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Recent Developments

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Constitutional Law—State Action Doctrine Invoked as a Limitation upon the Reach of the Fonrteenth Amendment

I. INTRODUCTION

The fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[1] The amendment thus explicitly forbids the state to engage in certain conduct, but places no express restriction on the acts of private individuals. Although the Supreme Court has consistently held that state action is a necessary element of a fourteenth amendment violation,[2] the concept of state action was expanded to cover activities arguably private in nature to the extent that by 1970 the Court was able and apparently willing to find state action in almost any situation. Consequently, state action was considered a moribund limitation.[3] In 1970, however, the Supreme Court, in *Evans v. Abney*,[4] cast substantial doubt upon the validity of previous conclusions by holding that the absence of state action barred relief on claims of racial discrimination. In addition, two recent cases, *Moose Lodge No. 107 v. Irvis*[5] and *Lloyd Corp. v. Tanner*,[6] also denied fourteenth amendment relief because of a lack of state action, and thus resolved the uncertainty by infusing the state action limitation with renewed vigor. This resurgence of state action, however, may not stem from the Court's re-interpretation or reversal of prior case law, even though the instant cases are seemingly inconsistent with earlier state action doctrines. This Comment will suggest that the recent treatment of state action by the Supreme Court can be explained by looking beyond the traditional state action rubric to a process of balancing the competing interests of the parties, and by considering the judicial reassessment of the values ascribed to each identified interest in the balancing process.

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1. U.S. CONST. amend. XIV, § 1.
2. *See* text accompanying notes 7-13 *infra*.
3. *See* note 28 *infra*.
4. 396 U.S. 435 (1970).
5. 407 U.S. 163 (1972).
6. 407 U.S. 551 (1972).

II. STATE ACTION DOCTRINES AND RECENT SUPREME COURT DECISIONS

The state action requirement of the fourteenth amendment was first announced in the *Civil Rights Cases,*[7] in which the fourteenth amendment was interpreted to be a prohibition directed against the state, without limiting the conduct of private individuals. The Court found it conceptually impossible for equal protection or due process to be denied except by state authority in the form of laws, customs, or judicial or executive proceedings. Thus, an individual might commit a crime or a tort, which the fourteenth amendment does not prohibit, but, as a private person, he was not capable of extinguishing another individual's right to equal protection or due process.[8] Since the decision in the *Civil Rights Cases,* the existence of the state action requirement has not been disputed, but neither that decision nor its progeny made clear the exact definition of state action.[9] The problem has been to determine whether an act or occurrence is so imbued with state participation and support as to fall within the proscriptive ambit of the fourteenth amendment. Although this determination cannot be distilled, according to the Supreme Court, into a concrete, infallible test,[10] there have been circumstances in which state action was found with relative ease: the enforcement of a statute that, on its face, was racially discriminatory,[11] the compliance with a statute that commanded a private entity to discriminate,[12] and discriminatory action by an agent of the state.[13]

Not all cases, however, present easily identifiable state action; deci-

7. 109 U.S. 3 (1883).

8. *See id.* at 17. Although the fourteenth amendment, as interpreted in the *Civil Rights Cases,* is only a negative safeguard to individual rights, this result was not inescapable; Mr. Justice Harlan, in a dissenting opinion, vigorously asserted that the fourteenth amendment must be read as imposing upon the states an affirmative duty to secure for blacks all rights enjoyed by whites. *Id.* at 61. Several commentators have found support for this theory in logic and in legislative history. *See, e.g.,* J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 221-22 (1951); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee,* 66 COLUM. L. REV. 855, 867-70 (1966). Whatever the merits of the affirmative duty theory, the Supreme Court has never expressly endorsed it.

9. One commentator has aptly described the state action doctrine as a "torchless search for a way out of a damp echoing cave." Black, *The Supreme Court, 1966 Term, Foreward: "State Action," Equal Protection, and California's Proposition 14,* 81 HARV. L. REV. 69, 95 (1967).

10. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

11. *See, e.g.,* Strauder v. West Virginia, 100 U.S. 303 (1880) (blacks excluded from jury service by statute).

