# SECTION 1981: EXTENDING THE RIGHT TO CONTRACT DOCTRINE TO PROHIBIT RACIALLY DISCRIMINATORY ADMISSIONS POLICIES IN PRIVATE SCHOOLS

The American educational system traditionally has been composed of both public and private institutions.[1] Since *Brown v. Board of Education,*[2] it has been clear that racial segregation in public education violates the equal protection clause of the fourteenth amendment. The constitutional doctrine announced in *Brown*, however, did not apply to private schools[3] which operated without any form of state involvement.[4] Thus, the racially discriminatory admissions policies of many private schools remained unchecked until the United States Supreme Court, in *Runyon v. McCrary,*[5] held that the denial of admission to a

1. The Supreme Court affirmed the alternative of sending children to public or private schools in Pierce v. Society of Sisters, 268 U.S. 510 (1925), which held that private school attendance constituted compliance with compulsory education laws. *See generally* D. KIRP & M. YUDOF, EDUCATIONAL POLICY AND THE LAW 1-31 (1974).

2. 347 U.S. 483 (1954) (racially segregated public educational facilities are inherently unequal and violate the fourteenth amendment).

3. Immediately after the Court's decision in *Brown*, private white schools began to increase in number and size. Their growth skyrocketed, however, after the passage of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c, 2000d (1970) and the subsequent Supreme Court decisions which compelled school authorities to take affirmative action to eliminate segregation. *See, e.g.,* Green v. New Kent County School Bd., 391 U.S. 430 (1968). Enrollment in those southern private schools organized in response to desegregation increased from about 25,000 in 1966 to approximately 535,000 in 1972. *See* Note, *Segregation Academies and State Action,* 82 YALE L.J. 1436, 1441 (1973).

4. The fourteenth amendment does not apply to "private" entities unless some form of state action is found. The courts, however, have found state action in a variety of private school activities including state funding, Griffin v. State Bd. of Educ., 296 F. Supp. 1178 (E.D. Va. 1969); Poindexter v. Louisiana Fin. Assistance Comm'n., 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968); use of public facilities, Gilmore v. City of Montgomery, 473 F.2d 832 (5th Cir. 1973), *rev'd in part,* 417 U.S. 556 (1974); textbook loans, Norwood v. Harrison, 413 U.S. 455 (1973); state control, Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970); Howard University v. National Collegiate Athletic Ass'n, 367 F. Supp. 926 (D.D. C. 1973), *aff'd*, 510 F.2d 213 (D.C. Cir. 1975); Buckton v. National Collegiate Athletic Ass'n, 366 F. Supp. 1152 (D. Mass. 1973); tax exemption, Green v. Connelly, 330 F. Supp. 1150 (D. D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971); Allen v. County School Bd., 198 F. Supp. 497 (E.D. Va. 1961). *But see* Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971) (the court held that the chartering of the university, providing financial aid in the form of public funds, and the granting of tax exemptions were not sufficient state involvement to transform a private university into a state university).

5. 427 U.S. 160 (1976).

private school solely on the basis of race violated the right to contract guarantee of 42 U.S.C. section 1981.[6]

In *McCrary*, parents of a five year old black child submitted an admissions application to a private school in Fairfax County, Virginia, to enroll their son in the school's summer day camp program.[7] The school returned the form, explaining that it was "unable to accomodate the application."[8] Upon further inquiry, the school's chairman informed the parents that the school was not integrated. The parents then contacted another private school in Arlington, Virginia, but did not submit an application after being told that only Caucasians were accepted.[9] Thereafter, the parents brought an action for damages based upon the deprivation of their child's civil rights, and to enjoin the schools[10] from discriminating against qualified blacks in their enrollment practices. The Supreme Court, affirming an award of equitable and compensatory relief,[11] held that 42 U.S.C. section 1981, which grants all persons equal rights to make and enforce contracts, prohibited private schools from excluding qualified children solely because of their race.

The post Civil War Congress enacted the original section 1981, which included a right to contract guarantee, as part of the Civil Rights Act of 1866[12] to enforce the thirteenth amendment.[13] Doubts concern-

6. 42 U.S.C. § 1981 (1970) provides in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ."

7. 427 U.S. at 165.

