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Teresa A. Clark

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CIVIL RIGHTS—PRIVATE SCHOOL'S POLICY OF REFUSING TO ADMIT BLACK PEOPLE SOLELY BECAUSE OF THEIR RACE VIOLATES CIVIL RIGHTS ACT OF 1866—42 U.S.C. § 1981—*Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va. 1973).

[I]n many areas of the South efforts to eliminate segregation in public education have been nullified by the massive withdrawal of white children from public schools and the concomitant establishment of a "private" school system. This movement away from public education threatens not only the achievements of fifteen years of integration efforts but also the very legitimacy of free public education in the South [W]hite withdrawal to segregated private schools . . . may be the foremost issue in school desegregation litigation.¹

The adoption of an extensive "private school" system in the southern states, with a primary aim of avoiding the effect of various Supreme Court cases banning public school segregation, has been premised on the assumption that their "private" nature would insure immunity from federal, and even state, remedial action.² Because the fourteenth amendment's equal protection clause has long been held

1. Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973) [hereinafter cited as *Segregation Academies*]: "A small number of private segregated schools were established prior to 1966 to accommodate the moderate numbers of white children who withdrew from the public schools because of the token integration achieved under voluntary transfer plans." *Id.* at 1441 n.36, citing (*inter alia*) U.S. COMMISSION ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-1967, and *Hearings on Equal Educational Opportunity Before the Senate Select Comm. on Equal Educational Opportunity*, 91st Cong., 2d Sess., pt. 3C at 1502 (1970) (testimony of Melvyn Leventhal, NAACP Legal Defense Fund).

The initial lack of enforcement of *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *implemented*, 349 U.S. 294 (1955), is obvious from a United States Department of Health, Education and Welfare Press Release, Apr. 11, 1973, at 2, and U.S. COMMISSION ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-1967, 7 (1967), stating that in 1965-66, 84.9 percent of black students in the eleven southern states attended schools which were 100 percent black. *Segregation Academies, supra* at 1436 n.1.

The Supreme Court, in *Green v. County School Bd.*, 391 U.S. 430 (1968), held that each school board had an affirmative duty to desegregate its schools. This decision was more successful in accomplishing actual desegregation; by 1972-73 only 9.2 percent of black students in the south were attending all-black schools. United States Dep't of Health, Education and Welfare Press Release, *supra*.

The effect of *Green* on integration was paralleled by a withdrawal of white students to private segregation academies. For example, the 56 predominantly black school districts in Mississippi lost 40 percent of their white students between 1968 and 1971. *Segregation Academies, supra* at 1451 n.81, citing Deposition of Lloyd Henderson, Director, Education Division, Office of Civil Rights, at 1-4, Plaintiff's Ex. 10, *Norwood v. Harrison*, 340 F. Supp. 1003 (N.D. Miss. 1972), *rev'd*, 413 U.S. 455 (1973).

2. *Segregation Academies, supra* note 1, at 1453.

to apply only to "state action,"³ *i.e.*, governmental activity, there could be no violation of the United States Constitution if such institutions are truly "private." In mid-1973, however, a federal district court in Virginia decided a "private school" case in a manner which promises the eventual demise of the segregation academy. The case was *Gonzales v. Fairfax-Brewster School, Inc.*,⁴ in which the United States District Court for the Eastern District of Virginia held, for the first time, that a federal civil rights statute, 42 U.S.C. § 1981, proscribed a private school's racially discriminatory admissions policy.⁵

3. In 1883, the Court decided *The Civil Rights Cases*, 109 U.S. 3, in an opinion which has been the foundation for the concept of "state action": that the fourteenth amendment expresses a prohibition on actions of states which deny persons the equal protection of their laws. *Id.* at 11. The wrongful act of an individual, unsupported by state authority, is only a private wrong which must be remedied through resort to state laws. *Id.* at 17. Since 1883, this easily stated idea has been the subject of much litigation, which has gradually seen the concept of "state action" so broadly interpreted, at least in the last 20 years, as to prompt some commentators to announce its abolition as a requirement for invoking the fourteenth amendment in cases of racial discrimination. *See, e.g.*, Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

As to what *kind* of state action is prohibited, *The Civil Rights Cases* and subsequent decisions have made it clear that *all* action by the state, whether by administrative agencies (*see, e.g.*, *Robinson v. Florida*, 378 U.S. 153 (1964) (health regulations prescribing different treatment (separate restrooms) for black people in public restaurants); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907) (action of state tax board)), the executive (*Mooney v. Holahan*, 294 U.S. 103 (1935) (action of public prosecutors)), the legislature (*Loving v. Virginia*, 388 U.S. 1 (1967) (state statute forbidding interracial marriages); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (state required segregation in public restaurants); *Buchanan v. Warley*, 245 U.S. 60 (1917) (city ordinance forbidding one race from moving into areas predominantly occupied by another race)), or the judiciary (*Shelley v. Kraemer*, 334 U.S. 1 (1948) (state court enforcement of restrictive covenant); *Hansberry v. Lee*, 311 U.S. 32 (1940) (court decree as due process violation)), which denies equal protection of the laws, is forbidden. Also, the "state" has been held to include local governmental entities which effectively act as agents of the state (*see, e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 15-16 (1958)). The difficulty with the concept has arisen where ostensibly private actions are somehow imbued with state authority. Here, the Court's task is to decide whether the government has so involved itself with the private discriminatory acts as to invoke constitutional limitations (*Evans v. Newton*, 382 U.S. 296, 299 (1966)). Otherwise, private acts of discrimination are not circumscribed by the equal protection clause of the fourteenth amendment. But Congress may have the power to outlaw private discrimination under section five of the fourteenth amendment (*United States v. Guest*, 383 U.S. 745 (1966)), and Congress has the power to outlaw private discrimination against black people under section two of the thirteenth amendment (*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)).

