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Charles Baily Tomb

that a cause of action for personal injury accrued only when the plaintiff has reason to know that he had been injured. While in *Young* the injury was not immediately recognized, the Fourth Circuit applied the same rationale in *Portis* where the cause of the injury "was neither known nor reasonably detectable."[312]

D. *Workmen's Compensation*

Because an employer had not made a good faith attempt to comply with the requirements of the West Virginia Workmen's Compensation Act,[313] the Fourth Circuit ruled in *Fair v. Korhumel Steel and Aluminum Co.*[314] that the employer was precluded from using the Act as a bar to an employee's negligence action. The court also held that by accepting money improperly tendered to him as a workmen's compensation award, the employee had not waived his negligence claim. One judge dissented in the case and admonished the court for being overly technical in light of the legislative purpose behind the Act.[315]

ANGELICA PRESTON DIDIER
WILLIAM BRUCE HAMILTON, JR.

FIRST AMENDMENT RIGHTS AND THE USE OF PUBLIC FACILITIES BY PRIVATE GROUPS WITH DISCRIMINATORY MEMBERSHIP POLICIES: *NATIONAL SOCIALIST WHITE PEOPLE'S PARTY v. RINGERS*

During the last quarter century, judicial decisions have consistently championed two constitutional values: the first amendment's guarantee of free speech and peaceful assembly[1] and the fourteenth amendment's proscription against state involvement in racial dis-

[312]483 F.2d at 673.
[313]W. VA. CODE ANN. § 23-2-1 (1973).
[314]473 F.2d 703 (4th Cir. 1973).
[315]*Id.* at 707. (Bryan, J., dissenting).

[1]*See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939). While first amendment rights are of extreme importance, the Supreme Court has ruled that they may be regulated under certain circumstances. For instance, police may prevent a breach of the peace where a "speaker passes the bounds of argument and undertakes incitement to riot . . . ." Feiner v. New York, 340 U.S. 315, 321 (1951). See notes 28-30 *infra* and accompanying text.

crimination of any sort.[2] *National Socialist White People's Party v. Ringers*[3] presented the Fourth Circuit with a unique situation—a potential conflict between these two amendments. The court was faced with deciding whether state participation in racial discrimination occurs when organizations with restrictive membership policies are given access to public facilities regularly made available to private groups for the exercise of first amendment rights. In a matter of first impression, the court held[4] that the first amendment interests of free speech and peaceful assembly must prevail.[5] The Fourth Circuit ruled that the use of public facilities by private groups with discriminatory membership policies does not constitute state involvement in the groups' practices.[6]

The dispute in *Ringers* arose from attempts by the National Socialist White People's Party, a successor of the American Nazi Party, to rent facilities in a Virginia high school for the purpose of holding political meetings.[7] Prior to 1970, the Party made two applications to rent the Yorktown High School auditorium. Permission was denied on both occasions. Finally, the Party was granted a rental permit to hold a public meeting on March 7, 1970. The permit was subsequently revoked when the Party issued a news release announcing a rally in the auditorium to which all interested members of the general public were invited, with the exception of Jews and blacks.[8] On the evening of the planned rally, a non-violent demonstration in protest of the permit revocation was held outside the school building and later at the home of the assistant superintendent of schools. Six party members were arrested at the assistant superintendent's home for violating a county noise ordinance.[9]

All of the auditorium rental applications were made pursuant to regulations promulgated by the Arlington County School Board. Virginia law permits local school boards to rent high school auditoriums

[2]*See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

[3]473 F.2d 1010 (4th Cir. 1973).

[4]The ruling was a 6-1, en banc decision.

[5]473 F.2d at 1019.

[6]*Id.*

[7]Membership in the National Socialist White People's Party is open to all white people who subscribe to the Party's doctrines. Among the purposes stated in the Party charter is the goal of "gaining power in the United States by all legal means and the elective process." National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1019 (4th Cir. 1973) (Butzner, J., dissenting).

[8]*Id.* It should be noted that while the Party did not invite blacks and Jews, it would not exclude them from public meetings if they sought admission. *Id.* at 1013.

[9]*Id.* at 1013.

during non-school hours for lawful assemblies[10] as long as the efficiency of the schools is not impaired.[11] Before leasing auditorium facilities, school boards are directed to adopt rules and regulations necessary to protect all school property used for public assemblies.[12] Accordingly, the Arlington County School Board issued regulations under which it rented the Yorktown High School auditorium to organizations in "good standing."[13]

On April 3, 1970, the Party made a fourth request to rent the auditorium. It was to be used for a private meeting, open only to "card carrying members and official supporters,"[14] at which Adolph Hitler's eighty-first birthday was to be commemorated.[15] The Board denied the request without explanation. As a result, the Party instituted suit seeking declaratory and injunctive relief.[16] It claimed that refusal to grant the permit constituted "state action" violative of the Party's first amendment rights of free speech and peaceful assembly. The Party maintained that the permit denial constituted an improper form of censorship and was therefore an invalid prior restraint of first amendment activities. It further claimed that its fourteenth amendment right to equal protection of the laws had been abridged.[17]

The School Board defended on the grounds that the Party's proposed meetings would likely result in violence and damage to school facilities. The Board also contended that renting the auditorium to the Party would foster and encourage the Party's discriminatory membership policy and that the Board would thereby become involved in that policy. In support of this latter contention, the Board

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[10]VA. CODE ANN. § 22-164 (Supp. 1973).

[11]VA. CODE ANN. § 22-164.1 (Repl. vol. 1973).

[12]VA. CODE ANN. § 22-164 (Supp. 1973).

[13]Note 72 *infra*.

[14]473 F.2d at 1013.

[15]National Socialist White People's Party v. Ringers, 429 F.2d 1269, 1270 (4th Cir. 1970). See note 16 *infra*.

[16]The history of the case is a long one. The district court refused the Party's request for a preliminary injunction to prevent the School Board from denying the use of the auditorium. National Socialist White People's Party v. Ringers, Civil No. 158-70-A (E.D. Va., April 16, 1970). On appeal, the Fourth Circuit held that there was no clear abuse of discretion in the district court's denial of interlocutory relief. The circuit court further ruled that the constitutional issues raised by the Party were not ripe for adjudication because of incomplete evidence and remanded the case for further hearing. National Socialist White People's Party v. Ringers, 429 F.2d 1269, 1270 (4th Cir. 1970). On remand, the district court ruled in favor of the School Board. National Socialist White People's Party v. Ringers, Civil No. 158-70-A (E.D. Va., June 5, 1972). See note 21 *infra* and accompanying text. Throughout the entire three years of litigation, the American Civil Liberties Union was of counsel appeared on brief for the Party.