8. *Id.*

9. Another plaintiff also called this school about enrolling her two-year old son in its nursery school. She asked whether the school was integrated, was told that it was not, and therefore, did not file a formal application. *Id.*

10. The Southern Independent School Association (SISA), an association of six state organizations which represent over 300 private, nonprofit schools, intervened as a party defendant. It was stipulated that many of these schools deny admission to blacks. *Id.* at 164.

11. The court of appeals upheld the district court's award of conpensatory relief to plaintiffs and the district court's denial of damages barred by the Virginia statute of limitations, but reversed the district court's award of attorney's fees to plaintiff. 515 F.2d 1082 (4th Cir. 1975), *aff'g in part,* Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973).

12. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866).

13. U.S. CONST. amend. XIII. Prior to the Civil War, black persons were considered chattel. Because their status was that of a slave, they could neither own property nor enter into contracts. *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, 275, (1969). After the war, Congress passed the thirteenth amendment, which technically abolished slavery and

ing the constitutional validity of the 1866 Act led to the passage of the fourteenth amendment.[14] After the fourteenth amendment's ratification, Congress passed the Civil Rights Act of 1870,[15] which reenacted the Civil Rights Act of 1866. This chain of events created disagreement among the courts about whether the 1870 reenactment was intended to incorporate a state action requirement into the Act.[16] This dispute, coupled with the Supreme Court's decision in 1906 to restrict the application of the thirteenth amendment to situations of actual enslavement,[17] severly limited the statute's usefulness as a means to combat private acts of racial discrimination.[18]

involuntary servitude throughout the nation. *See generally* Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 NAT'L BAR J. 26, 27 (1951); tenBroek, *Thirteenth Amendment of the Constitution of the United States-Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951); Note, *The 'New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969).

14. U.S. CONST. amend. XIV. *See generally* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329 (1952); tenBroek, *supra* note 13, at 200.

15. Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870).

16. The reenactment resulted in two different interpretations of the 1866 Act. The provisions of the reenactment modified the language of § 1981 by extending its protections to all persons within the United States, rather than to citizens alone. It was thought that the change of language in § 1981 indicated that the statute was intended to enforce the fourteenth amendment rather than the thirteenth. *See, e.g.*, Hurd v. Hodge, 334 U.S. 24, 30-31 n.7 (1948); United States v. Wong Kim Ark, 169 U.S. 649, 695-98 (1898). In addition, because the Civil Rights Act of 1870 followed the ratification of the fourteenth and fifteenth amendments, each of which contained state action requirements, some courts held that a state action requirement was incorporated into the 1866 Act. *See, e.g.*, Corrigan v. Buckley, 271 U.S. 323 (1926); Buchanan v. Warley, 245 U.S. 60 (1917); The Civil Rights Cases, 109 U.S. 3 (1883); Neal v. Deleware, 103 U.S. 370 (1880); Strauder v. West Virginia, 100 U.S. 303 (1879); Williams v. Yellow Cab Co., 200 F.2d 302 (3d Cir. 1952), *cert. denied*, 346 U.S. 840 (1953); Waters v. Paschen Contractors, Inc., 227 F. Supp. 659 (N.D. Ill. 1964); Spampinato v. M. Breger & Co., 166 F. Supp. 33 (E.D. N.Y. 1958), *aff'd*, 270 F.2d 46 (2d Cir. 1959), *cert. denied*, 361 U.S. 944 (1960); Chicago's Last Department Store v. Indiana Alchoholic Beverage Comm'n., 161 F. Supp. 1 (N.D. Ind. 1958). Other courts, however, maintained that the history of the 1870 Act demonstrated that Congress did not intend to alter the Civil Rights Act of 1866, and that the 1866 Act applied to acts of private discrimination. *See, e.g.*, U.S. v. Morris, 125 F. 322 (E.D. Ark. 1903); In re Turner, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247); United States v. Rhodes, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151). This position was reaffirmed by the Supreme Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

17. Hodges v. United States, 203 U.S. 1 (1906). The Supreme Court expressly overruled *Hodges* in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43 n.78 (1968).

