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Civil Rights: Closing the Back Door to the Discriminating Private Club - Tillman v. Wheaton-Haven Recreation Ass'n

Notes and Comments

CIVIL RIGHTS: Closing the Back Door to the Discriminating Private Club

Tillman v. Wheaton-Haven Recreation Ass'n[1]

The Wheaton-Haven Recreation Association, Inc., was formed in 1958 for the purpose of operating a swimming pool in Silver Spring, Maryland. The pool was initially financed by subscriptions from persons residing in the area, and is still maintained through members' contributions.[2] Membership in the Association is open to those residents of the area within a three-quarter mile radius of the pool who are accepted by the existing membership; members may be taken from outside the area as long as they do not exceed thirty percent of the total membership.

Dr. and Mrs. Harry Press were black homeowners living within the three-quarter mile radius. In 1968, Dr. Press attempted to obtain an application for membership. This request was refused, admittedly on the basis of his race. The Presses and three other plaintiffs[3] brought a class action in the United States District Court for the District of Maryland seeking declaratory and injunctive relief and damages.[4] They contended that the denial of membership on the basis of race constituted a violation of three federal statutes. They first claimed violation of that part of section 1 of the Civil Rights Act of 1866 now codified as 42 U.S.C. § 1981,[5] which gives all persons the same

1. 451 F.2d 1211 (4th Cir. 1971), *cert. granted,* 406 U.S. 916 (1972).

2. Present operations are financed by an initiation fee of $375 and annual dues of $50 to $60.

3. Mr. and Mrs. Murray Tillman were white members of Wheaton-Haven who invited a black guest, Mrs. Grace Rosner, to the pool. She was admitted on her first visit, but thereafter was denied admission under a new rule limiting guests to relatives of members. Mrs. Rosner is the fifth plaintiff.

4. Tillman v. Wheaton-Haven Recreation Ass'n, Civil No. 21,294 (D. Md. July 8, 1970).

5. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, *reenacted with minor changes by* Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 144 (codified as 42 U.S.C. § 1981 (1970)). It reads:

> 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 benefits 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.

right to make and enforce contracts as white citizens, asserting that membership is a contract between member and Association, and plaintiffs were denied, because of their race, the right whites would have had to make such a contract. Their second claim was under that portion of the 1866 Act now codified as 42 U.S.C. § 1982,[6] which gives all persons the same right enjoyed by whites to convey, purchase and hold property. They contended that membership is personal property subject to the 1866 Act and that the transfer of membership was incident to a sale of real property, still more clearly within section 1982. Third, they claimed that the discriminatory refusal was in violation of title II of the Civil Rights Act of 1964,[7] which bars discrimination in places of public accommodation. The district court granted summary judgment for the defendants.[8]

The Court of Appeals for the Fourth Circuit affirmed the decision.[9] The court agreed that Wheaton-Haven was a bona fide private club and thus exempt from the provisions of the Civil Rights Act of 1964.[10] It also held that actions brought under the 1866 Act were subject by implication to the private club exemption contained in the 1964 Act,

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6. Section 1982 states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

7. Civil Rights Act of 1964, § 201 *et seq.*, 42 U.S.C. §§ 2000a thru 2000a-6 (1970). Section 2000a (a) states: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

8. Tillman v. Wheaton-Haven Recreation Ass'n, Civil No. 21,294 (D. Md. July 8, 1970). The court found that Wheaton-Haven was a private club and thus exempt from coverage under title II, and that the case was distinguishable from Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), discussed *infra* Part II, since membership in the Wheaton-Haven pool was not incident to the purchase of a home in the area.

9. Tillman v. Wheaton Haven Recreation Ass'n, Inc., 451 F.2d 1211 (4th Cir. 1971).

10. 42 U.S.C. § 2000a(e) (1970), discussed *infra* at III. It seems certain that Wheaton-Haven would be covered by the 1964 Act were it not for the exemption. First, it falls within the definition of a place of entertainment under the statute, because the Supreme Court has held that such recreational facilities as swimming pools are places of entertainment. Daniel v. Paul, 395 U.S. 298 (1969), *rev'g* 395 F.2d 118 (8th Cir. 1968), *and* Kyles v. Paul, 263 F. Supp. 412 (E.D. Ark. 1967) (which had held that such facilities were not places of entertainment within the statutory language). Furthermore, the operations of the Wheaton-Haven affect commerce, as that concept has been defined in cases under the civil rights statute (*see* note 22 *infra*). The Wheaton-Haven pool was constructed by a Virginia contractor, and such equipment as the pumps and vending machines was manufactured outside of Maryland. The sources of the entertainment have, therefore, moved in commerce. *See, e.g.*, Daniel v. Paul, *supra* (nexus with commerce established where boats used at facility in Arkansas were manufactured and sold in Oklahoma).

thus avoiding the need to consider whether membership was either a contract or personal property. It further found that no cause of action was otherwise stated under the old Civil Rights Act, because there was no transfer of a right incident to a real property transaction falling within that section. The court took pains to distinguish the *Wheaton-Haven* fact situation from that in the case of *Sullivan v. Little Hunting Park, Inc.*,[11] in which the Supreme Court had held that transfers of membership incident to sales or leases of real property were subject to the requirements of section 1982.

