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Will ERA Force All Private Schools Coed?

Since the U.S. Supreme Court decision of *Runyon v. McCrary* on June 25, 1976, it must be assumed that ratification of the Equal Rights Amendment would probably mean that all private schools (elementary, secondary, and college) would become subject to a constitutional mandate prohibiting "sex discrimination," and they would therefore be forced to go coed, whether they want to or not.

Prior to this decision, it was generally assumed that ERA would enforce its coed mandate only on schools and colleges that receive some public money. This assumption is no longer valid because *Runyon v. McCrary* held that wholly private schools are forbidden to discriminate on the basis of race.

There are hundreds of private elementary and secondary schools that admit only girls or only boys. Many of them are among the best schools in the country. Many have built up an enviable reputation over generations. The fact that thousands of splendid students are graduated from them every year is proof that these schools fill a need in our society and produce good results -- in spite of the fact (or maybe because of the fact) that they discriminate on the basis of sex. Girls' schools discriminate against boys; boys' schools discriminate against girls.

Runyon v. McCrary was a case involving two elementary schools in Virginia which were charged with discriminating on the basis of race. The schools were wholly private. They received no public money of any kind. Apparently they did not even enjoy tax-exempt status. But the Supreme Court in a 7-to-2 decision held that they are forbidden to discriminate on the basis of race and that they must admit blacks.

The Supreme Court decision was based on a law (42 U.S.C. #1981) that was enacted in 1870. The title of this section of the law is "Equal rights under the law." As Justice White states in his dissent, it is completely clear that both the language and the legislative history of this law prove that it was intended and designed to abolish race discrimination "under the law" only. It was NOT intended to cover private relationships.

But the majority of the Supreme Court stretched the law to include the private acts of wholly private schools. For more than a hundred years, no one else had ever detected that meaning in the 1870 law.

The Supreme Court ruled in *Runyon v. McCrary* that the mandate against race discrimination is so important that it prohibits even private acts of discrimination, and it takes priority over --

* the First Amendment freedom of association,
* the Fifth Amendment right of due process,
* the constitutional right of privacy, and
* the right of parents to select private schools.

Practically every pro-ERA lawyer states -- even boasts! -- that ERA will impose a national standard which will apply the same strict standard to sex as we now apply to race. (In legal jargon, this is called making sex a "suspect" or impermissible classification, just like race.) The agitating women's lib lawyers (in NOW, ACLU, EEOC, and HEW) are all following the exact same pattern of bureaucratic regulation and court litigation as the "civil rights" lawyers have done.

The surest way to predict what the ultimate effect of ERA will be is to ask yourself the question: "Are we permitted to make this difference or separation based on race?" If your answer is "no", then -- if ERA is ratified -- you will not be permitted to make the same difference or separation based on sex. If ERA applies the *Runyon v. McCrary* rule to sex, no private school will be permitted to bar any pupil on the basis of sex; all private schools will be compelled to go coed -- probably with "affirmative action" ordered by HEW.

Although ERA purports to apply only to actions "under the law" (*i.e.*, actions touched by government), the Supreme Court could easily stretch ERA to cover private relationships such as private schools, under the rule of *Runyon v. McCrary*. It would be much easier to find a national mandate against discrimination in ERA -- a constitutional amendment -- because the U.S. Constitution is "the supreme law of the land." (Article VI)

Even the dissenters in *Runyon v. McCrary* conceded (in their footnote 2) that Congress has the *power* to ban race discrimination in private schools (under Section 2 of the 13th Amendment). Their dissent was based on the fact that Congress has not *yet* chosen to exercise that power. Therefore, Section 2 of ERA would surely give Congress the power to ban sex discrimination in wholly private schools. The militant women's libbers and HEW would certainly agitate to achieve this result since they have even tried to ban as "sex discriminatory" such school social functions as Mother-Daughter and Father-Son events.

If you want to preserve your right to attend or to send your child to an all-girls' or an all-boys' school, urge your State Legislators to defeat ERA! If it is ratified, the decision-making power will be in the hands of the Federal Government, HEW, and the U.S. Supreme Court, and your wishes will be irrelevant!

Runyon v. McCrary

U.S. Supreme Court, June 25, 1976

Mr. Justice *Stewart* delivered the opinion of the Court.

The principal issue presented by these consolidated cases is whether a federal law, namely 42 USC # 1981, prohibits private schools from excluding qualified children solely because they are Negroes.

