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Constitutional Law -- State Action -- Golden v. Biscayne Bay Yacht Club: Preventing Discrimination by Private Clubs

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1985(3) and section 1 of the fourteenth amendment must be of some significance and gives credence to the argument that Congress intended section 1985(3) to protect fourteenth-amendment-based rights against private interference.

Besides the court's failure to deal with the scope of *Griffin*'s criteria, the *Bellamy* decision has other shortcomings. The Fourth Circuit virtually ignored the *Griffin* framework of section 1985(3) interpretation, while relying on older and less relevant cases. The court did not consider whether the requisite class discrimination was satisfied. Nor was *Griffin*'s policy of giving civil rights statutes a broad interpretation considered or followed. Finally, the minimum consideration given *Griffin* was based on a misinterpretation of the Supreme Court's holding in that case. Although section 1985(3) has made great strides since 1971 towards becoming a vital civil rights statute, the *Bellamy* decision indicates that, at least until the Supreme Court clearly defines the scope of the statute, application of section 1985(3) will be greatly restricted.

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Constitutional Law—State Action—Golden v. Biscayne Bay Yacht Club: Preventing Discrimination by Private Clubs

Using the bay bottom off Miami as a vantage point, the Fifth Circuit has launched a state action torpedo to sink the membership practices of a private yacht club. Although the Supreme Court has refrained from answering whether the membership policies of private clubs can be attacked on state action grounds,[1] the Court of Appeals for the Fifth Circuit found the question squarely presented to it in *Golden v. Biscayne Bay Yacht Club*[2] and answered the question in the affirmative. In *Golden* the court held that leasing publicly owned bay bottom land to a yacht club for its docks constituted sufficient state involvement to unleash a fourteenth amendment attack on racial and religious discrimination in the club's membership practices.[3]

1. In Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-68 (1972), the Supreme Court refused on standing grounds to hear an attack on allegedly discriminatory membership practices of a private social club.

2. 521 F.2d 344 (5th Cir. 1975).

3. *Id.* at 352 (alternative holding).

The Biscayne Bay Yacht Club (hereinafter referred to as the Club) is a private social club with waterfront and dock facilities on Biscayne Bay, Florida.[4] The Club had utilized these facilities for thirty years when in 1962 the City of Miami asserted title to the bay bottom under the Club's docks.[5] Since 1962 the Club has leased the bay bottom from the city for one dollar per year.[6] The most recent lease included provisions prohibiting the Club from discriminating on the basis of race, religion or national origin against persons desiring access to the leased facilities and from requiring applicants for membership to be sponsored as a condition for consideration.[7] Despite this anti-discrimination proviso in the lease, membership in the Club has been by sponsorship and upon approval of the Club's Board of Governors by use of a three-vote veto system.[8]

Two plaintiffs, a black and a Jew, separately sought and were denied membership applications because of the sponsorship requirement.[9] Plaintiffs, alleging that the Club's membership policies were discriminatory, subsequently sought declaratory and injunctive relief against the Club, the City of Miami and its mayor and commissioners under 42 U.S.C. sections 1981 and 1983 and Title II[10] of the Civil Rights Act of 1964.[11] The district court, finding that the sponsorship policy discriminated against black and Jewish applicants and that the lease provided sufficient state involvement to meet the fourteenth amendment state action requirement, enjoined the Club under section 1983 from denying membership to persons solely on grounds of race or religious affiliation.[12]

On appeal, a divided Court of Appeals[13] for the Fifth Circuit affirmed. The court agreed with the district court that the sponsorship policy, in light of the fact that there had been no black or Jewish members since the Club's inception,[14] operated in practice to exclude

4. *Id.* at 347.
5. *Id.*
6. Golden v. Biscayne Bay Yacht Club, 370 F. Supp. 1038, 1040 (S.D. Fla. 1973).
7. *Id.* at 1040-41. The provisions were pursuant to two City of Miami ordinances. *Id.*
8. 521 F.2d at 347.
9. 370 F. Supp. at 1041.
10. 42 U.S.C. §§ 2000a *et seq.* (1970).
11. 370 F. Supp. at 1040-41.
12. *Id.* at 1042-44.
13. The court of appeals split 2-1. Chief Judge Brown wrote for the majority; Judge Coleman dissented.
14. The Commodore of the Jamaica Yacht Club, a black, was an honorary member. 521 F.2d at 347.