Judge Butzner dissented in *Wheaton-Haven*[12] arguing first that the facts of the case were indistinguishable from those in *Sullivan v. Little Hunting Park* and second that Wheaton-Haven was not a bona fide private club because race was the sole basis for excluding applicants for membership.

Three important elements make the decision significant. First is the holding that the Civil Rights Act of 1866, resurrected for use against private individuals in *Jones v. Alfred H. Mayer Co.*,[13] was modified in its scope by the Civil Rights Act of 1964. Second is the attempt to limit sections 1981 and 1982 to transfers of present valuable rights incident to transactions in real property, an apparent constriction of the implications of *Sullivan v. Little Hunting Park*. The last is the conclusion that an organization which has many features of a private club will not lose its exemption from the operation of the public accommodations law solely because its only membership criterion is race.

I. ADDING THE PRIVATE CLUB EXEMPTION TO THE 1866 ACT: REPEAL BY IMPLICATION

When Congress passed the Civil Rights Act of 1964,[14] the debates reflected a belief that it was the first federal legislation which prohibited discrimination in the provision of services by private individuals. The Civil Rights Act of 1866 was then thought to have been enacted pursuant to the Fourteenth Amendment and thus to extend only to discriminatory state actions.[15] Four years later, in

11. 396 U.S. 229 (1969).

12. 451 F.2d at 1222.

13. 392 U.S. 409 (1968).

14. 42 U.S.C. §§ 2000a thru 2000h-6 (1970).

15. *See, e.g.*, Hurd v. Hodge, 334 U.S. 24 (1948); Note, *Constitutional Law: The End of Private Racial Discrimination in Housing Through Revival of the Civil Rights Act of 1866* (42 U.S.C. § 1982), 6 TULSA L.J. 146 (1970).

Jones v. Alfred H. Mayer Co.,[16] the Supreme Court held that section 1982 was enacted pursuant to the thirteenth amendment,[17] which gave Congress the power[18] to forbid private acts of discrimination which could be considered badges and incidents of slavery.[19] Several courts of appeals since *Jones v. Alfred H. Mayer Co.* have held that what was said therein was equally applicable to contract rights protected by section 1981.[20]

Differences between the 1964 Act and the earlier legislation are at once apparent. The public accommodations section of the Civil Rights Act of 1964 is a narrowly drawn statute which deals with discrimination in four areas: hotels, food establishments, places of entertainment and establishments physically and economically interrelated with the first three types of covered establishments.[21] It was enacted pursuant to the commerce power; thus to come within its coverage an establishment must in some manner affect interstate commerce.[22] Furthermore, it contains an exemption from its coverage for private clubs.[23] Sections 1981 and 1982, on the other hand, are

16. 392 U.S. 409 (1968). The case has been the subject of extensive scholarly examination. *See, e.g.,* Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on* Jones v. Alfred H. Mayer Company, 22 RUTGERS L. REV. 537 (1968); Note, Jones v. Mayer: *The Thirteenth Amendment and the Federal Anti-Discrimination Laws,* 69 COLUM. L. REV. 1019 (1969).

17. U.S. CONST. amend. XIII, § 1, states: "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."

18. U.S. CONST. amend. XIII, § 2, states: "Congress shall have power to enforce this article by appropriate legislation."

19. The Court relied on an analysis of legislative history which at least one commentator has found to be questionable. *See* Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse,* in 1968 THE SUPREME COURT REVIEW 89 (P. Kurland ed. 1968). Justice Harlan, in his dissent in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 449 (1968), predicted possible conflicts with later comprehensive acts (specifically the Civil Rights Acts of 1968) which would be created by the Court's revival of the earlier statute.

20. *See* Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970).

21. 42 U.S.C. § 2000a(b) (1970).

22. 42 U.S.C. § 2000a(b), (c) (1970). The relationship to commerce was created to take advantage of dictum in the Civil Rights Cases, 109 U.S. 3, 18 (1883). In that case, similar legislation adopted during the Reconstruction Era was declared unconstitutional because its enactment was not within the powers given Congress under the thirteenth and fourteenth amendments. The Supreme Court suggested that the same laws might have been constitutional if enacted under the commerce clause.

An establishment may also be within the coverage of the 1964 Act if its discrimination is supported by state action. 42 U.S.C. § 2000a-1 (1970).