4. 363 F. Supp. 1200 (1973).

5. There have been several state court cases in which blacks have sued for private

In May of 1969, the parents of Colin M. Gonzales, both of whom are black, read in the "yellow pages" of a day camp program offered by Fairfax-Brewster School, a private school in Virginia. They submitted an application for the day camp, but were told that the school was unable to accommodate them. Mr. Gonzales subsequently telephoned Bobbe's Private School and was told that only white students were accepted there.⁶ Neither school had ever had a black student enrolled at either its school or its day camp; both schools were supported entirely by student tuition and received no assistance, financial or otherwise, from any local, state, or federal agency.⁷ The Gonzales' filed suit against the schools, alleging violations of section 1981 as the sole basis for their action.⁸

Section 1981 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

school discrimination under state civil rights statutes: *Reed v. Hollywood Professional School*, 169 Cal. App. 2d 887, 338 P.2d 633 (1959) (CAL. CIV. CODE §§ 51-52 (West 1970) were designed to protect against discrimination in "public places" only and, therefore, did not apply to discrimination by private schools); *Crawford v. Robert L. Kent, Inc.*, 167 N.E.2d 620 (Mass. 1960) (black person who was refused admission to a Fred Astaire dance school in Boston allowed to bring suit under state law for "discrimination in a place of public accommodation," the court holding that a dance studio operated for profit would qualify as a place of public accommodation); *McKaine v. Drake Business School, Inc.*, 176 N.Y.S. 33 (Sup. Ct. 1919) (refusal of private business school to admit black held to be violative of New York Civil Rights Law which provided that, "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations . . .").

At least one case has allowed a black person to recover for discrimination by a private school under a contract theory. In *Booker v. Grand Rapids Medical College*, 120 N.W. 589 (Mich. 1909), a black medical student who had satisfactorily completed his first year at an all white school was refused admission to the second year. The court held that, by admitting the student and accepting his tuition, the school had created an implied contract to allow the student to complete his course of study.

6. In August of 1972, Mrs. Sandra McCrary, also a black person, called Bobbe's Private School to enroll her 2 year old son, Michael, in nursery school. She was likewise told that the school accepted no black children. 363 F. Supp. at 1202.

7. *Id.* at 1201.

8. Colin Gonzales filed an action against Fairfax-Brewster. Mrs. McCrary, Michael McCrary, and Colin Gonzales filed suit against Bobbe's. The sole basis for each of the actions was 42 U.S.C. § 1981 (1970). Originally, 42 U.S.C. § 2000a (1964) was also invoked, but prior to trial it was withdrawn as a basis for the actions. The actions were consolidated for trial, and the Southern Independent School Association, a group representing private white schools in seven states, was allowed to join as an intervening party defendant. *Id.* at 1203 n.2.

as is enjoyed by white citizens⁹

The only defense advanced by either Fairfax-Brewster or Bobbe's was that neither school discriminated on the basis of race, and that plaintiffs had simply failed to satisfy their respective entrance requirements.¹⁰ From the facts presented, the court found in each case that the students had in fact been excluded on the basis of race, in violation of the statute.¹¹

The Southern Independent School Association, an intervening party defendant representing its member all-white private schools,¹² conceded that race was a factor in its policies of exclusiveness, but argued that 42 U.S.C. § 1981 could not be used to compel admission of a black child to a segregated private school of the type which it represented. Evidence adduced by the Association, that parents who send their children to these schools act rationally in believing that segregated education is beneficial and produces superior students, with fewer disciplinary problems, was rejected by the federal court as being an argument of the type rejected in *Brown v. Board of Education*.¹³

9. 42 U.S.C. § 1981 (1970).

10. 363 F. Supp. at 1202. Fairfax-Brewster advanced the argument that Colin Gonzales could not be admitted to its day camp because he had not demonstrated that he was academically qualified for the first grade. The school maintained that it would have been unfair to allow Colin to attend the summer program only to be forced to withdraw before the beginning of the academic year. The court rejected the argument as "unbelievable," especially since Colin had never been given a chance to demonstrate that he was academically qualified for Fairfax-Brewster.

Bobbe's Private School claimed that it had never received phone calls from either Mr. Gonzales or Mrs. McCrary. It maintained that the school was all-white simply because no black person had ever filled out an application. (After Michael McCrary had been rejected by Bobbe's, Mrs. McCrary's supervisor, a deputy Equal Employment Opportunity Commission officer with the Navy, called Bobbe's and was told that the school was segregated.) The court reasoned that it would have been absurd to require plaintiffs to have filed formal applications when they had been told that to do so would be useless. *Id.* at 1203.

11. *Id.* at 1203-04.

12. The association represents approximately 396 academies with a total enrollment of 176,000 students. *See Segregation Academies, supra* note 1, at 1448. The state organizations affiliated with the association include:

	<i>Enrollment</i>	<i>Schools</i>
Alabama Private School Ass'n:	22,000	65
Georgia (no statewide organization):	20,000	56
Louisiana Independent School Ass'n:	23,000	50
Mississippi Private School Ass'n:	50,000	92
North Carolina Private School Ass'n:	5,000	15
South Carolina Independent School Ass'n:	50,000	70
Virginia Independent Schools Ass'n:	11,000	47

Id. at 1448 n.70.