blacks and Jews.[15]

The majority devoted the bulk of its opinion to a determination of whether sufficient connection existed between the Club and the City of Miami to satisfy the "color of law" state action prerequisite[16] for relief under section 1983.[17] Noting that the Supreme Court has required that this examination be conducted by "sifting facts and weighing circumstances"[18] on a case-by-case basis, the court studied the similarities between the facts of the instant case and other cases involving discrimination by private individuals.[19] The court determined that there was sufficient state involvement present in *Golden* to constitute state action on either of two grounds. First, the court held that the leasing of publicly owned property *ipso facto* established a sufficient nexus between private and public conduct for a finding of state action when the

15. *Id.* at 348-49. In 1970, Dade County (in which the Club is located) had a combined black and Jewish population of thirty percent. 370 F. Supp. at 1043. The court also noted that the district judge could have found that racial and religious discrimination resulted from the Club's use of a three-vote veto. 521 F.2d at 349 n.10.

16. 42 U.S.C. § 1983 (1970) provides for a civil action for "deprivation of any rights, privileges, or immunities secured by the Constitution and the laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage of any State . . . ." Section 1983's "color of law" requirement is generally equated with the state action concept of the fourteenth amendment. Originally, there was a controversy over whether a cause of action could lie under section 1983 against anyone other than a state official acting pursuant to state law. A landmark case, Monroe v. Pape, 365 U.S. 167 (1961), settled the issue in favor of a broader reading of the statute. Subsequent cases have equated section 1983's "color of law" concept to the fourteenth amendment state action concept. Gibbs v. Titelman, 502 F.2d 1107, 1110 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 741 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); Green v. Dumke, 480 F.2d 624, 628 (9th Cir. 1973); *see, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

17. See 521 F.2d at 349-53. The majority deemed "it unnecessary to reach the question whether the Club's admission policies also violated § 1981 and Title II of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a." 521 F.2d at 348.

The Biscayne Bay Yacht Club would probably qualify for the private club exemption from Title II of the Civil Rights Act of 1964 under 42 U.S.C. § 2000a(e) (1970). The only Supreme Court case interpreting the scope of this exemption, Daniel v. Paul, 395 U.S. 298 (1969), laid out three criteria that must be satisfied to gain the exemption: 1) a non-business character, 2) membership control over club finances and governance, and 3) genuine selectivity over admissions. Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 492 (1974). The Biscayne Bay Yacht Club would easily satisfy these requirements. See 370 F. Supp. at 1040-41.

The question of the applicability of section 1981 to private clubs may be illuminated by a case pending in the Supreme Court, Runyon v. McCrary, 363 F. Supp. 1200 (E.D. Va. 1973), *modified*, 515 F.2d 1082 (4th Cir.), *cert. granted*, 44 U.S.L.W. 3279 (U.S. Nov. 11, 1975) (No. 62). For a discussion of section 1981's applicablility to private clubs, see Note, 74 COLUM. L. REV., *supra*, at 494-95.

18. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

19. See 521 F.2d at 349-53.

private entity practiced racial discrimination.[20] Second, in a somewhat confusing discussion of the facts in *Golden*, the court seemed to find that the Club and the city were engaged in a mutually beneficial joint venture.[21] To establish this symbiotic relationship the court pointed to the consensual nature of the lease between the city and the Club, to the benefits provided to the city by the existence of private dock facilities which relieved pressure on crowded public dock facilities, and to the benefits that the lease afforded the Club through making possible docks which were essential to the Club's existence and by providing financial assistance through the token rental fee.[22]

Since the Nineteenth Century *Civil Rights Cases*,[23] the fourteenth amendment has protected citizens from the denial by states of due process or the equal protection of the law but has erected "no shield against merely private conduct, however discriminatory or wrongful."[24] In spite of this limitation the Supreme Court and the lower federal courts have constructed three main theories to find the state action needed to reach and proscribe some types of private discrimination. Two of these theories—the public function theory, designed to reach private conduct that has taken on the character of governmental activity,[25] and the state encouragement or authorization theory, designed to reach private action taken pursuant to government encouragement or authorization[26]—are not apposite in *Golden*.[27]

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20. *See id.* at 352.
21. *See id.* at 351-52.
22. *See id.*
23. 109 U.S. 3 (1883).
24. Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (footnote omitted).
25. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966); Marsh v. Alabama, 326 U.S. 501 (1946).
26. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Lombard v. Louisiana, 373 U.S. 267 (1963).
27. The public function theory would be applicable in *Golden* only if providing dock facilities could be characterized as a governmental function. This characterization would be problematic here because private conduct has been found to constitute state action under the public function theory generally when the public entities are the sole and usual providers of the particular service. *See* Evans v. Newton, 382 U.S. 296, 300-02 (1966). For a full discussion of what constitutes state action under this theory, see Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 690-98 (1974).