23. 42 U.S.C. § 2000a(e) (1970) states: "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public,

general statutes which cover discrimination in all sales of property and all contracts.[24] The 1866 Act deals only with race discrimination, however; the 1964 statute also bars discrimination based on religion and national origin.[25] Problems occur when the right to use a facility fitting the 1964 Act's definition of a private club is asserted as a contract or property right ostensibly protected under the 1866 Act.

In finding that the private club exemption impliedly repealed any inconsistent implications of the older statutes, the court of appeals in *Wheaton-Haven* reasoned that since the later statute expressly protected conduct made unlawful by the earlier one such conduct could not be unlawful. It seemed to rest its interpretation primarily upon its reading of congressional intent, implying that if Congress acted intentionally to protect the values of associational freedom which inhere in private clubs by exempting them from requirements of nondiscrimination, this intent should not be thwarted by holding defendants liable for such conduct under another statute.[26]

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except to the extent that the facilities of such an establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

24. There are also differences in enforcement mechanisms. Sections 1981 and 1982 contain no enforcement provisions in themselves, but permit private plaintiffs to seek judicially-created remedies of injunction [Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)] or damages. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). The Civil Rights Act of 1964 may be enforced by a private plaintiff [42 U.S.C. § 2000a-3 (1970)] but the United States Attorney General is also given power to bring suit [42 U.S.C. § 2000a-5 (1970)] and a court has the power to refer any suit to the Community Relations Service established by title VII if the court feels that there is a reasonable possibility of obtaining voluntary compliance. 42 U.S.C. § 2000a-4 (1970).

25. *See* note 7 *supra*.

26. The Fourth Circuit explored in some detail the legislative history of the 1964 Act:

> The Act generated an almost unparalleled amount of debate in Congress and in the nation at large, and its exceptions were subjected to particular scrutiny. "Mrs. Murphy's roominghouse" came into the language as a generic classification during the debates. The remarks of both proponents and opponents of the Act make it clear that it was intended to outlaw racial discrimination in the furnishing of certain kinds of goods and services, except in the case of a few types of very small businesses and private organizations, to which no prohibition against discrimination was to extend. . . . Congressmen both favoring and opposing the enactment of a public accommodations law attacked the Act as written for making distinctions between permitted and prohibited discrimination . . . . The majority, however, justified the exemption for private clubs as an appropriate recognition of rights of privacy and associational preferences in cases "where freedom of association might logically come into play . . . ."

451 F.2d at 1214-15 n.5. This manifestation of intent is what led the court to extend a prohibition which by its terms applied only to title II to suits under another statute.

This conclusion appears to be an expression of the doctrine of repeal by implication.[27] Repeals by implication are said to be disfavored by courts; when there are two statutes upon the same subject the rule is to give effect to both if possible.[28] However, repeal by implication is recognized in two situations. Where the provisions in two acts are in irreconcilable conflict, the later one is said to repeal the earlier to the extent of the conflict. If the later act covers the whole subject of the earlier and is clearly intended to act as a substitute, the earlier statute will impliedly be repealed in its entirety.[29]

It is clear from the differences between the civil rights statutes that the 1964 Act was not meant to replace the 1866 Act in its entirety. The essence of Judge Haynesworth's decision in *Wheaton-Haven* was that there is an irreconcilable conflict between the two acts. If Congress intended the exemption to promote the values inherent in private clubs and to allow them to discriminate in their choice of members, its intent would certainly be thwarted if plaintiffs were allowed to bring suit for the same conduct under another statute. The requisite intent to repeal is as clear as it can be, considering that the members of Congress did not know that sections 1981 and 1982 would be applicable to the same conduct at the time they enacted the 1964 Act.[30]

A similar question has arisen in a closely related area — the effect of title VII of the Civil Rights Act of 1964[31] upon section 1981. In *Waters v. Wisconsin Steel Works*,[32] plaintiffs sued under section 1981 and title VII, alleging a discriminatory hiring policy on the part of defendants. The issue was whether a requirement in title VII, that only persons charged before the Equal Employment Opportunity Com-

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27. Some confusion results from the fact that it is not clear that the court believed it was using the doctrine of repeal by implication. The court's statement, "we do not suggest that a practice formerly forbidden by §§ 1981 and 1982 has, by implication, been repealed by the failure of § 2000a, later enacted, also to prohibit it," [451 F.2d at 1214 n.5] leads to the conclusion that the court believed it was using some doctrine other than repeal by implication. However, it is difficult to see what other doctrine might be relevant, particularly since the court cited only one case in its discussion of that issue — United States v. Borden Co., 308 U.S. 188 (1939) — which discussed the elements of the doctrine of implicit repeal en route to a holding that neither the Agricultural Marketing Agreement Act nor the Capper-Volstead Act modified section 1 of the Sherman Act. The likely meaning of the above quoted language is that the repeal was the result of the express prohibition contained in the later act, not simply of its failure to prohibit the same conduct.