[17]473 F.2d at 1012.

stressed that whenever a state places its power or prestige behind discriminatory acts or omissions,[18] the fourteenth amendment "state action" doctrine is invoked to prevent the use of state authority to further such discrimination.[19] As an arm of the state government, the School Board therefore argued that the "state action" doctrine required denial of the use of a public auditorium to political organizations with restrictive membership policies.[20] The district court found

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[18]*See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

[19]"State action" required under the fourteenth amendment has consistently been treated the same as "under color" of state law required by 42 U.S.C. § 1983 (1970). United States v. Price, 383 U.S. 787, 794 n.7 (1966), *citing* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Smith v. Holiday Inns, 336 F.2d 630 (6th Cir. 1964); Simkins v. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Hampton v. Jacksonville, 304 F.2d 320 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945).

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), sets forth what is probably the most quoted "state action" test:

> ["State action" occurs whenever a state] has so far insinuated itself into a position of interdependence [with an otherwise private person whose conduct allegedly violated the Fourteenth Amendment] 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.

365 U.S. at 725; *see* United States v. Price, 383 U.S. 787, 794 n.7 (1966); *cf.* Evans v. Newton, 382 U.S. 296 (1966); Robinson v. Florida, 378 U.S. 153 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244 (1963); Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957); Terry v. Adams, 345 U.S. 461 (1953); Public Utilities Commission v. Pollak, 343 U.S. 451 (1952); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Smith v. Allwright, 321 U.S. 649 (1944).

[20]While appearing in neither the court record nor the School Board's brief, it seems very likely that the Board felt it was faced with the following dilemma:

> (a) On one hand, it could grant the Party's rental permit application. After the news release publicizing the proposed March 7, 1970, meeting (note 8 *supra* and accompanying text), renting the auditorium would almost certainly have resulted in a suit by black civil rights groups claiming that the Board aided the Party's racist aims by providing a meeting place for a nominal fee—*i.e.*, a fourteenth amendment "state action" claim pursuant to 42 U.S.C. § 1983 (1970); or
> (b) It could deny a rental permit and risk a possible suit by the Party.

Admittedly, a civil rights group might have difficulty showing injury and thus encounter standing problems in trying to sue the Board. However, since the Party had shown no inclination to resort to the courts after the previous permit denials, it is understandable why the Board chose once again to deny the rental permit request.

both of the Board's defenses valid and ruled that denial of the rental application was justified.[21]

Thus, in *National Socialist White People's Party v. Ringers,* the Fourth Circuit was actually confronted with three questions. First, what constitutes a valid regulation of first amendment rights? Second, does the fourteenth amendment "state action" doctrine have any application where the use of facilities effectively dedicated to first amendment rights is involved? Third, where public facilities have been made available on a first-come first-served basis to a variety of organizations, does denial of their use to one certain organization constitute a denial of that organization's fourteenth amendment right to equal protection of the laws? Because of the circuit court's conclusions on the first amendment and "state action" issues, it did not reach this third question.[22]

First Amendment Rights and Government Regulation: Prior Restraint or Subsequent Punishment?

The Fourth Circuit in *Ringers* first considered the question of what constitutes a valid regulation, or proper prior restraint, of first amendment activities; *i.e.,* under what circumstances may a state circumscribe the rights of free speech and peaceful assembly?

Courts have consistently held that streets, parks, and other public places are "held in trust" for public purposes of assembly and communication of views on matters of general concern.[23] In essence, they

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[21]National Socialist White People's Party v. Ringers, Civil No. 158-70-A (E.D. Va., June 5, 1972).

[22]The Board agreed to the following stipulation with regard to the Party's alleged denial of equal protection:

> Over the past several years, the School Board has granted permit requests to hold both private and public meetings, on a continuing basis, to a wide variety of in-county and out-of-county organizations *(including groups whose membership does not include certain racial or religious affiliations).* Groups which have rented facilities include the Democratic Party, the Republican Party and other political, religious, civic and fraternal organizations . . . . Except for a few instances involving groups which had previously damaged school property during a prior usage, no group has been denied the use of an available facility with the exception of the Party. Uses have included dances, meetings, religious services and a wide variety of other uses.

473 F.2d at 1013-14 n.2 (emphasis added). Because of this stipulation, the Fourth Circuit stated that it was therefore uncertain whether or not denial of the rental permit application also involved abridgement of the Party's fourteenth amendment right to equal protection of the laws. However, it did not pursue the question because of its first amendment conclusions. 473 F.2d at 1013-14 n.2.

[23]473 F.2d at 1014-15, *quoting* Hague v. CIO, 307 U.S. 496, 515-16 (1939).

are public forums dedicated to the exercise of first amendment rights.[24] However, the privilege of using public forums and facilities is not unlimited or absolute. First amendment rights must be exercised in consonance with peace and good order.[25] Thus, the use of public facilities may be regulated in the interest of all;[26] but first amendment rights may not be abridged or denied in the guise of regulation.[27]

In *Brandenburg v. Ohio,*[28] the Supreme Court held that a statute restraining the rights of free speech and assembly must distinguish between "mere advocacy" and "incitement to imminent lawless action," regulating or punishing only the latter.[29] "A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the first and fourteenth amendments [and is therefore invalid]. It sweeps within its condemnation speech which . . . [the] Constitution has immunized from governmental control."[30]

Against this background, the Fourth Circuit in *Ringers* examined the School Board's defense that the Party's proposed meetings would likely result in violence and damage to school facilities. The court adopted the Seventh Circuit's decision in *Collin v. Chicago Park District*[31] and found the Board's defense "lacking in merit."[32] *Collin,* which also dealt with a controversy involving a successor to the American Nazi Party, discussed prior restraints at great length. In that case, there was evidence that the Party had used violent force in harassing peace demonstrators, and it was on this basis that the Park

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[24]Notes 50-53 *infra* and accompanying text.

[25]Hague v. CIO, 307 U.S. 496, 515-16 (1939). The *Hague* court also held that first amendment rights must be exercised "in subordination to the general comfort and convenience . . . ." *Id.* This language appears to be rather broad in light of more recent holdings. See notes 28-47 *infra* and accompanying text. However, governmental bodies are permitted to designate certain areas of a park for such things as picnics to the exclusion of other activities. Collin v. Chicago Park Dist., 460 F.2d 746 (7th Cir. 1972). They may also make and enforce regulations to promote the free flow of traffic on public streets. Feiner v. New York, 340 U.S. 315 (1951).

[26]Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Kunz v. New York, 340 U.S. 290 (1951); Hague v. CIO, 307 U.S. 496 (1939).