12. *See, e.g.,* Peterson v. City of Greenville, 373 U.S. 244 (1963) (city ordinance requiring restaurants to segregate races).

13. *See, e.g.,* Robinson v. Florida, 378 U.S. 153 (1964) (state board of health); Griffin v. Maryland, 378 U.S. 130 (1964) (deputy sheriff); Lombard v. Louisiana, 373 U.S. 267 (1963) (mayor).

sions over the course of the last thirty years may be viewed as providing a basis for at least four theories that support a finding of state action when none is immediately apparent. First, under a "public function" theory private entities serving a public function are subject to the restrictions of the fourteenth amendment because mere private ownership of an otherwise public facility does not justify narrowing the scope of constitutionally privileged conduct. This theory had its origins in *Marsh v. Alabama,*[14] which held that a company-owned town, which, but for its ownership, was like any other municipality, could not constitutionally prevent the exercise of first amendment rights on its streets. More recently, a privately owned shopping center in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.,*[15] and a public park formally under the control of private trustees in *Evans v. Newton*[16] were held to serve a public function, and the owners therefore could not prevent the exercise of first amendment rights on the shopping center property or discriminate on the basis of race in operating the park.[17] These later cases represent a significant expansion of the public function doctrine: in *Marsh* it seemed crucial that the company-owned town possessed all the elements of a municipality, but in *Logan Valley* and *Evans* individual municipal elements—a business district and a park—were, without more, a sufficient basis for operation of the doctrine.[18] Secondly, the Court has set forth a "state inaction" rationale[19] in *Burton v. Wilmington Parking Authority.*[20] In *Burton,* the Authority, an agency of the State of Delaware, owned a parking garage in which a

14. 326 U.S. 501 (1946).

15. 391 U.S. 308 (1968).

16. 382 U.S. 296 (1966).

17. An alternative ground of decision in *Evans v. Newton* was that since there had been no change in municipal maintenance of and concern over the park, the mere substitution of private trustees was insufficient to remove the facility from the public sector.

18. In *Marsh* and *Logan Valley,* plaintiffs relied on the first amendment rather than on the equal protection clause of the fourteenth amendment. The Court has, however, never intimated that the state action requirement differs between the 2 amendments. Furthermore, in *Marsh* and *Logan Valley* the first amendment was available to plaintiffs only because of that amendment's incorporation into the due process clause of the fourteenth amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925). It would be a strained interpretation of the fourteenth amendment to read different state action requirements into the due process and equal protection clauses. Finally, in deciding *Evans,* the Court relied on *Marsh. See* Evans v. Newton, 382 U.S. 296, 299, 302 (1966).

19. It should be noted that the fourteenth amendment does not contain the word "action." Thus it is not illogical to interpret the amendment as prohibiting state inaction in certain circumstances. *See* Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. PA. L. REV. 473, 481 (1962).

20. 365 U.S. 715 (1961). The "public function" theory interrelates with the "state inaction" theory. For example, in *Marsh* it was noted that the state may not *permit* a private corporation to govern a community so as to restrict fundamental rights. Marsh v. Alabama, 326 U.S. 501, 509 (1946).

restaurant had been constructed and leased to a private individual who refused service to blacks. The Court viewed the intertwined and symbiotic lessor-lessee relationship as compelling a finding that the Authority had an affirmative duty to forbid discrimination in the terms of the lease. Thus *Burton* suggests[21] that state action would be present whenever the state fails to prevent discrimination that, by virtue of a contractual relationship, it is in a good position to prevent.[22] Thirdly, in *Shelley v. Kraemer*[23] the Court found state action in the judicial enforcement of private racial discrimination. In *Shelley,* a state court had enforced a restrictive covenant that prevented a willing white vendor from selling the restricted property to a willing black purchaser. The Supreme Court reversed, holding that, although private individuals have the right to enter into a racially restrictive covenant, under the fourteenth amendment a state cannot participate in the discrimination by allowing its courts to enforce the covenant.[24] Lastly, in *Reitman v. Mulkey*[25] the people of California amended their constitution to guarantee the right of the individual to sell or to decline to sell real property to any person for any reason. Although the amendment in effect repealed two fair housing acts, it was entirely neutral on its face and merely returned California to a posture of noninterference in private racial discrimination. The Court held that, although the amendment was ostensibly neutral, it would have the tendency to encourage and authorize private discrimination[26] and was thus in violation of the fourteenth amend-

