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RECENT DECISIONS

Civil Rights—No STATE ACTION NECESSARY TO PROHIBIT RACIAL DISCRIMINATION BY “PRIVATE” SCHOOLS—*Gonzales v. Fairfax-Brewster School, Inc.*, Civil Action No. 494-72-A (E.D. Va., July 27, 1973).

Until recently,¹ 42 U.S.C. §§ 1981 and 1982 were virtually useless as instruments with which to combat purely private racial discrimination.² Certainly, one of the principal reasons behind this was the Supreme Court's decision in the *Civil Rights Cases*³ wherein the Court restrictively applied the thirteenth amendment,⁴ under which the Civil Rights Act of 1866 was enacted.⁵ However, in 1968, the Supreme Court ruled that the intention of Congress in enacting the Civil Rights Act of 1866 was to prohibit private racial discrimination as well as racial discrimination under color of law,⁶ and thereby vastly broadened the scope of the thirteenth amendment.⁷ The decision was based upon the Court's finding that 42

1. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

2. See Buchanan, *Federal Regulation of Private Racial Prejudice: A Study of Law In Search of Morality*, 56 IOWA L. REV. 473, 504 (1971); Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 475 (1969); Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1035-36 (1972); Comment, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615 (1969):

It undoubtedly came as a surprise to many lawyers to learn from the popular press that two wide-sweeping statutory provisions dealing with civil rights had gone virtually unused for a century. *Id.* at 615.

3. 109 U.S. 3 (1883).

4. *Id.* at 21-22, 24. "The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial." *Id.* at 26 (Harlan, J., dissenting).

5. Hemphill, *State Action and Civil Rights*, 23 MERCER L. REV. 519, 526 (1972); tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 203 (1951); see Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272, 276 (1969).

6. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Referring to the Civil Rights Act of 1866, the Supreme Court made it clear that it was to prohibit all forms of racial discrimination:

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property. *Id.* at 436.

7. *Id.* at 443:

At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free

U.S.C. § 1982⁸ was originally a part of section one of the Civil Rights Act of 1866.⁹ As a result of this decision, a number of actions were brought in an effort to combat private racial discrimination.¹⁰ However, many of these cases involved a contract issue,¹¹ and were decided under 42 U.S.C. § 1981.¹² The trend of judicial decisions involving Section 1981 indicates that it also is being interpreted as derived from the Civil Rights Act of 1866, and is therefore applicable to private acts of racial discrimination.¹³

man means at least this much, then the Thirteenth Amendment made a promise that the Nation cannot keep.

8. 42 U.S.C. § 1982 (1970):

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

9. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968); see Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

10. *Tillman v. Wheaton-Haven Recreation Ass'n*, 93 S. Ct. 1090 (1973); *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Cook v. Advertiser Co.*, 458 F.2d 1119 (5th Cir. 1972); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970); *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Rice v. Chrysler Corp.*, 327 F. Supp. 80 (E.D. Mich. 1971); *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D.N.C. 1971); *Smith v. North American Rockwell Corp.*, 50 F.R.D. 515 (N.D. Okla. 1970); *Tennessee v. Hartman*, 303 F. Supp. 411 (E.D. Tenn. 1969).

11. See, e.g., *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970); *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D.N.C. 1971).

12. 42 U.S.C. § 1981 (1970):

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

13. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 & n.28 (1968); Buchanan, *Federal Regulation of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 IOWA L. REV. 473 (1971); Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024 (1972); 23 VAND. L. REV. 413 (1970). *Contra*, *Cook v. Advertiser Co.*, 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972); *Smith v. North American Rockwell Corp.*, 50 F.R.D. 515 (N.D. Okla. 1970); *Tennessee v. Hartman*, 303 F. Supp. 411 (E.D. Tenn. 1969). For an historical analysis of the Civil Rights Act of 1866 indicating that it was not enacted to reach private discrimination see Ervin, *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485 (1969).

