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## Constitutional Law-Civil Rights: Towards Resolving 42 U.S.C. 1981 with the Right to Privacy and the Right to Associate

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**CONSTITUTIONAL LAW-CIVIL RIGHTS:  
TOWARDS RESOLVING 42 U.S.C. § 1981  
WITH THE RIGHT TO PRIVACY AND  
THE RIGHT TO ASSOCIATE**

*Runyon v. McCrary*<sup>1</sup>

Bobbe's School and Fairfax-Brewster School, Inc., were private schools operating in Virginia. Each maintained a student population of approximately 200 students during the regular academic year, and from 100 to 200 students during summer camp. Both schools, attempting to attract students, advertised in the yellow pages of the phonebook and mailed advertising brochures addressed to "resident."

In May 1969, Mr. and Mrs. Gonzales toured the summer camp facilities at Fairfax-Brewster School and applied for admission of their son Colin, a Negro. After receiving a form letter rejection, Mr. Gonzales telephoned Fairfax-Brewster and was informed that the school was not integrated. Mr. Gonzales then telephoned Bobbe's School. A similar call was placed by Mrs. McCrary in regards to the admission of her son Michael. Both were informed that Bobbe's School was not integrated.

Colin Gonzales, through his parents, filed suit against Fairfax-Brewster School alleging that the school's policy of denying admission to Negroes was a violation of 42 U.S.C. § 1981.<sup>2</sup> Colin Gonzales and Michael McCrary, through their parents, filed a class action against Bobbe's School on similar grounds. The trial court found both schools in violation of the Act.<sup>3</sup> This holding was affirmed by the court of appeals<sup>4</sup> and the United States Supreme Court.

Section 1981 is derived from the Civil Rights Act of 1866,<sup>5</sup> a major piece of Reconstruction legislation passed pursuant to the thirteenth amendment. Given its origin, it is not surprising that § 1981 only prohibits discrimination on the basis of race, and not on the basis of sex,<sup>6</sup> religion, or

1. 96 S. Ct. 2586 (1976).

2. 42 U.S.C. § 1981 (1974) provides:

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.

3. 363 F. Supp. 1200 (E.D. Va. 1973).

4. 515 F.2d 1082 (4th Cir. 1975).

5. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1865-1867).

6. *Abshire v. Chicago & E. Ill. R.R.*, 352 F. Supp. 601, 605 (N.D. Ill. 1972); *League of Academic Women v. Regents of Univ. of Calif.*, 343 F. Supp. 636, 638-40 (N.D. Cal. 1972).

racial exclusion on religious grounds.<sup>7</sup> Its protection extends to whites as well as blacks.<sup>8</sup>

*Runyon* was based on the § 1981 right to contract provision. This provision prohibits discrimination, public or private, on the basis of race in the making and enforcement of contracts.<sup>9</sup> This provision only applies where a contract is involved; it will not prohibit discrimination on the basis of race in a non-contractual situation. However, the § 1981 definition of contract is very broad. The passing of any consideration between the parties would be sufficient to constitute a contract under § 1981.<sup>10</sup> Further, § 1981 takes effect prior to the time at which a contract is formed by prohibiting a discriminatory refusal to offer to contract.<sup>11</sup>

The decision in *Runyon* continues the revival of the 1866 Civil Rights Act which began in *Jones v. Alfred H. Mayer Co.*<sup>12</sup> *Jones* reversed nearly a century of precedent which had restrictively construed both § 1981 and § 1982 and refused to extend them to private discrimination.<sup>13</sup> Section 1982, a companion to § 1981 in the 1866 Act, prohibited private discrimination in the sale or rental of real or personal property. In dicta, the Court stated that both the wording and the legislative history of § 1981 also dictated its application to private discrimination.<sup>14</sup> This interpretation is subject to dispute.<sup>15</sup>

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7. *Runyon v. McCrary*, 96 S. Ct. 2586, 2592 (1976) (dicta).