I

The respondents in No. 75-62, Michael McCrary and Colin Gonzales, are Negro children. By their parents, they filed a class action against the petitioners in No. 75-62, Russell and Katheryne Runyon, who are the proprietors of Bobbe's Private School in Arlington, Va. Their complaint alleged that they had been prevented from attending the school because of the petitioners' policy of denying admission to Negroes, in violation of 42 USC # 1981. . . . They sought declaratory and injunctive relief and damages. On the same day Colin Gonzales, the respondent in No. 75-66, filed a similar complaint by his parents against the petitioner in No. 75-66, Fairfax-Brewster School, Inc., located in Fairfax County, Va. The petitioner in No. 75-278, the Southern Independent School Association, sought and was granted permission to intervene as a party defendant in the suit against the Runyons. That organization is a nonprofit association composed of six state private school associations, and represents 395 private schools. It is stipulated that many of these schools deny admission to Negroes.

The suits were consolidated for trial. The findings of the District Court, which were left undisturbed by the Court of Appeals, were as follows. Bobbe's School opened in 1958 and grew from an initial enrollment of five students to 200 in 1972. A day camp was begun in 1967 and has averaged 100 children per year. The Fairfax-Brewster School commenced operations in 1955 and opened a summer day camp in 1956. A total of 223 students were enrolled at the school during the 1972-1973 academic year, and 236 attended the day camp in the summer of 1972. Neither school has ever accepted a Negro child for any of its programs.

In response to a mailed brochure addressed "resident" and an advertisement in the "Yellow Pages" of the telephone directory, Mr. and Mrs. Gonzales telephoned and then visited the Fairfax-Brewster School in May 1969. After the visit, they submitted an application for Colin's admission to the day camp. The school responded with a form letter, which stated that the school was "unable to accommodate [Colin's] application." Mr. Gonzales telephoned the school. Fairfax-Brewster's Chairman of the Board explained that the reason for Colin's rejection was that the School was not integrated. Mr. Gonzales then telephoned Bobbe's School, from which the family had also received in the mail a brochure addressed to "resident." In response to a question concerning that school's admissions policies, he was told that only members of the Caucasian race were accepted. In August 1972, Mrs. McCrary telephoned Bobbe's School in response to an advertisement in the telephone book. She inquired about nursery school facilities for her son, Michael. She also asked if the School was integrated. The answer was no.

Upon these facts, the District Court found that the Fairfax-Brewster School had rejected Colin Gonzales' application on account of his race and that Bobbe's School had denied both children admission on racial grounds. The Court held that 42 USC # 1981 makes illegal the schools' racially discriminatory admissions policies. It therefore enjoined Fairfax-Brewster and Bobbe's School and the member schools of the Southern Independent School Association from discriminating against applicants for admission on the basis of race. The Court awarded compensatory relief to Mr. and Mrs. McCrary, Michael McCrary, and Colin Gonzales. . . .

The Court of Appeals for the Fourth Circuit, sitting en banc, affirmed the District Court's grant of equitable and compensatory relief. . . . *McCrary v. Runyon*, 515 F2d 1082 (1975). Factually, the Court held that there was sufficient evidence to support the trial court's finding that the two schools had discriminated racially against the children. On the basic issue of law, the Court agreed that 42 USC # 1981 is a "limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or their pupils or patrons." *Id.*, at 1086. The relationship the parents had sought to enter into with the schools was in the Court's view undeniably contractual in nature, within the meaning of # 1981, and the Court rejected the schools' claim that # 1981 confers no right of action unless the contractual relationship denied to Negroes is available to all whites. *Id.*, at 1087. Finally, the appellate court rejected the schools' contention that their racially discriminatory policies are protected by any constitutional right of privacy. "When a school holds itself open to the public . . . or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection." *Id.*, at 1088.

We granted the petitions for certiorari filed by the Fairfax-Brewster School No. 75-66, Bobbe's School, No. 75-62, and the Southern Independent School Association, No. 75-278, to consider whether 42 USC # 1981 prevents private schools from discriminating racially among applicants. ——— U.S. ———, 46 L Ed 2d 276.

II

It is worth noting at the outset some of the questions that these cases do not present. They do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 USC # 1981 is in no way addressed to such categories of selectivity. They do not even present the application of # 1981 to private sectarian schools that practice *racial* exclusion on religious grounds. Rather, these cases present only two basic questions: whether # 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied.