Ultimately the Supreme Court will find a need to rule directly upon the applicability of Section 1981 to private racial discrimination,¹⁴ and the case of *Gonzales v. Fairfax-Brewster School, Inc.*¹⁵ may afford the Supreme Court such an opportunity.¹⁶

Colin Gonzales' parents, interested in sending Colin to Fairfax-Brewster, a private all white school, after visiting the school submitted all the application forms that had been supplied them, along with a medical certificate and check. The school returned to them their check and Colin's medical certificate along with a form letter stating that the school was "unable to accommodate the application." Colin and his parents are black, and although those representing the school denied that Colin was rejected because of his race, the *Gonzales* court found that race was the basis for Colin's rejection.¹⁷

The *Gonzales* court found that the plaintiff had been denied his right to make a contract, and therefore rendered a decision in his favor under 42 U.S.C. § 1981.¹⁸ In addition, the court found that it was not necessary for the plaintiff to show any state action in order to invoke Section 1981, relying on *Jones v. Alfred H. Mayer Co.*¹⁹ as authority for that conclusion.²⁰

14. The Supreme Court has not yet determined just how far 42 U.S.C. § 1981 may be extended to enforce one's right to make a contract. The possibility of constitutional conflicts occurring in this area would appear inevitable. Therefore, it would appear to be necessary for the Supreme Court to determine this issue and thereby give lower courts direction in this area.

15. Civil Action No. 494-72-A (E.D. Va., July 27, 1973).

16. The sole basis of the action is 42 U.S.C. § 1981. There were no allegations whatsoever that any state action was involved.

17. *Gonzales v. Fairfax-Brewster School, Inc.*, Civil Action No. 494-72-A (E.D. Va., July 27, 1973) (Bryan, Jr., J.):

In conclusion, the three Reisses [the Chairman of the Board, the Administrative Director, and the registrar] all denied that it was the school or day camp's policy to exclude an applicant because of his race. The Court rejects this testimony as unbelievable and finds that the reason for the rejection was because Colin was black. *Id.* at 3.

Several other parties were involved in another case which the court consolidated with the *Gonzales* case. Mr. and Mrs. McCrary and their son Michael brought an action against Bobbe's School upon a very similar fact situation.

The Southern Independent School Association intervened as a party-defendant in the action against Bobbe's asserting that it represents "non-profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents."

The intervenor takes a different tack from that of the principal defendants. It concedes that race is a factor in its policies of exclusiveness, but says that 42 U.S.C. § 1981 cannot be used to compel admission of a black child to a white school of the type it represents, and prays an adjudication to that effect. *Id.* at 5-6.

18. *Id.* at 6-7.

19. 392 U.S. 409, 423-24 (1968).

20. *Gonzales v. Fairfax-Brewster School, Inc.*, Civil Action No. 494-72-A, 7 (E.D. Va., July 27, 1973).

Furthermore, the "private" character of the schools involved was rejected.²¹

The weight of authority is in agreement with the *Gonzales* decision with respect to its finding that Section 1981 prohibits private discrimination which denies blacks the right to make a contract.²² It has been found that state action is no longer required to assert the mandate of Section 1981.²³ However, a small minority of cases has continued to see state action as a requirement for invoking Section 1981.²⁴

In *Tillman v. Wheaton-Haven Recreation Association*,²⁵ the Supreme Court found that 42 U.S.C. § 1982 was applicable to prohibit discrimination by a "private club," and by virtue of that finding decided that 42 U.S.C. § 1981 would also be applicable.²⁶ That decision is a strong indication that the *Gonzales* analysis of Section 1981, as it relates to the question of state action, is definitely the correct approach. Therefore, the fact that state action is not a requirement allows the court to bring the defendant "private" schools within the scope of Section 1981.²⁷

21. *Id.*

22. See cases cited note 11 *supra*; Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024 (1972).

23. See, e.g., *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). This court relied upon its own historical analysis of section 1981 and upon the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), in concluding that "[n]othing in this history shows any congressional intent in 1870 or in 1874 not to rely upon the Thirteenth Amendment or to restrict what is now § 1981 to cases involving state action." *Young v. International Tel. & Tel. Co.*, *supra* at 759-60.