21. "By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." 365 U.S. at 725. The Court specifically cautioned, however, against applying the holding in *Burton* to dissimilar factual circumstances. 365 U.S. at 725-26. Nevertheless, the language and reasoning in *Burton* have been of more than peripheral significance in subsequent state action cases. *See, e.g.,* Reitman v. Mulkey, 387 U.S. 369, 379-80 (1967); Peterson v. City of Greenville, 373 U.S. 244, 247-48 (1963).

22. The "state inaction" doctrine is perhaps the closest the Court has come to endorsing Mr. Justice Harlan's dissent in the Civil Rights Cases, 109 U.S. 3, 26 (1883). *Cf.* note 8 *supra.*

23. 334 U.S. 1 (1948).

24. Nor could the courts give damages for breach of the racially restrictive covenant. Barrows v. Jackson, 346 U.S. 249 (1953). *Shelley* could logically be read to hold that the courts may not enforce or give support to any private activities that the state itself could not constitutionally carry on. This interpretation would no doubt go considerably beyond what the Court and the framers of the fourteenth amendment intended. It would, for example, prevent the segregationist from enlisting the aid of a court in keeping blacks from his dinner table or in probating a will in which whites were preferred to blacks. Apparently because of *Shelley's* potential breadth, the Court has rarely relied on it as the basis of decision and has frequently been at pains to avoid a broad reading of the case. *Cf.* Bell v. Maryland, 378 U.S. 226 (1964). *Compare* Chief Justice Warren's majority opinion *with* Mr. Justice Douglas's concurrence, in Lombard v. Louisiana, 373 U.S. 267 (1963). These and other aspects of *Shelley* are considered in detail in Henkin, *supra* note 19.

25. 387 U.S. 369 (1967).

26. The majority opinion in *Reitman* is unsatisfying because of its heavy reliance on the

ment.[27]

In deciding these cases, the Supreme Court found state action in varying complex factual situations and reached results that few would condemn; yet, in so doing, the Court diluted the state action requirement to the extent that there was apparently no situation in which the Court could not, if so disposed, find state action. Several commentators writing before 1970 felt that state action was a limitation in name only and should be expressly abandoned.[28] In 1970, however, the Supreme Court's decision in *Evans v. Abney*[29] indicated that the question was far from settled. In *Evans,* a park had been given in trust to the city of Macon, Georgia, for use by whites only. After the Supreme Court's 1966 holding that the park could no longer be operated on a segregated basis,[30] the Georgia Supreme Court ruled that, in accordance with the evident intent of the settlor, the trust must fail and the park revert to the settlor's heirs.[31] In affirming, the Court expressed its regret that the park was lost to the people but found no discriminatory conduct by the state upon which to base fourteenth amendment relief.[32] Although *Evans* by itself might have been considered only a temporary interruption in the otherwise steady deterioration of the state action requirement, the recent decisions of *Moose Lodge No. 107 v. Irvis*[33] and *Lloyd Corp. v. Tanner*[34] indicate that state action is still a viable principle in the determination of fourteenth amendment violations. In *Moose Lodge,* the black guest of a white member was denied service of food and drink in Lodge No. 107[35] solely because of his race. The Lodge held

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California Supreme Court's finding that the amendment tended, as a matter of fact, to encourage discrimination. It is difficult to believe that the Court would have similarly deferred to an opposite finding. *See* A. COX, THE WARREN COURT 44-45 (1968). *But cf.* Black, *supra* note 9, at 83 n.55.

27. It has been suggested that a better rationale for *Reitman* is that the State had acted unconstitutionally in placing an extraordinary procedural hurdle before a minority group that wished to secure protective legislation through the ordinary democratic process. This rationale would avoid the difficulty of assessing the psychological effect of the amendment. *See* A. COX, *supra* note 26, at 47-48; *cf.* Black, *supra* note 9, at 75-82. *See generally* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection,* 1967 SUP. CT. REV. 39.