18. After the Supreme Court's decision in Hodges v. United States, 203 U.S. 1 (1906), litigants had to rely on the fourteenth amendment to contest racial discrimination. Unlike the thirteenth amendment, the fourteenth amendment was only applicable where there was some form of state action. To compensate for the lack of a judicial remedy against private discrimination, the courts attempted to expand the reach of the state action doctrine. *See generally* Henkin, Shelly v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Sengstock & Sengstock, *Discrimination: A Constitutional*

In 1968, however, the Supreme Court revived the thirteenth amendment and the Civil Rights Act of 1866 as judicial tools to prohibit private discriminatory activity. The Court, in *Jones v. Alfred H. Mayer Co.*,[19] reexamined the legislative history of the Civil Rights Act of 1866 and held that section 1982[20] prohibited a privately operated real estate company from refusing to sell a home to the plaintiff solely because he was black. The *Jones* Court, in dicta, inferred that section 1981 would prohibit private discriminatory acts in contracting.[21]

Following the *Jones* decision, the courts liberally applied the 1866 Civil Rights Act to various forms of private discrimination. The Supreme Court construed section 1982 to prohibit discriminatory exclusion from a community park[22] and a private club.[23] Lower courts inter-

*Dilemma,* 9 WM. & MARY L. REV. 59, 94 (1967); Williams, *The Twilight of State Action,* 41 TEX. L. REV. 347 (1963).

19. 392 U.S. 409 (1968).

20. 42 U.S.C. § 1982 (1970) provides: "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."

21. While not commenting directly on § 1981, the *Jones* Court inferred that §§ 1981-1982, as part of the Civil Rights Act of 1866, should be given parallel interpretations.

> In light of the concerns that led Congress to adopt [the Civil Rights Act of 1866] 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 . . . .

392 U.S. at 436. In addition, the *Jones* Court analyzed the legislative history of the 1866 Act and held that its reenactment in the Civil Rights Act of 1870 did not incorporate a state action requirement into the earlier act.

> But it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were meant somehow to *limit* its application to state action. The legislative history furnishes not the slightest factual basis for any such speculation, and the conditions prevailing in 1870 make it highly implausible.

*Id.* (emphasis in original). Even after the *Jones* decision, however, a few courts still required a showing of state action to invoke § 1981. *See, e.g.,* Cook v. The Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds,* 458 F.2d 1119 (5th Cir. 1972) (§ 1981 applies only to state action and is not violated by refusal of newspaper to publish Negro bridal announcement in society section of newspaper); Tennessee v. Hartman, 303 F. Supp. 411 (E.D. Tenn. 1969) (actions committed by hospital and physician in their private capacities were not "under color of state law" as required by § 1981); Culpepper v. Reynolds Metal Co., 296 F. Supp. 1232 (N.D. Ga. 1969), *rev'd on other grounds,* 421 F.2d 888 (5th Cir. 1970) (section 1981 does not provide jurisdiction in fair employment practices action). Recently courts have accepted the interpretation of § 1981 set forth by the *Jones* Court. In WRMA Broadcasting Co. v. Hawthorne, 365 F. Supp. 577, 580 (M.D. Ala. 1973), the court stated that "it has now become clear that this circuit has adopted the theory that state action is not a requisite element of a section 1981 claim by a black plaintiff." *See also* notes 24-29 *infra.*

22. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (defendant corpora-

preted section 1981 to bar private acts of racial discrimination[24] related to contracting in employment cases,[25] business contracts and services,[26] hospital admissions policies,[27] the use of recreational facilities,[28] and admissions to state licensed training schools.[29] In addition, the Supreme Court, prior to *McCrary,* stated that "§ 1981 affords a federal remedy against discrimination in private employment on the

tion's refusal to approve a membership share assignment to a black person which would have permitted access to a private park and playground violated the right to lease guarantee of § 1982).

23. Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973) (swimming pool association's racially discriminatory membership policy violated the right to purchase, lease and hold property under § 1982).

24. Courts have also interpreted § 1981 to protect resident and registered aliens against private discriminatory acts related to contracting. *See* Roberto v. Hartford Fire Ins. Co., 177 F.2d 811 (7th Cir. 1949), *cert. denied,* 339 U.S. 920 (1950); Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D. Tex. 1972), *modified,* 498 F.2d 641 (5th Cir. 1974). Non-minorities can also obtain relief under § 1981. McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976) (§ 1981 was violated where two white employees were discharged for misappropriating cargo, but a black employee charged with the same offense was not discharged; statute protects whites as well as nonwhites).

