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A Lease as State Action: *Burton* and *Moose Lodge* Revisited: *Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344 (5th Cir. 1975), *rev'd on rehearing en banc*, 530 F.2d 16, *cert. denied*, 97 S. Ct. 186 (1976)

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Note

A Lease as State Action: *Burton* and *Moose Lodge* Revisited

Golden v. Biscayne Bay Yacht Club, 521 F.2d 344 (5th Cir. 1975), *rev'd on rehearing en banc*, 530 F.2d 16, *cert. denied*, 97 S. Ct. 186 (1976).

I. INTRODUCTION

At what point does state involvement in a private activity become a "symbiotic relationship"[1] or indicate that a state has "insinuated itself into a position of interdependence"[2] with the challenged actor so as to justify the application of the equal protection clause of the fourteenth amendment?[3] Since it was posed by the *Civil Rights Cases*,[4] this question has admitted of no easy answer.[5] The Supreme Court, when considering the question, repeatedly[6] has instructed lower federal courts dutifully to "sift facts and weigh circumstances"[7] to resolve it. Yet now, almost 100 years after Justice Bradley's institutionalization of the requirement of "state action" in fourteenth amendment litigation,[8] no measure of certainty in the application of the test of state action is discernable. Appropriately, the United States Court of Appeals for the Fifth Circuit

1. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).
2. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).
3. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
4. 109 U.S. 3 (1883).
5. *See, e.g.*, Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974); Comment, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974); 54 TEXAS L. REV. 641 (1975).
6. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
7. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).
8. *See* Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.").

has, after the second trip through the sifter, reversed its panel opinion and found that no state action existed in the lessee-lessor situation presented by *Golden v. Biscayne Bay Yacht Club*.[9]

II. THE CONTROVERSY

Plaintiffs Golden and Fincher, upon applying for membership in the all-white, all-Christian Biscayne Bay Yacht Club, were informed by the club that in order to qualify for membership, they first had to be sponsored by three members of the club. This sponsorship selection process was governed by the club's charter and by-laws, which took no affirmative position regarding the membership potential of blacks or Jews.[10] However, as the district court found, the club engaged in systematic, though subtle, discrimination against members of the black race and the Jewish faith.[11]

Golden and Fincher sought injunctive and declaratory relief in the federal district court on the basis of 42 U.S.C. §§ 1981,[12] 1983,[13] and 2000a.[14] They premised the application of the fourteenth

9. 521 F.2d 344 (5th Cir. 1975), *rev'd on rehearing en banc*, 530 F.2d 16, *cert. denied*, 97 S. Ct. 186 (1976).
10. 521 F.2d at 347.
11. 370 F. Supp. at 1043.
12. 42 U.S.C. § 1981 (1970):
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

13. 42 U.S.C. § 1983 (1970):
> 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.

14. 42 U.S.C. § 2000a (1970):
> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accomodations of any place of public accomodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
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> . . . .
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> (d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on un-

amendment, and consequently the remedial[15] legislation enacted pursuant to it, on the club's lease of bay bottom land from the City of Miami. The lease, they contended, provided the state involvement necessary to bring the club's activities within the ambit of fourteenth amendment scrutiny which, they argued, would result in the injunction of the club's membership practices. The district court,[16] and the original panel of the circuit court[17] agreed. On rehearing en banc, however, the Fifth Circuit held that the relationship between the state and the club as created by the lease was insufficient to activate the fourteenth amendment's proscriptions.

III. STANDARDS OF REVIEW

The *Golden* case thus presents an interesting combination of the factors which produced two significant Supreme Court precedents relating to state action. In *Burton v. Wilmington Parking Authority*,[18] the Court held that a lease of commercial property by a state made it a "joint participant in the challenged activity"[19] of refusing restaurant service to black patrons, and that the activity was a violation of the equal protection clause. However, Justice Rehnquist, writing for the Court in *Moose Lodge No. 107 v. Irvis*,[20] found insufficient state action to warrant a constitutional proscription of the refusal of service to a black guest of one of a private club's members. Both factors, a lease of state-owned property, and a private club as the challenged actor, were present in the *Golden* case, and posed a seemingly perplexing problem of interpretation of the Supreme Court's decisions. The problem, however, is not merely