[27]"A state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." Feiner v. New York, 340 U.S. 315, 320 (1951), *quoting* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940); Hague v. CIO, 307 U.S. 496, 516 (1939).

[28]395 U.S. 444 (1969) (Ohio criminal syndicalism statute ruled invalid).

[29]*Id.* at 448.

[30]*Id., citing* Yates v. United States, 354 U.S. 298 (1957); DeJonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931).

[31]460 F.2d 746 (7th Cir. 1972).

[32]473 F.2d at 1014.

District premised its denial of the requested park area. The District did offer four alternative sites in distant parks where it felt that onlookers would be unlikely to react violently to the Party's exhortations. Such action was found invalid by the Seventh Circuit for three reasons. First, the requested park area had been previously used by public speakers, and the alternative sites removed the party from the area in which it was likely to draw the largest number of supporters. Meeting at one of the alternative sites would therefore have weakened the meeting's effect and crippled the Party's plea to some degree, both results serving to infringe upon the Party's first amendment rights.[33] Second, the Park District presented inadequate evidence to allow a "well-founded belief" that violence would occur.[34] Finally, the court stated that the existence of a hostile audience does not justify the restraint of otherwise legal first amendment activities.[35] It emphasized that the "expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers."[36]

As pointed out in *Collin*, the Supreme Court has often stated that any system of prior restraints bears "a heavy presumption against its constitutional validity."[37] Such systems require concrete evidence of their necessity; undifferentiated fear or foreboding of violence is inadequate to permit regulation of first amendment rights.[38] Therefore,

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[33]460 F.2d at 752.

[34]*Id.* at 754.

[35]*Id.*, *citing* Greogry v. Chicago, 394 U.S. 111 (1969); Terminello v. Chicago, 337 U.S. 1 (1949). *See also* Coates v. Cincinnati, 402 U.S. 611, 615 (1971); Street v. New York, 394 U.S. 576, 592 (1969); Cox v. Louisiana, 379 U.S. 536, 551-53 (1965); Edwards v. South Carolina, 372 U.S. 229, 238 (1963); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940). If hostile audiences were a basis for restraining first amendment activity, the following situation would exist:

> [T]he right of . . . people to gather in public places for social or political purposes would be continually subject to summary suspension through the good faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is "annoying" because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.

Coates v. Cincinnati, 402 U.S. 611, 615-16 (1971) (footnotes omitted).

[36]460 F.2d at 755, *quoting* Street v. New York, 394 U.S. 576, 592 (1969). *See also* Bachellar v. Maryland, 397 U.S. 564, 567 (1970).

[37]New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Freedman v. Maryland, 380 U.S. 51, 57 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota, 283 U.S. 697, 713 (1931).

[38]Healy v. James, 408 U.S. 169, 191 (1972), *citing* Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 508 (1969).

free speech and assembly may only be circumscribed where there is a "clear and present danger" that violence will result.[39] It is solely where "there are *special, limited circumstances* in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment."[40]

While *Collin, Brandenburg,* and other pertinent cases[41] all seem to address the regulation, restraint, or curtailment of first amendment rights, it is implicit in those cases that governmental intervention is constitutionally justified only when it deals with the abuse of those privileges.[42] Consequently, the most effective and most consistently upheld means of dealing with first amendment abuses is in their punishment, not in the restraint of first amendment activities from which abuses may arise.[43] This is so even where the exercise of

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[39]Schenck v. United States, 249 U.S. 47, 52 (1919). "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* Mr. Justice Holmes' "clear and present danger" test has received almost universal acceptance. However, it should be remembered that the test was enunciated during World War I. Mr. Justice Douglas contends that the "clear and present danger" standard can be justified only under the War Power, if at all. *See* Brandenburg v. Ohio, 395 U.S. 444, 450-55 (1969) (Douglas, J., concurring).

The "balancing test" is also used in *some* cases concerning the first amendment. Schneider v. State, 308 U.S. 147, 161 (1939). However, it is properly used only where first amendment rights are of tangential importance, such as cases involving statutes which regulate personal activities or require disclosure of membership lists. It has been strongly suggested by Mr. Justice Black that the "balancing test" is inappropriate in all situations, regardless of the circumstances. *See* Franz, *The First Amendment in the Balance,* 71 YALE L.J. 1424 (1962).

[40]473 F.2d at 1015, *quoting* Carroll v. Princess Anne, 393 U.S. 175, 180 (1968) (emphasis added). See also notes 28-30 *supra* and accompanying text.

[41]See note 37 *supra.*

[42]Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 541, 171 P.2d 885, 889 (1946), *citing* DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

[43]Statutes designed to prevent activities which are constitutionally subject to state regulation are often drawn in unnecessarily broad terms. The Supreme Court has repeatedly found such statutes invalid. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307-08 (1964); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463-65 (1958). See also notes 58-63 *infra* and accompanying text. Even those statutes which are drawn in sufficiently narrow terms may be broadened through improper administration and thereby become unconstitutionally broad. See notes 71-72 *infra* and accompanying text. The effects of improper administration are neutralized when proper procedural safeguards are provided. See notes 54-72 *infra* and accompanying text. However, because of the dangers inherent in any system of prior restraints, the most consistently upheld method of regulating first amendment activities is the proper subsequent punishment of abuses arising from those activities. The Supreme Court's statement in Kunz v. New York, 340 U.S. 290 (1951), illustrates this point: "There are appropriate public remedies to protect the peace and order of the community if appellant's

first amendment rights results in a situation likely to arouse passions or cause recriminations. "There is nothing new in the fact that charges of reprehensible conduct [or allegations of racial superiority] may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect [individuals and] the press against censorship and restraint . . . ."[44] Thus, the expression of racist and anti-semitic views in public places is a right protected against restraint and censorship; free speech may not be circumscribed on the grounds that the message is unpopular or distasteful.[45] If the exercise of first amendment rights results in abuse or violence, appropriate remedies exist to protect the public interests of peace and good order.[46] In short, because of the possible imposition of invalid prior restraints by courts and administrative bodies, the solution for abuse of first amendment rights lies not in regulation but in proper subsequent punishment.[47]

Ringers confronted the Fourth Circuit with an excellent example of administrative regulations arbitrarily applied at the prior restraint stage; the Board employed its auditorium rental provisions so as to deny administratively the Party's first amendment rights. The vacuity of the School Board's contention that permitting the Party to use

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speeches should result in disorder or violence." 340 U.S. at 294; DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Near v. Minnesota, 283 U.S. 697, 715 (1931). *See* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1518-19 (1970).

