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the very product of that cooperative effort.50

There are still some difficult problems remaining. First, as the Second District noted, there remains clear Florida precedent in support of applying the governmental/proprietary use test to determine whether a governmental unit can ignore its own zoning ordinance.51 Although beyond the scope of the holding in the noted case, the Temple Terrace courts’ criticism of the governmental/proprietary use test52 and the passage of the Planning Act,53 seem to undercut the authority of this precedent.

There also remains the problem of land use control in our federal system of government, and the amount of deference which federal and state governments should grant to each other.54 This, of course, is clearly beyond the scope of this note. Nonetheless, it looms as an important problem in the not too distant future.

These, and perhaps other problems in the area of governmental immunity will remain; however, the decision rendered by the Second District and adopted by the supreme court in Temple Terrace presents a reasoned analysis for resolution of the problems.

JOSEPH M. MATTHEWS

Lease of Bay Bottom Land Does Not Constitute State Action

Responding to allegations of discriminatory membership policies violative of the fourteenth amendment equal protection clause, the court in Golden held that the leasing of bay bottom land by the City of Miami to a private club did not constitute state ac-

50. It should be noted that the Planning Act contains the standard clause: Nothing in this act is intended to withdraw or diminish any legal powers or responsibilities of state agencies or change any requirements of existing law that local regulations comply with state standards or rules. FLA. STAT. § 163.3211 (1975). However, this does not diminish the force of the clear legislative intent that the state cooperate with local governments to achieve the most effective land use program possible.

51. Nichols Eng’r & Research Corp. v. State ex rel. Knight, 59 So. 2d 874 (Fla. 1952); ALA Mobile Home Park, Inc. v. Brevard County, 246 So. 2d 128 (Fla. 4th Dist. 1971).

52. See text accompanying notes 29-31, supra.

53. See note 48 supra, particularly FLA. STAT. § 163.3194(1) (1975).

54. See e.g., Maryland-Nat’l Capital Park and Planning Comm’n v. United States Postal Serv., 487 F.2d 1029 (D.C. Cir. 1973), noted in 10 WIL. L.J. 477 (1974) (reviewing court should particularly scrutinize a federal agency decision not to file an environmental impact statement when such action results in a deviation from local zoning procedures).
tion. In so doing, the court decided that the degree of state involvement necessary to constitute state action is the same whether racial discrimination or some other violation of the fourteenth amendment is alleged. This note comments on the decision in light of United States Supreme Court precedent and decisions of other circuits and suggests that this case raises issues requiring resolution on a national level.

Plaintiffs Harold S. Golden and David Fincher, a Jew and a Black, expressed to officials of the private Biscayne Bay Yacht Club an interest in obtaining applications for membership. They were informed that in order to be eligible for membership it was necessary to be sponsored by a member.¹ Plaintiffs then brought suit in the United States District Court for the Southern District of Florida seeking declaratory and injunctive relief.² They asserted that the club’s admission policies were discriminatory on the basis of race and religion and therefore violated the fourteenth amendment and civil rights statutes.³ The district court found that the

¹. The district court found that plaintiff Golden had sent a letter to the commodore of the club on February 18, 1969, requesting an application for membership, and was informed that membership was by sponsorship only. On January 14, 1972, plaintiff Fincher expressed his interest in joining the club but was similarly advised. No proposal for membership was ever submitted on behalf of either plaintiff. Golden v. Biscayne Bay Yacht Club, 370 F. Supp. 1038, 1041 (S.D. Fla. 1973).

². The club argued, in the district court, that since plaintiffs had never been proposed for membership they suffered no injury and, therefore, could not contest the club’s membership policies. The district court held, however, that after plaintiffs expressed an interest in joining the club, being told that there was nothing they could do without a recommendation served as a sufficient rejection to give them standing to challenge the club’s membership policies. 370 F. Supp. at 1042. The three-judge panel which heard the case affirmed on this point. Golden v. Biscayne Bay Yacht Club, 521 F.2d 344, 348 (5th Cir. 1975). The en banc majority, while expressing doubt as to plaintiff’s standing “concluded, however, not to allow this point to decide the disposition of the appeal.” Golden v. Biscayne Bay Yacht Club, 530 F.2d 16, 23 (5th Cir. 1976).

³. 42 U.S.C. §§ 1981 (Equal rights under the law), 1983 (Civil action for deprivation of rights), and 2000(a) (Prohibition against discrimination or segregation in places of public accommodation) (1970).
club's membership policy was discriminatory in operation and effect and that it was conducted "under color of law" because the club's docking facilities were located on bay bottom land leased from the city of Miami for an annual fee of one dollar. The district court ordered the club to discontinue its discriminatory policies. A three-judge panel of the United States Court of Appeals for the Fifth Circuit affirmed, one judge dissent-
After rehearing en banc, the United States Court of Appeals for the Fifth Circuit held, reversed: The lease of bay bottom land to the club did not supply the requisite significant state action in the club's membership policies to invoke the fourteenth amendment and grant relief under 42 U.S.C. section 1983. Golden v. Biscayne Bay Yacht Club, 530 F.2d 16 (5th Cir. 1976).