The state encouragement theory would probably not be applicable in *Golden* because, far from encouraging private discrimination, the City of Miami attempted to prevent it by including in the lease the anti-discrimination provisions mentioned in the text accompanying note 7 *supra*. Any attempt to find state authorization in *Golden* on the theory that the city's acquiescence in the discriminatory conduct *implied* state authorization would be precluded by the plaintiffs' failure to show that city officials had knowledge of the Club's discriminatory practices. See 370 F. Supp. at 1044. *But see* text accompanying notes 52-54 *infra*.

The third theory—the state involvement or "nexus" theory—which is at issue in the principal case, had its first full statement in *Burton v. Wilmington Parking Authority*,[28] in which the Supreme Court held that the proscriptions of the fourteenth amendment ran against a lessee of public property when the lessee and the state were engaged in a mutually beneficial venture.[29] Various factors established the symbiotic relationship in *Burton*: the operation of the lessee's restaurant within a public parking garage that provided the restaurant with additional demand for its services and with convenient parking facilities for its patrons, and the state's dependence for financing its garage on the rental receipts from its commercial lessees in the building.[30]

Using the state involvement theory, lower federal courts have frequently found that leases of public property, when accompanied by other ties between the state and the private activity, establish the requisite nexus between the state and the challenged private conduct. These cases typically have involved situations in which the state has attempted through a lease to exercise some control over the lessee's conduct or to secure additional benefits for the state.[31] Leases have not been sufficient to constitute state action in a few cases in which the alleged constitutional violation did not involve racial discrimination[32] or

28. 365 U.S. 715 (1961).

29. *See id.* at 724-26.

30. *See id.* at 724.

31. *See* Wimbish v. Pinellas County, 342 F.2d 804 (5th Cir. 1965) (lessee barred from discriminating against blacks where lease of county land required lessee to build a golf course subject to county's approval of plans, gave county powers designed to keep golf course open to general public, and vested title to all improvements in county); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) (lessee of courthouse basement barred from denying cafeteria service to blacks where express purpose of lease was to furnish cafeteria service for benefit of persons frequenting courthouse). *But cf.* Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962) (barring racially segregated operation of private golf courses where owner purchased the courses from city and where the land would revert to the city should the land fail to be used as golf courses); Jones v. Marva Theatres, Inc., 180 F. Supp. 49 (D. Md. 1960) (lessee barred from continuing segregated seating arrangements where lease of theatre located in city hall granted city right to use the premises four days per year).

32. *See* Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975) (White, J., and Burger, C.J., dissenting) (allowing private hospital to refuse to permit physician to perform elective abortions where county built and leased hospital to defendant for nominal consideration but had no control over hospital policies). *Contra*, O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140 (6th Cir. 1973) (reversing dismissal of section 1983 claim against private hospital which refused to permit plaintiff doctor to practice there when hospital leased from county for nominal consideration under contract that required specified number of official members on defendant's board of directors).

in which a lease had little or no connection with the challenged practice.[33]

Two recent Supreme Court decisions, *Moose Lodge No. 107 v. Irvis*[34] and *Jackson v. Metropolitan Edison Co.*,[35] which refused to find state action, restricted the use of the state involvement theory enunciated in *Burton*.[36] Although the facts of both of these non-lease cases could easily have been the basis for finding a *Burton* mutually beneficial relationship, the Supreme Court required that the state be directly involved in the challenged private conduct when the challenged action is initiated by the private entity and not the state.[37] This new requirement retreats significantly from the view implicit in *Burton* that the state becomes inextricably involved in a private party's discriminatory practices whenever the state and the private individual have formed a mutually beneficial relationship.[38]