28. *See, e.g.*, United States v. Borden Co., 308 U.S. 188 (1939).

29. *See* Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

30. *See* text accompanying notes 14–20 *supra*.

31. 42 U.S.C. §§ 2000e thru 2000e–15 (1970), dealing with equal employment opportunity.

32. 427 F.2d 476 (7th Cir. 1970).

mission could be joined in suit, extended to an action brought under section 1981. The Seventh Circuit examined the legislative history, to see if Congress would have intended repeal had it been aware of the rights granted by the 1866 Act. The court's answer was that while the legislative history did not compel the conclusion that Congress would have intended to repeal absolutely the right to bring suit under section 1981, the strong preference for resolution of disputes by conciliation expressed by members of Congress suggested that the right to sue under section 1981 would have been modified had Congress been aware of that right.[33] Therefore, the section 1981 suit was held subject to the conciliation requirement of title VII. Although other courts have reached the opposite result,[34] they have agreed with the *Waters* court that the issue in employment cases is whether the existence of different *remedies* in the later act is sufficient to modify the *remedy structure* of the earlier one. In the *Wheaton-Haven* situation the conflict is more basic than a mere struggle between contradictory enforcement mechanisms; either defendants are exempt from all liability, as a result of the 1964 Act, or they are fully liable under the 1866 Act. In that situation, repeal by implication seems logical.

There must remain some doubt as to the applicability of the doctrine, however, in light of the Supreme Court's pronouncements in *Sullivan v. Little Hunting Park, Inc.*[35] In that case, the Court stated that title II "in no way" supersedes the 1866 Act, and that "the hierarchy of administrative machinery provided by the 1964 Act is not at war with survival of the principles embodied in § 1982."[36] While the Court did not specifically deal with the private club exemption, and it was apparently negating repeal of section 1982 as a whole rather than in part, this statement might be taken to mean that section 1982 is not affected *at all* by the 1964 Act.

Furthermore, the 1964 Act contains a saving clause which states that nothing in title II shall prevent any plaintiff from enforcing rights based on laws "not inconsistent" with that statute.[37] It might be said

33. *Id.* at 486.

34. *See, e.g.*, Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971); Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971). The *Waters* case was criticized in Note, *Is 1981 Modified by Title VII of the Civil Rights Act of 1964*, 1970 DUKE L.J. 1223, because of differences in the means of enforcement and scope of application, and because of the Supreme Court's statements in *Jones v. Alfred H. Mayer Co.* and *Sullivan v. Little Hunting Park* that the earlier acts were not in conflict with the later act.

35. 396 U.S. 229 (1969), *noted in* 84 HARV. L. REV. 82 (1970); 15 How. L.J. 941 (1969).

36. 396 U.S. at 237.

37. 42 U.S.C. § 2000a-6(b) (1970).

that the 1866 Act does not come within the saving clause because of the inconsistency on the issue of private clubs. On the other hand, it could be argued that the clause as a whole means that the enactment of title II is to have *no* effect on any existing remedy.

II. DEFINING A TRANSFER INCIDENT TO A REAL ESTATE TRANSACTION

There are other difficulties in reconciling the Fourth Circuit's opinion in *Wheaton-Haven* with the earlier Supreme Court case. In *Sullivan,* plaintiff owned two membership shares[38] in Little Hunting Park, one of which he assigned to a black person, attendant to the latter's lease of a home owned by plaintiff. The Board of Directors of the non-stock corporation which operated the recreational facility refused to permit the assignment because of the lessee's race, and Sullivan sued. The Supreme Court found that the transfer of membership was incident to the lease, because there was no doubt that the lessee paid part of his rent for the privilege of using the club. The Court held that when conveyance of membership rights in a community recreational facility was coupled with creation of a leasehold, the entire transaction came under section 1982, and racial discrimination was illegal in either part of the transaction.

The plaintiffs in *Wheaton-Haven* claimed a similar connection between a real estate transaction and club membership. When a member of the Wheaton-Haven Association sells his home and resigns his

38. The manner in which these shares were obtained is not clear from the Supreme Court's opinion. The *Wheaton-Haven* court was of the opinion that Little Hunting Park was organized and built by the subdividers of the surrounding residential land to enhance sales, and that it was necessary that one *own* property in one of the subdivisions to join, although there was no residence requirement. The court placed some reliance upon these facts to distinguish Little Hunting Park from the Wheaton-Haven Association, which was organized by community members and which did not require any land ownership. 451 F.2d at 1218. However counsel for plaintiffs in *Wheaton-Haven* (who had represented the successful plaintiffs in *Sullivan*), claimed that Little Hunting Park, like Wheaton-Haven, was a voluntary association organized by community residents and that there was no requirement that members either reside in or own property in a prescribed geographic area. *See* Petition for Rehearing of Plaintiffs-Appellants at 2 and 4, Tillman v. Wheaton-Haven Recreation Ass'n, 451 F.2d 1211 (4th Cir. 1971).