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der color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

15. The issue of whether the fourteenth amendment may be implemented by primary legislation is beyond the scope of this note. Suffice it to say that the issue is far from resolution. *See, e.g.*, Runyon v. McCrary, 96 S. Ct. 2586 (1976).
16. *See* Golden v. Biscayne Bay Yacht Club, 370 F. Supp. 1038 (S.D. Fla. 1973).
17. *See* Golden v. Biscayne Bay Yacht Club, 521 F.2d 344 (5th Cir. 1975).
18. 365 U.S. 715 (1961).
19. *Id.* at 725.
20. 407 U.S. 163 (1972).

one of interpretive reading, but of upon what basic premise an analysis of the fourteenth amendment's guarantees should proceed.

The *Golden* court took the position that the scope of its review in determining the existence of state action should consist of a case-by-case, factual resolution approach. To exercise this limited power of review, the court first armed itself with the applicable legal principles as articulated by the Supreme Court. A review of the Supreme Court precedents, however, reveals that a state action issue cannot be resolved on a purely factual basis, but must be viewed as the application of a definitive set of ascertainable legal principles to a given set of facts.

The *Civil Rights Cases*,[21] decided in 1883, provide the backdrop for all state action litigation. The cases present a simple, logical interpretation of the fourteenth amendment's scope. Clearly, the amendment's drafters could not have intended that private discriminatory activities were forbidden by the amendment, in view of the express language they chose.[22] However, even with agreement from all quarters[23] that there must be state involvement to activate the amendment's proscriptions, the controversy among jurists over what standards to use in determining the existence of that state involvement continues to rage. The decision in *Golden* reflects the controversy that infiltrates the federal bench as a result of sharply divided Supreme Court precedent.

Burton v. Wilmington Parking Authority, a seminal case in modern state action litigation, contains the shibboleths which have become standards to apply in determining the existence of government involvement which rises to the level necessary to trigger the fourteenth amendment. The test of *Burton*, as opposed to the easily cited language the Court uses, is basically a determination of whether the state either provides support to a private actor whose discriminatory practices are challenged, or derives a benefit, financial or otherwise, from the discriminatory activity.

Appended to the *Burton* test is another test, most recently ar-

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21. 109 U.S. 3 (1883).
22. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
23. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or a woman who his or her associates must be. The individual can be as selective as he desires.
Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting).

ticulated, but not followed, in *Jackson v. Metropolitan Edison Co.*[24] The test *Jackson* purports to apply is a determination of whether a private actor, which may or may not receive governmental support, has become so imbued with a governmental character that its actions will be treated judicially as tantamount to those of the state.[25] As a result of the *Jackson* rationale, which is virtually the same as that expressed by Justice Harlan in his dissent in the *Civil Rights Cases*,[26] three clearly articulated tests of state action are cognizable: (1) the state provides support to a private, discriminatory actor; (2) the state derives a benefit from the discrimination; and (3) the private actor acts with a governmental character so that its actions are treated as those of the state.

The latter test, *i.e.*, the private actor, who, for whatever reason, takes on a position relatively analogous to the state and is consequently treated congruently with the state for fourteenth amendment purposes, obviously has no application in the *Golden* situation. Yet the Fifth Circuit viewed *Jackson* as authority for the proposition that satisfaction of the "significant" state action test requires a finding that the challenged action be tied sufficiently to the state so as to be treated as the action of the state itself.[27] This is quite clearly an unwarranted application of the *Jackson* test. The Biscayne Bay Yacht Club, at least on the record made in the district court, hardly can be viewed in the same light as the public utility in *Jackson* for state action purposes. In fact, the Fifth Circuit quite realistically reached the conclusion that "[t]he club was genuinely private."[28] It is unjustifiable to read the *Jackson* test as a further hurdle for the plaintiff in a state action case to clear, rather than as a distinct test to be applied in a situation in which state action is alleged on the basis of a private actor becoming imbued with a governmental character.

While the *Jackson* test clearly has no application to the *Golden* situation, one of the two tests articulated in *Burton* just as clearly does have application.