24. See, e.g., *Cook v. Advertiser Co.*, 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972). The *Cook* court arrived at the conclusion that section 1981 was actually enacted under section 16 of the 1870 Civil Rights Act, and not derived from the Civil Rights Act of 1866. Therefore, the court reasoned that section 1981 was passed pursuant to the fourteenth amendment, and that under such circumstances a requirement of state action was necessary. *Smith v. North American Rockwell Corp.*, 50 F.R.D. 515, 518 (N.D. Okla. 1970). The court stated: "Absent any clear ruling by the United States Supreme Court to the contrary, the Court is constrained to preserve the long-standing general construction of 42 U.S.C. § 1981 as extending only to such actions, or omissions to act under 'color of state law'." *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232 (N.D. Ga. 1969), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970); *Tennessee v. Hartman*, 303 F. Supp. 411 (E.D. Tenn. 1969). *But see* Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1037-39 (1972).

25. 93 S. Ct. 1090 (1973).

26. *Id.* at 1095. The Court stated:

In light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club. Consequently, our discussion and rejection of Wheaton-Haven's claim that it is exempt from § 1982 disposes of the argument that Wheaton-Haven is exempt from § 1981.

27. *Gonzales v. Fairfax-Brewster School, Inc.*, Civil Action No. 494-72-A (E.D. Va., July

In *Gonzales* Judge Bryan, Jr., applying the Supreme Court's reasoning,²⁸ found that there was no "plan or purpose of exclusiveness. . . . there being no selective element other than race,"²⁹ in the schools' admission policies, and that under such circumstances the schools in question were not "truly private."³⁰ Furthermore, the fact that the schools are advertised in the yellow pages gives support to the court's finding that they were not truly private.³¹ The court also found that "the opportunity to attend these schools was open to every white child,"³² and therefore concluded, relying on the Supreme Court's prior reasoning,³³ that Section 1981 could be applied to enforce the plaintiffs' right to contract.³⁴ The Supreme Court used this reasoning in part to show that Wheaton-Haven Recreation Association and Little Hunting Park, Inc. were not truly private clubs, and that since they were not truly private, Sections 1981 and 1982 were not to be held inapplicable by virtue of the private club exemption of the public accommodations law.³⁵ This is not an issue in the *Gonzales* case,³⁶ but the court's finding that the schools are not truly private is important in overcoming possible conflicts between the constitutional prohibition of private racial discrimination and the constitutionally guaranteed rights of liberty and voluntary association.³⁷

27, 1973). "Neither school receives any assistance, financial or otherwise, from any state, local or federal agency; and each relies entirely on funds derived from tuition paid by students to support its operations." *Id.* at 1.

28. *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).

29. *Id.* at 236.

30. *Gonzales v. Fairfax-Brewster School, Inc.*, Civil Action No. 494-72-A (E.D. Va., July 27, 1973). The opinion went on to say:

It is difficult to accept the defendants' argument that the plaintiffs may not have been qualified to meet their school's high standards. This answer is certainly unavailing with regard to the day camp or nursery and is suspect insofar as the first grade is concerned since Colin Gonzales, because of his race, was never given the opportunity to demonstrate that he was qualified. *Id.* at 7-8.

31. *See, e.g., United States v. Johnson Lake Inc.*, 312 F. Supp. 1376, 1379 (S.D. Ala. 1970).

32. *Gonzales v. Fairfax-Brewster School, Inc.*, Civil Action No. 494-72-A, 7 (E.D. Va., July 27, 1973).

33. *Tillman v. Wheaton-Haven Recreation Ass'n*, 93 S. Ct. 1090 (1973); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). Both these cases were concerned with "private" clubs. The Supreme Court found that in both cases membership in the clubs was open to any whites living within the designated geographic area. The Supreme Court reasoned that since membership was primarily predicated upon being white and living within the designated areas, the clubs in question were not truly private clubs.

34. *Gonzales v. Fairfax-Brewster School, Inc.*, Civil Action No. 494-72-A (E.D. Va., July 27, 1973).

35. *Tillman v. Wheaton-Haven Recreation Ass'n*, 93 S. Ct. 1090, 1094-95 (1973); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236-38 (1969); *See* 42 U.S.C. § 2000a(e) (1970).

36. *Gonzales v. Fairfax-Brewster School, Inc.*, Civil Action No. 494-72-A, 9 (E.D. Va., July 27, 1973).