A. Applicability of # 1981

It is now well established that # 1 of the Civil Rights Act of 1866, 14 Stat 27, 42 USC # 1981 (1970), prohibits racial discrimination in the making and enforcements of private contracts. See *Johnson v. Railway Express Agency, Inc.* 421 U.S. 454, 459-460; *Tillman v. Wheaton-Haven Recreation Assn.* 410 U.S. 431, 439-440, *Cf. Jones v. Alfred H. Mayer Co.* 392 U.S. 409, 441-443, n. 78.

In *Jones* the Court held that the portion of # 1 of the Civil Rights Act of 1866 presently codified as 42 USC #1982 prohibits private racial discrimination in the sale or rental of real or personal property. Relying on the legislative history of # 1, from which both # 1981 and # 1982 derive, the Court concluded that Congress intended to prohibit "all racial discrimination, private and public, in the sale . . . of property," 392 U.S. at 437, and that this prohibition was within Congress' power under # 2 of the Thirteenth Amendment "rationally to determine what are the badges and the incidents of slavery, and . . . to translate that determination into effective legislation." Id., at 440-441.

As the Court indicated in *Jones*, 392 US, at 441-443, n 78, that holding necessarily implied that the portion of # 1 of the 1866 Act presently codified as 42 USC # 1981 likewise reaches purely private acts of racial discrimination. The statutory holding in *Jones* was that the "[1866] Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property." 392 US, at 436. One of the "rights enumerated" in # 1 is "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ." 14 Stat 27. Just as in *Jones* a Negro's # 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's # 1 right to "make and enforce contracts" is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.

The applicability of the holding in *Jones* to # 1981 was confirmed by this Court's decisions in *Tillman v. Wheaton-Haven Recreation Assn., supra,* and *Johnson v. Railway Express Agency, Inc., supra.* In *Tillman* the petitioners urged that a private swimming club had violated 42 USC ## 1981, 1982, and 2000a et seq., by enforcing a guest policy that discriminated against Negroes. The Court noted that "[t]he operative language of both # 1981 and # 1982 is traceable to the Act of April 9, 1866, c 31, # 1, 14 Stat 27." 410 U.S., at 439. Referring to its earlier rejection of the respondents' contention that Wheaton-Haven was exempt from # 1982 under the private club exception of the Civil Rights Act of 1964, the Court concluded that "[i]n light of the historical interrelationship between # 1981 and # 1982 [there is] no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club." *Id.*, at 440. Accordingly the Court remanded the case to the District Court for further proceedings "free of the misconception that Wheaton-Haven is exempt from ## 1981, 1982, and 2000a." *Ibid.* In *Johnson v. Railway Express Agency, Inc., supra,* the Court noted that # 1981 "relates primarily to racial discrimination in the making and enforcement of contracts," 421 U.S., at 459, and held unequivocally "that # 1981 affords a federal remedy against discrimination in private employment on the basis of race." *Id.*, at 459-460.

It is apparent that the racial exclusion practiced by the Fairfax-Brewster School and Bobbe's Private School amounts to a classic violation of # 1981. The parents of Colin Gonzales and Michael McCrary sought to enter into contractual relationships with Bobbe's Private School for educational services. Colin Gonzales' parents sought to enter into a similar relationship with the Fairfax-Brewster

School. Under those contractual relationships, the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments. The educational services of Bobbe's Private School and the Fairfax-Brewster School were advertised and offered to members of the general public. But neither school offered services on an equal basis to white and non-white students. As the Court of Appeals held, "there is ample evidence in the record to support the trial judge's factual determinations . . . [that] Colin [Gonzales] and Michael [McCrary] were denied admission to the schools because of their race." The Court of Appeals' conclusion that # 1981 was thereby violated follows inexorably from the language of that statute, as construed in *Jones, Tillman,* and *Johnson.*

The petitioning schools and school association argue principally that # 1981 does not reach private acts of racial discrimination. That view is wholly inconsistent with *Jones'* interpretation of the legislative history of # 1 of the Civil Rights Act of 1866, an interpretation that was reaffirmed in *Sullivan v. Little Hunting Park, Inc.* 396 U.S. 229, and again in *Tillman v. Wheaton-Haven Recreation Assn., supra.* And this consistent interpretation of the law necessarily requires the conclusion that # 1981, like # 1982, reaches private conduct. See *Tillman v. Wheaton-Haven Recreation Assn.,* 410 U.S. at 439-440, *Johnson v. Railway Express Agency, Inc.* 421 U.S., at 459-460.