25. *E.g.,* Payne v. Ford Motor Co., 461 F.2d 1107 (8th Cir. 1972) (unfavored treatment); Brady v. Bristol-Meyer, Inc., 459 F.2d 621 (8th Cir. 1972) (discriminatory practices); Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971) (transfer); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) (job placement); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971) (false charges); Tramble v. Converters Ink Co., 343 F. Supp. 1350 (N.D. Ill. 1972) (discharge); Page v. Curtiss-Wright Corp., 332 F. Supp. 1060 (D. N.J. 1971) (promotion); Tolbert v. Daniel Constr. Co., 332 F. Supp. 772 (D. S.C. 1971) (refusal to hire); Central Contractors Ass'n. v. Local 46, IBEW, 312 F. Supp. 1388 (W.D. Wash. 1969) (work stoppage); Clark v. American Machine Corp., 304 F. Supp. 603 (E.D. La. 1969) (job classification); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968), *aff'd sub nom.* United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973) (union membership and referral status). *But cf.* Kyles v. Calcasieu Parish Sheriff's Dept., 395 F. Supp. 1307 (W.D. La. 1974) (claim of racial discrimination in hiring barred by sovereign immunity); Keys v. Continental Ill. Nat'l. Bank and Trust Co., 357 F. Supp. 376 (N.D. Ill. 1973) (dismissal from job based on failure to comply with dress code not race).

26. Young v. AAA Realty Co., 350 F. Supp. 1382 (M.D.N.C. 1972) (rental of apartments); Sims v. Order of United Commercial Travelers, 343 F. Supp. 112 (D. Mass. 1972) (issuance of insurance contracts); Black v. Bonds, 308 F. Supp. 774 (S.D. Ala. 1969) (service in a restaurant).

27. United States v. Medical Soc'y, 298 F. Supp. 145 (D. S.C. 1969) (equal admissions to and employment opportunities in private hospital).

28. Scott v. Young, 421 F.2d 143 (4th Cir.), *cert. denied,* 398 U.S. 929 (1970) (admission to private amusement park).

29. Grier v. Specialized Skills, Inc., 326 F. Supp. 856 (W.D. N.C. 1971) (admission to state licensed barber training school).

basis of race."[30]

Thus, in view of the case law, the Supreme Court in *McCrary*, was faced with a clear choice—either to restrict the scope of section 1981 and reaffirm the pre-Jones decisions,[31] or to continue the trend begun by *Jones* and construe section 1981 to bar private acts of discrimination in contracting.[32] Following the *Jones* interpretation of the Civil Rights Act of 1866, the *McCrary* Court affirmed the broad applicability and constitutionality of section 1981.[33] The Court asserted that section 1981 *does in fact* prohibit racial discrimination in the making and enforcement of private contracts.[34] Applying the statute to private school admissions, the Court upheld the determination that the relationship between the school and the parent and child was contractual,[35] and concluded that the defendants' actions were a "classic violation"[36] of section 1981. The *McCrary* Court further held that prohibiting private racial discrimination under the facts presented did not infringe the defendants' freedom of association,[37] parental rights[38] or right of

30. Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975) (comparing § 1981 and Title VII of the Civil Rights Act).

31. See notes 17 & 18 and accompanying text *supra*.

32. See notes 24-29 and accompanying text *supra*.

33. 427 U.S. at 168-75.

34. *Id.* at 168. In dissent, Justice White argued that § 1981 did no more than remove legal disabilities in contracting (i.e., state laws prohibiting contracting with Negroes).

> The statute [§ 1981] by its terms does not require any private individual or institution to enter into a contract or perform any other act under any circumstances; and it consequently fails to supply a cause of action by respondent students against petitioner schools based on the latter's racially motivated decision not to contract with them.

*Id.* at 194-95 (White, J., dissenting).

35. The Court reasoned that a contractual relationship exists between private schools and parents who enroll their children in them, because the schools receive payments for services rendered and the student receives instruction in return for those payments. *Id.* at 172. *See, e.g.*, Asheville School v. Kirk, 269 Ill. App. 365 (1933); McClintock v. Lake Forest Univ., 222 Ill. App. 468 (1921); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909). *See generally* Note, *The Student-School Legal Relationship: Toward a Unitary Theory,* 5 Suffolk U.L. Rev. 468, 475-76 (1971).

36. 427 U.S. at 172.