At a time when the Supreme Court is restricting[39] the use of the state action concept, the Fifth Circuit in *Golden* is increasing its scope. The court's holding that a lease of public property *ipso facto* establishes state involvement when the lessee practices racial discrimination is a significant departure from earlier state action cases involving leases. In *Burton* the Supreme Court expressly noted that not all leases of public property would constitute state action.[40] Indeed, the great pains taken in *Burton*[41] and other lease cases[42] to establish additional links between the state and private defendants accused of racial discrimination would have been needless if a lease itself could have sufficed to constitute state action. One Fifth Circuit lease case, *Wimbish v. Pinellas County*,[43]

33. *See* Solomon v. Miami Woman's Club, 359 F. Supp. 41 (S.D. Fla. 1973) (dismissing suit by blacks to enjoin allegedly discriminatory membership practices of private clubs and federation where federation leased land for its state headquarters from a municipality for nominal consideration under a contract requiring lessee to build office which would revert to city and to pay taxes on building).

34. 407 U.S. 163 (1972).

35. 419 U.S. 345 (1974).

36. Note, *Termination of Electrical Service Does Not Constitute State Action for Purpose of the Fourteenth Amendment*, 24 EMORY L.J. 510, 525 (1975); Note, *Public Utilities—State Action and Informal Due Process After Jackson*, 53 N.C.L. REV. 817, 823-24 (1975); see Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 847 (1974).

37. *See* 419 U.S. at 351, 358; 407 U.S. at 176-77; Note, 60 VA. L. REV., *supra* note 36, at 849-50.

38. *See generally* Note, 24 EMORY L.J., *supra* note 36, at 529.

39. See text accompanying notes 34-38 *supra*.

40. 365 U.S. at 725-26.

41. See *id.* at 722-25.

42. Cases cited note 31 *supra*.

43. 342 F.2d 804 (5th Cir. 1965).

which the court in *Golden* cited,[44] supports this reading of *Burton*. In that case the Fifth Circuit explicitly relied on the lease's additional provisions to tie the state to the private endeavor.[45]

In holding that an unadorned lease could constitute state action, the court in *Golden* appears to have ignored the *Moose Lodge-Jackson* requirement that the state be directly involved in the private conduct that is being challenged. The *Golden* majority held that *Moose Lodge* was not controlling because that case involved a license instead of a lease.[46] This attempt at distinguishing *Golden* from *Moose Lodge* was much too simplistic since the rationale of the *Moose Lodge* and *Jackson* holdings does not appear to be limited to licensing situations. Applied in a leasing situation, the *Moose Lodge-Jackson* requirement would dictate that the state be directly involved in its lessee's discriminatory conduct.

The Fifth Circuit in *Golden* was not compelled to hold that a lease when coupled with racially disciminatory practices constituted sufficient state involvement in order to enjoin those practices under section 1983. The court could have employed the fuller *Burton* analysis as modified by *Moose Lodge* and *Jackson* to find state action in this case.

Golden's facts would clearly seem to fulfill the state involvement theory's basic requirement of a mutually beneficial relationship. The lease of the bay bottom land provided the Club with docks essential to its existence and with financial subsidization through the token rental fee.[47] These benefits seem more important to the Club in *Golden* than the convenient parking and increased patronage[48] that the lease in *Burton* provided the Eagle Restaurant. The lease in *Golden* also benefitted the City of Miami since the existence of private dock facilities relieved the city from having to provide more public dock facilities.[49] The benefits to the City of Miami seem at least as important as the benefits[50] provided the state in *Burton* where the receipts from the lease helped defray the cost of providing parking facilities for the public. In addition, other state involvement lease cases have found state action

44. 521 F.2d at 352.

45. 342 F.2d at 805-06. The *Wimbish* lease contained provisions that gave the county effective control over plans for construction of a golf course which was closed to blacks, control over membership and greens fees, and title to all improvements. *Id.*

46. 521 F.2d at 353.