8. *McDonald v. Santa Fe Trail Transp. Co.*, 96 S. Ct. 2574 (1976) (Two white employees and one black were charged with misappropriating cargo of their employer. Although the white employees were dismissed, the black was not. The white employees claimed that the employer was in violation of § 1981 which they alleged applied to whites as well as blacks. Held: § 1981 prohibits racial discrimination in private employment against whites and non-whites alike. Plaintiffs also filed under the 1964 Civil Rights Act.

The potential impact of the *Runyon* and *McDonald* decisions is far reaching. For example, it may now be impermissible for private law and medical schools to maintain affirmative action admissions programs. Since § 1981 prohibits private racially motivated refusals to contract, and since *McDonald* extends this protection to whites as well as blacks, then affirmative action programs for minority racial groups may violate § 1981 since there is racially motivated contractual discrimination. The only limitation on § 1981's application to reverse discrimination would be the rights of freedom of association and privacy.

9. See statute quoted note 2 *supra*.

10. *Runyon v. McCrary*, 96 S. Ct. 2586, 2594 (1976).

11. *Scott v. Young*, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970) (An admission price to an amusement park was found to constitute a contract). See also *U.S. v. Medical Soc'y of S.C.*, 298 F. Supp. 145 (D.S.C. 1967); *Black v. Bonds*, 308 F. Supp. 774 (S.D. Ala. 1969).

12. 392 U.S. 409 (1968).

13. *Hodges v. United States*, 203 U.S. 1, 17-19 (1906); Civil Rights Cases, 109 U.S. 3, 24-25 (1883).

14. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-35 (1968).

15. See the dissent of J. White at 96 S. Ct. 2586, 2604 (1976) (Justice White argues that the majority misconstrued both the legislative history of the Act, and the concept of contract). See also *Cook v. Advertiser Co.*, 323 F. Supp. 1212 (N.D. Ala. 1971); *Smith v. North Am. Rockwell Corp.*, 50 F.R.D. 515 (N.D. Okla. 1970).

*Jones* forewarned of a similar extension of § 1981 to private discrimination. The Court emphasized the common origin of the sections. Also, it expressly overruled *Hodges v. United States*<sup>16</sup> which had restrictively construed § 1981 and refused to extend it to private discrimination.

In the aftermath of *Jones*, the Supreme Court reaffirmed its interpretation of § 1981 in a series of cases beginning with *Sullivan v. Little Hunting Park*.<sup>17</sup> In *Sullivan*, § 1981 was used to prohibit a private hunting park from denying a Negro the contractual opportunity to enter the hunting park. In *Tillman v. Wheaton Haven Recreation Ass'n*,<sup>18</sup> a private swimming club adopted and enforced a racially discriminatory guests admissions policy. In remanding the case for further proceedings under § 1981, the Court found that § 1981 and § 1982 were similarly derived and should be similarly construed to extend to private discrimination. Finally, in *Johnson v. Railway Express Agency, Inc.*,<sup>19</sup> a case involving discrimination against a black with regard to seniority rights, the Court held that § 1981 prohibited private discrimination on the basis of race in employment.

There appears to be no question that § 1981 will be used to prohibit private, racially motivated refusals to contract. But, § 1981 has been given widespread application by lower courts in combatting contractual discrimination.<sup>20</sup> Its greatest impact has been in the area of employment discrimination.<sup>21</sup> Section 1981 has been used to prohibit private racial discrimina-

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*But see* Larsen, *The New Law of Race Relations*, 1969 WIS. L. REV. 470; Comment, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615 (1969).

16. 203 U.S. 1 (1906).

17. 396 U.S. 229 (1969).

18. 410 U.S. 431 (1973).

19. 421 U.S. 454 (1975).

