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Civil Rights-- 42 U.S.C. Sec. 1981: Keeping a Compromised Promise of Equality to Blacks

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COMMENTARIES

CIVIL RIGHTS – 42 U.S.C. §1981: KEEPING A COMPROMISED PROMISE OF EQUALITY TO BLACKS

The full realization of black equality demands sacrifices by whites. Laws designed to free a minority from discrimination necessarily encroach on the majority's freedom of choice. The correction of past abuses by granting preferential treatment to blacks entails a concrete cost to whites when there are finite opportunities for jobs and professional education. Juxtaposing the national commitment to advance one race against the fundamental guarantee of equal rights for all poses a troubling legal dilemma that the Supreme Court has just begun to address through the newly reborn Civil Rights Act of 1866.[1]

Since its 1968 rediscovery, the 1866 Act has been steadily advanced as a tool against private racial discrimination.[2] While the Supreme Court has not clearly defined the scope of the Act, it has promoted reliance on one provision, section 1981.[3] Because that section was enacted pursuant to the thirteenth amendment, it can be used as a tool for combatting racism in areas immune from fourteenth amendment state action attack.[4] Ironically,

1. For decades court decisions indicated that the 1866 Act, 42 U.S.C. §§1981 and 1982 applied only to state imposed racial discrimination. *See, e.g.*, Hurd v. Hodge, 334 U.S. 24, 32 (1948). In 1968, however, the Court declared that private racial barriers are reached by the Act in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The Court stated: "At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." *Id.* at 443.

2. Following *Jones*, the Court applied §1982 of the Act to outlaw racial discrimination in a neighborhood recreational facility operated for the benefit of community residents. Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). Another case utilized both §§1981 and 1982 to compel a swimming pool association to admit blacks living in the membership area. Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). In Johnson v. REA, Inc., 421 U.S. 454 (1975), the Court held that §1981 provides a remedy for racial discrimination in employment.

3. 42 U.S.C. §1981 (1970) 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."

4. *See* Cody v. Union Elec., 518 F.2d 978 (8th Cir. 1975). *Cody* illustrates how a §1981 remedy can prevail where a state action challenge to a discriminatory practice was unavailing. Blacks accused a private utility of charging them higher deposits than whites were paying. The district court, relying on Jackson v. Metro. Edison Co., 419 U.S. 345 (1974), denied relief because the utility lacked the state action required to sustain a challenge under 42 U.S.C. §1983. On appeal the Eighth Circuit sustained the conclusion that the company was not "under color of state law," but held that even as private discrimination, the actions of the utility company could be reached by §1981.

section 1981 is being increasingly utilized by white plaintiffs claiming that black advancement has gone too far. Reverse or benign discrimination which allegedly "robs Peter to pay Paul"[5] is now being challenged under section 1981.[6] Thus, with the growing role of section 1981 in civil rights litigation, the statute appears to have generated separate conflicting forces.

Two recent Supreme Court decisions illustrate this growing conflict and demonstrate the need for a principled reconciliation. In *Runyon v. McCrary*,[7] the Court held that section 1981 overcame assorted constitutional privileges claimed by segregated private schools and outlawed their discriminatory admissions policies. On the same day, the Supreme Court granted a section 1981 cause of action to white employment discriminatees in *McDonald v. Santa Fe Trail Transportation Co.*[8] At first glance, these cases appear to be at odds, one extending black access and opportunity, the other allowing potential challenges to minority advancement programs.

This commentary will examine whether there is an underlying unity of purpose in *McCrary* and *McDonald*, and attempt to assess the future role of section 1981 in balancing conflicts that emerge from the law of race relations. First, the background and revitalization of the 1866 Act will be briefly discussed. Then, *McCrary* and *McDonald* will be examined in order to identify the principles shaping each decision. Finally, a conclusion will suggest the direction in which the Court is moving in using section 1981 to balance minority progress and its cost to the majority.

BACKGROUND: REVIVAL OF A CENTURY OLD PROMISE OF EQUALITY

Before 1968, federal relief against racial discrimination was largely confined to activities embued with state action or to practices specifically included within the Civil Rights Act of 1964.[9] The state action doctrine was based on the association of sufficient governmental involvement with challenged conduct to trigger the fourteenth amendment command of equal protection.[10] The 1964 Act,[11] which was constitutionally based on the commerce clause,[12] was directed at discrimination by employers of 15 or more

5. This phrase was used by the Chief Justice in his dissent from a decision that granted back seniority rights to black discriminatees, thereby advancing their economic status beyond that of some incumbent white workers. Franks v. Bowman Transp. Co., 96 S. Ct. 1251, 1272 (1976) (Burger, C.J., dissenting).

6. *See, e.g.*, WRMA Broadcasting Co. v. Hawthorne, 365 F. Supp. 577 (M.D. Ala. 1973) (white victim of employment discrimination had standing to sue under §1981). *Contra*, Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205 (N.D. Ala. 1973) (white denied §1981 standing; allegedly fired for extensive association with black co-workers).

7. 96 S. Ct. 2586 (1976).

8. 96 S. Ct. 2574 (1976).