The problem presented to the court in Golden is whether the state has become sufficiently involved in the actions of a seemingly private entity to require application of the proscriptions of the fourteenth amendment. Inquiry into the existence of state involvement is necessary because of the construction that has been given to the fourteenth amendment since the Civil Rights Cases. As stated by Chief Justice Vinson in Shelley v. Kraemer: "[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." The United States Supreme Court has never stated a hard and fast rule which may be applied in all situations to determine if the requisite state involvement is present. However, the Court has indicated that merely because a private entity receives any benefits or services from the state does not mean that discrimination by that entity violates the fourteenth amendment. Therefore, the appropriate inquiry is not merely into the existence of state involvement but also must encompass the nature

8. 521 F.2d 344. For a complete discussion of the panel decision see 54 Tex. L. Rev. 641 (1976).
9. The en banc reversal of the panel decision was based entirely on its conclusion that the requisite state action was not present and therefore an action could not be maintained under section 1983. The panel, having found relief appropriate under section 1983, had not reached the questions of whether or not an action could be maintained under 42 U.S.C. § 1981 or 42 U.S.C. § 2000(a) (1970). These questions were not, therefore, confronted by the court en banc. Also, the court referred only briefly to the other points raised by appellant before the panel. 530 F.2d at 23. See notes 2 and 7 supra. It might further be pointed out that while continuing to rely on its position with regard to all issues raised before the panel, for purposes of the rehearing en banc appellant's brief was "primarily directed to the color of law question." Brief for Appellant at 3 (emphasis in original).
10. 109 U.S. 3 (1883).
11. 334 U.S. 1, 13 (1948).
12. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court indicated that a case-by-case analysis would be necessary to determine whether the extent of state involvement required the application of fourteenth amendment restraints in particular situations. "Only by sift ing facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Id. at 722.
and extent of state involvement in the private activity. In the context of the equal protection clause, it is only where the state has "significantly involved itself with invidious discriminations" that the restrictions of the fourteenth amendment apply.  

However, in determining whether the state's involvement in private activity is significant, it has been suggested that it is not sufficient merely to examine the nature and extent of the state's involvement with the private entity in question. In situations where the action challenged is neither purely private conduct nor solely state action a court may be called on to "decide when and which private rights are subject to constitutional limitations because of government involvement." Thus, it has been suggested that courts must also consider the nature of the private rights asserted by the parties in determining whether or not state action is present. Using this approach, which focuses on the nature of the right asserted and the conduct challenged as well as on the extent of state involvement, some courts have employed a less exacting standard in determining if the requisite state action is present in cases where the plaintiff alleges racial discrimination than in cases involving alleged violations of other constitutional rights. Furthermore, when this "balancing of interests" approach is employed, the

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14. Id., quoting Reitman v. Mulkey, 387 U.S. 369, 380 (1967). The "significant-involvement" test has been further defined and indices of significant state involvement have been extrapolated from the case law. These include the quantum of state contacts with the private entity, and whether the state contacts confer a benefit on the private entity which tend to perpetuate the discriminatory activity. Note, Developing Legal Vistas for the Discouragement of Private Club Discrimination, 58 Iowa L. Rev. 109, 115 (1972).

In addition to the significant involvement theory of state action, other theories have also been developed. These include the "public-function" principle, which is premised on the theory that if a private entity engages in activities of a public nature, such entity must conform to the standards of conduct prescribed by the fourteenth amendment; and the "minimal involvement" theory which differs from the significant involvement theory essentially in degree and has not been widely applied by the courts. Id. at 112-13. For a similar discussion of state action theories see Note, Constitutional Law—Private Club Discrimination, 1970 Wis. L. Rev. 595, 597-99. For further discussion of state action theories in the context of the instant case see notes 35 and 54 infra.

16. Id.
17. Id.; see Weise v. Syracuse University, 522 F.2d 397, 405 (2d Cir. 1975) (nature of right infringed as well as the extent of state involvement should be considered in determining if state action is present); Pitts v. Department of Revenue, 333 F. Supp. 662, 669 (E.D. Wis. 1971) (court cannot decide in the abstract whether state action is sufficient to impregnate private conduct with governmental character—court must examine that conduct both in light of the right allegedly violated and in light of the right under which it is asserted to be proper).
18. See cases cited note 55 infra.
state action determination may serve as a mechanism by which a court can give priority to one right or interest over another. This is because a finding of no state action may deny a federal court the jurisdiction to hear the case, thus preserving the status quo.\textsuperscript{19}

\textit{Golden} is an interesting case for several reasons. First, the court's decision was made in the absence of any clearly controlling decision by the United States Supreme Court on the issue of whether a lease of public property to an otherwise private club constitutes state action for fourteenth amendment purposes.\textsuperscript{20} Second, the Fifth Circuit, in \textit{Golden}, has apparently rejected the proposition that a less exacting standard for the determination of state action should be employed in cases involving racial discrimination. Finally, the case illustrates that the state action decision may decide, in effect, which of several conflicting and important interests are to be afforded constitutional protection.