20. *Payne v. Ford Motor Co.*, 461 F.2d 1107 (8th Cir. 1972) (A Negro claimed that he was subjected to different and less favorable conditions of employment than white employees. The court found that § 1981 prohibits private employment discrimination on the basis of race); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972) (§ 1981 prohibits private discrimination in employment on the basis of race); *Brown v. Gasten County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), *Cert. denied*, 409 U.S. 982 (1972) (A black alleged discrimination against his employer in hiring, promotion, pay and other conditions of employment). *But see* *Cook v. Advertiser Co.*, 323 F. Supp. 1212, 1216 (5th Cir. 1972) (Action against a newspaper for discriminatory refusal to publish bridal announcements of blacks. Held: § 1981 extends only to state action and does not bar private discrimination on the basis of race); *Smith v. North Am. Rockwell Corp.*, 50 F.R.D. 515, 518 (N.D. Okla. 1970) (Action by several employees of defendant alleging discriminatory promotion practices. Held: § 1981 does not extend to private discrimination on the basis of race).

21. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973) (Plaintiff alleged that defendant freight company conspired with defendant union to discriminate against blacks in employment. Held: § 1981 prohibits private discrimination on the basis of race); *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757 (3rd Cir. 1971) (Facts and holding similar to *Macklin*); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971)

tion in hiring,<sup>22</sup> firing,<sup>23</sup> and promotion.<sup>24</sup> However, § 1981 has not been limited to employment discrimination, but also has been used to obtain admission to a private amusement park,<sup>25</sup> admission to a private hospital,<sup>26</sup> insurance from a private company,<sup>27</sup> service in a restaurant,<sup>28</sup> and rental of an apartment.<sup>29</sup>

The extension of § 1981 to private discrimination raises the constitutional issues of freedom of association and privacy. Given the fact that contracts permeate our private and public lives, there must come a point at which the § 1981 right to contract must yield to competing interests. Although the rights of association and privacy overlap to some extent, they are separate interests.

Although *Runyon* recognized the importance of the right to freedom of association, it refused to acknowledge that the right includes, at times, the right to exclude others, on the basis of race, from one's associations.<sup>30</sup> Freedom of association is not explicitly guaranteed by the Constitution; it warrants constitutional protection because of its penumbral relationship to first amendment rights.<sup>31</sup> Protection of the right to associate has been found necessary for the stimulation and protection of the effective advocacy of beliefs and ideas.<sup>32</sup> The theory is that a homogenous group will be

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(Discrimination in concitions of employment. Held: § 1981 prohibits private employment discrimination on the basis of race).

22. *Young v. ITT*, 438 F.2d 757 (3rd Cir. 1971); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971); *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970) (Defendant's racially discriminatory hiring policies designed to exclude Negroes was prohibited by § 1981).

23. *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971) (Negro discharged by his employer on the basis of race); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970) (Defendant's action in discharging a Negro solely on the basis of race was found to violate § 1981).

24. *Ellison v. Rock Hill Printing & Finishing Co.*, 64 F.R.D. 415 (D.S.C. 1974); *Copeland v. Mead Corp.*, 51 F.R.D. 266 (N.D. Ga. 1970).

25. *Scott v. Young*, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970).

26. *U.S. v. Medical Soc'y of S.C.*, 298 F. Supp. 145 (D.S.C. 1969).

27. *Sims v. Order of United Commercial Travelers*, 343 F. Supp. 112 (D. Mass. 1972).

28. *Black v. Bonds*, 308 F. Supp. 774 (S.D. Ala. 1969).

29. *Young v. A.A.A. Realty Co.*, 350 F. Supp. 1382 (M.D.N.C. 1972).

30. 96 S. Ct. at 2596 (1976).

31. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (Defendant was charged with contempt for failure to relate either the contents of a speech, or his knowledge of the Progressive party. Held: Defendant's first amendment rights of expression and association could not be overridden except by a sufficiently compelling state interest).