47. See text accompanying note 22 *supra.*

48. See text accompanying note 30 *supra.*

49. See text accompanying note 22 *supra.*

50. See text accompanying note 30 *supra.*

when the primary benefit to the public entities came from the private provision of recreational facilities open to their citizens.[51]

Not only do the facts in *Golden* satisfy *Burton* but they also meet the *Moose Lodge-Jackson* requirement. The city is directly implicated in the Club's discriminatory membership practices in two ways. First, the city's failure to enforce the anti-discrimination provisions[52] in its lease represents, at a minimum, an acquiescence in the Club's discriminatory practices.[53] More importantly, any time a state provides a scarce public resource for the exclusive use of a private club that has discriminatory membership practices, the state effectively allocates the public resource in a discriminatory manner.[54]

Although *Golden*'s holding appears to be a sweeping one, the Fifth Circuit expressly restricted the applicability of its finding of state action to situations in which racial or religious discrimination is present.[55] The court was compelled to do this because of its inability to distinguish an earlier Fifth Circuit case[56] which did not involve racial discrimination and in which the leasing of a publicly owned facility to be operated as a private hospital was held not to constitute state action. The rationale the

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51. *See* cases cited in note 31 *supra.*

52. See text accompanying note 7 *supra.*

53. *But cf.* note 27 *supra.*

54. In his dissenting opinion, Judge Coleman argued that since the city does not exercise any control over the Club's internal matters, the case does not satisfy the requisite connection that *Moose Lodge* and *Jackson* demand and argued that the decision by the Court of Appeals for the Second Circuit in New York Jaycees, Inc. v. United States Jaycees, 512 F.2d 856 (2d Cir. 1975), should be followed. In that case, the Second Circuit held that federal funding of public service projects was not a sufficient nexus to attack discriminatory membership policies when non-members were the beneficiaries of the projects. *New York Jaycees* is inapposite to *Golden* because the members in *Golden* are the exclusive beneficiaries of the dock facilities and the financial subsidization that flow from the lease of public land.

It is possible to argue that *Moose Lodge* implicitly rejected the argument contained in the text because no state action was found to inhere when members of the lodge received the benefits that stemmed from a liquor license. On the other hand, *Moose Lodge* is distinguishable from *Golden* because in *Moose Lodge* there was no finding that the liquor license was essential to the lodge's existence and the Court used standing grounds to turn back the attack on the discriminatory membership practices. *See* 407 U.S. at 164-79. *Moose Lodge* is a perplexing case because the indicia of state action which the decision lays out could be satisfied on the case's facts. *See The Supreme Court, 1971 Term,* 86 HARV. L. REV. 50, 73 (1972).

55. See 521 F.2d at 350-53. Although the cases the majority cited to justify its position all involve racial discrimination, the majority equates religious discrimination to racial discrimination because it "carries the same stigma of inferiority and badge of opprobrium . . . ." *Id.* at 351.

56. Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied,* 96 S. Ct. 433 (1975) (White, J., and Burger, C.J., dissenting).

court gave for attacking racially motivated constitutional violations more vigorously than other violations was that such denials "precipitated enactment of the Fourteenth Amendment."[57] Whatever the original impetus behind the fourteenth amendment's enactment, its protection has been extended to all citizens. If other challenged private actions are constitutional violations, there would seem to be no reason to permit them to go unredressed unless there are countervailing policy reasons. The *Golden* court failed to mention any.[58]

While lower federal courts have split over whether a lesser degree of state involvement is required to proscribe private racial discrimination than to proscribe other constitutional violations,[59] the Supreme Court has not expressly embraced either view.[60] The *Golden* majority, citing the results of a number of Supreme Court cases, attributed to the Court an unwillingness to condone *any* degree of state involvement in cases involving racially discriminatory conduct.[61] The Fifth Circuit, however, ignored the Supreme Court case most directly on point with *Golden—Moose Lodge*—in which the high Court upheld a private club's right to refuse to serve a black guest.[62] In that case the Supreme Court seemed to give greater weight to the associational rights of the private defendant than to the black plaintiff's interests.[63] Although the Court rested its holding on the lack of direct state involvement in the discriminatory conduct, commentators have suggested that the high Court must have been influenced by the defendant's associational rights

57. 521 F.2d at 351.

58. The *Golden* court implied that there might be countervailing policy reasons. *See id.* at 350 n.12. The majority cited Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873, 879 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975), to the effect that the "potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in areas unaffected by racial considerations has led courts to define more precisely the applicability of the state action doctrine." 521 F.2d at 350 n.12. The *Golden* court, however, excluded the most likely countervailing reason: the Club's associational rights. See text accompanying note 70 *infra*.

59. See Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); *cf.* Chiaffitelli v. Dettmer Hosp., Inc., 437 F.2d 429 (6th Cir. 1971) (per curiam); Meredith v. Allen County War Memorial Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968). *Contra*, O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140, 1143-44 n.3 (6th Cir. 1973).

60. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting).

61. 521 F.2d at 350, 351 n.14.

62. *See* 407 U.S. 163.

63. *See id.*

because the other facts of the case are indistinguishable from earlier cases finding state action.[64]

The Supreme Court's handling of *Moose Lodge* and other recent state action cases has suggested to commentators that the high Court is actually employing a state action analysis that balances the rights of plaintiffs against the competing interests of private defendants in deciding whether there is state action.[65] One commentator has argued that such a covert balancing approach obscures the basic issues involved in answering whether the fourteenth amendment should run against private individuals in a given case.[66] He recommended using a two-stage analysis which balances conflicting constitutional rights of the parties after an initial determination that the state is involved in the challenged conduct.[67] The Supreme Court has not expressly adopted such an approach but instead has continued overtly to rest its decisions solely on the failure to find a sufficient quantum of state involvement in the private conduct.[68]

The high Court's failure to explain the considerations that lie at the heart of its decisions, when added to the "sifting facts and weighing circumstances" approach of the state action cases, permits haphazard results as lower courts pick and choose among conflicting Supreme Court opinions for guidance.[69] It also promotes haphazard consideration of the competing policies at stake. For instance, the Fifth Circuit in *Golden*, while emphasizing the invidious nature of racial discrimination, perfunctorily disposed of the Club's associational rights in a single paragraph by asserting that the private exercise of freedom of association deserves no consitutional protection when it involves state action.[70] Yet this is in conflict with the weight seemingly given private associational rights in *Moose Lodge* in the face of charges of racial discrimina-

64. *See* Note, 60 VA. L. REV., *supra* note 36, at 849-50; *cf.* Note, 53 N.C.L. REV., *supra* note 36, at 825-26.

65. Note, 53 N.C.L. REV., *supra* note 36, at 825; *see* Note, *Gilmore v. City of Montgomery: Is There More to Equal Protection Than State Action?*, 53 N.C.L. REV. 545, 550 (1975); Note, 60 VA. L. REV., *supra* note 36, at 850.

66. Note, 53 N.C.L. REV., *supra* note 65.

67. *Id.*

68. *Id.* at 549-50.

69. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 150 (1975).

70. 521 F.2d at 353. For a discussion of the absolutionist approach to associational freedom, see Note, 60 VA. L. REV., *supra* note 36, at 854-63. For an argument that a rule of reason should be employed to balance the competing values, see Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 101-03 (1967). For a discussion of how and when the rights of private individuals should give way to constitutional proscriptions, see Note, 74 COLUM. L. REV., *supra* note 27.

tion. While in *Golden* the rights of religious and racial minorities may well outweigh the Club's associational rights, the case, as the first[71] imposition of fourteenth amendment duties on what would traditionally have been considered a private club, warrants a much fuller discussion of the associational freedoms of the Club.

In sum, *Golden*'s assault on the Club's membership practices was misplaced because the Fifth Circuit refused to base its holding solely on a *Burton-Moose Lodge-Jackson* state involvement analysis. Its reliance on the lease as an adequate basis for finding state action seems to run counter to the latest pronouncements on the issue by the Supreme Court. The court's overly broad construction of state action was partly excusable because the Supreme Court has not articulated the relative importance it attaches to the nature of the constitutional right asserted by plaintiffs and the countervailing interests of private defendants. Unless the high Court dispels the confusion that has arisen from its handling of these cases, state action assaults on private discrimination will continue to be hit-or-miss attacks.

MICHAEL W. PATRICK

Criminal Procedure—Michigan v. Mosley: A New Constitutional Procedure

In *Miranda* v. *Arizona*[1] the United States Supreme Court set out specific guidelines, which, if not followed, required that statements obtained through custodial interrogation not be used against the accused.[2]

71. This conclusion depends on which definition of private club is used. Using the definition discussed at note 17 *supra*, *Golden* represents the first decision imposing constitutional restrictions on membership in a private social club. *See* 521 F.2d at 353 (Coleman, J., dissenting). *But cf.* Goodloe v. Davis, 514 F.2d 1274 (5th Cir. 1975).

1. 384 U.S. 436 (1966).

2. Briefly stated *Miranda* held:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege of self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right to remain silent and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain si-