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Civil Rights--42 U.S.C. 1981 (1974) Requires All-White Private Schools to Contract with Blacks for Admission

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RECENT DEVELOPMENTS

CIVIL RIGHTS—42 U.S.C. § 1981 (1974) REQUIRES ALL-WHITE PRIVATE SCHOOLS TO CONTRACT WITH BLACKS FOR ADMISSION. *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E. D. Va. 1973).

Two black children, Colin Gonzales and Michael McCrary, were denied admission to summer day camps in two all-white Virginia private schools because of their race. Their parents brought consolidated actions in *Gonzales v. Fairfax-Brewster School, Inc.*,[1] for a declaration that the school policies violated a federal statute.[2] Section 1981 grants *all* persons the same rights as are enjoyed by white citizens to make and enforce contracts and guarantees them equal benefit of all laws which pertain to the security of persons and property. The plaintiffs also sought compensatory damages and a permanent injunction prohibiting the defendant schools from following their discriminatory policy. An association representing private, white schools intervened as a defendant. The intervenor conceded that race was a factor in its policies of exclusiveness, but contended that section 1981 could not reach discrimination in wholly private schools. In its opinion, the federal district court held that section 1981 is to be read literally, and thus no state action is necessary to invoke the statute. The court found that private schools whose enrollment policy had no basis for exclusiveness other than race were not truly "private" schools and therefore could not discriminate on the basis of race without violating section 1981. The court also ruled that the intervenor's testimony which asserted that

1. 363 F. Supp. 1200 (E.D. Va. 1973).

2. 42 U.S.C. § 1981 (1974): 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 all 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.

their schools had higher academic achievement and lower disciplinary problems than integrated schools was irrelevant. *Gonzales* seems to conform to the latest statement of the Supreme Court on section 1981[3] and will thus have a profound effect on states such as Oklahoma which have held that state action is a prerequisite to invoking section 1981.[4]

Gonzales marks the first use of section 1981 to force private, all-white schools to contract with blacks for admission into their schools. However, in other attempts to use section 1981 as a bar to private discriminatory practices, such as in employment contracts, the lower federal courts have not uniformly held that section 1981 reaches purely private discrimination. The differences of opinion center on the question of whether section 1981 was passed by Congress to enforce the fourteenth amendment, which requires state action,[5] or the thirteenth amendment, which does not require state action.[6]

Prior to 1968, a similar division existed in the federal courts over interpretation of section 1982, the companion statute to section 1981, which guarantees blacks the same property rights that white citizens enjoy.[7] The Supreme Court, in *Jones v. Alfred H. Mayer Co.*,[8] held

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3. Tillman v. Wheaton-Haven Rec. Ass'n, 410 U.S. 431 (1973).

4. Smith v. North American Rockwell Corp.—Tulsa Div., 50 F.R.D. 515 (N.D. Okla. 1970).

5. U.S. CONST. amend. XIV, §§ 1, 5.

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

6. U.S. CONST. amend. XIII.

> Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

7. 42 U.S.C. § 1982 (1974):

> 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.

8. 392 U.S. 409 (1968), *noted in* 15 How. L.J. 699 (1969). The commentator discussed the significance of which amendment § 1982 was intended to enforce:

> The arguments of the majority and dissenting opinions center around Congress' authority to enact § 1982 and whether this authority was derived from the Thirteenth or Fourteenth Amendment. This determination is crucial in that (1) if § 1982 were enacted under Congress' power to enforce the Thirteenth Amendment, the provisions of § 1982 *are not* limited to state action but would also apply to individual private action or (2) if § 1982 were enacted under Congress' power to enforce the Fourteenth Amendment, the provisions of § 1982 are limited only to state action for that is all with which the Fourteenth Amendment is concerned.

15 How. L.J. at 704.

that section 1982 does not require state action to invoke it. In resolving the question the Court said:

> We hold that § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.[9]

However, in *Cook v. The Advertiser Company*,[10] a federal district court found an historical basis for giving different treatment to section 1981. The court held that section 1981 was a derivative of section 16 of the Civil Rights Act of 1870 which was enacted subsequent to the adoption of the fourteenth amendment. Therefore section 1981 was presumed to enforce the fourteenth amendment. However, the court also found that section 1982 was a derivative of section one of the 1866 Civil Rights Act which was enacted subsequent to the adoption of the thirteenth amendment but prior to the adoption of the fourteenth amendment. Therefore section 1982 was held to enforce the provisions of the thirteenth amendment. The court in *Cook* noted that the *Jones* decision interpreted section 1982 to reach private discrimination but the *Jones* ruling did not extend to section 1981. Therefore the *Cook* court found that section 1981 requires state action because of its different historical basis. Nevertheless, other federal courts have arrived at exactly the opposite conclusion and have held that section 1981 is the historical companion of section 1982 and that neither statute requires state action before it can be invoked.[11]

In 1973, the United States Supreme Court settled at least the historical basis of this controversy over the construction of sections 1981 and 1982 in *Tillman v. Wheaton-Haven Rec. Ass'n.*[12] The court found that the historical basis for *both* statutes was in the Civil Rights Act

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9. 392 U.S. at 413.