[44]Near v. Minnesota, 283 U.S. 697, 722 (1931). In *Near*, Mr. Chief Justice Hughes wrote that the first amendment guaranty of a free press was provided because the power of a government to prevent publication is a "more serious public evil" than any scandal that words may produce. *Id.* He alluded to the history of the first amendment in a quote from Madison:

> To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct.

Id., *quoting* REPORT ON VIRGINIA'S RESOLUTIONS, MADISON'S WORKS, vol. iv, 549 (1788).

[45]Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959); Collin v. Chicago Park Dist., 460 F.2d 746, 754 (7th Cir. 1972). See note 35 *supra* and note 85 *infra*.

[46]Kunz v. New York, 340 U.S. 290, 294 (1951); *cf.* Near v. Minnesota, 283 U.S. 697, 717 (1931), *quoting* Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313 (1820): "The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse."

[47]Note 43 *supra*.

the high school would result in violence and damage to school facilities is shown by the trial stipulations. In the stipulations, the Board agreed that other than the Party's action following revocation of the rental permit for the March 7, 1970, meeting, it knew of no other violent acts by the Party.[48] However, even the March 7 demonstration was non-violent, and it should further be noted that the Party was protesting the denial of its asserted right to use the auditorium. To have held that denial of the Party's first amendment rights could be justified on the basis of a subsequent demonstration in protest of that denial would have been anomalous.[49]

That the Board found the Party's program distasteful is quite understandable; but once a school's doors are opened for public purposes, "tickets of admission" in the form of acceptable convictions and affiliations clearly cannot be demanded.[50] The Fourth Circuit found that the Board's repeated exercise of discretionary authority to rent the Yorktown High School auditorium for non-school purposes constituted "an effective dedication of the auditorium for the exercise of first amendment rights . . . [making it] conceptually indistinguishable for first amendment purposes . . . [from such 'public places' as] streets and parks, which too, are acquired and maintained at public expense."[51] The court's determination that the Board had effectively caused the auditorium to become a public forum meant

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[48]National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1014 n.3 (4th Cir. 1973).

[49]United States v. Dougherty, 473 F.2d 1113, 1126 (D.C. Cir. 1972).

[50]Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 543, 171 P.2d 885, 892 (1946). States are not permitted to impose unconstitutional requirements as conditions for granting privileges. This is true even where the privilege in question is the use of state property. 28 Cal. 2d at 542, 171 P.2d at 891; Murdock v. Pennsylvania, 319 U.S. 105, 110-11 (1943); Hague v. CIO, 307 U.S. 496, 515 (1939); Frost v. Railroad Comm'n, 271 U.S. 583, 594 (1926). *See* Ellis v. Allen, 165 N.Y.S.2d 624, 626 (App. Div. 1957), *appeal dismissed*, 4 N.Y.2d 693, 171 N.Y.S.2d 86 (1958): "School authorities may, if they choose, close the door to all outside organizations, but if they open the door they must treat alike all organizations in the same category." *See also* Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) (first amendment rights of Jehovah's Witnesses); Niemotko v. Maryland, 340 U.S. 268, 272-73 (1951) (first amendment rights of Jehovah's Witnesses); Collin v. Chicago Park Dist., 460 F.2d 746 (7th Cir. 1972) (first amendment rights and use of public park facilities by National Socialist Party); United States v. Crowthers, 456 F.2d 1074, 1079 (4th Cir. 1972) (public use of Pentagon areas may be regulated as long as it is done with fine impartiality).

[51]473 F.2d at 1014 (footnotes omitted). "Censorship of those who would use the school building as a forum cannot be rationalized by reference to its setting. School desks and blackboards, like trees or street lights, are but the trappings of the forum; what imports is the meeting of minds and not the meeting place." *Id.* at 1015 n.7, *quoting* Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 543, 171 P.2d 885, 892 (1946). See text accompanying notes 23-24 *supra*.

the Party could not be barred without a showing that its meetings would result in "imminent lawless action" or "violence." Finding that the Board failed to carry its burden of proof that the Party acted violently,[52] the court ruled the denial of the rental permit application was an invalid prior restraint of the Party's first amendment rights.[53]

The School Board could have denied the Party's request only if it had acted in complete accordance with properly drawn regulations. In order for a statute or an administrative regulation to vest valid restraining control over first amendment rights, it must fulfill the requirements of procedural due process. Only with procedural safeguards designed to eliminate the dangers of censorship can a system of prior restraints avoid constitutional infirmity.[54] A review of pertinent cases reveals five basic requirements which must be met.[55]

First, because prior restraints are "fraught with danger and viewed with suspicion,"[56] statutes and regulations establishing them

[52]The burden of proving that a prior restraint is proper rests with the state. "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." Speiser v. Randall, 357 U.S. 513, 526 (1958). *See* Healy v. James, 408 U.S. 169, 184 (1972); Freedman v. Maryland, 380 U.S. 51, 58 (1965); NAACP v. Button, 371 U.S. 415, 437-38 (1963); Kunz v. New York, 340 U.S. 290, 293-94 (1951). Note that *Speiser* involved a criminal statute while *Ringers* does not. However, this difference is not a valid ground for distinction since in both cases the state tried to suppress first amendment activities. "[I]t is immaterial that it sought to accomplish that objective in the one case by threat of punishment and in the other by censorship." Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 538, 171 P.2d 885, 896 (1946). *See also* Thornhill v. Alabama, 310 U.S. 88, 97 (1940); Hague v. CIO, 307 U.S. 496, 516 (1939); Near v. Minnesota, 283 U.S. 697, 715 (1931).

[53]Even private property is not immune from the reach of the first amendment and may be found to constitute a "public forum." Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (union may picket within shopping center boundaries); Marsh v. Alabama, 326 U.S. 501 (1946) (company town may not proscribe right of Jehovah's Witnesses to distribute religious literature). Whenever an owner opens his property to the public for his own advantage his private property rights become subordinate to the statutory and constitutional rights possessed by those using the property. 326 U.S. at 506. *But see* Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972) (strictly limiting *Logan Valley Plaza* decision to its facts; distribution of handbills may be forbidden when unrelated to any activity within shopping mall).

[54]Carroll v. Princess Anne, 393 U.S. 175, 181 (1968), *citing* Freedman v. Maryland, 380 U.S. 51, 57 (1965).

[55]Along with the five demands of procedural due process, it should also be remembered that courts have very liberal standing requirements when first amendment rights are at issue. "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." Freedman v. Maryland, 380 U.S. 51, 56 (1965).