It would seem that the *Wheaton-Haven* court was correct in its belief that membership in Little Hunting Park was tied to the land rather than to one's residence; otherwise it is difficult to see how members could own more than one membership share, as Sullivan uncontestedly did. Furthermore, if membership was not tied to the land, it is difficult to see why the Supreme Court relied on the lease transaction, instead of dealing with the membership share itself as personal property.

membership, his purchaser is entitled, under the by-laws, to a first option to become a member.[39] The first option entitles its holder to have his application for membership considered immediately, without having to go to the end of a waiting list. The plaintiffs argued that the first option was the same as the outright transfer permitted by Little Hunting Park, barely disguised. The court held[40] that the first option was not the equivalent of a transfer of membership because the membership rolls of Wheaton-Haven had never been full.[41] Thus the first option gave nothing, because all prospective members had a similar "right" without purchasing the option.

The court's conclusion was correct on the facts as stated in its opinion. The situation would be less clear if the membership rolls had been full and there was a waiting list. The question of whether the option would be the same as the assignment of a membership share would then seem to depend upon whether there were nonracial criteria for choosing members.[42] If there were no criteria for membership except race, then being vaulted over the waiting list would automatically entitle a white person to membership and would be equivalent to assignment of a membership share; a black purchaser would receive no such benefit. If there were some other criteria, then the option would give every purchaser only the right to be considered immediately. While this is a right of some value it is not equivalent to the transfer of a membership share by the transferor.

In dissent, Judge Butzner argued that the option was important economically because a white might be able to sell his home for a higher price than could the plaintiffs if he could assure his purchaser of an option for membership in Wheaton-Haven if the membership rolls became full. It is true that this effect could be construed to be an interference with the right to sell, but it seems implausible that the

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39. Members who sell their homes are not required to resign. However, each family may have only one membership, which was not the case in *Sullivan*. Membership is not transferable, unless the first option provisioin is considered a transfer of some membership rights.

40. Consideration of this argument was actually unnecessary, since Dr. Press's transferor was not a member of Wheaton-Haven. There was, therefore, no transaction which would have given Dr. Press any sort of interest in Wheaton-Haven. 451 F.2d at 1217 n.14. The court, nevertheless, discussed the option issue at length.

41. The court relied on defendant's assertion at oral argument that membership, limited to 325 families, had been held at 260 families for several years. 451 F.2d at 1213 n.1. Counsel for plaintiffs vehemently contested this assertion. He stated, citing defendant's answers to interrogatories, that as of March 1, 1968, the membership rolls were full. Petition for Rehearing of Plaintiffs-Appellants at 2, Tillman v. Wheaton-Haven Recreation Ass'n, 451 F.2d 1211 (4th Cir. 1971).

42. *See* notes 58–66 *infra* and accompanying text.

scope of the statute was intended to include such an indirect interference.[43] Defendant's action was not conduct that directly interfered with the right to sell, but was conduct arguably prohibited under other statutes which indirectly created an opportunity to discriminate.

Plaintiffs also argued that *Sullivan v. Little Hunting Park, Inc.*, was controlling because Wheaton-Haven drew its members from an area so geographically delimited that the purchase of a home in the area impliedly carried with it the right to membership in the Association. The court rejected this argument, finding that in *Sullivan* ownership of land was the criterion for admission and membership was tied to acquiring rights in a subdivision developed by the persons who had built the recreational facilities, whereas the Wheaton-Haven Association was a voluntary grouping of individuals; the radius requirement was merely an area preference, and there was no connection between membership and ownership of land.

Judge Haynesworth ignored other possible applications of section 1981 and 1982.[44] He did not discuss the possibility that section 1981 might provide relief on the ground that the plaintiff was denied the right to make a membership contract because of his race.[45] Several cases have held that a ticket of admission to a place of entertainment constitutes a contract between the facility and the user and thus have provided a remedy for refusal of admission.[46] There would seem to be a similar contract arising between the Wheaton-Haven Association and a member. This argument was put before the Fourth Circuit

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43. An argument can be made that there is an interference with the right to sell. One case which would support this argument is Contract Buyers League v. F & F Investment, 300 F. Supp. 210 (N.D. Ill. 1969), which held that charging blacks higher prices for property than whites would have been charged is a violation of section 1982. However, even this case concerned a direct relationship between a buyer and a seller, and, therefore, would be weak authority in the Wheaton-Haven situation, where the impediment was created by a stranger to the sale. If an extension were made in the statute's scope to hold organizations liable for such indirect effects, the transactions which would be included would be myriad — certainly more than could have been imagined when section 1982 was enacted. *See generally* Bush v. Kaim, 297 F. Supp. 151, 162 (N.D. Ohio 1969) (discussion of limitations of section 1982).