28. *E.g.,* Black, *supra* note 9; Silard, *supra* note 8; Williams, *The Twilight of State Action,* 41 TEXAS L. REV. 347 (1963).

29. 396 U.S. 435 (1970).

30. Evans v. Newton, 382 U.S. 296 (1966); *see* text accompanying notes 16-19 *supra.*

31. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).

32. Apart from its constitutional implications, the result in *Evans* is disquieting because of the windfall benefit realized by the settlor's heirs. The heirs received a valuable piece of property that had been improved by the city at the taxpayers' expense, yet these same taxpayers will be denied use of the park. *See* Evans v. Abney, 396 U.S. 435, 451-52 (1970) (Brennan, J., dissenting). *See generally The Supreme Court, 1969 Term,* 84 HARV. L. REV. 30, 54-60 (1970).

33. 407 U.S. 163 (1972).

34. 407 U.S. 551 (1972).

35. Moose Lodge No. 107 is the Harrisburg, Pennsylvania, chapter of the Loyal Order of Moose, a nonprofit national fraternal organization.

a club liquor license issued by the Pennsylvania Liquor Control Board and was accordingly subject to the extensive regulatory scheme imposed on all liquor licensees in Pennsylvania.[36] Irvis contended that because a state agency had issued Moose Lodge a liquor license, the Lodge's discriminatory conduct constituted state action within the meaning of the fourteenth amendment. Irvis therefore sought injunctive relief[37] to require the Liquor Control Board to revoke Moose Lodge's liquor license for as long as the discriminatory practices continued. The Court, however, rejected Irvis's arguments, since it found that the State's regulation of Moose Lodge, however pervasive, did not foster or encourage discrimination,[38] did not create a partnership or joint venture between the State and the Lodge, and did not spawn a symbiotic relationship similar to that found in *Burton v. Wilmington Parking Authority*.[39] The Court concluded that Moose Lodge's discriminatory activities, with one inconsequential exception,[40] involved no state action[41] and thus were unrestricted by the fourteenth amendment.[42] In *Lloyd Corp. v.*

36. *See* PA. STAT. ANN. tit. 47, §§ 4-401 to -411 (1969). The pervasive control by the State over liquor licensees is fully described in Brief for Appellee at 45-61, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

37. Irvis formally based his complaint on 42 U.S.C. § 1983 (1970), but the Court limited its discussion to the fourteenth amendment, upon which § 1983 is based. It is unclear in what way, if any, the state action requirement differs between § 1983 and the fourteenth amendment. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 162-71 (1970).

38. The Court appears here to have distinguished Reitman v. Mulkey, 387 U.S. 369 (1967).

39. 365 U.S. 715 (1961); *see* text accompanying notes 19-22 *supra*.

40. Section 92.1 of the Moose Lodge by-laws required racial discrimination against black guests. The Liquor Control Board required that every private club adhere to the provisions of its by-laws. *See* Pennsylvania Liquor Control Board Regulations § 113.09 (1970). The Court conceded that by this Regulation the State, through its administrative agency, would be in effect commanding Moose Lodge to discriminate. To avoid this result, the Court enjoined enforcement of § 113.09 regarding the discriminatory provisions of Moose Lodge's by-laws. This exception will have no effect on Moose Lodge, which is still free both to discriminate and to serve liquor.

41. Mr. Justice Douglas argued in dissent that since club liquor licenses are subject to a restrictive quota system and not freely available, and since a liquor license is essential to the existence of a fraternal organization, the State was sanctioning racial discrimination by giving Moose Lodge the important advantage of a liquor license. Mr. Justice Brennan also dissented; presenting no new arguments, he quoted at length the opinion of the court below, Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970), and his separate opinion in Adiekes v. S.H. Kress & Co., 398 U.S. 144, 188 (1970).