37. *See Buchanan, Federal Regulation of Private Racial Prejudice: A Study of Law in*

Judge Bryan, Jr. is not alone in extending Section 1981 beyond the employment context.³⁸ But, the *Gonzales* decision does vastly broaden the scope of Section 1981. Its effect will be to cause all private schools to question the validity of their admission policies. It is important to note however that Section 1981 prohibits *racial* discrimination only.³⁹ Therefore, schools which make their selection process in reliance on subjective standards other than race would not come within the scope of Section 1981.⁴⁰

The *Gonzales* decision aids in the conclusion that the vital issue concerning Section 1981 is no longer whether state action is or is not a requirement, but to what extent a broadening of the scope of Section 1981 may conflict with the constitutional rights of liberty, property, privacy and voluntary association.⁴¹ In *Gonzales*, the defendants' refusal to make a contract with the plaintiffs was a result of discrimination based solely upon the plaintiffs' race,⁴² and not upon any "individualized associational concerns."⁴³ Therefore, it would appear that the court's extension of Section 1981 to the private school setting is valid. The Supreme Court has indicated that citizens do have the right, in some circumstances, to discriminate against

Search of Morality, 56 IOWA L. REV. 473 (1971); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 496 (1962). In reference to possible constitutional conflicts, Henkin states:

Increasing equality of the races is the direction of the Constitution. But if the Constitution today weighs on the side of equality, claims of liberty—even of liberty to discriminate on account of race—are not without constitutional protection. *Id.* at 489.

38. See, e.g., *Grier v. Specialized Skills Inc.*, 326 F. Supp. 856 (W.D.N.C. 1971). The court found in this case, that the plaintiffs, who were black, did have a right, under 42 U.S.C. § 1981, to make and enforce a contract to enter the defendant's barber training school.

The majority of cases involving the right to contract under section 1981 have been involved with employment situations where there has been racial discrimination on the part of an employer. See, e.g., *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970).

39. *Gonzales v. Fairfax-Brewster School, Inc.*, Civil Action No. 494-72-A, 7 (E.D. Va., July 27, 1973). See Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1035 (1969).

40. See Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1035 (1969).

41. See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962): "There is . . . a small area of liberty favored by the Constitution even over claims to equality. Rights of liberty and property, of privacy and voluntary association, must be balanced. . . ." *Id.* at 496.

42. *Gonzales v. Fairfax-Brewster School, Inc.*, Civil Action No. 494-72-A, 3, 7 (E.D. Va., July 27, 1973).

43. Buchanan, *supra* note 37, at 509, 526-27.

others.⁴⁴ The Supreme Court will have to determine just how far Section 1981 may be extended to enforce one's right to make a contract.⁴⁵ It is possible that the *Gonzales* case will serve as the instrument with which the Supreme Court may draw more specific constitutional guidelines in this delicate area of the law.

J. G. C.

44. *Norwood v. Harrison*, 93 S. Ct. 2804 (1973): "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.* at 2813. It is important to note however, that this case was not concerned with 42 U.S.C. §§ 1981, 1982, nor was it concerned with discrimination by private individuals.

45. *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D.N.C. 1971). It was found, in this case, that 42 U.S.C. § 1981 was applicable to enforce the plaintiff's right to make a contract, but the court further stated:

It is not assumed that *Jones v. Alfred H. Mayer Co.* and *Sullivan v. Little Hunting Park* have answered all the unforeseen questions which may arise as to discrimination in contract matters *vis-a-vis* the Thirteenth and Fourteenth Amendments and Sections 1981 and 1982. Nor should they be read to portend the complete irrelevance of "state action" in assessing the constitutionality or legality of discriminatory conduct. Absent state action or express constitutional prohibition, personal discrimination in a variety of private matters is a continuing and natural aspect of constitutional freedom; liberty must find room for diversity, narrowness and peculiarity, so long as they do not impose upon others. *Id.* at 863.

See Buchanan, *Federal Regulation of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 IOWA L. REV. 473 (1971); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966). These articles all deal, in part, with possible conflicts between civil rights legislation and other constitutionally guaranteed rights.