44. This oversight may be attributable to a conclusion by the court that since it read the private club exemption into sections 1981 and 1982 and concluded that Wheaton-Haven was a private club, there was no need to consider other possibilities.

45. The court stated that admission to membership "is not incident to any contract" if it was not incident to the contract of sale of the real property. 451 F.2d at 1216 n.11. However, it failed to consider the membership agreement itself as a contract. As noted above [note 5 and accompanying text], the ban on racial discrimination in making contracts has survived the passage of the 1964 Act.

46. *See* Scott v. Young, 421 F.2d 143 (4th Cir. 1970), *aff'g* 307 F. Supp. 1005 (E.D. Va. 1969); Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949).

by the plaintiffs,[47] but apparently to no avail.[48] Plaintiffs also argued that a membership share in the association was personal property[49] and thus was within the scope of section 1982 independent of the sale of real estate. Either of these grounds seems to be adequate to bring the transaction within the Civil Rights Act of 1866. Without so stating, the court must have assumed that the private club exemption negated these two theories, leaving that exemption as the crux of the decision.

III. WHAT MAKES A CLUB PRIVATE?

The Civil Rights Act of 1964 contains no standards for determining what organizations qualify as private clubs.[50] Courts have, therefore, developed qualifications on a case-by-case basis.[51] There is no single test; it is said that all factors must be taken into account in determining what is basically a factual question.[52] Among the factors considered are advertising,[53] the members' reasons for organizing,[54]

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47. Brief for Appellants at 7, Tillman v. Wheaton-Haven Recreation Ass'n, 451 F.2d 1211 (4th Cir. 1971).

48. The court never dealt with the argument, although it recited it. 451 F.2d at 1213.

49. Brief for Appellants at 7, Tillman v. Wheaton-Haven Recreation Ass'n, 451 F.2d 1211 (4th Cir. 1971). The Supreme Court implied in *Sullivan* that membership is personal property within the scope of section 1982. 396 U.S. at 236. However, the Court cited no authority for this proposition and there appears to be none. Justice Harlan, dissenting, took strong issue with the majority's suggestion. 396 U.S. at 248.

The *Wheaton-Haven* plaintiffs cited Page v. Edmunds, 187 U.S. 596 (1903), and Hyde v. Woods, 94 U.S. 523 (1876), to support their contention, but neither case appears to be directly on point.

50. *See* note 23 *supra*.

51. *See generally* United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969); Note, *Public Accommodations Laws and the Private Club*, 54 GEO. L.J. 915 (1966); Note, *Public Accommodations: What is a Private Club?*, 30 MONT. L. REV. 47 (1968).

52. *See, e.g.*, Nesmith v. Y.M.C.A., 397 F.2d 96 (4th Cir. 1968).

53. *See, e.g.*, United States v. Johnson Lake, Inc., 312 F. Supp. 1376 (S.D. Ala. 1970).

54. While one court has stated that the members' reason for organizing is not a relevant criterion, Nesmith v. Y.M.C.A., 397 F.2d 96 (4th Cir. 1968), several courts have held that the fact that a club was formed solely to avoid obeying the Public Accommodations Act aids in finding the "club" to be a sham. United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969) (restaurant converted to private club after blacks began to seek admittance); United States v. Northwest Louisiana Restaurant Club, 256 F. Supp. 151 (W.D. La. 1966) (restaurants solicited to become part of club to avoid the 1964 Act). This is especially true when the same establishment was form-

financial structure[55] and the degree of internal democracy.[56] The defendant club bears the burden of showing that its organization is private and, therefore, exempt from statutory coverage.[57]

Wheaton-Haven has all of the technical attributes of a private club. It does not publicly solicit members or advertise its facilities. The club was organized in 1958, long before passage of the Civil Rights Act of 1964, and there has been no suggestion of racist motives in its establishment. The evidence was scant on the issue of finances, but there was a suggestion that the sum of dues paid did not exceed the club's expenses. There was no testimony indicating that any individual or group profited from the club's operation. Members of the Board of Directors had to be members of the club. Regular membership meetings were held, and participation by members was high.

The factor, however, which seems to have been most important in the cases considering whether an organization is a private club, is that of membership and admission policies. Offering to serve all the white persons in a geographic area is said to be inconsistent with the nature of a private club.[58] Genuine selectivity on some reasonable basis is important.[59] There must be some established machinery for admission of new members, such as a membership committee composed of members.[60] If only a nominal membership fee is charged, and an admission fee is charged each time the facilities are used, an establishment will probably be characterized as a public accommoda-

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erly operated as a segregated public restaurant. United States v. Richberg, 398 F.2d 523 (5th Cir. 1968).