In \textit{Golden}, the sole link between the City of Miami and the private yacht club was the lease involving city bay bottom land upon which the club's docking facilities stood. The city had been deeded the bay bottom land in 1949 by the Trustees of the Internal Improvement Fund of the State of Florida under terms which required that the land be used for public purposes.\textsuperscript{21} In 1962 the city had asserted ownership to the land and since that time had rented it to the club at the annual rate of one dollar. The club, however, had utilized the land for some 30 years prior to 1962. In 1969, the city obtained a waiver for its lease to the club by asserting that the docks maintained by the club helped relieve the city's shortage of dock facilities.\textsuperscript{22} Also, the City of Miami had enacted ordinances dealing with the rental of city-owned property which prohibited discrimination on the basis of race, religion, color, or natural origin, and further prohibited sponsorship requirements for membership when the lessee was a private club.\textsuperscript{23} On these facts the three-judge

\begin{itemize}
  \item \textsuperscript{20} The district court found that the club met the test of being a private club and was not formed as a subterfuge to evade civil rights laws. 370 F. Supp at 1041.
  \item \textsuperscript{21} \textit{Id.} at 1040. The deed restrictions are quoted at some length by Chief Judge Brown in his dissent in the noted case. 530 F.2d at 25 n.7.
  \item \textsuperscript{22} 370 F. Supp. at 1040. The waiver was necessary because of the requirement that the land be used solely for public purposes.
  \item \textsuperscript{23} \textit{Id.} at 1040-41. The ordinances are also quoted at length in Chief Judge Brown's dissent in the noted case. 530 F.2d at 27 n.10.
\end{itemize}
panel had found the lease to be "essential to the club's function" and therefore sufficient state action to require compliance with the fourteenth amendment.  

In reversing the panel, the majority of the en banc court relied primarily on three United States Supreme Court decisions. The earliest of these, Burton v. Wilmington Parking Authority, involved a lease of space in a municipal parking garage to a private party for use as a restaurant. The land and building were publicly owned and financed, and the building was dedicated to public uses. The lessor parking authority, an agency of the State of Delaware, had many obligations to the lessee under the lease. Furthermore, income from the lease was necessary to make bond financing available, and the existence of the restaurant may have increased the demand for parking facilities. The restaurant refused to serve plaintiff solely on the basis of race, and plaintiff sued for declaratory and injunctive relief. On those facts, the Supreme Court found the requisite state action present, stating:

The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

In Moose Lodge No. 107 v. Irvis, plaintiff, a guest at a private club, was refused service on the basis of his race. He subsequently brought an action for injunctive relief claiming that because the State Liquor Board had issued the club a license authorizing the sale of alcoholic beverages on its premises, the club's refusal of service to him was state action for purposes of the equal protection clause of the fourteenth amendment. A three-judge district court held that the state granted license was invalid because it violated the equal protection clause. On appeal the Supreme Court reversed, holding that the operation of the state regulatory scheme did not sufficiently involve the state in the club's discriminatory guest

24. 521 F.2d at 347, 352. It is noteworthy that in the panel decision the court did not greatly emphasize the effect of these ordinances. The ordinances were discussed at greater length in Chief Judge Brown's dissent in the noted case. 530 F.2d at 26-31, 33.


26. 365 U.S. at 725.

policies to make the policies state action for fourteenth amendment purposes. The Court evinced a concern that a finding of state action, merely because a private entity received any benefit or service from the state or was subject to state regulation in any degree, would emasculate the distinction between private and state conduct. The Court further explained that nothing in this situation approached the "symbiotic relationship" between the lessor and lessee found in Burton and distinguished Burton by stating that "while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building."

The facts in Jackson v. Metropolitan Edison Co. were different. In Jackson the right asserted by the complaining party was the right to procedural due process prior to termination of electric service by a state regulated utility, not the right to equal protection of the laws. The Court defined the state action inquiry as "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." The Court concluded that the state was not sufficiently connected with the utility's action in terminating plaintiff's electric service to make the utility's conduct state action for purposes of the fourteenth amendment.

In deciding that the requisite significant state action was not present in Golden, the court found neither the "symbiotic relationship" present in Burton nor facts sufficient to establish that the city had "insinuated itself into a position of interdependence" with the club so that it could be considered a joint participant in the internal

28. 407 U.S. at 177. However, the Court did hold that plaintiff was entitled to a decree enjoining enforcement of a Pennsylvania Liquor Control Board regulation which required club licensees to adhere to all provisions of their constitutions and by-laws, insofar as that regulation required compliance by Moose Lodge with racially discriminatory provisions. While the regulation was neutral in its terms, the Court was of the opinion that in a case where such provisions required racial discrimination, the result of the rule's application "would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule." Id. at 179.