It is noteworthy that Congress in enacting the Equal Employment Opportunity Act of 1972, 86 Stat103, as amended, 42 USC ## 2000e et seq. (1970 ed Supp IV), specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted by this Court in *Jones,* insofar as it affords private sector employees a right of action based on racial discrimination in employment. See *Johnson v. Railway Express Agency, Inc.,* 421 U.S., at 459. There could hardly be a clearer indication of congressional agreement with the view that # 1981 does reach private acts of racial discrimination. *Cf. Flood v. Kuhn,* 407 U.S. 258, 269-285; *Joint Industry Board v. United States,* 391 U.S. 224, 228-229. In these circumstances there is no basis for deviating from the well-settled principles of stare decisis applicable to this Court's construction of federal statutes. See *Edelman v. Jordan,* 415 U.S. 651, 671 n. 14.

B. Constitutionality of # 1981 As Applied

The question remains whether # 1981, as applied, violates constitutionally protected rights of free association and privacy, or a parent's right to direct the education of his children.

1. Freedom of Association

In *NAACP v. Alabama,* 357 U.S. 449, and similar decisions, the Court has recognized a First Amendment right "to engage in association for the advancement of beliefs and ideas . . . ." *Id.,* at 460. That right is protected because it promotes and may well be essential to the "[e]ffective advocacy of both public and private points of view, particularly controversial ones" that the First Amendment is designed to foster. *Id.,* at 460. See *Buckley v. Valeo,* ——— U.S. ———. 46 L Ed 2d 659, 96 S Ct 612; *NAACP v. Button,* 371 U.S. 415.

From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood v. Harrison,* 413 U.S. 455, "the Constitution . . . places no value on discrimination," *id.,* at 469, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under # 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts." 413 U.S. at 470. In any event, as the Court of Appeals noted, "there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma." 515 F2d, at 1087.

2. Parental Rights

In *Meyer v. Nebraska,* 262 U.S. 390, the Court held that the liberty protected by the Due Process Clause of the Fourteenth Amendment includes the right "to acquire useful knowledge, to marry, establish a home and bring up children," *id.,* at 399, and, concomitantly, the right to send one's children to a private school that offers specialized training—in that case, instruction in the German language. In *Pierce v. Society of Sisters,* 268 U.S. 510, the Court applied "the doctrine of *Meyer v. Nebraska,*" *id.,* at 534, to hold unconstitutional an Oregon law requiring the parent, guardian, or other person having custody of a child between eight and 16 years of age to send that child to public school on pain of criminal liability. The Court thought it "entirely plain that the [statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.,* at 534-535. In *Wisconsin v. Yoder,* 406 U.S. 205, the Court stressed the limited scope of *Pierce,* pointing out that it lent "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society" but rather "held simply that while a State may posit [educational] standards, it may not preempt the educational process by requiring children to attend public schools." *Id.,* at 239. And in *Norwood v. Harrison,* 413 U.S. 455, the Court once again stressed the "limited scope of *Pierce,*" *id.,* at 461, which simply "affirmed the right of private schools to exist and to operate. . . ." *Id.,* at 462.

It is clear that the present application of # 1981 infringes no parental right recognized in *Meyer, Pierce, Yoder,* or *Norwood.* No challenge is made to the petitioners' right to operate their private schools or the right of parents to send their children to a particular private school rather than a public school. Nor do these cases involve a challenge to the subject matter which is taught at any private school. Thus, the Fairfax-Brewster School and Bobbe's Private School and members of the intervenor association remain presumptively free to inculcate whatever values and standards they deem desirable. *Meyer* and its progeny entitle them to no more.

3. The Right of Privacy

The Court has held that in some situations the Constitution confers a right of privacy. See *Roe v. Wade,* 410 U.S. 113, 152-153; *Eisenstadt v. Baird,* 405 U.S. 438, 453; *Stanley v. Georgia,* 394 U.S. 557, 564-565; *Griswold v. Connecticut,* 381 U.S. 479, 484-485; See also *Loving v. Virginia,* 388 U.S. 1, 12, *Skinner v. Oklahoma,* 316 U.S. 535, 541.

While the application of # 1981 to the conduct at issue here -- a private school's adherence to a racially discriminatory admissions policy -- does not represent governmental intrusion into the privacy of the home or a similarly intimate setting, it does implicate parental interests. These interests are related to the procreative rights protected in *Roe v. Wade, supra, and Griswold v. Connecticut, supra.* A person's decision whether to bear a child and a parent's decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities. But it does not follow that because government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education.