42. Irvis pursued his state remedies with greater success. He filed a complaint with the Pennsylvania Human Relations Commission, which found that Moose Lodge was a "public accommodation" under the Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, § 954(*l*) (Supp. 1972), and ordered Moose Lodge to cease discriminating. The Commission's order was reversed on appeal. Commonwealth v. Loyal Order of Moose, 92 Dauph. 234 (1970), *aff'd*, 220 Pa. Super. 356, 286 A.2d 374 (1971) (4-3 decision). The Pennsylvania Supreme Court reversed, however, and reinstated the Commission's finding and order. Pennsylvania Human Relations Comm'n v. Moose Lodge No. 107, 294 A.2d 594 (Pa. 1972).

Tanner,[43] the private owner of a large shopping center[44] prevented anti-war protesters from distributing handbills on the center premises. The protesters then sued for a declaratory judgment to establish their right under the first and fourteenth amendments to distribute handbills in the shopping center. The Supreme Court found earlier public function cases distinguishable: the doctrine announced in *Marsh v. Alabama* was held applicable only to private property possessing *all* the characteristics of a municipality, and the holding in *Logan Valley* was viewed as expressly limited to free speech activity directly related in purpose to the use to which the shopping center was being put. The Court then noted that property does not lose its private character merely because the public is generally invited to use it for designated purposes. The Court therefore concluded that because the shopping center did not serve a public function,[45] the owner's prohibition of handbilling did not constitute state action[46] within the meaning of the fourteenth amendment.[47]

III. Balancing of Competing Interests

By using the established state action doctrines, the Court could have found state action with relative ease in *Evans*, *Moose Lodge* and *Lloyd Corp.* In *Evans*, state action could have been found on the authority of *Shelley v. Kraemer*, since the state court's approval of a racially discriminatory reversion in *Evans* is conceptually similar to the unconstitutional enforcement of a racially restrictive covenant in *Shelley*.[48] In *Moose Lodge*, the Court could successfully distinguish *Burton v. Wilmington Parking Authority* only by apparently ignoring the "state inaction" rationale, since the licensing relationship between Pennsylvania and Moose Lodge, like the lessor-lessee relationship in *Burton*, placed the State in a position from which it could easily have required, through

43. 407 U.S. 551 (1972).

44. Lloyd Center is a large, modern retail shopping center in Portland, Oregon. There are 60 commercial tenants in the Center, which covers 50 acres and is bounded by 4 public streets and crossed by 5 others.

45. Although the Court's holding is couched in terms of "dedication . . . to public use," 407 U.S. at 570, this phrase appears to be merely a different label for "public function."

46. "[I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only." 407 U.S. at 567.

47. Mr. Justice Marshall, joined by Justices Douglas, Brennan, and Stewart, argued in dissent that since the shopping center had already been opened to a wide range of expressive activity, the distribution of handbills was directly related to the use to which the center was being put. The dissent therefore concluded that *Logan Valley* was not properly distinguishable. 407 U.S. at 577-84.

48. Mr. Justice Brennan, dissenting in *Evans*, thought a finding of state action was also required by Reitman v. Mulkey, 387 U.S. 369 (1967).

its pervasive regulatory scheme, nondiscriminatory policies as a condition to the continued enjoyment of the benefits[49] of a liquor license.[50] Finally, in *Lloyd Corp.* the Court could have found state action even under its view of the "expressly limited" holding in *Logan Valley*[51] by characterizing the expressive activity as directly related to the use to which Lloyd Center was being put.[52] Furthermore, the shopping center in *Lloyd Corp.* was more like the company-owned town in *Marsh v. Alabama* than was the shopping center in *Logan Valley;* thus either *Marsh* or *Logan Valley* would have been adequate authority on which to base a finding of state action. Instead, the Supreme Court declined to follow the seemingly dispositive formulas and doctrines of prior state action cases when it decided *Evans, Moose Lodge,* and *Lloyd Corp.*, and as a result, it might be assumed that the Court implicitly has either discarded the formulas or reinvigorated the state action requirement. Yet these assumptions, even if accurate, reflect only conclusions about what the Court did, and, as such, are not helpful in explaining and reconciling the state action cases. These cases do, however, fit within an analytic framework in which the Court is viewed as engaging in a complex balancing process whereby the interests competing in a constitutional controversy are weighed and the result announced in terms of state action. The term "interest" has two dimensions when used in this context: first, on the level of the private parties, it encompasses not only the litigants' personal constitutional rights, but also their interests and legitimate desires that do not have constitutional stature; secondly, on the level of the Court's role in the constitutional scheme of government, it includes the impact of the litigation at hand on the federal system—the advantages and disadvantages of introducing the federal constitution into an otherwise local controversy.[53] In *Evans,* for example, although the Court had previously held that segregated operation of the