[56]*Id.* at 57.

must be drawn in the narrowest possible terms that will accomplish their particular objective.[57] Officials may not be given broad discretion as to whether permits will issue.[58] Statutes which are designed to prevent interference with the normal utilization of streets, parks, and other public places have generally been upheld;[59] but licensing systems which grant administrative officials power to withhold permits based on broad criteria unrelated to the proper and essential regulation of public places have received consistent condemnation.[60] For example, the Supreme Court has invalidated ordinances which used such phrases as "*may* be granted . . . by the police commissioner . . . ,"[61] "[t]he commission shall grant . . . *unless in its judgment* . . . ,"[62] and "[i]t shall be unlawful . . . to assemble . . . in a manner *annoying* . . . ."[63]

The second requirement of procedural due process is that a permit application must be decided quickly. This is especially true where political questions are involved, for "timing is of the essence in politics."[64] Third, notice must be given of the decision[65] and a prompt explanation must be provided if a permit request is denied.[66] Fourth,

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[57]Carroll v. Princess Anne, 393 U.S. 175, 183 (1968).

[58]Permitting an individual to refuse a permit on the mere "opinion that such refusal will prevent 'riots, disturbances, or disorderly assemblage' . . . can . . . be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities." Hague v. CIO, 307 U.S. 496, 516 (1939).

[59]Cox v. New Hampshire, 312 U.S. 569 (1941).

[60]Kunz v. New York, 340 U.S. 290, 294 (1951). See note 43 *supra*. "Where state action designed to regulate prohibitable action also restricts associational rights . . . the State must demonstrate that the action taken is reasonably related to protection of the State's interest and that 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' " Healy v. James, 408 U.S. 169, 189-90 n.20 (1972), *quoting* United States v. O'Brien, 391 U.S. 367, 377 (1968).

[61]Kunz v. New York, 340 U.S. 290, 291 n.1 (1951) (emphasis added).

[62]Shuttlesworth v. Birmingham, 394 U.S. 147, 149 (1969) (emphasis added).

[63]Coates v. Cincinnati, 402 U.S. 611 (1971) (emphasis added).

[64]Shuttlesworth v. Birmingham, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

[65]Collin v. Chicago Park Dist., 460 F.2d 746, 756-57 (7th Cir. 1972).

[66]460 F.2d at 756. In providing explanations, the government must be consistent. It "may not permit public meetings in support of government policy and at the same time forbid public meetings that are opposed to that policy. It may not accomplish its selective objective by convenient labelling: good ones are religious services and bad ones are demonstrations." United States v. Crowthers, 456 F.2d 1074, 1079 (4th Cir. 1972). "Only a *specific* intent to cause violence, directed to the specific demonstration and manifested by specific plans, should suffice for a permit refusal or injunction; a general intent extrapolated from rhetoric or previous exploits should not be enough. Concrete evidence should be required." Collin v. Chicago Park Dist., 460 F.2d 746, 754

the state must bear the burden of proving that the imposition of a prior restraint is proper.[67] Consequently, once a negative decision is rendered, the governmental body is required to seek an immediate judicial determination of the merits of a permit application.[68] "[O]nly a procedure requiring a judicial determination suffices to impose a valid final restraint."[69] The fifth and last requirement is that proceedings may not be *ex parte*.[70]

Measured against the requisites of procedural due process, it is apparent that the regulations promulgated by the School Board in *Ringers* were inadequate.[71] They did meet the requirement that statutes and regulations establishing prior restraints be narrowly drawn. After receiving the rental fee in advance, high school principals were to issue permits for the use of school auditoriums to organizations in "good standing," which was defined as "no previous record of abuse to school facilities."[72] The provision was not discretionary, yet the

(7th Cir. 1972), *quoting* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1509 (1970) (footnote omitted; emphasis in original).

[67]See note 52 *supra*.

[68]Freedman v. Maryland, 380 U.S. 51, 58-59 (1965); Collin v. Chicago Park Dist., 460 F.2d 746, 756 (7th Cir. 1972). The *Collin* court said that it was hesitant to require that governmental bodies resort to the courts every time they decide that a permit for the use of a public forum should be denied. Nevertheless, it held that the requirement was a necessary part of the safeguards dictated by procedural due process. 460 F.2d at 756. One exception to the "immediate judicial determination rule" has been permitted. The Supreme Court has held that films differ from other forms of expression. As a result of the unique nature of the film industry, longer time limits for judicial determinations are permitted. However, a court decision is still necessary within a reasonable time. Freedman v. Maryland, 380 U.S. 51, 61 (1965).

Mr. Justice Harlan has argued that in the case of obscenity prompt judicial review is not of the essence: "[T]he subject of sex is of constant but rarely particularly topical interest. Distribution of *Ulysses* may be thought by some to be more important for society than distribution of the daily newspaper, but a one or two-month delay in circulation of the former would be of small significance whereas such a delay might be effective suppression of the latter." A Quantity of Books v. Kansas, 378 U.S. 205, 224-25 (1964) (Harlan, J., dissenting) (footnote omitted).

[69]Freedman v. Maryland, 380 U.S. 51, 58 (1965). *See* A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Marcus v. Search Warrant, 367 U.S. 717 (1961).

[70]Carroll v. Princess Anne, 393 U.S. 175, 180, 182-83 (1968); A Quantity of Books v. Kansas, 378 U.S. 205, 210-11 (1964).

[71]The inadequacies of the Board's regulations were not discussed by the Fourth Circuit. However, the court adopted the Seventh Circuit's opinion in *Collin* as part of its own, and a somewhat similar regulation was in question there. See notes 31-40 *supra* and accompanying text.

[72]The pertinent portions of the "Regulations Governing the Use of School Facilities by Outside Groups" which were in effect in early 1970 read as follows:

Party's application was rejected even though it had never damaged school property. Furthermore, the Board provided no explanation of why the permit was denied. The arbitrary nature of the decision vividly illustrates the necessity for procedural safeguards—including a final judicial determination—where first amendment rights are involved.

The First Amendment-Fourteenth Amendment Conflict: Does the "State Action" Doctrine Apply Where Views Inimical to Fourteenth Amendment Values Are Expressed in Publicly Financed Forums?

The most significant issue in *Ringers* was whether the fourteenth amendment "state action" doctrine has any application where the exercise of first amendment rights is involved; *i.e.*, must public places regularly utilized by private groups be made available to all groups, regardless of their racial and religious beliefs or policies?

Courts have consistently held that "state action" exists where private parties discriminate on the basis of race against a backdrop of state compulsion or involvement.[73] Once "state action" which fosters or encourages private racial discrimination is found, the state is considered a partner in the challenged activity, and the fourteenth amendment forbids the private individual to discriminate in carrying out his enterprise or activity.[74] However, the existence of "state action" can only be determined in relation to the facts and circumstances of each particular case.[75] Neither the Supreme Court nor any other court has ever "attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations."[76]

In examining the School Board's "state action" defense, the

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1. GENERAL. The public school buildings of Arlington County are available to community groups at any time when the facilities to be used are not required for school purposes. . . .