9. *See generally*, Seldin, *Eradicating Racial Discrimination at Public Accommodations Not Covered by Title II*, 28 RUTGERS L. REV. 1 (1974).

10. The state action limitation was set forth in the Civil Rights Cases, 109 U.S. 3 (1883) where the Court noted: "under the fourteenth [amendment], as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings." *Id.* at 23.

11. 42 U.S.C. §§2000a-2000h (1970).

12. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), where

workers[13] and to places of public accommodation.[14] Both approaches suffered significant limitations. Even painstaking searches for state action could not impose equal protection upon truly private transactions. Further, the approach of the 1964 Act was one of compartmentalized proscription so that private discrimination was not prohibited unless included within a specific category.[15] Thus, the nation's solemn promise of equal opportunity was often defeated. Retail stores, the waiting rooms of doctors and dentists, private clubs and private schools were among the lawful havens for racial intolerance.[16]

In 1968, a new avenue of attack on racial barriers was opened by the landmark decision of *Jones v. Alfred H. Mayer Co.*[17] The Court awakened the Civil Rights Act of 1866 from a century of virtually undisturbed slumber[18] and held that a realty company could not lawfully refuse to sell a home to a black claimant solely on account of his race.[19] This application

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the court found Title II a valid exercise of Congress' power to regulate interstate commerce insofar as it required hotels and motels to provide service without regard to race or color.

13. 42 U.S.C. §2000e (1970). Title VII is further limited to operations dealing in interstate commerce.

14. 42 U.S.C. §2000a (1970).

15. The Civil Rights Act of 1964 contains eleven titles that target for federal remedy various areas of discrimination. 42 U.S.C. §§2000a-2003 (1970). The reach of these modern provisions is specifically limited. For example, Title II exempts private establishments from its proscription. 42 U.S.C. §2000a(e) (1975). Title IV commands desegregation only in public schools, 42 U.S.C. §2000c (1970) while Title VI's prohibition of discrimination is confined to federally assisted programs. 42 U.S.C. §2000d (1970).

16. *See* Seldin, note 9 *supra* at 5, noting that barber shops, beauty parlors, nursery schools, cemeteries, funeral homes, self-service laundries, dance studios and shoe shine parlors were similarly excluded from coverage under the Act. All of these operations appear to be reached by §1981, however. See text accompanying notes 41-44 *infra.*

17. See note 1 *supra.*

18. In the Civil Rights Cases, 109 U.S. 3 (1883), the Court asserted in dictum that the 1866 Act applied only to racial discrimination cloaked with state action. *Id.* at 16-17. Thus the law became little more than a statutory embodiment of the fourteenth amendment and could be used only where an equal protection claim was already available. *See, e.g.*, Kerr v. Enoch Pratt Library, 149 F.2d 212 (4th Cir. 1945) (in a suit based on both the fourteenth amendment and §1981, a black applicant successfully challenged the discriminatory refusal to allow her in a public library class).

19. So far, *Jones* and its progeny have only confronted denials to blacks occurring solely on account of race. When such denials are allegedly based on factors in addition to race, the applicability of §1981 is less certain. Several approaches have been borrowed from the law of torts to ascertain the extent to which an exclusion must be caused by race in order to invoke §1981.

A "but for" test was adopted in a thoughtful district court opinion addressing a black child's application to a private school. Riley v. Adirondack S. School for Girls, 368 F. Supp. 392, 397 (M.D. Fla. 1973). The court reasoned that "the same right" guaranteed by §1981 forbids denials to blacks where similarly situated whites would prevail. Correspondingly, where whites with like qualifications would be denied an opportunity to contract, blacks could not maintain a §1981 action simply because race was an incidental factor in their exclusion. Such an objective approach would allow courts to evaluate §1981 claims by examining whether disparate treatment was accorded similarly situated whites and blacks. In *Riley*, however, the lower court's utilization of a "but for" test was reversed upon appeal. Riley v. Adirondack S. School for Girls, 541 F.2d 1124 (5th Cir. 1976). The Fifth Circuit propounded a "substantial factor" test for §1981 by extrapolating from seemingly innocuous language in *McCrary* that observed that §1981 "prohibits racial discrimination in

of section 1982[20] to private property transactions led lower courts to construe its "statutory twin,"[21] section 1981, as outlawing racially motivated refusals to enter into private contracts. Following *Jones*, every federal circuit to consider the question concluded that section 1981 forbade racial discrimination in private employment.[22] In 1975, the Supreme Court endorsed this view in *Johnson v. Railway Express Agency*[23] and ruled that section 1981 provided a remedy for job discrimination independent of the relief available under Title VII of the 1964 Civil Rights Act.[24]

This increasing reliance on the 1866 Act by civil rights litigators was primarily due to two of its features. First, its constitutional base is the enforcement clause of the thirteenth amendment, a general authorization for Congress to legislate against badges and incidents of slavery that obviates the need for state action.[25] Second, the section's language is extremely broad. Instead of tailoring a grievance to fit a category specified within the 1964 Civil Rights Act, a claimant can rely on an expansive declaration of his right in property and contract — "the same right . . . as is enjoyed by white citizens."[26] Thus, racial barriers beyond the grasp of modern legislation and equal protection began to fall within the ambit of the 1866 Act.[27]