29. 407 U.S. at 173.
30. Id. at 175.
32. In Jackson, the plaintiff advanced various theories to support a finding of state action. Plaintiff argued that state action was present because of the "monopoly status" conferred upon the utility by the state; because the utility performed a "public function"; because the business was "affected with the public interest"; and because the state had authorized and approved the termination practice by not disapproving a general tariff, incorporating the practice, filed with the Public Utilities Commission. 419 U.S. at 351-54.
membership policies of the club. The lease was found not to provide "a sufficiently close nexus between the city and the club so that the action of the club may be fairly treated as that of the city." The court went on to express its opinion that the district court and circuit court panel, in finding significant state action, had applied a "but for" rule, and that the Supreme Court had attributed little significance to the "but for" approach in Moose Lodge and Burton.

It is arguable, however, that the relevant Supreme Court decisions could have been interpreted to reach a different result. The two Supreme Court cases discussed by the court which appear to be closest to Golden, factually and in terms of the interests of the

33. 530 F.2d at 22. Due to its emphasis on the lack of a showing that the city had involved itself in the internal membership policies of the club, 530 F.2d at 20, 22, and because Chief Judge Coleman had emphasized this point in his dissent in the panel decision, 521 F.2d at 354, the Golden case may be interpreted as requiring state participation in the precise activity challenged as a prerequisite to a finding of state action. There is some support for this view of state action in Jackson: "But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." 419 U.S. at 351, citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972). This somewhat restrictive view of state action has been espoused in other cases. New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975) (sex discrimination); Junior Chamber of Commerce, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir.), cert. denied, 419 U.S. 1026 (1974) (sex discrimination); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969) (due process); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) (freedom of expression). It is submitted that such a restrictive view of state action is inappropriate in a case involving racial or other class-based discrimination since it would be a rare situation where a governmental entity would be directly involved in the decision to discriminate. Such an approach would allow considerable state support to private discriminatory activity as long as there was no direct involvement in the decision to discriminate. It is unlikely that the Supreme Court would accept such a state action requirement in the context of racial discrimination. As stated by Justice White concurring in Gilmore v. City of Montgomery: "It is perfectly clear that to violate the Equal Protection Clause the State itself need not make, advise, or authorize the private decision to discriminate that involves the State in the practice of segregation or would appear to do so in the minds of ordinary citizens." 417 U.S. 556, 582 (1974).

34. 530 F.2d at 22.

35. The "but for" rule had its origin in Shelley v. Kraemer, 334 U.S. 1 (1948). Shelley dealt with the validity of court enforcement of restrictive covenants which had as their purpose the exclusion of persons of designated races from ownership or occupancy of real property. The Court held that in granting judicial enforcement in such cases the states had denied the petitioners equal protection. In so holding, the Court stated that "it is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." Id. at 19 (emphasis added). The rule in Shelley v. Kraemer has been characterized as the "minimum involvement" test and has not been widely applied by the courts. See note 14 supra, and sources cited therein.

36. 530 F.2d at 22.
parties at stake, are Burton and Moose Lodge. State action cases subsequent to Burton and Moose Lodge have sometimes viewed these decisions as drawing a "line of demarcation" between situations which do and those which do not involve unconstitutional state action.\(^3\) This approach was also evident in Golden.\(^3\) Golden is factually closer to Moose Lodge in that the discriminating party was a private club, whereas in Burton it was a public restaurant. However, Golden more closely resembles Burton in that the state involvement took the form of a lease rather than a license as in Moose Lodge.\(^3\) Numerous precedents in the Fifth Circuit and elsewhere have based findings of state action upon leases of public property to private entities.\(^4\) Courts have perhaps been prone to finding state action based on leases because of a concern that the

38. 530 F.2d at 19, 22.
39. For further discussion concerning the relationship between Golden, Moose Lodge, and Burton, see 54 Tex. L. Rev. 641, 645-48 (1976) noting the panel decision in Golden. There, in criticizing the panel decision, the author states that while Golden and Burton both involved leases, the resemblance ends there, and concludes "there was nothing in Golden approaching the economic interdependence present in Burton."

It should be noted, however, that with the exception of Solomon, which found no state action, none of the cases involved leases to truly private clubs which had not been formed to evade the requirements of the fourteenth amendment.
government should not be allowed to accomplish indirectly what it may not accomplish directly.\textsuperscript{41} Furthermore, the lease-license distinction would seem to have a basis in reason. The Court's holding in \textit{Moose Lodge} seems to have resulted, at least in part, from a fear that a finding of state action based on a regulatory scheme would destroy the distinction between state and private conduct.\textsuperscript{42} While such a fear may be well founded due to the pervasive licensing and regulation by the state today, it is not at all clear that the leasing of public property is as pervasive, and therefore that it would substantiate a similar fear.\textsuperscript{43}

The court also completely ignored the recent Supreme Court decision in \textit{Gilmore v. City of Montgomery}.\textsuperscript{44} Though not involving a lease situation, \textit{Gilmore} dealt with the use of publicly owned property by discriminatory organizations. The specific issue in \textit{Gilmore} involved whether a municipality should be enjoined from permitting segregated school and non-school groups the use of public park and recreational facilities. The Court held that in permitting private schools and affiliated groups the exclusive use of park recreational facilities, the city had, in effect, created "enclaves of segregation" in the context of a 1959 park desegregation order, and affirmed the district court injunction against such use.\textsuperscript{45} With regard to the nonexclusive use of public recreational facilities by private school groups, the Court held that on the record presented it was unable to determine whether such use involved the govern-

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\textsuperscript{41} Chief Judge Brown expressed this fear in his dissent. 530 F.2d at 32. However, it should be noted that there was no indication that the City of Miami intended to accomplish any discrimination, especially in view of the ordinances enacted which prohibited discrimination. See note 23 supra and accompanying text.

