its wide discretion and broad implication in declaring the 1967 Act unconstitutional.

For the future as based on past precedent in the case at hand and in the case of *Berta v. State,* it seems that the Georgia Supreme Court will continue to support a general law in this area with certain necessary exceptions but will continue to strike down a hit or miss law which has no logic in its classifications and no equity in its exemptions.

JACOB BEIL

CIVIL RIGHTS—TITLE II OF CIVIL RIGHTS ACT OF 1964—PRIVATE CLUB EXCLUSION

Nesmith v. Young Men's Christian Ass'n[1] involved a class action brought by a Negro seeking injunctive relief against alleged racially discriminatory practices in the operation of a YMCA health and athletic club building. The YMCA provided lodging to transient guests and sold food in an adjacent community club building physically connected to the health and athletic club building by a covered walkway. Both buildings were served by the same heating unit and other facilities and both were under the same management. Plaintiff asserts that since the activities of the community club building constitute a place of public accommodations as defined by Title II, Section 201 (b) (1) and (b) (2) of the Civil Rights Act of 1964,[2] and since Section 201 (e) is inapplicable,[3] its total facilities and operations are covered by the act. This argument is based on the contention that the athletic and health club facilities are physically located within the premises of the community club building, a covered facility, and thus comes within the provisions of Section 201 (b) (4) of the act[4] which provides coverage of any establishment "which is physically located within the premises of any establishment otherwise covered by this section . . . which holds itself out as serving patrons of such covered establishment."[5] The parties agreed that the community club fell within the provisions of the act.

The court held plaintiff's argument to be faulty in several respects. First, the athletic club facilities are not physically located within premises of the community building. The fact of the connecting walkway, common heating unit and operation by the same person are of little consequence. Second, there is no evidence that defendant association has ever represented that its athletic facilities are available to patrons of the community building or to the public generally. Membership to the community club does not give access to the athletic club. Further, admission to membership is within

1. 273 F. Supp. 502 (E.D. N.C. 1967).
2. 78 Stat. 243, 42 U.S.C. §2000a (1964).
3. *Id.*
4. *Id.*
5. *Id.*

the sole discretion of a membership committee. No scheme or subterfuge to evade the provision of Title II exists, such membership procedure being established for over twenty-seven years. While admission is discretionary, there is some basis of selectivity, and while admission refusals have been small, the committee has nevertheless in the last year rejected five persons, one being plaintiff and the others Caucasians.[6]

Section 201 (e) of the Civil Rights Act of 1964 specifically exempts clubs "not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection 201 (b) of this section."[7] At present no authoritative case has been decided which construes literally the language of this section; such lack resulting in an absence of definitive guidelines for use in dealing with cases involving this subsection. It was said by Senator Long during the debate in the United States Senate on this section of the Act that "its purpose is to make it clear that the test of whether a private club or other establishment not open to the public is exempt from Title II relates to whether it is *in fact* a private club . . . not open to the public."[8] As to the requirement concerning whether a club is *in fact* a private club, Senator Humphrey during the same debate said, "We intend only to protect the genuine privacy of private clubs and other establishments whose membership is genuinely selective on some reasonable basis."[9]

One writer has pointed out that, based on court decisions, cases dealing with alleged discrimination by private clubs seldom turn on any one issue,[10] and one court stated that in determining whether an establishment falls within the provisions of the act, each case must be decided on its own merits.[11] In cases where the courts have been faced with this problem in the past, there can be isolated factual guidelines which have been considered as determinative in individual cases. Primary among these factors are the following: (1) whether it is a bona fide club with limited membership;[12] (2) whether a genuine lack of qualification for membership exists, so that in practical effect the only requisite is being white;[13] (3) whether a procedure for obtaining membership is a sham such as offering membership cards as a matter of course to any white customer;[14] (4) whether the limit of members or practice of real selectivity was not such as to remove exemp-

6. Nesmith v. Young Men's Christian Ass'n, 273 F. Supp. 502 (E.D. N.C. 1967).
7. 78 Stat. 243, 42 U.S.C. §2000a (1964).
8. 110 Cong. Rec. 13697 (1964) (emphasis added).
9. *Id.*
10. Comment, *Title II of Civil Rights Act of 1964 Provides Relief Against Discrimination*, 43 Texas L. Rev. 423 (1965).
11. Willis v. Pickrick Restaurant, 231 F. Supp. 396 (N.D. Ga. 1964).
12. Commission of Corporation v. Chilton Club, 318 Mass. 285, 61 N.E.2d 335 (1945).
13. Castle Hill Beach Club v. Aubury, 142 N.Y.S.2d 432, aff'd 2 N.Y.2d 596, 146 N.E.2d 186 (1957).
14. United States v. Northwest Restaurant Clubs, 256 F. Supp. 151 (W.D. La. 1966).

tions;[15] and (5) advertising to the general public without reference to a particular group.[16] Within these limitations as used by courts in previous cases it would appear that the decision in the principal case was not within the established criteria because there was no evidence of advertising, plus there was some basis of selectivity, and an acceptable procedure for membership did exist. Even if one challenged the court's ruling that the fact of the connecting walkway, common heating unit and management was of no consequence, he would still be unable to surmount the obstacle of the requirement of a *holding out of services* to patrons of the covered establishment.[17]