Burton proceeded from the basic premise that the fourteenth amendment should be construed as a constitutional prohibition against state-supported discrimination, no matter how indirectly

24. 419 U.S. 345 (1974).
25. *See id.* at 351.
26. *See* Civil Rights Cases, 109 U.S. 3, 37-43 (1883) (Harlan, J., dissenting).
27. *See* Golden v. Biscayne Bay Yacht Club, 530 F.2d 16, 19 (5th Cir.), *cert. denied*, 97 S. Ct. 186 (1976).
28. *Id.* at 17.

the state chooses to provide that support. The original panel opinion of the Fifth Circuit in *Golden* noted that the Biscayne Bay Yacht Club was the recipient of a very favorable lease price for the bay bottom land in question.[29] The district court's opinion, while not specifically finding as a fact that the lease price of one dollar per year amounted to a subsidy of the club by the city, clearly proceeded from the unarticulated premise that it did: "Here . . . the defendant Club enjoys a select privilege not available to each citizen but one coveted by many citizens in the South Florida area. More critically, the privilege is essential to the Club's operation."[30] Both the district court and the circuit's panel opinion thus concluded that the one-dollar lease price was a form of state support for the challenged activity.

However, the en banc court rather blithely disregarded this clear-cut nexus: "There is no finding in this record that the lease fee is grossly inadequate, amounts to subsidy for the club, or represents a substantial financial contribution to the operation of the club."[31] As previously noted, the real issue facing the en banc court was a determination of upon what basic premise an analysis of the protections afforded by the fourteenth amendment should proceed. It appears that the court did not choose the amendment as being a viable tool for the eradication of racial or religious discrimination.

Golden thus reflects, like *Moose Lodge*, the superficial factual treatment courts have accorded *Burton* in finding no state action. In both cases, the courts emphasized that the actor whose conduct was challenged was a private club in a private building on privately owned property whose internal affairs were in no way governed by the state. Such an analysis fails to recognize the thrust of the *Burton* holding. Though *Burton* does stand for the proposition that courts must sift facts and weigh circumstances in a case-by-case approach to the state action problem, the *Burton* court specifically pointed out that the factual approach it found desirable was designed to ferret out "the nonobvious involvement of the State in private conduct . . . ."[32] Thus, by a concerted attempt to read *Burton* as a limited holding, rather than as an affirmative policy statement regarding the extent to which the fourteenth amendment's proscription of state-condoned discrimination should apply, the *Moose Lodge* and *Golden* courts managed to inject a sufficient

29. *See* Golden v. Biscayne Bay Yacht Club, 521 F.2d 344, 347 (5th Cir. 1975).
30. Golden v. Biscayne Bay Yacht Club, 370 F. Supp. 1038, 1042 (S.D. Fla. 1973).
31. Golden v. Biscayne Bay Yacht Club, 530 F.2d 16, 20 (5th Cir.), *cert. denied*, 97 S. Ct. 186 (1976).
32. 365 U.S. at 722.

amount of speculation into state action litigation to allow the masking of a policy decision against the protection of civil rights with a screen of precedent. Armed with this group of uncertain and unmanageable standards, the lower courts are free to decide state action cases on an ad hoc basis, virtually insulated from significant review. If the lower courts are free to decide a constitutional issue of such magnitude on pure policy grounds, private actors who potentially could be construed as state actors hardly can be expected to conform to a constitutional standard. Far more important, an individual can only guess whether an infringement of his constitutional rights has occurred, unless he or she is possessed of the same ability to "sift facts and weigh circumstances" as is the Supreme Court.

IV. THE RACIAL DISCRIMINATION-OTHER VIOLATION DICHOTOMY

The original panel opinion, and the petitioners' request for review in the Supreme Court,[33] both present a significant, albeit tangential issue which necessitates discussion. Initially, the panel opinion of the circuit court distinguished racial discrimination and "other types of constitutional violations,"[34] asserting that a much lower threshold of state action will suffice to trigger the fourteenth amendment's proscriptions in cases of racial discrimination.[35] The en banc court did little more than recognize the problem through continual characterizations of precedent as being either racial discrimination cases or as involving some other form of constitutional violation, and wholly failed to come to grips with the issue.