\textsuperscript{42} 407 U.S. at 173.

\textsuperscript{43} See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); cf. Gilmore v. City of Montgomery, 417 U.S. 556 (1974). This fear was, however, expressed by the court in Magill v. Avonworth Baseball Conference, 516 F.2d 1328, 1334 (3d Cir. 1975), where the court indicated that if the state action concept included every private use of a public facility, the concept would be "improvidently expanded" and freedom of activity severely curtailed. However, there the court was concerned with nonexclusive use of public property. The situation in \textit{Golden} involved exclusive use of public property. See Gilmore v. City of Montgomery, 417 U.S. 556 (1974), notes 44-54 infra and accompanying text. For further discussion of \textit{Magill} see note 54 infra.

\textsuperscript{44} 417 U.S. 556 (1974).

\textsuperscript{45} Id. at 569. Justice Blackmun stated in \textit{Gilmore} that the term "exclusive use" implied "that an entire facility is exclusively, and completely, in the possession, control, and use of a private group." Id. at 566.
ment so directly in the actions of the users that court intervention on constitutional grounds was warranted.46 Turning to use by private non-school groups, the Court indicated that the portion of the district court order prohibiting the mere use of certain facilities by any private segregated school or club was not predicated on a proper finding of state action.47 However, the Court went on to say:

If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation. Here, for example, petitioners allege that the city engages in scheduling softball games for an all-white church league and provides balls, equipment, fields, and lighting. The city's role in that situation would be dangerously close to what was found to exist in Burton, where the city had "elected to place its power, property and prestige behind the admitted discrimination."48

The Court then remanded the case to the district court for further consideration.

It is submitted that the Court in Gilmore left open the possibility that the exclusive use of public property by private non-school groups could be the basis for a finding of state action. Furthermore, the Court felt Moose Lodge was not fully applicable to the situation in Gilmore, stating that "[b]ecause the city makes city property available for use by private entities, this case is more like Burton than Moose Lodge."49 Thus, it would appear that the Supreme Court has recognized a distinction between situations where government involvement takes the form of allowing the use of government property by a private discriminating entity and situations where the government involvement takes the form of licensing and regulation. Therefore, it would appear that Moose Lodge was not controlling in Golden.50

46. Id. at 570.
47. Id. at 574.
48. Id.
49. Id. at 573.
50. It should be noted that in Moose Lodge one of the grounds upon which the Court distinguished Burton was that the Moose Lodge was located on land owned by Moose Lodge and not by a public authority. 407 U.S. at 175. The Court similarly distinguished Burton in Jackson v. Metropolitan Edison Co. 419 U.S. at 357-58. In both Moose Lodge and Jackson the Court found state action not present, and on the basis of these cases it appears that licensing and regulation by the state, without more, will not constitute state action. However,
Chief Judge Brown, in his dissent, appears to have been of the opinion that *Gilmore* required a finding of state action in *Golden*. In situations where the state allows public property to be used by private entities, the precedential value of these cases should perhaps be limited. As stated by the *Gilmore* Court in distinguishing *Moose Lodge*:

In contrast, here, as in *Burton*, the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities, and in whether that involvement makes the city "a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." [citing *Burton*] ... The question then is whether there is significant state involvement in the private discrimination alleged.

417 U.S. at 573. Since *Golden* involved the use of public property by a private entity, the court should, therefore, have focused on *Burton* and *Gilmore* and determined if the city's involvement was significant within the meaning of those decisions.

51. 530 F.2d at 31-32. Judge Brown also compared *Golden* to *Gilmore* by indicating that, as the city's policies in *Gilmore* operated to contravene an outstanding desegregation order, so also the city's lease in *Golden*, and its refusal to recognize the club's membership policies, operated to contravene its own antidiscrimination ordinances. 530 F.2d at 32.

In addition to his discussion of *Gilmore*, Chief Judge Brown discussed at some length the ordinances enacted by the City of Miami which prohibited both racial and religious discrimination by lessees of city property, and sponsorship requirements when the lessee is a private club. 530 F.2d at 26-31, 33. Chief Judge Brown was of the opinion that the ordinances imposed a burden on both the city and the club to prevent discrimination and that the city's failure to remove the barrier of discrimination constituted "complicity in the enterprise of sufficient magnitude to satisfy even the most conservative state action standards." *Id.* at 30-31. There is support in the case law for the Chief Judge's assertion that failure to act on the part of a municipality may constitute state action. In *Jennings* v. *Patterson*, 488 F.2d 436 (5th Cir. 1974), plaintiffs sought to base a finding of state action on the failure of city officials to remove a barricade placed across a public street by private persons to prevent black residents from using the street. The court held that the failure of the city and its governing officials to dismantle the fence constituted the state action proscribed by 42 U.S.C. § 1983. *Id.* at 441. Similarly, in *Azar* v. *Conley*, 456 F.2d 1382 (6th Cir. 1972), where plaintiffs had brought a civil rights action alleging harassment and intimidation by various defendants, including police officers, and inaction and cover up on the part of police and other city officials, the court concluded that "[s]election 1983 is applicable in the case of acts of omission as well as commission." *Id.* at 1387.