What of the future? In which direction will the courts move? Will there be a further movement in the direction of a liberal construction of Title II to widen the base of facilities declared to be not private in fact and so remove what has been termed "a daily affront and humiliation involved in discriminatory denials to facilities open to the public?"[18] One area in which the courts will be quick to respond concerns clubs found to exist, or be supported, "under color of any statute, ordinance, regulation, custom or usage of any state or territory."[19] If a club is so found, then under the act, a basis for court intervention to compel integration of the club facilities is present. "Since the Civil Rights cases the supreme court has held that the fourteenth amendment prohibits *State Action* (emphasis added) and not purely private action. Subsequent decisions have greatly expanded the reach of *State Action* (emphasis added)."[20] It has also been suggested that such expansion has not yet ended.[21] This is clearly evidenced by the case of *Ethridge v. Rhodes*,[22] where the Federal District Court for the Southern District of Ohio enjoined the State of Ohio from contracting with a construction firm for the construction of a new medical school building because, as stated by the court: "Since the contractors will hire only through unions and a majority of the craft unions do not have Negro members and will not refer non-member Negroes, the contractors will hire only non-Negroes in a majority of the crafts needed to work on the project."[23] Only

15. Evans v. Laurel Links, Inc., 261 F. Supp. 474 (E.D. Va. 1966).
16. Clover Hill Swimming Club, Inc. v. Goldsboro, 47 N.J. 25, 219 A.2d 161 (1966); Fletcher v. Coney Island, 69 Ohio L. Abs. 264, 121 N.E. 574 (Ct. C.P. 1954), rev'd other grounds, 100 Ohio App. 259, 136 N.E.2d 244 (1955), aff'd 165 Ohio St. 150, 134 N.E.2d 371 (1956). *See also Civil Rights Act of 1964—Public Accommodations—Private Exemption*, 45 N.C. L. REV. 498 (1967).
17. Nesmith v. Young Men's Christian Ass'n, 273 F. Supp. 502 (E.D. N.C. 1967). *See also* Pickney v. Meloy, 241 F Supp. 943 (N.D. Fla. 1965); 2 U.S. CODE CONG. & AD. NEWS 2358 (1964).
18. General Statement to H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964), 2 U.S. CODE CONG. & AD. NEWS 2391 (1964).
19. 42 U.S.C. §1983.
20. Curtis, *Constitutional Law—Racial Discrimination—Expansion of State Action*, 46 N.C. L. REV. 149 (1967).
21. *Id.*
22. 268 F. Supp. 83 (S.D. Ohio 1967).
23. *Id.* at 87.

a moment's reflection is required to realize the far reaching effect such a decision can have on the expansion of the concept of state action.

What then does this mean to private clubs such as the defendant association; at what point will their activities cross the dividing line between purely private activities and the nebulous concept of state action? Will the fact of incorporation under the laws of a state furnish the necessary state participation. Up to this point the courts have avoided such a determination. But perhaps indicative of the future is the concurring opinion of Mr. Justice Douglas in *Garner v. Louisiana*,[24] wherein he stated that the fact of a mere busines license granted by the state may be sufficient to constitute such activity. Another area for which some groundwork already exists is that of exemption from taxation as is the defendant association. The courts have held that the underlying reason for such exemption is that it be given in return for the performance of functions which benefit the *public*.[25] As said by one court, "in the exercise of the power to tax, it is inherent that a state be free to select the subjects of taxation and to grant exemptions."[26] Thus, it is not inconceivable that in the future federal courts will find that the exercising of the power to select subjects for taxation is an exercise of state action within the meaning of the act, and that the requirement that an organization possessing such an exemption, so conduct itself as to benefit the general public in the use of its facilities, and not just the white public.[27] This is particularly true when viewed from the standpoint that it is obviously inconsistent with the public interest as a whole to allow exemptions for organizations which refuse to recognize or to accept members from the public at large, instead accepting only a particular segment thereof, the remainder being excluded from consideration solely on the basis of race. This type of exclusion has in effect been declared as against public policy when related to actions under color of state law.

OTIS H. ALMAND, JR.

TORTS—DAMAGES—COMPARATIVE NEGLIGENCE

Plaintiff's decedent was killed in an automobile collision. Plaintiff sought recovery[1] under the Illinois Wrongful Death Act.[2] The first and second counts of the declaration were not considered on appeal; plaintiff appealed from a dismissal of the third count which did not allege that the deceased was exercising ordinary care for his own safety at the time of the collision but did allege that if there was any negligence on the part of the plaintiff's

24. 368 U.S. 157 (1961).
25. 84 C.J.S. *Taxation* §281 (1954).
26. Leo Feist, Inc. v. Young, 46 F. Supp. 622 (D. Wis. 1942); *cf*, Williams v. Rescue Fire Co., Inc., 254 F. Supp. 556 (D. Md. 1966).
27. *Cf.* Williams v. Rescue Fire Co., Inc., 254 F. Supp. 556 (D. Md. 1966).
1. Maki v. Frelk, 85 Ill. App.2d 439, 229 N.E.2d 284 (1967).
2. ILL. REV. STAT. ch. 70 §§1, 2 (1965).