13. 363 F. Supp. at 1204, *discussing* *Brown v. Board of Educ.*, 347 U.S. 483 (1954). In *Brown*, the Supreme Court held that the doctrine of "separate but equal"

Judge Bryan, the author of the *Gonzales* opinion, was clearly referring to *Brown's* rationale for invalidating *public* school segregation: that separate (segregated) schools are inherently unequal, deprive black children of an adequate education, and, consequently, are forbidden by the equal protection clause.¹⁴ Thus, the schools' contention, that benefits to the white children justified their practices, was rejected on what would seem to be the logical corollary to the *Brown* holding.¹⁵ That is, allowing white parents to independently establish segregated schools, even though no public funds are expended, tends to accomplish what *Brown* forbade—a segregated school system.¹⁶ The difficulty with this analysis, of course, is that *Brown* was directed at *public* schools,¹⁷ a factor which was a necessary precondition for using the equal protection clause because of its "state action" requirement.¹⁸ In *Gonzales*, the absence of state action was clear.¹⁹ The court more correctly could have reasoned by analogy that the same *principles* under which segregated public school systems are held to infringe on fourteenth amendment guarantees²⁰ could *also* be used to support the rationality of a congressional judgment that private school discrimination should be violative of federal civil rights legislation, regardless of the motive or alleged benefits of such private policies of discrimination.

The Civil Rights Act of 1866, of which 42 U.S.C. § 1981 is a part,²¹ has only recently been applied to private discrimination. The

espoused by advocates of segregated public schools violated the fourteenth amendment. When the defendant school board failed to integrate its school after the first opinion, the Court issued a second opinion, 349 U.S. 294 (1955), ordering that the board "make a prompt . . . start toward compliance with . . . the May 17, 1954, ruling." *Id.* at 300.

14. *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954).

15. 363 F. Supp. at 1204.

16. *Id.*

17. *Id.*

18. See note 3 *supra* and accompanying text.

19. 363 F. Supp. at 1201.

20. 347 U.S. at 492-95.

21. In its original form, 42 U.S.C. §§ 1981 & 1982 (1970) were part of section 1 of the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Act was a controversial one, passed over the veto of President Andrew Johnson,²² and the post-Civil War Supreme Court limited its application to cases in which state action was involved.²³ As a result, the Act was seldom invoked.

It was not until 1968 that the United States Supreme Court, in *Jones v. Alfred H. Mayer Co.*,²⁴ established that the Act could be invoked even in the absence of state action. In *Jones*, suit had been brought by a black person to whom a developing-company had refused to sell a home.²⁵ The basis of the suit was 42 U.S.C. § 1982,²⁶ which gives to black people the same right to purchase and to hold property as is enjoyed by white people. The Supreme Court held that Congress possessed the power, by virtue of the enabling clause of the thirteenth amendment,²⁷ to prohibit discrimination in public and private property

22. The Supreme Court, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), noted the history of the section. President Andrew Johnson vetoed the Act of March 27, 1866. In the congressional debate following the veto, the President characterized the Act as overly broad. On April 6, 1866, the Senate, and on April 9, 1866, the House, overrode the veto. *Id.* at 435 and accompanying notes.

23. See, e.g., *Hurd v. Hodges*, 334 U.S. 24, 31 (1948); *The Civil Rights Cases*, 109 U.S. 3, 16-17 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1875). A representative lower court case is *Waters v. Paschen Contractors, Inc.*, 227 F. Supp. 659 (N.D. Ill. 1964). This was a class action by black bricklayers against employers and unions for conspiracy to discriminate in hiring practices in the construction of a federal building. The court wrote that

[i]t is well settled law that the Civil Rights Acts, Sections 1981-1983, Title 42 U.S.C., apply only to acts done under color of state law. The Constitutional authority for the enactment of these statutes is found in the Fourteenth Amendment, which unequivocally limits state action alone.

Id. at 660. The court in this case made no mention of other cases to support its sweeping generalization of this "well-settled law."

24. 392 U.S. 409 (1968).

25. *Id.* at 412.

26. 42 U.S.C. § 1982 (1970) reads in full:

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.

Section 1982 is the codified version of the Civil Rights Act.

27. Section 1. Neither slavery nor involuntary servitude . . . shall exist within the United States

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

The Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968), quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883), noted that the thirteenth amendment "abolished slavery, and established universal freedom":

[T]he Enabling Clause of that Amendment empowered Congress to do much more.

For that clause clothed "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."

Id. See also DuBois, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 95

sales.²⁸ Moreover, the Court explicitly overruled *Hodges v. United States*,²⁹ a 1906 case in which the Court had refused to invoke section 1981 against a group of whites who had terrorized some black individuals seeking work at a sawmill where only white people were employed.³⁰

In 1969, the Court extended the application of section 1982 to membership discrimination by an essentially private recreational organization in *Sullivan v. Little Hunting Park, Inc.*³¹ Little Hunting Park was a nonstock Virginia corporation organized for recreational purposes, under whose bylaws a person owning a membership share was entitled, when he rented his home, to assign his share to his tenant subject to approval of the board of directors.³² Sullivan, a member of the corporation, sought to assign his membership to a black family to whom he had rented his home. His assignment was refused, and he was expelled from the corporation when he protested the refusal.³³ The Virginia district court had refused to apply 42 U.S.C. § 1982 because Little Hunting Park was "a private social club."³⁴ The Supreme Court found "nothing of the kind on [the] record."³⁵ There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area³⁶ The Court did not determine what effect a showing that the defendant was a private social club would have had on the applicability of section 1982.³⁷

In the most recent Supreme Court case under the 1866 Act, *Till-*

(1968); Note, *Civil Rights-Protection Under the Thirteenth Amendment—Housing Discrimination*, 20 CASE W. RES. L. REV. 448 (1969).

28. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

29. 203 U.S. 1 (1906), *rev'd*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968).

30. The *Hodges* Court refused to apply the theory advanced by the government that: "[T]he people used in the [13th] Amendment language which this court has said permits Congress to enact legislation operating directly to punish the acts of individuals, not sanctioned by any color of state authority." 203 U.S. at 12.

While the Court did not specifically mention the need for state action to invoke the 1866 Act, it refused to find that the thirteenth amendment empowered the Congress to protect blacks from every interference with contract rights. The Court held that this protection of individual rights belonged more properly within the state's police powers. *Id.* at 16.

31. 396 U.S. 229 (1969).

32. *Id.* at 234.

33. *Id.* at 234-35.

34. *Id.* at 235-36.

35. *Id.* at 236.

36. *Id.*

37. *Id.* at 237-38.

man v. Wheaton-Haven Recreation Association,³⁸ sections 1981 and 1982 were applied to private discrimination by a recreational association. Wheaton-Haven Recreation Association operated a community swimming pool, use of which was limited to white members and their white guests.³⁹ Under Wheaton-Haven's by-laws, a person residing within a certain geographical area was entitled to membership.⁴⁰ A black couple who bought a home in the preference area, a white couple, members of Wheaton-Haven whose Negro guest was refused admission to the pool, and the guest brought suit for declaratory and injunctive relief under 42 U.S.C. §§ 1981 and 1982 and the Civil Rights Act of 1964.⁴¹ The district and appellate courts had held that none of the statutes were applicable to the organization because it was private.⁴² Relying on *Sullivan*, the Court unanimously held that a clear violation of section 1982 was presented.⁴³ The Supreme Court, responding to a contention that a provision of the 1964 Civil Rights Act which exempted "private clubs"⁴⁴ was also applicable in section 1982 actions, found that the association relied upon no selective element within the defined geographic area other than race.⁴⁵ The court therefore concluded:

. . . Wheaton-Haven is not a private club and . . . it is not necessary to consider the issue of any implied limitation on the sweep of § 1982 when its application to a truly private club within the meaning of § 2000a(c) [the exemption in the 1964 Civil Rights Act], is under consideration.⁴⁶

By its terms, section 1982 is directed at correcting the denial to black people of the same "right . . . to make and enforce contracts . . . as is enjoyed by white citizens"⁴⁷ Until *Gonzales*, it was

38. 410 U.S. 431 (1973).

39. *Id.* at 433-34. The racial restrictions were formally adopted only after Negroes applied for membership and guest privileges.

40. *Id.* at 433 n.3.

41. *Id.* at 434. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.* (1970), prohibits discrimination in places of public accommodation. See note 67 *infra* and accompanying text.

42. 410 U.S. at 435-37.

43. *Id.* at 438.

44. 42 U.S.C. § 2000a(e) exempts from the provisions of the 1964 Act: "[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 [public]"

45. 410 U.S. at 438.

46. *Id.* at 439-40.

47. 42 U.S.C. § 1981 provides in full:

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

applied primarily in the area of discrimination in employment practices, and there has been a noticeable expansion of its applicability in this context.⁴⁸ Using it in private school discrimination cases, however, had apparently not been attempted prior to *Gonzales*.⁴⁹ Yet enrolling one's child in a private school clearly appears to involve a contractual relationship, in which tuition money is exchanged for education of the child, and the application of section 1981 in this setting presents no obvious conceptual difficulties.⁵⁰ Judge Bryan concluded that the section had the same broad scope as section 1982, so that "no

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.

48. See, e.g., *Penn v. Schlesinger*, 490 F.2d 700 (5th Cir. 1973) (black employees' allegations that federal agencies' hiring and promotional practices were racially discriminatory constituted a cause of action under § 1981); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972) (black welder suing under § 1981 granted relief for employer's discrimination in employment opportunities); *Young v. IIT*, 438 F.2d 757 (3d Cir. 1971) (black sheet metal worker allowed to sue under § 1981 for private job discrimination); *Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529 (S.D. Tex. 1972), *aff'd*, 458 F.2d 1119 (5th Cir. 1973) (Mexican alien allowed to bring suit under § 1981 for job discrimination by a private employer and a union, where plaintiff was transferred to another job with fewer benefits); *Dobbins v. International Bhd. of Elec. Workers*, 292 F. Supp. 413 (S.D. Ohio 1968) (§ 1981 applied to job discrimination against Blacks by a labor union). *But see* *Cook v. Advertiser Co.*, 323 F. Supp. 1212 (N.D. Ala. 1971), in which the court refused to apply section 1981 against a newspaper publisher who refused to print the wedding announcement of a black couple, under the theory that section 1981 could be applied only to state action.

Some of the more recent job discrimination cases have been based on the more specific prohibitions of 42 U.S.C. § 2000e-2 (1970), which prohibits job discrimination. This code section, Title VII of the Civil Rights Act of 1964, established the Equal Employment Opportunity Commission. *Id.* § 2000e-4. The Act was amended in 1972 to give the Commission power to bring suit against a discriminatory employer, Pub. L. No. 92-261 (Mar. 24, 1972). See, e.g., *EEOC v. Firestone Tire & Rubber Co.*, 336 F. Supp. 273 (D. Md. 1973); *EEOC v. Cleveland Mills Co.*, 364 F. Supp. 1235 (W.D.N.C. 1973); *EEOC v. Western Electric Co.*, 364 F. Supp. 188 (D. Md. 1973).