Both *Jennings* and *Azar* relied on substantially the same language in *Monroe* v. *Pape*, 365 U.S. 167 (1961). The issue before the Court in *Monroe* was "whether Congress, in enacting [42 U.S.C. § 1983] meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Id.* at 172. The pertinent language in *Monroe* is as follows:

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

*Id.* at 180.

Although not cited by Chief Judge Brown in *Golden*, there is also dicta in *Burton* which is supportive of his position.
However, his interpretation of *Gilmore* is perhaps overly broad, as the Court in *Gilmore* did not actually hold that unconstitutional state action would exist where the state allows any discriminatory private entity the use of public property. Also, in discussing situations where state action may be found through the use of publicly owned property, the *Gilmore* Court indicated that aid in addition to the use of the city property may be required. However, it is clear that *Gilmore* had a direct bearing on the factual situation in *Golden*. In recent decisions, other courts have found it necessary to consider *Gilmore* in situations where state action was sought to be based upon the use of public land by a private discriminating entity and the majority in *Golden* should have faced and dealt with

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As the Chancellor pointed out, in its lease with Eagle [the restaurant] the Authority [the state agency] could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be.

365 U.S. at 725.

The majority in *Golden*, however, dismissed the issue raised by the ordinances on two grounds. First, the court indicated that there was no cross assignment of error by appellees which raised any issue of pendant jurisdiction relief. 530 F.2d at 22. Second, the court stated that nothing was said in the district court "about a failure to enforce the ordinances as possibly supplying grounds for Fourteenth Amendment relief." Id. at 23.

52. See text accompanying note 47 supra.

53. 417 U.S. at 574.

54. *Fortin* v. Darlington Little League, 514 F.2d 344 (1st Cir. 1975); *Magill* v. Avonworth Baseball Conference, 516 F.2d 1328 (3d Cir. 1975). Both *Fortin* and *Magill* involved actions by young girls, through their parents, against boys' baseball leagues after the girls were refused permission to participate in the baseball programs. In both cases, plaintiffs urged the courts to find state action based primarily upon the fact that the leagues conducted their baseball programs on public property. In *Fortin*, the district court had found that baseball diamonds were laid out to league specifications, were primarily for the league's benefit, and that due to league activities the general public was often precluded from using the facilities. 376 F. Supp. 473, 478 (D.R.I. 1974). The First Circuit, relying on *Gilmore*, affirmed the lower court's finding of "significant" state action. 514 F.2d at 347. In *Magill*, the Third Circuit in finding no state action distinguished *Fortin* stating that there was no evidence that diamonds were laid out to league specifications, that the facilities were primarily for the league's benefit, or that the general public was often precluded from using the facilities. 516 F.2d at 347. *Magill* also relied heavily on *Gilmore*.

It is important that in both cases the courts' approaches indicated that a "government function" theory of state action was inapplicable. Rather, they focused on whether the state's involvement was significant. The governmental or "public function" theory of state action would appear to be applicable only in limited situations where the private entity is exercising a power, or performing a service, "delegated to it by the State which is traditionally associated with sovereignty." *Jackson* v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974). Based on these cases it would appear that, despite the deed to the city requiring that the bay bottom
the Gilmore decision.

In Golden, the court rejected the less stringent test for state action espoused by some courts in cases involving racial discrimination.\(^5\) The three-judge appellate panel had justified its acceptance of a less stringent test in cases involving racial discrimination on the ground that "such discrimination was the very condition that precipitated the enactment of the fourteenth amendment."\(^5\) Furthermore, the panel had gone on to extend prior law by equating religious discrimination with racial discrimination.\(^5\) The panel's conclusion that a less stringent standard should be applied evoked a strong dissent from Judge Coleman:

But the present majority opinion says that state action is not in what the state does but is to be determined by who it does it to, that is, there is one law for a racial or religious complaint and yet another for the denial of an abortion which the state is constitutionally forbidden to deny. I simply cannot grasp the logic for this type of judicial picking and choosing.\(^5\)

land be used for public purposes, public function analysis would have been neither successful nor appropriate in Golden. For a brief discussion of state action theories see note 14 supra, and for a more detailed analysis see the sources cited therein.