49. In Pennsylvania, liquor licenses are scarce and of great value to the licensee; Moose Lodge itself conceded that a fraternal organization would be hard-pressed to survive without a liquor license. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 183 (1972) (Douglas, J., dissenting).

50. It was also argued that a finding of state action was required by Reitman v. Mulkey, 387 U.S. 369 (1967), on the ground that the State had encouraged and supported Moose Lodge in its discrimination. *See* Brief for Appellee at 70-72, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

51. *See* text accompanying notes 43-47 *supra.*

52. *See* note 47 *supra.*

53. Similar balancing processes have been described by the commentators. *See, e.g.*, Henkin, *supra* note 19; Van Alstyne & Karst, *State Action,* 14 STAN. L. REV. 3 (1961). Van Alstyne and Karst present an exhaustive analysis of the interests to be balanced and their weights in various hypothetical situations.

park would be unconstitutional,[54] the black citizens nevertheless retained an interest in assuring that their previous victory over past discrimination would be more than pyrrhic. If the park reverted to the settlor's heirs, the black community would interpret the reversion as a disguised attempt to avoid integration, and some injury—albeit psychological and ill-defined—probably would result.[55] In addition, if the reversion of the park to private parties was prevented by the Court, the blacks would gain access to recreational facilities from which they previously had been barred. The settlor's heirs, on the other hand, had an interest in preserving the principle of freedom of testation[56] and in protecting their fifth amendment property rights. At this point, the interests of the heirs may seem unlikely to outweigh those of the black community, but the Court heavily weighted one other interest: that of the State in fulfilling its "traditional role" in regulating and administering estates and trusts.[57] Thus it seems that this state interest in federal noninterference may have tipped the balance in favor of the settlor's heirs. An analysis of *Shelley v. Kraemer* reveals a similar underlying balancing process and suggests reasons for the opposite results in *Evans* and *Shelley*. In *Shelley,* the black couple had an interest in obtaining decent housing and in securing freedom from present and future racial discrimination. Furthermore, since the previous owners of the property were willing vendors, refusing enforcement of the restrictive covenant would not infringe upon the vendors' fifth amendment property rights. By contrast, the complaining owner's interest in enforcing the covenant was to maintain control, not over his own property, but over neighboring property. Finally, the stated goal of the parties to the covenant was racial discrimination, which is not likely to be considered a legitimate interest. On balance, the interests of the black couple in *Shelley* far outweighed those of the property owner.

In *Moose Lodge,* Irvis had a substantial interest in not being the object of racial discrimination; indeed, securing equal treatment for

54. Evans v. Newton, 382 U.S. 296 (1966); *see* text accompanying notes 16 & 17 *supra.*

55. *See* Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

56. Freedom of testation, although generally accepted in principle, is subject to numerous restrictions and exceptions. Common-law dower or the statutory forced share, homestead and exempt property statutes, and federal and state inheritance taxation all dilute freedom of testation. *See generally* Hines, *Freedom of Testation and the Iowa Probate Code,* 49 IOWA L. REV. 724, 727-31 (1964). Whatever may be the social utility of freedom of testation, the Court was apparently unwilling to abandon the principle. *See* Evans v. Abney, 396 U.S. 435, 447 (1970).