The distinction is a valid one in terms of the relevant case law,[36] but its absurdity is classically illustrated by the *Golden* situation. Strict adherence to the distinction by the panel opinion would have made it impossible for the court to afford Golden the same fourteenth amendment protection as Fincher—merely because he was not black. The only logical conclusion the court could have reached, without a showing of more significant state action, was to enforce the constitutional prohibitions with respect to the claim of plaintiff Fincher, and to deny the fourteenth amendment's protections as to plaintiff Golden. Faced with this dilemma, the panel opinion, rather than taking the seemingly revolutionary view[37] that

33. Golden v. Biscayne Bay Yacht Club, 530 F.2d 16 (5th Cir.), *cert. denied*, 97 S. Ct. 186 (1976).
34. 521 F.2d at 351.
35. *See id.* at 350-51.
36. *See id.* at 350-51 nn. 12-14.
37. This view is revolutionary only in terms of precedent. Many so-called "landmark" decisions have followed the principle that the constitu-

the fourteenth amendment should prohibit all discrimination, regardless of its character, asserted:

> We believe, in this context, religious discrimination against the Jewish applicant carries the same stigma of inferiority and badge of opprobrium that is characteristic of racial discrimination. Accordingly, we apply the well developed standards utilized in the racial discrimination setting to both litigants, for the gravity of harm is exactly the same as to both plaintiffs and there exists no rational basis for distinguishing between them by allowing relief as to one while denying it to the other.[38]

By analogizing plaintiff Golden's position to that of his black counterpart through the use of language characteristic of a thirteenth amendment analysis,[39] the panel avoided the problem it found inherent in the fourteenth amendment by applying the proscriptions of the thirteenth. The contradictory nature of this reasoning is apparent. Constrained by precedent from finding a violation of the fourteenth amendment, which on its face makes no reference to a particular class of persons to whom it should apply, the court based its holding on the thirteenth amendment, which by its terms applies to "slavery and involuntary servitude,"[40] a condition imposed upon only one group of people at the time of the amendment's passage—blacks.

While this was the basis of the panel's holding, the language used indicates a potentially far-reaching (and far more rational) test which would apply the fourteenth amendment's guarantees to all aggrieved plaintiffs, regardless of their status in terms of the type of discrimination to which they have been subjected.

By focusing on the "gravity of harm"[41] to both plaintiffs, and concluding that "there exists no rational basis for distinguishing between them,"[42] the panel shifted the emphasis of its inquiry from a determination of whether state action existed to an analysis of the respective injury suffered by each plaintiff. Presumably, this would not entail a complete rejection of the state action require-

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tion is a "living document" that should be construed with an eye to changing situations, social values, and practical circumstances. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

38. 521 F.2d at 351.
39. *See id.* ("the same stigma of inferiority and badge of opprobrium that is characteristic of racial discrimination").
40. U.S. CONST. amend. XIII, § 1: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."
41. 521 F.2d at 351.
42. *Id.*

ment, but the establishment of a floor of state action, above which any person who suffers as a result will be afforded relief, regardless of the nature of the constitutional violation, be it racial discrimination or not. This is a far better approach to the problem than an absurd distinction between "racial discrimination" and "other types of constitutional violations." It establishes that society, as reflected by the courts, will not tolerate any contravention of a constitutional guarantee, without reference to the status of the party whose rights have been violated.

V. CONCLUSION

Whether any form of discrimination amounts to a violation of the equal protection clause of the fourteenth amendment is an issue now capable of being resolved on the basis of an ad hoc policy determination. Buttressed by precedent that allows a reviewing court the latitude necessary to discount the importance of some circumstances, in favor of others, the constitutionally protected right of equality is subject to a balancing analysis which fosters virtually unpredictable results. Until courts resolve themselves to the view that fourteenth amendment litigation must proceed from the basic premise that society will not tolerate the use of its collective resources to support discriminatory activities, the problem presented by *Golden v. Biscayne Bay Yacht Club* will minimize the worth of the amendment as a means of eradicating discrimination.

Mike Klein '77