10. 323 F. Supp. 1212 (M.D. Ala. 1971), *noted in* 33 U. PITT. L. REV. 121 (1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972). On appeal, refusing to publish society announcements of blacks was held not to give rise to an enforceable right of contract. Thus, there was no breach of § 1981, since no consideration was paid for these announcements. 458 F.2d at 1122.

11. Scott v. Young, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970) (the court held that ". . . § 1981, the sister to § 1982, must be construed in similar broad fashion." *Id.* at 145); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972) (§ 1981 was derived from the Civil Rights Act of 1866 and reaches private, racial discrimination in employment); Boudreaux v. Baton Rouge Marine Contracting Company, 437 F.2d 1011 (5th Cir. 1971) (Both §§ 1981, 82 are derived from the Civil Rights Act of 1866 and must be construed consistently as reaching private entities).

12. 410 U.S. 431 (1973).

of 1866, and that the Civil Rights Act of 1870 was merely a reenactment of part of the earlier 1866 act. The Civil Rights Act of 1866 stated in part:

> That all persons born in the United States . . . of every race and color . . . shall have the same right, in every State and Territory in the United States, *to make and enforce contracts* . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens . . . . (emphasis added)[13]

Thus the predecessor of section 1981 was enacted before the fourteenth amendment was formally proposed, and though reenacted in 1870, it still had the continued purpose of enforcing the thirteenth amendment.

However, the Court did not state in *Tillman* that these statutes must be construed similarly in *all* cases.

> 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 (emphasis added).[14]

By confining the case to its facts, there may still be a question of whether private *schools* should be treated differently for section 1981 purposes than private *clubs*, but it seems reasonable to predict that the Court, to be consistent, would continue to hold both section 1981 and section 1982 as implementing the thirteenth amendment in areas other than membership in private clubs.

The *Gonzales* decision relied heavily upon and closely paralleled the two major holdings of the Supreme Court in *Tillman.* First, the court held that section 1981 can reach private discrimination, and, second, the court redefined a "private establishment". This second aspect of *Gonzales* held that section 2000a(e) of Title 42[15] is not a limitation on section 1981 and the exemption for private establishments did not apply in this case because the Supreme Court had previously abolished

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13. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.
14. 410 U.S. at 440.
15. 42 U.S.C. § 2000a (1974) provides in part:

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (e) The provisions of this subchapter shall not apply to a private club or other establishment 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 (b) of this section.

traditional notions of what is "private".[16] Thus, since neither school's admission policy evidenced any exclusiveness other than race in selecting students, these were not truly "private" schools. The district court's ruling is in line with the *Tillman* decision in which the Supreme Court unanimously held that a swimming pool which has no selective element other than race is not a private club within the meaning of section 2000 a(e).

Traditionally, private schools have been able to discriminate on the basis of race, in the absence of specific state statutes prohibiting discrimination.[17] The relationship between pupil and school was thought to be governed by contract rather than public rights. The state of Oklahoma specifically forbids discrimination only in the public schools, and therefore would conform to the traditional state position.[18] The Oklahoma position on section 1981 was stated by the federal district court for the northern district in *Smith v. North American Rockwell Corp—Tulsa Div.*[19] The court held that section 1981 extends only to actions or omissions under color of state law. However, this position has been reversed by the Supreme Court in the *Tillman* decision. Thus, *Gonzales* should be applicable to any private school in Oklahoma which has no selective criteria other than race. Indeed, through *Gonzales*, discrimination in private schools may now be under attack in all states as violating the black citizen's right to contract as protected by section 1981.

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16. Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). The Court said:
> The Virginia trial court rested on its conclusion that Little Hunting Park was a private social club. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race.

Id. at 236.

17. Reed v. Hollywood Professional School, 169 Cal. App. 2d 887, 338 P.2d 633 (App. Dep't 1959) (Private school could refuse to admit a five-year-old black girl because the state civil rights act did not include private schools as places of public accommodation); Kirkpatrick v. Williams, 53 N.M. 477, 211 P.2d 506 (1949) (Private beauty school had total discretion in accepting students; only upon acceptance would any right of contract arise); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909) (Medical school's refusal to admit Blacks did not deny them any constitutional rights).

18. OKLA. STAT. tit. 70, § 1210.201 (1971), provides: "Segregation of children in the public schools of the State of Oklahoma on account of race, creed, color or national origin is prohibited."

19. 50 F.R.D. 515 (N.D. Okla. 1970); Judge Barrows held:
> Absent any clear ruling by the Supreme Court to the contrary, the Court is constrained to preserve the longstanding general construction of 42 U.S.C. § 1981 as extending only to such actions or omissions to act, under "color of state law."

Id. at 518.