57. Evans v. Abney, 396 U.S. 435, 447 (1970). More recently, the Court has apparently given the state's interest in fulfilling this "traditional role" constitutional stature. *See* Labine v. Vincent, 401 U.S. 532, 538-39 (1971) (intestate succession statute excluding certain illegitimate children not unconstitutional).

blacks was the motivating principle of the fourteenth amendment. Irvis's interest in eating and drinking at Moose Lodge, as distinguished from his interest in being free from racial discrimination, is more difficult to assess. It seems unlikely that Moose Lodge No. 107 was so convenient or attractive an establishment that use of its facilities was of major importance to black citizens. The opposing interests were the freedom of association guaranteed to the members of Moose Lodge by the first amendment,[58] and the fifth amendment right possessed by the Lodge as a private club[59] to use its property as it sees fit, without state regulation of the persons permitted to use that property.[60] Thus Moose Lodge's interest in excluding Irvis apparently outweighed the latter's interest in using the club's facilities. The Court thus has made it clear that the interest in being free from racial discrimination is not paramount; if the competing interest is strong enough, the state action requirement can be summoned up to deny relief. In *Burton v. Wilmington Parking Authority,* a different conclusion was reached from the balancing process. Here, the discriminating restauranteur had no significant interest in preserving his associational freedom, since he held himself out as serving the general public; nor was his proprietary interest in the premises substantial, since he was only a lessee.[61] Furthermore, the Authority, as owner of the building, had no legitimate interest in excluding black customers from the restaurant. Like Irvis, the black customer had a substantial interest in being free from discrimination, but unlike Irvis, the customer in *Burton* had a definite interest in using the segregated facilities. Surely access to a public restaurant, presumably convenient to a public garage, is of greater importance than access to a private fraternal club. Indeed, Congress has expressly recognized, in the enactment of the Civil Rights Act of 1964,[62] the importance of access

58. The freedom of association has long been recognized. *See* Shelton v. Tucker, 364 U.S. 479 (1960); De Jonge v. Oregon, 299 U.S. 353 (1937). This has been true even when the association was for the purpose of advocating morally indefensible conduct. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ku Klux Klan assembling to advocate continued oppression of blacks).

59. The "private club" status of Moose Lodge is not undisputed. *See* note 42 *supra*. Nevertheless, compared with some of the purported "private clubs" that the Court has considered, Moose Lodge seems private indeed. *See, e.g.,* Daniel v. Paul, 395 U.S. 298 (1969) (Lake Nixon Club, an amusement area covering 232 acres and serving 100,000 patrons each season for a "membership fee" of 25¢).

60. *Moose Lodge* is factually only one step removed from the frequently stated hypothetical situation in which a white homeowner refuses to allow blacks to enter his home. No one seriously contends that the fourteenth amendment should be invoked against this sort of discrimination. The homeowner's rights of privacy and property clearly outweigh whatever right the excluded black may claim under the fourteenth amendment. *Cf.* Civil Rights Cases, 109 U.S. 3, 59 (1883) (Harlan, J., dissenting).

61. *See* Van Alstyne & Karst, *supra* note 53, at 55.

62. 42 U.S.C. § 2000(a) (1970).

to public accommodations for black citizens. Thus the lessee's interests were inferior to those of the black customer, and accordingly, state action was found.

Finally, in *Lloyd Corp.*, the shopping center owner had a right to control the use of his property under the fifth amendment, and the antiwar protesters had a competing interest in exercising their first amendment freedom of expression. Other factors, however, were brought into the balancing process: the owner's interests could be vindicated only on and about his property, while the protesters could have exercised their rights effectively on any publicly owned property.[63] Thus the owner's interests outweighed those of the protesters, and the state action requirement was held to bar relief. The conflicting interests in *Logan Valley* were the same[64] as those in *Lloyd Corp.* except that the union in *Logan Valley* could bring its grievances effectively to the attention of the consuming public only by picketing on the shopping center premises, since the center was the situs of the labor dispute. Thus the balance was tipped in favor of the picketers, and the Court was therefore able to find state action.