55. If all the profits from a club's operation are retained by one person or a small group of persons, the organization is considered a proprietary establishment, not a club. United States v. Jack Sabin's Private Club, 265 F. Supp. 90 (E.D. La. 1967). Courts have consistently looked through such devices as management contracts between a paper "club" and the actual proprietor. *See, e.g.,* Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970).

56. Bell v. Kenwood Golf & Country Club, Inc., 312 F. Supp. 753 (D. Md. 1970). Courts look to see if members actually control the club.

57. *See, e.g.,* Nesmith v. Y.M.C.A., 397 F.2d 96 (4th Cir. 1968); Daniel v. Paul, 395 F.2d 118 (8th Cir. 1968).

58. Nesmith v. Y.M.C.A., 397 F.2d 96 (4th Cir. 1968). *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969). The Court presented no facts in support of this conclusion, and was not considering the 1964 Act.

59. Nesmith v. Y.M.C.A., 397 F.2d 96 (4th Cir. 1968); United States v. Johnson Lake, Inc., 312 F. Supp. 1376 (S.D. Ala. 1970); United States v. Jack Sabin's Private Club, 265 F. Supp. 90 (E.D. La. 1967). The fact that there is no limit upon membership except the size of the facilities indicates that an organization lacks the selectivity of a private club.

60. *See* Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970).

tion.[61] Regular admittance of nonmembers who are not bona fide guests is an indication that the establishment is public, not private.[62]

Wheaton-Haven's claim for private club consideration seems least convincing under the last and most important standard. That only members and bona fide guests may use the pool merely makes a finding that a facility is a private club possible, not inevitable. That a member's initial investment is relatively heavy and annual dues are substantial suggest a financial standard for membership, but in the absence of evidence that the charges were beyond the means of a large number of the potential white applicants, such a standard does not suggest any nonracial exclusiveness. That the applicants must be approved by the Board of Directors and that there was a policy of keeping the membership small prove nothing in absence of proof that these rules ever operated to exclude anyone other than blacks. That the reason given for rejection of the Presses application was their race creates a strong impression that race was *the* membership standard and all whites were acceptable applicants.[63]

The issue that is raised by the lack of selectivity demonstrated — though it was not raised by the plaintiffs in *Wheaton-Haven* — is whether an organization which is managed as a private, member-controlled club may use the statutory exemption to protect discrimination solely on the basis of race. In view of the fact that the 1964 Act was adopted to remove race[64] as a factor in the provision of services and opportunities, it would be inconsistent to protect from its strictures clubs whose only basis of selectivity was the forbidden criterion. On the other hand, tradition, ethnic pride and identification and, most important, constitutionally protected freedom of association[65] militate against judicial inquiry into the membership standards of genuine

61. *See, e.g.*, United States v. Richberg, 398 F.2d 523 (5th Cir. 1968).

62. United States v. Northwest Louisiana Restaurant Club, 256 F. Supp. 151 (W.D. La. 1966).

63. The *Wheaton-Haven* court tried to marshal facts to overcome the conclusion that only blacks were excluded. It said that some considerations of social and financial standing were implicit in the club's operations and that some whites had been rejected informally, though the latter "fact" did not appear in the club's records. These "facts" do not seem to satisfy the requirement that there must be some reasonable standards for admission, which would seem to represent a failure of defendant to sustain its burden of proof. The court, of course, did not so find.

64. As well as color, religion and national origin. *See* note 7 *supra*.

65. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972) (Douglas, J., dissenting). Justice Douglas, in asserting that the first amendment guarantees a "zone of privacy," stated that "the fact that the Moose Lodge allows only Caucasions to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race." *Id.*, 179–80. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965). Comment, *Association, Privacy and*

"clubs," in which people associate for a common purpose or to achieve a common goal.[66]

The solution, if one is sought,[67] may be to permit judicial scrutiny of membership standards under a standard similar to the one developed for employment standards in *Griggs v. Duke Power Co.*[68] in those cases in which a "private club" is serving the same function as a place of public accommodation. Thus, a dining club, a community swimming pool or a roller rink would have to demonstrate either that its admission standards were actually nondiscriminatory — that is, they did not exclude members of one race more than of another out of proportion to the possible membership pool — or that its standards bore some relationship to the club's purpose — for example, requiring ability to swim or ownership of a bathing suit for membership in a swim club. Organizations having a purpose other than the provision of "goods, services, facilities, privileges, advantages, and accommodations"[69] within the meaning of the 1964 Civil Rights Act would be permitted to exclude people from membership on any basis whatsoever, in their members' exercise of freedom of association. Thus, churches, political groups and chess clubs, for example, could restrict their memberships to a single race without inviting scrutiny under the 1964 Act.