The Court has repeatedly stressed that while the parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. See *Wisconsin v. Yoder,* 406 U.S., at 213; *Pierce v. Society of Sisters,* 268 U.S., at 534; *Meyer v. Nebraska,* 262 U.S., at 402. Indeed, the Court in *Pierce* expressly acknowledged "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils. . . ." 268 U.S., at 534. See also *Prince v. Massachusetts,* 321 U.S. 158, 166.

Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under # 2 of the Thirteenth Amendment fully consistent with *Meyer, Pierce,* and the cases that followed in their wake. As the Court held in *Jones v. Alfred H. Mayer Co., supra,* "[i]t has never been doubted . . . 'that the power vested in Congress to enforce [the Thirteenth Amendment] by appropriate legislation' . . . includes the power to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.' " 392 U.S., at 438. The prohibition of racial discrimination that interferes with the making and enforcement of contracts for private educational services furthers goals closely analogous to those served by # 1981's elimination of racial discrimination in the making of private employment contracts and, more generally, by # 1982's guarantee that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." *Jones v. Alfred H. Mayer Co.* 392 U.S., at 443. ...

[The section of the opinion dealing with two other issues, the statute of limitations and attorney's fees, is omitted. The concurring opinions of Mr. Justice Powell and Mr. Justice Stevens are also omitted.]

Dissenting Opinion

Mr. Justice **White,** with whom Mr. Justice **Rehnquist** joins, dissenting.

We are urged here to extend the meaning and reach of 42 USC #

1981 so as to establish a general prohibition against a private individual or institution refusing to enter into a contract with another person because of that person's race. Section 1981 has been on the books since 1870 and to so hold for the first time would be contrary to the language of the section, to its legislative history and to the clear dictum of this Court in the *Civil Rights cases*, 109 U.S. 3, 16-17, (1883), almost contemporaneously with the passage of the statute, that the section reaches only discriminations imposed by state law. The majority's belated discovery of a congressional purpose which escaped this Court only a decade after the statute was passed and which escaped all other federal courts for almost 100 years is singularly unpersuasive. I therefore respectfully dissent.

I

42 USC #1981 captioned "equal rights under the law," provides in pertinent part:

"All persons within the jurisdiction of the United States shall have the same rights to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal protection of the laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."

On its face the statute gives "all persons" (plainly including Negroes) the "*same rights* to make . . . contracts . . . as is enjoyed by white citizens." (Emphasis added.) The words "rights . . . enjoyed by white citizens" clearly refer to rights existing apart from this statute. Whites had at the time when #1981 was first enacted, and have (with a few exceptions mentioned below), no right to make a contract with an unwilling private person, no matter what that person's motivation for refusing to contract. Indeed it is and always has been central to the very concept of a "contract" that there be "assent by the parties who form the contract to the terms thereof," ALI Restatement, Contracts #19 (b), see also 1 Williston, Contracts #18(3). The right to make contracts, enjoyed by white citizens, was therefor always a right to enter into binding agreements only with willing second parties. Since the statute only gives Negroes the "same rights" to contract as is enjoyed by whites, the language of the statute confers no right on Negroes to enter into a contract with an unwilling person no matter what that person's motivation for refusing to contract. What is conferred by 42 USC #1981 is the *right*—which was enjoyed by whites—"to make contracts" with other willing parties and to "enforce" those contracts in court. Section 1981 would thus invalidate any state statute or court-made rule of law which would have the effect of disabling Negroes or any other class of persons from making contracts or enforcing contractual obligations or otherwise giving less weight to their obligations than is given to contractual obligations running to whites. The statute 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.

II

[A long section of Justice White's opinion setting forth the legislative history of 42 USC #1981 is omitted.]...

Thus the legislative history of #1981 unequivocally confirms that Congress' purpose in enacting that statute was solely to grant to all persons equal capacity to contract as is enjoyed by whites and included no purpose to prevent private refusals to contract however motivated.