\(^{55}\) Weise v. Syracuse University, 522 F.2d 397, 406 (2d Cir. 1975); Jackson v. Statler Foundation, 496 F.2d 623, 628 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975); Pitts v. Dep't of Revenue, 333 F. Supp. 662, 668 (E.D. Wis. 1971); see Ascherman v. Presbyterian Hosp. of Pac. Medical Center, Inc., 507 F.2d 1103, 1106 (9th Cir. 1974); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968); Bright v. Isenbarger, 314 F. Supp. 1382, 1392-94 (N.D. Ind. 1970), aff'd, 445 F.2d 412 (7th Cir. 1971) (appellate court found it unnecessary to decide whether state action cases not involving discrimination require a more demanding standard). See also Jackson v. Metropolitan Edision Company, 419 U.S. 345, 365 (1974) (Marshall, J., dissenting).

\(^{56}\) 521 F.2d at 351.

\(^{57}\) The panel had concluded that "in this context religious discrimination ... carries the same stigma of inferiority and badge of opprobrium that is characteristic of racial discrimination." Id. The court further indicated that this case involved invidious discrimination which violated the equal protection clause of the fourteenth amendment as well as the establishment and free exercise clauses of the first amendment. Id. at n.18.

\(^{58}\) 521 F.2d at 355. Judge Coleman's reference to the denial of an abortion refers to a claim asserted in Greco v. Orange Memorial Hosp., 513 F.2d 873 (5th Cir.), cert. denied, 423 U.S. 1000 (1975). In Greco, the hospital had refused to allow nontherapeutic abortions. A doctor sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 alleging that the hospital's policy was unconstitutional. The hospital leased both the land and the hospital building from the county for one dollar per year. County and federal money had been used to erect the original building and subsequent additions. Furthermore, the hospital was exempt from federal, state, and local taxation. The court in Greco held that there was not sufficient involvement by the county to justify the imposition of constitutional restrictions. The panel majority in Golden had distinguished Greco on the ground that the hospital was not accused of racial discrimination. 521 F.2d at 350-51. The Greco court had distinguished Burton on the same basis. 513 F.2d at 879-80.
However, the logic behind this approach to state action was well expressed by Judge Smith in *Weise v. Syracuse University*:

As the conduct complained of becomes more offensive, and as the nature of the dispute becomes more amenable to resolution by a court, the more appropriate it is to subject the issue to judicial scrutiny. This explains the willingness to find state action in racial discrimination cases although the same state-private relationship might not trigger such a finding in a case involving a different dispute over a different interest. Class-based discrimination is perhaps the practice most fundamentally opposed to the stuff of which our national heritage is composed, and by far the most evil form of discrimination has been that based on race.  

It would appear that Judge Coleman's view has prevailed. The majority in *Golden*, after noting that both *Burton* and *Moose Lodge* involved racial discrimination, asserted that the Supreme Court accepted them as lines of demarcation in *Jackson*, a nonracial case, and concluded that whether or not racial discrimination is involved, "the facts either establish or do not establish significant state involvement in the private activity." Thus, the court's decision in *Golden* may fairly be read as requiring that future analysis of state action be limited to the nature and extent of the state involvement in the private activity, and that regardless of the nature of the constitutional right allegedly infringed, a single standard be applied. Presumably, this analysis would also preclude focus on the nature of the challenged party's constitutional rights. Thus, it is possible to read the court's opinion as rejecting the balancing of interests approach to state action.

However, while the *Golden* majority did not discuss in detail the interests of the parties at stake, it would appear that their

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59. 522 F.2d 397, 406 (2d Cir. 1975). While many cases seem to have acknowledged the existence of two state action standards, one for cases involving racial discrimination and another for nonracial cases, it seems possible that further gradations of state action will evolve in future cases. This possibility was foreshadowed in *Weise*. There plaintiffs contended that discrimination on the basis of sex should be categorized with discrimination on the basis of race for purpose of finding state action. The court stated, however, that "it is not necessary to put sex discrimination into the same hole as race discrimination to hold that in this case a less stringent state action standard should be employed . . . ." *Id.*  

60. 530 F.2d at 190.  
61. It would be anomalous to refuse to allow the nature of the interest asserted by the complaining party to influence the state action decision through the use of a different standard depending on the nature of that right and yet allow the nature of the interest challenged to militate against a finding of state action.
relative interests were considered by the court. Judge Brown in the panel majority opinion indicated "that Courts should minimize the extent to which they infringe on the individual's First Amendment right to freedom of association." Also, Judge Coleman, dissenting in the panel decision, expressed concern as to the effect of the panel decision upon "the heretofore loudly trumpeted constitutionally guaranteed rights of privacy and freedom of association." Thus, the court seems to have recognized that the members of the club could assert strong associational and privacy interests. On the other hand, the plaintiffs could clearly assert a strong interest in being considered for membership without regard to race or religion.

In a case such as Golden, where the court is faced with "a conflict between two profound claims of right" and where precedent does not clearly mandate a finding of state action, it is unlikely that a decision can or should be made merely on an examination of the extent of state involvement without considering the nature of the interests of the parties at stake. To the extent that the court was influenced by the associational and privacy interests of the club, the decision may be viewed as a policy decision to protect those interests by preventing federal court intervention in the membership policies of the club.