49. 363 F. Supp. at 1205 n.5. See note 5 *supra* and accompanying text.

50. Several cases have held, at least impliedly, the relationship between a private school and a student enrolled therein to be a contractual one: *Robinson v. University of Miami*, 100 So. 2d 442 (Fla. 1958); *John B. Stetson Univ. v. Hunt*, 102 So. 637, 640 (Fla. 1924); *People ex rel. Tinkoff v. Northwestern Univ.*, 77 N.E.2d 345, 349 (Ill. App. 1947), *cert. denied*, 335 U.S. 829 (1948); *Booker v. Grand Rapids*, 120 N.W. 589, 591 (Mich. 1909); *Miami Military Institute v. Leff*, 220 N.Y.S. 799, 808 (Buffalo City Ct. 1926). See generally Note, *The Student-School Legal Relationship: Toward a Unitary Theory*, 5 SUFFOLK U.L. REV. 468 (1970).

The court's only mention of a contractual relationship between plaintiff students and defendant schools is in the court's notation that, "[i]f read literally . . . [§ 1981] covers these plaintiffs, who have been denied their right to make a contract with the defendants because they are not white." 363 F. Supp. at 1203.

state action is necessary to invoke § 1981.⁵¹ This rationale is amply supported by the Supreme Court's pronouncements in *Jones* and *Tillman*⁵² and by the fact that the two sections were originally part of the same act of Congress, so that section 1981 is ostensibly applicable even in the non-"state action" (private) arena.⁵³

The key question left open with respect to section 1981 is whether there are any limits to its application. Does it forbid any white person to refuse to contract for racial reasons with any black person in any and all possible contractual situations? Does it apply to places of public accommodations or, to put it another way, did the 1964 Civil Rights Act merely afford a different remedy for a right already long existent? Does section 1981 outlaw white private fraternities and clubs established on a discriminatory basis?

Gonzales extends section 1981 to a new area—private schools—but perhaps even more important, the Court's conclusion suggests that the scope of section 1981 will not be easily contained.⁵⁴ In response to the idea that the schools were "truly private" the court was not satisfied to conclude that there was no method of selection of students "other than race;"⁵⁵ it went on to state that, "[T]he [1964] act is not a limitation on § 1981, and consequently the exemption of 42 U.S.C. § 2000(e) for private establishments does not apply in this case."⁵⁶

If section 1981 was actually intended to apply to private discriminatory activity, as the *Jones* Court said section 1982 was intended to do,⁵⁷ such discussion of the private or non-private nature of the defendant would not seem necessary. It should be enough that the court has determined that discrimination is present, and that an apparently non-governmental entity was responsible. A more correct analysis in the *Gonzales* context would have simply noted that the "private" nature of the organization was irrelevant because section 1982 (and thus 1981), as interpreted in *Jones*, applied regardless of its private or public nature.⁵⁸ The approach (and the language) utilized by Judge

51. 363 F. Supp. at 1204; *Riley v. Adirondack Southern School for Girls*, 368 F. Supp. 392, 397 (M.D. Fla. 1973).

52. 392 U.S. at 423-26; 410 U.S. at 437-39.

53. 410 U.S. at 439-40; *Riley v. Adirondack Southern School for Girls*, 368 F. Supp. 392, 395 (M.D. Fla. 1973).

54. 363 F. Supp. at 1203-04.

55. *Id.* at 1204.

56. *Id.* at 1205.

57. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968).

58. *Id.* at 423-24.

Bryan apparently was derived from Justice Douglas' opinion in *Sullivan*, wherein he rebutted the argument that section 1982 did not apply because of the exemption for "private social clubs," by asserting that the use of race as the sole basis for exclusiveness was an insufficient criteria, standing alone, for a "private club."⁵⁹ Justice Douglas' response in *Sullivan* was derived from *Daniel v. Paul*,⁶⁰ a case which interpreted the Civil Rights Act of 1964 as to its exemption for private clubs from the Act's ban on racial discrimination in places of public accommodation.⁶¹ Use of language from a case decided on a statute quite distinct from section 1982, especially where there was no argument ostensibly advanced on the 1964 Act in *Sullivan*, makes the possi-

59. 396 U.S. at 236. One recent lower court decision, *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970), set out the criteria for a private club:

- (1) An organization which has permanent machinery established to carefully screen applicants for membership and who selects or rejects such applicants . . . ;
- (2) which limits the use of the facilities and the services of the organization strictly to members . . . ;
- (3) which organization is controlled by the membership . . . ;
- (4) which organization is non-profit and operated solely for the benefit and pleasure of the members; and
- (5) whose publicity, if any, is directed solely and only to members for their information and guidance.

Id. at 1153.

Factors by which the federal courts have found clubs to be non-private include: (1) lack of true exclusiveness, in which an organization is open to all comers, white skin being the only membership requirement: *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969); *Stout v. YMCA*, 404 F.2d 687, 688 (5th Cir. 1968); *Nesmith v. YMCA*, 397 F.2d 96, 102 (4th Cir. 1968); *Wright v. Cork Club*, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970); *United States v. Jordan*, 302 F. Supp. 370, 377 (E.D. La. 1969); *United States v. Clarksdale King & Anderson Co.*, 288 F. Supp. 792, 795 (N.D. Miss. 1965); *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90, 94 (E.D. La. 1967); *United States v. Northwest Louisiana Restaurant Club*, 256 F. Supp. 151, 153 (W.D. La. 1966); *Lackey v. Sacoolas*, 191 A.2d 395, 396-97 (Pa. 1963); (2) a purely commercial operation: *Daniel v. Paul*, 395 U.S. 298, 301 (1969); *United States v. Richberg*, 398 F.2d 523, 526-28 (5th Cir. 1968); *Wright v. Cork Club*, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970); *United States v. Johnson Lake, Inc.*, 312 F. Supp. 1376, 1379 (S.D. Ala. 1970); *Bell v. Kenwood Golf & Country Club*, 312 F. Supp. 753, 757-59 (D. Md. 1970). For general discussions of criteria for "private clubs," see "*Public Accommodations*," in M. KONVITZ & T. LESKES, A CENTURY OF CIVIL RIGHTS ch. 6 (1961); Note, *Public Accommodations: What is a Private Club?*, 30 MONT. L. REV. 47 (1969); Note, *Public Accommodations Laws and the Private Club*, 54 GEO. L.J. 915 (1966).