32. *Buckley v. Valleo*, 96 S. Ct. 612 (1976) (Limits on campaign expenditures violate plaintiff's right of expression and right of association); *Kusper v. Pontikes*, 414 U.S. 51 (1973) (State primary law which forbids a voter from changing party affiliation and voting in another party's primary election without a 23 month delay. Held: The primary law violates the voter's right of association); *Shelton v. Tucker*, 364 U.S. 479 (1960) (Arkansas statute which required teachers to file an affidavit

able to formulate and advance its beliefs more effectively when it is free from outside interference. The protection extends beyond political beliefs to encompass association for social, legal or economic purposes.<sup>33</sup> Freedom of association should include the freedom of segregation where the association is a highly personal one, such as a contract for a babysitter or private tutor.<sup>34</sup> The application of § 1981 to such highly personal areas would infringe upon both the freedom of association and the right of privacy.<sup>35</sup>

The application of the right of association beyond such highly personal situations to large groups presents a more complex problem. Although it did not confront the issue directly, *NAACP v. Alabama*<sup>36</sup> provided us with insight into the problems involved. In *NAACP*, the Supreme Court found that the NAACP's right to association was violated by a court order requiring it to produce its membership lists pursuant to state law. The Court emphasized that release of the lists would subject the NAACP to private pressure which, in turn, would inhibit the members' desire to associate. In reaching its decision, the Court weighed the state's interest in production of the lists against the NAACP's right to associate and need for privacy of the lists.

The Court recognized that the right to associate is not absolute, but is subject to being overridden by a sufficiently compelling state interest.<sup>37</sup> Under § 1981, the state interest would be the prohibition of discrimination on the basis of race. The countervailing interest would be the group's right to associate. In the balancing process, the court should weigh the strength of the association's claim to first amendment protections, and its need for privacy.

Using this balancing process, the *Runyon* decision, that Bobbe's School and Fairfax-Brewster School did not have the right to segregate, is recon-

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stating every organization to which they have belonged in the previous five years violated their right of association); *NAACP v. Alabama*, 357 U.S. 449 (1958).

33. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (Overturned Connecticut statute forbidding dissemination of information on contraceptives); *NAACP v. Button*, 371 U.S. 415, 430-31 (1963) (Statute forbidding solicitation of legal business held to violate right of expression and association when applied to an association which sought to protect legal rights).

34. *Runyon v. McCrary*, 96 S. Ct. 2586 (1976) at 2602 (Powell J., concurring).

35. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

36. 357 U.S. 449 (1958).

37. *U.S. Civil Service Commission v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (Congress can constitutionally forbid federal employees from engaging in political campaigning); *Healy v. James*, 408 U.S. 169 (1972) (Refusal to recognize SDS on college campus. Held: Not violative of first amendment to refuse to recognize SDS on campus where there was sufficiently compelling state interest); *Scales v. United States*, 367 U.S. 203 (1958) (Right to associate can be overridden by a sufficiently compelling state interest. In *Scales*, the right of a communist organization to associate was found to be outweighed by the state interest as defined in the Internal Security Act); *NAACP v. Alabama*, 357 U.S. 449 (1958).

cilable with the holding in *NAACP*. In that case NAACP had a strong claim to first amendment protections and a strong need for privacy, but the state interest was not compelling. In *Runyon*, both schools had a weaker claim to first amendment protection. Both schools were more public than private, and there was a compelling state interest—the right of blacks to get a quality education.