37. The right of association embraces "the freedom to engage in associations for the advancement of beliefs and ideas." NAACP v. Alabama, 357 U.S. 449, 460 (1957). The *McCrary* Court asserted that termination of the school's discriminatory admissions practice would not inhibit the teaching of any ideas or dogmas, and thus found no infringement of the right of association. 427 U.S. at 176. Furthermore, the Court noted that "[i]ndividious private discrimination . . . has never been accorded affirmative constitutional protections." *Id. quoting* Norwood v. Harrison, 413 U.S. 455, 470 (1973).

38. It is well settled that parents have the right to direct the upbringing and

privacy.[39]

*McCrary* is not a panacea. The decision will not achieve full-scale integration of private schools. Section 1981 can be used to prohibit racially discriminatory admissions policies of private schools where the prospective student is denied admissions *solely* because he is black. Academic, financial, religious and sex-based restrictions on admissions were not within the scope of the McCrary holding[40]. Where the school's acts of racial discrimination are neither blatant nor explicit, the plaintiff's burden of proof may be prohibitive.[41] Moreover, private schools may attempt to circumvent *McCrary* by practicing covert racial discrimination and using pledges, donations, and scholarships to evade the contract requirement necessary to invoke section 1981. Despite its limited scope, however, the Supreme Court's decision in *McCrary* is significant. Discriminatory practices within private education were considered outside the scope of judicial scrutiny until *McCrary*.[42] Although the *McCrary* decision focused on the freedom to

education of their children. Pierce v. Society of Sisters, 268 U.S. 510 (1925). The *McCrary* decision does not affect a private school's right to operate or teach a particular subject, nor does it affect the parents' right to send their children to private schools. The *McCrary* Court held that no parental right had been infringed upon because the parents were free to send their children to private schools and the schools were "presumptively free to inculcate whatever values and standards they deem[ed] desirable." 427 U.S. at 177.

39. The Court held that although the application of § 1981 to a racially discriminatory school admissions policy implicates parental interests, parents "have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." 427 U.S. at 178.

40. 427 U.S. at 167.

41. *See* Gonzales v. Southern Methodist Univ., 536 F.2d 1071 (5th Cir. 1976) (injunction denied because the record revealed no evidence of discrimination based on race); Riley v. Adirondack Southern School for Girls, 368 F. Supp. 392 (M.D. Fla. 1973) (court denied relief after finding other factors present, aside from race, to deny plaintiff's admission).

42. *See, e.g.*, Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909) (constitution did not restrain the refusal to admit blacks students to a medical school incorporated under state law); Barker v. Bryn Mawr College, 278 Pa. 121, 122 A. 220 (1923) (a private school has discretion to exclude or dismiss undesirable students).

After Brown v. Board of Education, 347 U.S. 483 (1954), the courts applied the fourteenth amendment to prohibit discrimination in private schools where some form of state action was present. *See* note 4 *supra*. But where state action was not found, the fourteenth amendment did not apply to private schools. *See, e.g.*, Bright v. Isenberger, 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971) (due process requirements do not apply to expulsion proceedings in a private school); Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962) (racially exclusionary admissions); Reed v. Hollywood Professional School, 169 Cal. App. 2d 887, 338 P.2d 633 (1959) (racially exclusionary admissions).

contract rather than the overall desegregation of private education, it nonetheless provides a new weapon with which aggrieved persons can challenge racial discrimination in private education.[43] By affirming the *Jones* Court's historical interpretation of the Civil Rights Act of 1866, *McCrary* ensures that the thirteenth amendment will remain a viable constitutional restraint on private discrimination.

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43. The *McCrary* Court affirmed the Fourth Circuit's reversal of an award of attorney's fees to plaintiffs holding that § 1981 did not specifically authorize a fee award and that there was no other statutory basis for the fees. 427 U.S. at 182-86. *See* Ayeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), *noted in* 1975 WASH. U. L. Q. 1071 (rejecting "private attorneys general" theory of fee awards unless statutorily authorized). The inability to recover attorney's fees under § 1981 might have inhibited other aggreived persons from bringing suits against private schools with racially discriminatory admissions policies. Congress, however, has eliminated this potential barrier. The Civil Rights Attorneys Fee Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, authorizes an award of attorneys fee to a prevailing party in actions brought to enforce § 1981 as well as other enumerated civil rights statutes. *See generally* Larson, *The Civil Rights Attorneys Fees Awards Act of 1976,* 10 CLEARINGHOUSE REV. 778 (1977).