The court's statement in *Gonzales* that *Sullivan* had "abolished traditional notions of what is 'private' insofar as these [civil rights] types of actions are concerned" (363 F. Supp. at 1205), is contradicted by the abundance of cases in which lack of exclusiveness other than race had been held, in lower court opinions preceding *Sullivan*, to evidence a non-private organization.

Both Fairfax-Brewster and Bobbe's would be easily classified as non-private under the criteria established above, since both advertised in the yellow pages (*id.* at 1202) and neither had admission requirements which were apparently enforced routinely, other than race. See *id.* at 1204.

60. 395 U.S. 298 (1969).

61. See note 44 *supra* and accompanying text.

bility of confusion very likely.⁶² The defendants in *Tillman*, specifically raised the issue that this private club exemption of the 1964 Act applied, and thus precluded section 1982's applicability,⁶³ but the Supreme Court followed the dictates of *Sullivan*, and thus *Daniel v. Paul*, and concluded that in fact the recreational association was not truly private.⁶⁴ Consequently, the issue of whether section 1982 was somehow restricted by the 1964 Act was not decided in *Tillman*.

Judge Bryan's opinion seemed to reflect a belief that the preceding Supreme Court cases, *Sullivan* and *Tillman*, rested to some extent on a determination of such "non-privateness," whereas it appears that this determination was made, or should have been in *Sullivan*, only in response to a defense argument based on the 1964 Act's exemption.⁶⁵ There was no such argument advanced in *Gonzales*, although Judge Bryan did make a point of saying that the private club provision would not have aided the schools because of the racial basis for their "privateness."⁶⁶

It is difficult to see how Judge Bryan could have reached any other conclusion, for the primary aim of the 1964 Act was to secure equality of treatment in facilities of "public accommodation," *i.e.*, those associated with travel, sustenance, or recreation.⁶⁷ But even if a public accommodation were involved, the intent of the legislature to expand rather than limit civil rights in enacting the 1964 Act is apparent from a saving clause in the act itself: "[N]othing in this subchapter shall preclude any individual from asserting any right based on any other federal or state law not inconsistent with this subchapter"⁶⁸

62. 396 U.S. at 237-38.

63. 410 U.S. at 438.

64. *Id.*

65. 396 U.S. at 237-38.

66. 363 F. Supp. at 1205.

67. The Civil Rights Act of 1964 (42 U.S.C. § 2000a *et seq.* (1970)) prohibits many specific forms of public discrimination and outlaws discrimination in places of public accommodations. Other portions cover public facilities (*id.* § 2000b), public education (*id.* § 2000c), federally assisted programs (*id.* § 2000d), employment opportunities (*id.* § 2000e), registration and voting statistics (*id.* § 2000f), community relations service (*id.* § 2000g), and miscellaneous provisions (*id.* § 2000h).

68. 42 U.S.C. § 2000a-6(b). Lower federal courts have consistently recognized that the 1964 Act did not preempt the 1866 Civil Rights Act. *See Long v. Ford Motor Co.*, 352 F. Supp. 135 (E.D. Mich. 1972) (a black person brought suit against a former employer under section 1981, and it was held that the Civil Rights Act of 1964 did not preempt section 1981). *Accord*, *Boureaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971).

The courts have not yet decided whether or not a *true* private club, which has a legitimate basis of membership or affiliation, other than or in addition to the racial

A companion defense raised in *Gonzales* is a first amendment argument based upon the freedom of association of members of private groups.⁶⁹ It appears that, to date, no Supreme Court decisions have specifically decided whether or not the right to freedom of association permits private organizations to exclude members on the basis of race.⁷⁰

exclusiveness, could be affected by sections 1981 or 1982. Such a situation was presented in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), where it was effectively conceded that the Lodge's limitations on members and guests, to Caucasians only, was not its sole reason for existence. *Id.* at 171. A refusal to admit the black guest of a member was attacked on the theory that state action was implicated in the discrimination because the Lodge possessed a state-issued liquor license, which resulted in the state's extensive involvement with the Lodge pursuant to its power of regulation of licensees. *Id.* The Court held (6-3) that this was insufficient state entanglement with the Moose Lodge to require the operation of the equal protection clause. *Id.* at 171-72. If one views the membership in a private club as a contractual situation (*see, e.g.,* Comment, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 460, 462 & nn. 11-12 (1970); Note, *Constitutional Law—Private Club Discrimination*, 1970 WIS. L. REV. 595, 605-06), then section 1981 should apply. As to the guest situation, a standing issue would be involved because seeking admittance in this capacity does not involve any but the most attenuated of "contracts." This issue could have been decided in *Tillman* because of the presence of a plaintiff-member whose basis of complaint was denial of admission to his black guest and because the guest herself was also a plaintiff. *See* text accompanying notes 38-46 *supra*. Because the lower court had dismissed their action solely on the theory of the association's private nature, the Supreme Court did not reach the question of whether or not there was a sufficient contractual relationship for section 1981 to apply. Nevertheless, it would appear that, from the viewpoint of a contractual analysis, the member is the person to assert the denial of the right, under the membership contract, to bring any guest he wishes regardless of their race.