The constitutional guarantee of privacy also represents a limitation on § 1981. This right has generally been limited to such highly personal areas as the use of contraceptives,<sup>38</sup> the decision to terminate a pregnancy,<sup>39</sup> and the use of pornography in one's own home.<sup>40</sup> The right of privacy correlates to the privateness of the activity. As an activity becomes increasingly public, the strength of its claim to a right of privacy is diminished. Like other constitutional rights, the right of privacy is not absolute, and may be restricted by a sufficiently compelling state interest.<sup>41</sup>

In *Runyon*, Bobbe's School and Fairfax-Brewster School were not accorded protection under the right of privacy because of the public nature of their activities. The Court noted that both schools appealed to a public constituency through their advertising, and utilized no selective element other than race.<sup>42</sup> The right of privacy should provide a limitation on § 1981 where the activity is actually private. When an individual hires someone to work in a private situation, such as a housekeeper or babysitter in a private home, he should fall within constitutional privacy protections.<sup>43</sup> In such a case, § 1981 should yield to the right of privacy. Similarly, a small, highly personalized school with heavily restricted admissions should also be protected. Barring probable ethical problems a similar claim might be made for certain personal business relations as attorney-client or doctor-patient.

As with the right to associate, the problem becomes more complex where a larger organization is involved. It is possible, arguing by analogy, that any private club or organization could gain an exemption from § 1981 through the private club exemption contained in the 1964 Civil Rights Act.<sup>44</sup> In *Cornelius v. Benevolent Protective Order of Elks*,<sup>45</sup> a federal district

38. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

39. *Roe v. Wade*, 410 U.S. 113 (1973).

40. *Stanley v. Georgia*, 394 U.S. 557 (1969).

41. *See Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

42. 96 S. Ct. at 2595 n.10.

43. *Id.* at 2602. A like claim could be made for a great master of the arts such as a violinist, who accepted three prize students per year to live with him and receive personalized instruction.

44. 42 U.S.C. § 2000 *et seq.* The private club exemption is 42 U.S.C. § 2000a(e) which provides:

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

court found the exemption applicable on the basis that provisions of one statute which specifically focus on a particular problem will prevail over provisions of a different statute more general in its coverage, in the absence of express contrary legislative intent.<sup>46</sup> Although more than one lower court has held the exemption applicable to § 1981,<sup>47</sup> the Supreme Court has not decided the issue. In *Runyon*, the Court avoided the question by finding that because both schools were actually public, they would not qualify for the exemption.

The Supreme Court has signalled that should the exemption apply to § 1981, then an organization must be private in fact to claim the exemption. In *Tillman v. Wheaton Haven Recreation Ass'n*<sup>48</sup> the Court held that a club which had no selective element other than race would not qualify for the exemption. Insight into what constitutes a private club may be gained from *Cornelius* where the Elks Club was found to be a private club. The criteria used by the court included the selectiveness of the group in the admission of members, the membership procedures of the group, the degree of membership control in regard to the admission of new members, the history of the organization, the existence and substantiality of dues, the limitation of club facilities to members, the non-predominance of the profit motive, and the lack of organizational advertisement.<sup>49</sup> In applying these criteria, the court was persuaded that the Elks Club was private because of its admission requirements and procedures.<sup>50</sup>

If the exemption does apply to § 1981, any organization which is private, even a private school, qualifies for the exemption. Organizations

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patrons of an establishment within the scope of subsection (b) of this section.

45. 382 F. Supp. 1182 (D. Conn. 1974).

46. *Id.* at 1201.

47. *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974); *Sims v. Order of United Commercial Travelers*, 343 F. Supp. 112 (D. Mass. 1972).

48. 410 U.S. 431 (1973).

49. 382 F. Supp. at 1203.

50. *Id.*

At the time of the alleged violation of § 1981, the Elks' constitution provided that only white male citizens of the United States who believe in God and who live within the jurisdictional limits of the local lodge were eligible for membership. Thus, besides black males, other non-"whites", women, non-believers, aliens and out-of-towners were also not welcome. The constitution further provides that an applicant must answer various questions about his background and be sponsored by a member in good standing. The secretary of the lodge submits the application to the membership, and the chief officer refers it to a standing investigative committee composed of members of the lodge. As part of the investigative process, the applicant is required to appear before the committee. The report of the committee is presented to the membership at the regular meeting, and the entire membership is notified that the applicant will be considered at the next meeting. Three negative votes bar the applicant.