2. RENTAL PERMIT AND PAYMENT. If the applying organization is in *good standing (no previous record of abuse to school facilities)*, the principal on receipt of FULL ADVANCE PAYMENT . . . *will* issue a PERMIT FOR USE OF SCHOOL BUILDING . . . .

(Emphasis added.) Brief for Appellant, Appendix at 24, National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973).

[73]Adickes v. S.H. Kress & Co., 398 U.S. 144, 169 (1970); see note 18 *supra*.

[74]Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961); see notes 18, 19 *supra*.

[75]365 U.S. at 726.

[76]Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

Fourth Circuit discussed *Burton v. Wilmington Parking Authority.*[77] In *Burton*, a municipality owned and operated a publicly financed parking facility and leased space to commercial businesses, one of which was a restaurant with a "whites only" policy. The Supreme Court found that the city had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant [in the restaurant's refusal to serve blacks] . . . ."[78] By inaction, the city had effectively placed its power, property, and prestige behind the restaurant's exclusionary practices.[79] In other words, the city was something less than a neutral party, and its knowing acquiescence in the restaurant's "whites only" policy caused that discrimination to acquire a public character. As the Fourth Circuit pointed out, however, *Burton* dealt with a purely commercial activity; first amendment rights were not at issue.[80]

In contrast, *Ringers* concerned a private organization which sought to exercise its privileges of free speech and assembly in a publicly owned forum. The court characterized the situation as one where the state was required to be neutral and where denial of the auditorium's use would greatly impair the exercise of the Party's first amendment rights.[81] Referring to *Healy v. James,*[82] the court held that the Party, like all political organizations, was "entitled to first amendment protections, including the use of facilities for meetings and other appropriate purposes."[83] As *Healy, Collin,* and a number

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[77]365 U.S. 715 (1961).

[78]*Id.* at 725. *See* Evans v. Newton, 382 U.S. 296 (1966). "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." 382 U.S. at 299.

[79]Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

[80]National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (1973). The statement that *Burton* dealt with a purely commercial activity should not be construed to mean that there is no such thing as "commercial speech." Though advertising is a form of speech, it is not protected by the broad guaranty of the first amendment. *See, e.g.*, Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (broadcasters not required to accept paid editorial advertisements); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) ("purely commercial advertising" not protected by the first amendment; newspapers may be forbidden to carry sex designated advertising).

[81]473 F.2d at 1017.

[82]408 U.S. 169 (1972). In this case, the refusal by a state supported college to recognize a local S.D.S. chapter and afford it the use of campus facilities for its meetings was held to be without proper justification and a potential denial of first amendment rights. The case was remanded for further hearing.

[83]National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (1973), *citing* Healy v. James, 408 U.S. 169, 181 (1972).

of other cases[84] unequivocally demonstrate, protection is not denied simply because the general populace finds a political group's message repulsive or antithetical.[85]

The *Ringers* court found the situation confronting it comparable to that in *Everson v. Board of Education.*[86] In *Everson*, the Supreme Court permitted New Jersey to pay the transportation costs of children attending parochial schools, finding the service similar to such general government services as police and fire protection, sewer connections, highways, and sidewalks.[87] Providing the transportation service did not exceed the bounds prescribed by the first amendment prohibition against laws "respecting the establishment of religion;" hence, the state had not violated the constitutional requirement that it be neutral in religious matters.[88] Similarly, the Fourth Circuit found that while the fourteenth amendment prohibits "Virginia from practicing the discrimination which the Party practices, the first amendment also prohibits [the state] from hampering its citizens in the exercise of their right to speak and assemble freely by denying a generally provided public forum."[89] Consequently, the court ruled that the School Board was required to provide the auditorium upon proper application by any group.[90]

It was on this point that Judge Butzner based his very appealing dissent. He stated that it was "the Party's exclusion of black citizens, not its [racist and anti-semitic] message, that justified the Board's refusal to rent the auditorium."[91] His general contention was that the adoption of three civil rights amendments and the enactment of a series of laws designed to "secure civil rights affirm our national goal of eradicating all government-fostered racial discrimination."[92] He maintained that it is within a framework of nondiscrimination that political parties must exercise their first amendment rights.[93]

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[84]Notes 35 and 45 *supra*.

[85]"I do not believe that it can be too often repeated that the freedom of speech, press, petition, and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1015 n.8 (4th Cir. 1972), *quoting* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting), *cited with approval*, Healy v. James, 408 U.S. 169, 188 (1972); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[86]330 U.S. 1 (1947).

[87]*Id.* at 17-18.

[88]*Id.* at 18.

[89]National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (4th Cir. 1973).

[90]*Id.* at 1018.

[91]*Id.* at 1020-21 (Butzner, J., dissenting).

[92]*Id.* at 1020.

[93]*Id.* at 1022.

In developing this argument, the dissent cited a large number of cases in which the Supreme Court invalidated a variety of devices utilized to exclude blacks from participation in the political process. Judge Butzner asserted that those decisions,[94] which included the *White Primary Cases*,[95] implicitly teach that when "state action" is united with political organizations which bar black people from full political participation, "the union is illegal despite the first amendment rights possessed by white members of the organization."[96] The point is irrefutable, but it must be recognized that all of the cases cited arose against a backdrop of state statutory requirements and state enforcement. One group of cases concerned statutes designed to exclude blacks from voting rolls.[97] The other group dealt with political parties performing the essential state function of running election

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[94]Judge Butzner cited South Carolina v. Katzenbach, 383 U.S. 301, 311-12 (1966), as a catalogue of devices used to exclude blacks from the political process. Though some of the cases enumerated involved the fifteenth rather than the fourteenth amendment, he contended that the distinction was not a critical one since both amendments forbid racial discrimination which is "tainted by state action." 473 F.2d at 1021. *Katzenbach* listed the following devices:

> Grandfather clauses were invalidated in Guinn v. United States, 238 U.S. 347 (1915), and Myers v. Anderson, 238 U.S. 368 (1915). Procedural hurdles were struck down in Lane v. Wilson, 307 U.S. 268 (1939) . . . . Improper challenges were nullified in United States v. Thomas, 362 U.S. 58 (1960). Racial gerrymandering was forbidden by Gomillion v. Lightfoot, 364 U.S 339 (1960). Finally, discriminatory application of voting tests was condemned in Schnell v. Davis, 336 U.S. 933 (1949), Alabama v. United States, 371 U.S. 37 (1962), and Louisiana v. United States, 380 U.S. 145 (1965).