69. The Southern Independent School Association supported its argument that section 1981 should not be applied to purely private actions with misquoted dicta from *Norwood v. Harrison*, 413 U.S. 455 (1973):

(although) the Constitution does not proscribe private bias, (it places no value on discrimination). . . . (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 469-70, *quoted at* 363 F. Supp. at 1204, with portions in parenthesis omitted by the defendants in *Gonzales*.

Norwood was a unanimous opinion in which the Court held that a Mississippi textbook program which allowed private segregated schools to use state supplied textbooks violated the equal protection clause of the fourteenth amendment.

70. The fundamental issue as to whether there is constitutional protection for the right of an organization to discriminate in selecting its members was faced in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). The New York Civil Rights Law prohibited labor organizations from denying membership or services based upon race, color, or creed. The union in that case maintained that the law violated the due process clause of the fourteenth amendment. The Court, in a unanimous opinion, held that there was no constitutional protection for the union's discrimination. *Id.* at 94-97.

A number of lower court cases have raised the issue in dicta: *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112, 113-14 (D. Mass. 1972)

Freedom of association is not specifically guaranteed by the Constitution. Formal recognition of the right came in 1958 in *NAACP v. Alabama*,⁷¹ where the NAACP had been fined for contempt after refusing to produce membership lists pursuant to the state's foreign corporation registration statute. It had been suggested that a constitutionally protected right to freedom of association might be found in either the first or fifth amendments.⁷² The Supreme Court, in holding the statute unconstitutional, based its decision on the first amendment:

It is beyond debate that freedom to engage in association *for the advancement of beliefs and ideas* is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech. Of course, it is immaterial whether the *beliefs sought to be advanced* by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to close scrutiny.⁷³

In deciding whether state regulation of, or interference with, a private organization amounts to violation of this right, the Supreme Court

("we know of no authority for the proposition that membership in a private organization may be secured by suit under the civil rights statutes"); *Wesley v. City of Savannah*, 294 F. Supp. 698 (S.D. Ga. 1969) (use of a municipal golf course for an all-white function was held to be in violation of the Civil Rights Act of 1964, although the court mentioned that formation of a private club was merely one expression of freedom of association). See also *STP Corp. v. United States Auto Club, Inc.*, 286 F. Supp. 146 (S.D. Ind. 1968). An employee of STP was seeking an injunction against the club for not allowing his turbine engine car to enter into competition. The court noted that "[c]ourts will not interfere with the internal affairs of an association except in case of fraud, illegality or violation of a civil right." *Id.* at 170.

Cases involving discrimination by private clubs have generally been concerned with whether there was enough government participation to make the discrimination violative of the fourteenth amendment (see *Moose Lodge v. Irvis*, 407 U.S. 163, 171 (1972)), or, lacking government participation, whether the club could factually qualify under the private club exemption to the Civil Rights Act of 1964. See note 44 *supra*.

71. 357 U.S. 449 (1958). The constitutional right to freedom of association was referred to several times prior to its formal enunciation in 1958. See *Watkins v. United States*, 354 U.S. 178, 188 (1957); *American Communications Ass'n v. Douds*, 339 U.S. 382, 409 (1950); *A.F. of L. v. American Sash Co.*, 335 U.S. 538, 546 (1949) (Frankfurter, J., concurring); *Whitney v. California*, 274 U.S. 357, 371 (1927). See generally Note, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 1970 DUKE L.J. 1181, 1190 [hereinafter referred to as *Private Club Discrimination*].

72. 357 U.S. at 460.

73. *Id.* at 460-61 (citations omitted). The first amendment reads in pertinent part: "Congress shall make no law respecting . . . the right of the people peaceably to assemble . . ." The Supreme Court has held that this freedom of assembly includes freedom of association. See *Bates v. Little Rock*, 361 U.S. 516, 528 (1960).

has generally applied a balancing test.⁷⁴ The rights of a group and its members to be free from interference is weighed against the governmental interests involved.⁷⁵ The interests most strongly calling for non-intervention seem to be those most closely related to rights specifically mentioned in the first amendment. For instance, a New York statute requiring the Ku Klux Klan to submit its membership lists was upheld on the grounds that the Klan's activities involved unlawful violence and intimidation,⁷⁶ whereas similar disclosure statutes have been found invalid as against civil rights organizations whose interests are legal, as well as being specifically protected as freedom of expression under the first amendment.⁷⁷

Freedom of association is a less viable defense to the application of section 1981 than to the application of any state law, since section 1981 was promulgated under the enabling clause of the thirteenth amendment.⁷⁸ Thus, two constitutionally protected rights are pitted against one another: the right to freedom from slavery guaranteed by the thirteenth amendment and expanded into the right to racial equality in contracting versus the first amendment right to freedom of association.⁷⁹ Dicta in several Supreme Court cases suggest that the Court

74. 357 U.S. at 466.

75. In *NAACP v. Button*, 371 U.S. 415 (1963), the Court held a Virginia statute prohibiting solicitation of business by attorneys to be in violation of the first and fourteenth amendments as applied to the members and attorneys of the NAACP. The Court balanced the state's interests against those of the NAACP:

[A]lthough the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed.

Id. at 444.