Such a reconciliation of the public accommodations section of the 1964 Civil Rights Act with freedom of association would end the use

the Private Club: The Constitutional Conflict, 5 HARV. CIV. RIGHTS-CIV. LIBS. L. REV. 460 (1970).

66. A case that might be relevant on the question of permissible standards in light of the purposes of the Civil Rights Act is Griggs v. Duke Power Co., 401 U.S. 424 (1971), which invalidated under title VII of the 1964 Act employment criteria which were fair on their face but had a discriminatory effect on minority applicants or employees. The Court held that such criteria could be used by employers only if they had a demonstrable relation to job performance. *See* Note, *Employment Discrimination: The Burden Is on Business,* 31 MD. L. REV. 255 (1971).

By analogy, an organization dedicated to studying Southern victories in the Civil War or an association concerned with the culture of a black African nation might have a single race membership without setting a racial criterion if similar views on the issue under discussion were the standard. If, however, a member of the "excluded" race met the reasonable criteria for membership, the *Griggs* test would mandate his acceptance. This does not seem to comport with Justice Douglas' understanding of freedom of association. *See* note 65 *supra.*

67. The Court could choose to escape the issue by referring to its earlier statements on the subject in Daniel v. Paul, 395 U.S. 298 (1969) (dictum), and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). In both of those cases the Court found an organization not to be a private club, chiefly because of the absence of a "plan or purpose of exclusiveness." 396 U.S. at 236. Neither opinion contained an extensive examination of the tension between freedom of association and the effort to open American society to all individuals.

68. *See* note 66 *supra.*

69. 42 U.S.C. § 2000a(a) (1970).

of devices to evade the public integration contemplated by the Act. It would avoid the public examination of truly and understandably private organizations feared by supporters of civil rights activity.[70] It would require that persons do their public swimming, dining and skating in integrated groups.

IV. CONCLUSION

Certiorari has been granted in *Tillman v. Wheaton-Haven Recreation Association, Inc.*[71] Plaintiffs are seeking reversal by the Supreme Court primarily upon the grounds that the Fourth Circuit failed to apply *Sullivan* correctly to the *Wheaton-Haven* situation.

A more important issue for the Supreme Court to consider would be the effect of the Civil Rights Act of 1964 upon the Civil Rights Act of 1866. Conflict between the two statutes is bound to become more frequent, and it is essential that the relationship be delineated to insure both uniformity and maximum efficiency in their application.[72] The proper result would be affirmance of the *Wheaton-Haven* court's decision upon this point; the result otherwise would be a clear frustration of congressional intent.

A second area of confusion the court might clear up is that of how far *Sullivan v. Little Hunting Park* should extend. If the Fourth Circuit was correct in finding only a tenuous relationship of property ownership to Wheaton-Haven Association membership and limited value in a first option, extension of the holding of *Sullivan* to the *Wheaton-Haven* facts would represent a major extension of the coverage of the 1866 Civil Rights Act. On the other hand, affirmance of the Fourth Circuit's view of the limited scope of *Sullivan* might inspire the use of artificial devices to separate swim club membership from property ownership to avoid the impact of the public accommodations sections of the 1964 Act.

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70. The Supreme Court has painstakingly protected civil rights organizations from having to open membership lists to the scrutiny of the public or of public officials on the ground that it would chill the exercise of freedom of association. N.A.A.C.P. v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); N.A.A.C.P. v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). Justice Douglas' dissenting opinion in the *Moose Lodge* case indicates that he continues to place a high value on associational freedom. *See* note 65 *supra.*

71. 406 U.S. 916 (1972).

72. The same problem of repeal by implication could arise, for example, in an action by an individual claiming racial discrimination in the rental of a unit in an owner-occupied two- or three-unit dwelling exempt from the nondiscrimination requirements of the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (1970), but obviously covered by the 1866 Civil Rights Act, 42 U.S.C. § 1982 (1970). Similar associational considerations would be presented in a case of that nature. *See* note 26 *supra.*

The most significant issue for the Court to discuss would be whether the private club exemption may be claimed by an association displaying a total lack of selectivity in membership except on the basis of race. In view of the measure of regard displayed by the Court for freedom of association in the recent past, it might hold that the issue of membership criteria is not a permissible area of inquiry in deciding whether an organization is a private club. Such a holding might result in the emasculation of title II of the Civil Rights Act of 1964.

Caught between a penumbral constitutional right and a fundamental social policy decision, the Supreme Court might well sidestep the question of whether definable membership standards are the heart of the judicial test for private club status.