473 F.2d at 1021 n.2, *quoting* South Carolina v. Katzenbach, 383 U.S. 301, 311-12 (1966).

To the cases listed in *Katzenbach*, the dissent added Hadnott v. Amos, 394 U.S. 358 (1969), which voided discriminatory application of a corrupt practices act by invoking the first, fourteenth, and fifteenth amendments. The dissent also cited Nixon v. Herndon, 273 U.S. 536 (1927) (Texas law prohibiting black voters in Democratic Party primaries invalid under fourteenth amendment), and Nixon v. Condon, 286 U.S. 73 (1932) (rules of Texas State Executive Committee of the Democratic Party prohibiting black voters in party primary invalid under fourteenth amendment). 473 F.2d at 1021 n.2. *Herndon* and *Condon* are normally included as part of the *White Primary Cases*. See note 95 *infra*.

[95]Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932). . . . 473 F.2d at 1021 n.3. Though not included by the dissent, Nixon v. Herndon, 273 U.S. 536 (1927), is also generally considered to be one of the *White Primary Cases*. The dissent did include *Herndon* in an extensive footnote which listed a series of devices used to exclude blacks from the political process. See note 94 *supra*.

[96]473 F.2d at 1021.

[97]Note 94 *supra*.

primaries, thereby becoming adjuncts of the state government.[98] In both groups state law enforced and encouraged discrimination, either directly or indirectly. Consequently, blacks were excluded from political participation. In *Ringers*, such was not the case. Virginia did not try to exclude blacks from either voting rolls or Party membership, nor was the Party running a primary as an adjunct of the state government.[99] In spite of the Party's discriminatory membership policies, it cannot be said that it acted either alone or in conjunction with state law to abridge the right of others to vote or participate in government.[100] Thus, the cases are inapposite.[101]

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[98]Note 95 *supra*.

[99]The internal affairs of political parties are generally immune from governmental regulation. However, a three judge district court recently held that where a state grants political parties the power to conduct primary elections and to select their national convention delegates in those primaries, rules promulgated by the political parties are subject to the Voting Rights Act of 1965, 42 U.S.C.A. § 1973c (Supp. 1972). MacGuire v. Amos, 343 F. Supp. 119 (M.D. Ala. 1972). Section 5 of the Act requires certain states and their subdivisions to obtain federal approval before changing any voting standards, practices, or procedures. See Comment, *MacGuire v. Amos: Application of Section 5 of the Voting Rights Act to Political Parties*, 8 HARV. CIV. RTS. L. REV. 199 (1973).

[100]473 F.2d at 1016-17.

[101]One might argue that providing the auditorium at a nominal fee is a form of state subsidy which aids the Party in promoting its message of racial superiority. Subsidies which encourage and finance schemes of racial segregation are void. For instance, states are prohibited from supplying textbooks to schools which exclude students on the basis of race. Norwood v. Harrison, 413 U.S. 455 (1973). However, where first amendment rights are involved, the state is required to maintain strict neutrality, giving all groups equal access to public facilities. See notes 81-90 *supra* and accompanying text. Denying a private group the use of public facilities because of its views would be a violation of that neutrality and an imposition of a form of censorship. See notes 121-26 *infra* and accompanying text.

Furthermore, a claim that other, privately owned facilities are available for the exercise of the Party's first amendment rights would also be invalid. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939).

The use of public facilities for the purposes of free speech and assembly is somewhat analogous to newspapers' access to the mails at less than cost. "[G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever . . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated." Hannegan v. Esquire, 327 U.S. 146, 156 (1946). In *Hannegan*, the Supreme Court ruled that the government is not required to give newspapers second-class mail rates but once it does so, the rates must be given to all newspapers—they may not be granted or denied on a selective basis. 327 U.S. at 152, 155-56, 158. Similarly, a school board is not required to open school doors to the general public, but once the doors are open, school facilities must be made available to all individuals and organizations. See note 50 *supra* and notes 114-20 *infra*.

Judge Butzner also stressed that though students and union members possess the freedoms of speech and association,[102] public schools and labor unions may not deny participation in their respective activities on the basis of discriminatory criteria.[103] He therefore maintained that political parties are likewise forbidden to discriminate.[104] In relation to public schools, racial segregation has been forbidden because "[s]eparate but equal . . . educational facilities are inherently unequal."[105] With regard to labor unions and other voluntary associational organizations, courts have ruled restrictive membership policies invalid when membership is shown to be an economic necessity or a requirement for a better job classification.[106] In contrast, however, courts have *never* held that membership in any particular political party is a constitutional right. They have simply held that neither states nor political parties performing *essential* state functions may exclude blacks from the political process in any manner.[107]

In further support of the contention that the Board was justified in denying the Party's rental permit application, the dissent also discussed *Moose Lodge v. Irvis*[108] in some detail. In *Moose Lodge*, the Supreme Court ruled that granting a state liquor license to a private club with a discriminatory membership policy did not constitute "state action."[109] Judge Butzner felt three distinctions could be drawn between the situation in *Moose Lodge* and that in *Ringers:* (1) *Moose Lodge* involved a private club while *Ringers* involved a political organization open only to whites; (2) the Lodge used its own land

[102]473 F.2d at 1022, *citing* Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969); Hague v. CIO, 307 U.S. 496 (1939).

[103]473 F.2d at 1022, *citing* Brown v. Board of Education, 347 U.S. 483 (1954); Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945); United States v. International Longshoremen's Ass'n, 460 F.2d 497 (4th Cir.), *cert. denied*, 409 U.S. 1007 (1972).

[104]473 F.2d at 1022.

[105]Brown v. Board of Education, 347 U.S. 483 (1953). "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

[106]"We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees." Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945) (footnote omitted). *See* United States v. International Longshoremen's Ass'n, 460 F.2d 497, 499-500 (4th Cir.), *cert. denied*, 409 U.S. 1007 (1972).

[107]Notes 94-101 *supra* and accompanying text. See also Comment, *MacGuire v. Amos: Application of Section 5 of the Voting Rights Act to Political Parties*, 8 HARV. CIV. RTS. L. REV. 199 (1973).

[108]407 U.S. 163 (1972).