III

The majority seeks to avoid the construction of 42 USC #1981 arrived at above by arguing that it (*i.e.*, #1977 of the Revised Code of 1874) is a re-enactment *both* of #16 of the Voting Rights Act of 1870—the Fourteenth Amendment statute—*and* of part of #1 of the Civil Rights Act of 1866—the Thirteenth Amendment statute. The majority argues from this that #1981 does limit *private* contractual choices because Congress may, under its Thirteenth Amendment powers, proscribe certain kinds of private conduct thought to perpetuate "badges and incidents of slavery," *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 439, (1968); and because this Court has already construed the language "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to . . . *purchase . . . real . . . property*" (emphasis added) contained in the Thirteenth Amendment statute to proscribe a refusal by a private individual to sell real estate to a Negro because of his race. *Jones v. Alfred H. Mayer Co., supra*, at 420-437. The majority's position is untenable.

First of all, as noted above, #1977 of the Revised Statutes was passed by Congress with the Reviser's unambiguous note before it that the section derived solely from the Fourteenth Amendment statute, accompanied by the confirmatory sidenote "equal rights under the law." Second and more importantly, the majority's argument is logically impossible, because it has the effect of construing the language "*the same rights to make contracts as is enjoyed by white citizens*" contained in #1977 of the Revised Statutes to mean one thing with respect to one class of "persons" and another thing with respect to another class of "persons." If #1981 is held to be a re-enactment of a Thirteenth Amendment statute aimed at private discrimination against "citizens" *and* the Fourteenth Amendment statute aimed at state law created legal disabilities for "all persons," including aliens, then one class of "persons"—Negro citizens—would, under the majority's theory, have a right not to be discriminated against by private individuals and another class—aliens—would be given *by the same language* no such right. The statute draws no such distinction among classes of persons. It logically must be construed either to give "all persons" a right not to be discriminated against by private parties in the making of contracts or to give no persons such a right. Aliens clearly never had such a right under the Fourteenth Amendment statute (or any other statute); #1977 is concededly derived solely from the Fourteenth Amendment statute so far as coverage of aliens is concerned; and there is absolutely no indication that alien's rights were expanded by the re-enactment of the Fourteenth Amendment statute in #1977 of the Revised Code of 1874. Accordingly, the statute gives *no* class of persons the right not to be discriminated against by private parties in the making of contracts. . . .

IV

The majority's holding that 42 USC #1981 prohibits all racially motivated contractual decisions—particularly coupled with the Court's decision in *McDonald v. Santa Fe, supra*, that whites have a cause of action against others including blacks for racially motivated refusals to contract—threatens to embark the judiciary on a treacherous course. Whether such conduct should be condoned or not, whites and blacks will undoubtedly choose to form a variety of associational relationships pursuant to contracts which exclude members of the other race. Social clubs, black and white, and associations designed to further the interests of blacks or whites are but two examples. Lawsuits by members of the other race attempting to gain admittance to such an association are not pleasant to contemplate. As the associational or contractual relationships become more private, the pressures to hold #1981 inapplicable to them will increase. Imaginative judicial construction of the word "contract" is foreseeable; Thirteenth Amendment limitations on Congress' power to ban "badges and incidents of slavery" may be discovered; the doctrine of the right to association may be bent to cover a given situation. In any event, courts will be called upon to balance sensitive policy considerations against each other—which considerations have never been addressed by any Congress—all under the guise of "construing" a statute. This is a task appropriate for the legislature, not for the judiciary.

Such balancing of considerations as has been done by Congress in the area of racially motivated decisions not to contract with a member of the other race has led it to ban private racial discrimination in most of the job market and most of the housing market and to go no further. The judiciary should not undertake the political task of trying to decide what other areas are appropriate ones for a similar rule.

V

. . . What has already been said demonstrates that this Court's construction of 42 USC #1982 in *Jones v. Mayer, supra*, does not require me to construe 42 USC #1981 in a similar manner. The former is a Thirteenth Amendment statute under which the Congress may and did seek to reach private conduct, at least with respect to sales of real estate. The latter is a Fourteenth Amendment statute under which the Congress may and did reach only state action. . . .

. . . The Court simply cited several court of appeals' decisions each of which had erroneously assumed the legislative history of #1981 to be identical to that of #1982 and thus assumed the construction of #1981 to be governed by this Court's decision in *Jones v. Mayer, supra*. Moreover, the dictum in *Johnson v. REA, Inc.*, is squarely contrary to the dictum in *The Civil Rights Cases, supra*. The issue presented in this case is too important for this Court to let the more recent of two contradictory dicta stand in the way of an objective analysis of legislative history and a correct construction of a statute passed by Congress. *Cf. Jones v. Mayer, supra*, at 420 n. 25.

Accordingly, I would reverse.

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