IV. CONCLUSION

The Supreme Court opinions in a long line of state action cases developed formulas and doctrines for determining whether state action is present. Yet these doctrines have been inaccurate guides for predicting Court action. In *Evans,* the "judicial enforcement of private discrimination" proved unreliable, as did "state inaction" in *Moose Lodge* and "public function" in *Lloyd Corp.*[65] The foregoing analysis has suggested that this inaccuracy exists because the articulated state action doctrines do not reflect the true grounds of the Court's decisions, and that the Court's rationale and holdings in state action cases can be understood only by analyzing the rights and interests competing for the Court's

63. Mr. Justice Marshall, dissenting in *Lloyd Corp.*, argued that a significant proportion of the community could be reached only at Lloyd Center. 407 U.S. at 580-81. A majority of the Court, however, reached an opposite conclusion, a finding that was crucial to the decision of the case. *Id.* at 567. Neither side presented convincing evidence in support of its conclusion.

64. It could, however, be argued that the union picketers' interest in organizing the recalcitrant employer was greater than the protesters' interest in protesting against the Vietnam war. The average person may well be more vitally concerned with working conditions and economic power than with matters of foreign policy.

65. Despite its failure in prognostication, a firm doctrine or a well-settled formula may command greater respect than a decision frankly presented as the collective value judgment of 9 men. *See* Van Alstyne & Karst, *supra* note 53, at 58. Certain eccentricities in Supreme Court opinions may also be explained by the difficulty in getting 5 Justices to agree on a point of law or fact. *See* FELIX FRANKFURTER REMINISCES 298 (H. Phillips ed. 1960).

recognition in the controversy at hand. Under this analysis, state action is a name given to the result of a complex process of balancing these rights and interests; the finding of state action or of no state action is descriptive of value judgment previously made, but usually unexpressed, that one litigant's rights and interests are superior to those of his adversary.[66] The Supreme Court has implied, particularly in *Lloyd Corp.*, that this balancing process is the essence of state action jurisprudence.[67] Even had the Court expressly described the mechanics of this process, however, the truly important questions would still be left unanswered. Because the crucial step in any balancing process is assigning weight to the elements balanced, the relevant inquiries in the state action cases must be: What are the competing rights and interests and what relative weight does the Court assign them? Answers to these questions will explain any retrenchment perceived in the Court's decision to deny relief in *Evans, Moose Lodge,* and *Lloyd Corp.*, despite numerous cases granting relief in similar situations. The state action doctrine and the underlying balancing process have not changed; the change stemmed from the assignment of different weights to the rights and interests in balance because of an overall judicial reassessment of values and priorities.[68] In *Lloyd Corp.*, for example, the property right seems to be accorded greater weight than in previous cases;[69] in *Evans,* unusual weight seems to be given to the State's interest in federal noninterference.[70] *Moose Lodge* gives a definite impression of change in the Court's values and priorities, yet it is difficult to identify the change specifically. It may be that the Court is assigning less weight to the individual's interest in freedom from racial discrimination.[71] These changes in con-

66. The interest of the state in federal noninterference, if any, would be balanced in favor of whichever party was asserting the lack of state action.

67. *See* Central Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972); Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972); Evans v. Abney, 396, U.S. 435, 447 (1970); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319, 324 (1968); Marsh v. Alabama, 326 U.S. 501, 505-06, 509 (1946).

68. Some decisions appear to be shifting away from vigorous protection of individual rights. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972) (5-4 decision) (requiring newsmen to disclose sources to grand juries not unconstitutional); Harris v. New York, 401 U.S. 222 (1971) (5-4 decision) (dilution of *Miranda* safeguards). Other decisions, however, have expanded individual rights. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (unanimous) (alienage an "inherently suspect" classification). It would thus be an oversimplification to conclude that the Court is merely becoming more "conservative."

69. "Ownership does not always mean absolute dominion." Marsh v. Alabama, 326 U.S. 501, 506 (1946); *cf.* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319, 324 (1968).

70. *Compare* Mr. Justice Black's majority opinion *with* Mr. Justice Douglas's dissent in United States v. Oregon, 366 U.S. 643 (1961).

71. *Cf.* Wright v. Emporia City Council, 407 U.S. 451 (1972) (5-4 decision). The significance of *Wright* is that the decision was nonunanimous, a rarity among school desegregation cases.

stitutional emphasis are an inevitable result of changes in Court personnel and are necessary to ensure that constitutional interpretation does not become irrelevant to the constantly changing structure and complexion of society.[72]

72. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 106-08 (1962).