[109]*Id.* at 176-77.

while the Party desired the use of a public building for its meetings; and (3) a liquor license did not serve to encourage public discrimination while use of a public auditorium might give added respectability to the Party and aid in furthering its racist aims.[110] The dissent argued that these distinctions permitted a showing of "state action" in *Ringers* and thereby allowed the Board to deny the Party's rental request.[111] However, one further distinction should also be made—no first amendment rights were at issue in *Moose Lodge* while they were crucial in *Ringers*. Because of the extreme importance of first amendment rights,[112] this very significant difference vitiates the effect of the other distinctions.

Even while arguing that the School Board could validly deny the rental application, the dissent conceded that the National Socialist White People's Party would have been entitled to hold its meetings in any Arlington County park regularly used for the exercise of free speech and the exchange of ideas.[113] Thus, the dissent attached significance to the nature of the particular forum. However, previous cases had held that the fact that an indoor auditorium was requested should make no difference, as long as it was also regularly used as a public forum.[114] Accordingly, the majority in *Ringers* refused to permit walls and a roof to "insulate against" the first amendment's requirements.[115] It would not allow the amendment's protections "to turn on structural distinctions between . . . an open public park, a public amphitheatre, a public stadium, or an enclosed public auditorium."[116]

The majority's refusal to attach significance to the forum's structure led it to conclude that the "state action" doctrine does not extend to public facilities utilized for the purposes of free speech and peaceful assembly.[117] As the court stated, the most effective way to expose "falsehoods and fallacies" is through education and the promotion of more speech, not through state imposed silence;[118] any

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[110]473 F.2d at 1022.

[111]*Id.*

[112]Notes 81-90 *supra* and accompanying text.

[113]473 F.2d at 1020. *See also* Brandenburg v. Ohio, 395 U.S. 444 (1969); Collin v. Chicago Park Dist., 460 F.2d 746 (7th Cir. 1972).

[114]Notes 50-53 *supra* and accompanying text.

[115]473 F.2d at 1015.

[116]*Id.*

[117]*Id.* at 1016.

[118]*Id.* at 1018-19. On this point, the Fourth Circuit quoted Mr. Justice Brandeis: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." 473 F.2d at 1018-19 *quoting* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

identification of the school building with the Party's program would be eliminated by the wide variety of groups using the high school auditorium.[119] The circuit court therefore concluded that the essential point was not that *Ringers* presented "insufficient state action, but simply that the state action doctrine is not applicable where a group seeks to exercise first amendment rights in a public forum dedicated to that purpose."[120]

Conclusion

In *National Socialist White People's Party v. Ringers*, the Fourth Circuit recognized that to find state involvement in the Party's restrictive membership policy, thereby allowing the School Board's "state action" defense, was equivalent to making the Board a censor. Such a decision would have effectively given the School Board the power to impose prior restraints on the Party and other discriminatory organizations.[121] Under any system of censorship, those whose rights will be denied are apt to be members of minority groups or advocates of minority or unpopular viewpoints. Censorship power in the hands of a school board could therefore be used to deny the first amendment privileges of free speech and peaceful assembly to a wide variety of private groups, including those which are constitutionally permitted to maintain discriminatory membership policies.[122] Fur-

[119]473 F.2d at 1018. The Supreme Court has stated that broad dissemination of a wide spectrum of "diverse and antagonistic views" is necessary to ensure the general welfare. *Id.* at 1018 n.18, *quoting* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[120]473 F.2d at 1017, 1019. On close analysis, the court's holding is not quite as broad as it appears. For instance, the School Board could not permit the Party to post guards for the purpose of keeping certain persons out of its public meetings. Such knowing acquiescence in an exclusionary policy was found to constitute "state action" in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). See notes 77-80 *supra* and accompanying text. Furthermore, where facilities are publicly owned or operated, individuals may not be denied access on discriminatory bases. This proposition was acknowledged by the Party. Brief for Appellant at 24 n.19, National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973), *citing* Evans v. Newton, 382 U.S. 296 (1966) (public parks); Brown v. Louisiana, 383 U.S. 131 (1965) (public library); Watson v. Memphis, 373 U.S. 526 (1963) (public parks); Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom facilities); Turner v. Memphis, 369 U.S. 350 (1962) (public restaurant); Holmes v. Atlanta, 223 F.2d 93 (5th Cir.), *aff'd* 350 U.S. 879 (1955) (municipal golf courses); Dawson v. Baltimore, 220 F.2d 386 (4th Cir.), *aff'd* 350 U.S. 877 (1955) (public beaches); Brown v. Board of Education, 347 U.S. 483 (1954) (public schools).

[121]473 F.2d at 1016.

[122]Brief for Appellant at 22, National Socialist White People's Party v. Ringers,

thermore, had the "state action" defense been found valid, the court could not logically have limited it solely to cases involving school boards. In the future, any governmental body responsible for public facilities would have been able to avail itself of the defense, thus enabling both school boards and administrative agencies to control the views expressed in public forums and to deny their use on the basis of controversial beliefs which rental applicants might express in those facilities.[123] In other words, the "state action" defense would allow the imposition of invalid prior restraints on free speech and peaceful assembly,[124] a violation of the strict neutrality that states and their subdivisions must maintain at all times in the area of first amendment rights.[125]

The holding allays the fears of certain organizations that they may be denied access to public facilities because of allegations of state involvement in their messages or programs. At the same time, the task of administrative agencies responsible for public facilities is made easier. Prior to *Ringers*, auditorium administrators were faced with two choices: (1) they could rent public facilities to groups espousing racist viewpoints and risk suit by civil rights groups; or (2) they could refuse to rent the facilities on the grounds of "state action" in connection with the groups' policies and risk suit by the discriminatory organizations.[126] *Ringers* resolved this problem in favor of first amendment interests and thereby served to reaffirm the vital importance of those interests. Thus, the case extricates the public administrator from a dilemma while simultaneously adding a measure of certainty and stability to the law. In summary, the *Ringers* decision, being solidly founded in first amendment principles, recognizes that the basic rationale underlying the first amendment would be severely compromised if an administrative body of any kind could successfully assert the "state action" defense in such circumstances.

CHARLES BAILY TOMB

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473 F.2d 1010 (4th Cir. 1973), *citing* Moose Lodge v. Irvis, 407 U.S. 163 (1972). As the brief points out, the right to maintain restrictive or discriminatory membership policies derives from the right of free association, made applicable to the states through the fourteenth amendment. Louisiana v. NAACP, 366 U.S. 293, 296 (1961); Bates v. Little Rock, 361 U.S. 516, 523 (1960). Such discriminatory membership policies are invalid only when membership is shown to be an economic necessity. See note 106 *supra* and accompanying text.

[123]473 F.2d at 1016.

[124]*Id.* See notes 23-72 *supra* and accompanying text.

[125]Notes 86-90 *supra* and accompanying text.

[126]Note 20 *supra*.