private Club Discrimination*, 58 IOWA L. REV. 108, 136-41 (1972); Note, *The Desegregation of Private Schools: Is Section 1981 the Answer?*, 48 N.Y.U. L. REV. 1147 (1973); Note, *Constitutional Law—Private Club Discrimination*, 1970 WIS. L. REV. 595; Note, *Section 1981 and Private Groups: The Right to Discriminate versus Freedom from Discrimination*, 84 YALE L.J. 1441, 1449-50 n.45 (1975).

circumstances. Meanwhile, the Supreme Court was discovering a constitutionally protected sphere of privacy in which individual liberty is the preferred value.¹⁵⁶ This sphere includes the privacy of one's own dwelling place,¹⁵⁷ the privacy of family life,¹⁵⁸ and the privacy of social association.¹⁵⁹ These two developments would be wholly consonant with an explicit announcement by the Court that the Thirteenth or Fourteenth Amendment prohibits racial discrimination in the public but not in the truly private sphere.

In addition to clarifying this long-confused area of the law, an explicit announcement of the public sphere—private sphere doctrine would have two additional advantages. First, there are two relatively standard reasons cited by commentators for replacing the state action doctrine with a full-blown public sphere doctrine: (1) A public sphere doctrine seems to be closer than the state action doctrine to the true purpose of the Thirteenth, Fourteenth, and Fifteenth Amendments,¹⁶⁰ and (2) a public sphere doctrine makes more sense in light of the ubiquitous interconnections between governmental and non-governmental life in recent times.¹⁶¹ Second, the recent cases demand utilization of a public—private distinction as a tool of resolution. With no real acknowledgement that it was moving far away from the state action doctrine, the Court in *Runyon* was forced to employ the public sphere—private sphere rationale to settle the issues presented in that case. Similar questions can be expected to reach the Court soon. The Court recently refused to hear the appeal of a case posing the question of whether a private yacht club may bar blacks from membership,¹⁶² but the justices will not be able to ignore the issue forever. If the constitutional concerns both for the liberty of private life and for equality of treatment in the world of citizen life are to be respected, both of these concerns should be faced squarely by the Court.

156. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

157. *Stanley v. Georgia*, 394 U.S. 557 (1969).

158. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 197 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

159. *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

160. See H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Black, *supra* note 14, at 100-03, 108; Carl, *Reflections on the "Sit-ins,"* 46 CORNELL L.Q. 444, 454-55 (1961); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954).

161. See text accompanying note 73 *supra*.

162. *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir.), *cert. denied*, 97 S. Ct. 186 (1976).

In *Runyon* the Court quite properly ignored the sterile state action question of the degree of government involvement in the schools when it declared that section 1981 did indeed cover contracts for the services of private schools. More importantly, the Court in the *Runyon* case faced more directly than ever before the crucial question of where to draw the line between the public and the private spheres. Both Justice Stewart's opinion for the Court and Justice Powell's separate concurrence made important statements about the sphere of private life. Although the Court gave considered attention in *Runyon* to the nature of the private sphere, it has yet to combine those reflections with comparably well-developed reflections concerning the sphere of public life. The Court will continue to look beyond the state action question, as it has been doing quietly since 1972,¹⁶³ but, in addition, it should admit that what it is looking at is the question of which activities fall into the sphere of the public life of the community.

163. See Note, *Section 1981 and Private Groups: The Right to Discriminate versus Freedom from Discrimination*, 84 YALE L.J. 1441, 1464-65 (1975), in which the author agrees that the Court has sub silentio been making public versus private sphere distinctions, but, unlike this article, it does not note the seminal impact of *Moose Lodge* in this development. See also 22 J. PUB. L. 281 (1973), which does acknowledge the public sphere shift in *Moose Lodge* but does not include comment on later developments.