Golden v. Biscayne Bay Yacht Club presented the court with a particularly difficult choice. In light of relevant Supreme Court pre-

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62. 521 F.2d at 353.
63. 521 F.2d at 356.
64. It has been suggested, however, that the associational rights of a social organization may be less compelling than those which may be asserted by other groups, such as religious or political organizations, because of the primary value placed on religious and political association by the first amendment. Note, Developing Legal Vistas, supra note 14. However, social organizations may be able to assert a strong private interest. Therefore, it has further been suggested that it may be more sensible to consider the right to privacy, rather than freedom of association, in attempting to measure the limits of racial and religious discrimination. Note, Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy, 1970 Duke L.J. 1181, 1211.
65. The strength of the plaintiff's interest in the context of the instant case has been questioned elsewhere. See 54 Tex. L. Rev. 641, 648 noting the panel decision in Golden. Regarding plaintiff's right to use the docking facilities of a private club, the note states that it is "of minimal importance [not rising] to a level of significance sufficient to invoke judicial solicitude." Id. at 648. Although other rights may be entitled to greater judicial concern, it can effectively be argued that whenever discrimination on the basis of race or religion occurs, arguably supported by the state, the complaining party is able to assert an important right or interest.
cedent the issue of the existence or nonexistence of significant state action was a close one. Furthermore, resolution was made more difficult in that the underlying policies weighed heavily—the elimination of state supported discrimination, and the protection of associational and privacy rights are both important goals. While the court’s decision is not necessarily subject to criticism on a policy level, it is subject to some criticism for not confronting, and distinguising if possible, a relevant and recent Supreme Court decision. Also, to the extent that concern with the associational and privacy rights of the club affected the court’s decision, the court should have articulated the impact of these considerations on its decision. Such a pronouncement would have provided a clear statement that the court’s refusal to act against discriminatory conduct was made in light of important countervailing interests. This would have avoided any implication of judicial approval of, or even insensitivity to, discriminatory conduct.

67. Plainly there was some support given by the lease from the city to the club. As stated by Mr. Justice White concurring in the judgment in Gilmore:

[T]here is very plainly state action of some sort involved in the leasing, rental, or extending the use of scarce city-owned recreational facilities to private schools or other private groups. . . . For Fourteenth Amendment purposes, the question is not whether there is state action, but whether the conceded action by the city, and hence by the State, is such that the State may be deemed to have denied the equal protection of the laws.

417 U.S. at 582.

68. The particular facts of the instant case, and the nature of the relief sought by plaintiffs and granted by the district court added a further dimension to the problem. As stated by the court in Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182 (D. Conn. 1974), suits aimed directly at stopping allegedly unconstitutional conduct by private entities have appeared to present courts with the bleak alternative of either finding “state action,” with its drastic impact on every aspect of the entities’ operations, or finding no “state action,” thus allowing entities subject to no public accountability for their conduct to continue to receive public assistance so long as that assistance, however substantial, does not reach the critical mass which transforms the entity into an agent of the state.

382 F. Supp. at 1190 n.8. Furthermore, while it has been suggested that suits to enjoin state assistance of private conduct involve a less drastic remedy than suits aimed directly at enjoining private conduct, Note, Developing Legal Vistas, supra note 14, at 111, and therefore may well succeed upon a lesser showing of state involvement, 382 F. Supp. at 1190 n.8, it is arguable that on the facts of the present case the cancellation of the lease would have acted upon private conduct in a more direct way. Without the use of the bay bottom land to support its docks, the club would not have been able to exist as a yacht club. See 530 F.2d at 32 (Brown, C.J., dissenting).


70. One commentator has noted that one of the costs of perpetuating private discrimina-
Golden presents several state action issues worthy of resolution on a national level. The issue of whether a less stringent state action standard should be applied in cases involving alleged racial discrimination should be definitively answered and the law in the circuits made uniform on this point. Also, the question of the impact of any constitutional right which defendant may assert on the state action decision should be considered so that courts throughout the country can focus on only the appropriate factors. Finally, and more specifically, the issue of the nature of state involvement necessary for a finding of state action in the private club context is worthy of further definition by the Court. Moose Lodge made it clear that licensing and regulation are not sufficient. However, Gilmore indicated that where the state makes public property available for private use, Moose Lodge is not entirely apposite. Since similar cases are likely to arise in the future, further guidance would be desirable. The Supreme Court has, however, denied certiorari in Golden.71 It is submitted that this denial was unfortunate as the opportunity to make important contributions to state action theory was lost.

LOUIS B. TODISCO

Time, Inc. v. Firestone: Is Rosenbloom Really Dead?

The author suggests that the Supreme Court has redefined the once discarded subject matter analysis for determining the applicability of the constitutional privilege in defamation suits and incorporated it into a new, two-pronged test for determining whether a defamation plaintiff is a public figure.

Time, a nationally known weekly news magazine, published an item in its "Milestones" section informing its readers that Russell A. Firestone, heir to the tire fortune and wife, Mary Alice Sullivan

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