Similarly, in discussing the issue of whether Alabama's statutes governing disclosure of names of members in an organization violated the fourteenth amendment, the Court in *NAACP v. Alabama* said:

We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association.

357 U.S. at 463.

76. *Bryant v. Zimmerman*, 278 U.S. 63 (1928). See *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (Subversive Activities Control Act requirement of registration of communist party organizations held valid since the danger to members caused by registration was overridden by the interest in national security).

77. *Gibson v. Florida Legislative Investigation Comm'n*, 372 U.S. 539, 543-46 (1963); *Bates v. Little Rock*, 361 U.S. 516, 528 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). See *Private Club Discrimination*, *supra* note 71, at 1192.

78. See note 27 *supra* and accompanying text.

79. There is some authority for the proposition that freedom of association was meant to assure only the full effectuation of express first amendment rights, rather than

views the right of a truly private organization to exclude members on the basis of race to be a protected one. For example, in *Evans v. Newton*,⁸⁰ Justice Douglas wrote that “[a] private golf club, however, restricted to either Negro or white membership is one expression of freedom of association.”⁸¹ Two years prior to *Evans*, Justice Goldberg noted in *Bell v. Maryland*⁸² that “prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the bases of personal prejudices including race.”⁸³

On the other hand, dictum in the most recent case, *Norwood v. Harrison*,⁸⁴ indicates that the Court views the right of association as one subject to some limitations:

[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination 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.⁸⁵

In *Norwood*, a unanimous Court held that a Mississippi textbook program which allowed private segregated schools to use state supplied text books violated the equal protection clause of the fourteenth amendment.⁸⁶

The strongest interest being balanced against private segregation academies' freedom of association right to exclude black students seems to be the interest of the federal government in racial equality in education. The detrimental effects of segregated education, as de-

to protect the rights of private organizations. See Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1039 (1969); Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, 46 VA. L. REV. 730, 752 (1960).

80. 382 U.S. 296 (1966).

81. *Id.* at 299.

82. 378 U.S. 226 (1964).

83. *Id.* at 313 (Goldberg, J., concurring). *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896):

The argument [that enforced separation of the races stamps the “colored race” with a badge of inferiority] also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.

84. 413 U.S. 455 (1973). See note 69 *supra*.

85. 413 U.S. at 469-70.

86. *Id.* at 468-70. See note 69 *supra*.

scribed in *Brown*, are accomplished by a flight to private segregation academies as well as by direct segregation in the public schools.⁸⁷ Especially in view of the proliferation of private academies after the various school desegregation cases,⁸⁸ the constitutional rights of all citizens to an equal education would be thwarted if segregation academies are allowed to continue to discriminate in their membership requirements.

In view of the Court's recent expressions in *Norwood* and the detrimental impact which segregation academies have had on the notion of integrated public schools, the defense of freedom of association would seem to be misplaced in the private school context. Moreover, the "right" of private clubs to discriminate cannot be said to assume constitutional proportions. If consenting adults cannot be permitted to see "obscene" films (despite the absence of a victim) lest the public be "offended" and the environment be detrimentally affected,⁸⁹ then (particularly in the light of the thirteenth amendment) it is difficult to see why discriminatory private clubs should be protected, for they do create victims and they, in the judgment of Congress as expressed in the Civil Rights statutes, equally offend public morals. To presume that Congress is constitutionally prevented from outlawing this tortious behavior, however "private," seems questionable at best.

CONCLUSION

A hundred year old statute, the Civil Rights Act of 1866, which was seldom invoked until *Jones v. Alfred H. Mayer Co.* in 1968, has

87. Decreased enrollment in public schools, caused by the flight of white students to segregation academies, causes a reduction of state funds for local systems. In most southern states, aid from the state to local school districts is based on attendance. See, e.g., ALA. CODE tit. 52, § 207(2) (Supp. 1971); GA. CODE ANN. ch. 32-6 (1969); MISS. CODE ANN. §§ 6248-01 to 6248-26 (Supp. 1972).

Transfers of experienced teachers and administrators have also occurred in many districts with private academies. In Louisiana, between 1962 and 1967, 35 percent of the teachers in segregation academies came from the public schools. *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833, 851 (E.D. La. 1967). In areas in which the public schools have been almost completely reseggregated, white teacher switchover has apparently been significant. See *Norwood v. Harrison*, 413 U.S. 455, 467 n.9 (1973).

For the impact of segregation academies on the public school system in general, see *Segregation Academies*, *supra* note 1, at 1450.

88. See note 1 *supra* and accompanying text. "The estimated enrollment in Southern private schools organized or expanded in response to desegregation increased from roughly 25,000 in 1966 to approximately 535,000 by 1972." *Segregation Academies*, *supra* note 1, at 1441.

89. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

been applied for the first time against racial discrimination by private segregation academies. In holding that the Act, in the present form of 42 U.S.C. § 1981, applied to such discrimination despite the absence of state action, the federal district court in *Gonzales v. Fairfax-Brewster School, Inc.* has provided a powerful tool for civil rights advocates. If the court's holding is upheld in the appellate courts, it may well mark an end to the long series of ruses which have been employed to avoid school integration.⁹⁰ Moreover, *Gonzales* would appear to be part of an ongoing trend to interpret the old Civil Rights statutes in a way that would suggest that all forms of "private" discrimination are offensive to those discriminated against, to the general public, and to the laws of the United States.

Teresa A. Clark

90. For a good discussion of the resistance to school desegregation in the southern states, see *Segregation Academies*, *supra* note 1; Note, *Post-Brown Private White Schools—An Imperfect Dualism*, 26 VAND. L. REV. 587 (1973); Note, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321 (1968).