Even before the resuscitation of the 1866 law the legal tools against racial discrimination, together with pressures exerted by government and individual conscience, resulted in the widespread implementation of affirmative action plans to correct past inequality.[28] These programs frequently rely

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the making and enforcement of private contracts." 96 S. Ct. at 2593. The *Riley* decision found "it can hardly be gainsaid that racial discrimination arises" whenever race " 'was at least one of the factors which motivated the defendant's action. . . .' " 541 F.2d 1124, 1126 (*quoting* 368 F. Supp. at 395). *See also* Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349 (7th Cir. 1970) (for purposes of a §1982 action: "Race is an impermissable factor in an apartment rental decision").

20. 42 U.S.C. §1982 (1970) provides: "All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

21. Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 994 (D.C. Cir. 1973).

22. *See, e.g.*, Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974).

23. 421 U.S. 454 (1975).

24. *Id.* at 466.

25. "[T]he 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.' " 96 S. Ct. at 2598 (*citing* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968)).

26. See note 3 *supra*.

27. See sources cited in note 4 *supra*. A further illustration of how §1981 can exceed the grasp of equal protection is found in the dissent to Evans v. Newton, 382 U.S. 296, 315 (1966) (Harlan, J., dissenting). Harlan rejected the majority's extension of the public function-state action rationale to outlaw racial exclusion by a private park. He reasoned that this holding opened the door to an equal protection challenge to segregation in private schools. *Id.* at 322. Joining Harlan's dissent was Justice Stewart, who authored the majority opinion in *McCrary*.

28. The underlying principle of affirmative action has been thus stated: "It has been suggested that the minority admissions policy is not necessary, since the same objective could be accomplished by improving the elementary and secondary education of minority students to a point where they could secure equal representation in law schools through

on quotas and preferential consideration to guarantee a minimum level of minority participation. While affirmative action has brought quick results for some,[29] it has also led to the appearance of a new civil rights plaintiff, the white alleging that he is a victim of reverse discrimination. Previous challenges to reverse or benign discrimination, grounded in equal protection, have generally been rejected by the lower federal courts.[30] In denying relief and upholding preferential treatment, the courts have found benign classifications justified by legitimate, even compelling state interests in overcoming the present effects of past abuses.[31] The Supreme Court waived its opportunity to address the constitutionality of remedial discrimination when it ruled moot the celebrated challenge of Marco Defunis to preferential standards for admitting minority law school applicants.[32] After section 1981 emerged as a means to attack racial barriers, the lower courts divided on whether the law protected whites.[33] In *McDonald v. Santa Fe Trail Transportation Co.*, the Supreme Court held for the first time that the majority has a right to be free from discrimination.[34] Thus, section 1981 may have become

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direct competition with nonminority applicants on the basis of the same academic criteria. This would be highly desirable, but 18 years have passed since the decision in *Brown v. Board of Education* [citation omitted], and minority groups are still grossly underrepresented in law schools. If the law school is forbidden from taking affirmative action, this under-representation may be perpetuated indefinitely." Defunis v. Odegaard, 82 Wash. 2d 11, 36, 507 P.2d 1169, 1184 (1973), *vacated as moot*, 416 U.S. 312 (1974).

29. One commentator noted that in 1971-1972, there were almost as many blacks enrolled as first year law students as there were black attorneys. Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. LEGAL ED. 293 (1975).

30. *See* Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (court found a compelling interest to justify racial quotas aimed at curing racial imbalance in construction trades); Porcelli v. Titus, 431 F.2d 1254, 1257-58 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) (proper governmental purpose found in promotion policies favoring minority school teachers); Brooks v. Beto, 366 F.2d 1, 24-26 (5th Cir. 1966) (judicial requirement of minimum percentage of blacks on grand jury a permissible remedy of past discrimination). *But see* Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248, 249 (N.D. Cal. 1972) (striking down system preferring black school administrators in absence of past discrimination).

31. "[T]here is no question that a compelling need exists to remedy serious racial imbalance in the construction trades . . ." Associated Gen. Contractors v. Altshuler, 490 F.2d 9, 18 (1st Cir. 1973).

32. *See* Defunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974). Defunis was among 1,600 applicants for 150 places in a starting class at the University of Washington Law School. Upon being rejected, he claimed that admissions standards preferring minorities had unconstitutionally denied him a chance to attend law school. His equal protection suit prevailed at the trial level and he was admitted pursuant to a court order. By the time his case reached the Supreme Court, he was about to graduate. The law school stipulated that he would be permitted to finish and so the Court, finding no case or controversy to invoke its jurisdiction, ruled the action moot. 416 U.S. at 319-20.

In dissent, Justice Brennan emphasized the importance of the question sought to be resolved and noted that 26 amicus briefs had been filed. 416 U.S. at 450. (Brennan, J., dissenting).

Justice Douglas, in dissent, was the sole member of the Court to address the merits of Defunis' suit. 416 U.S. at 320-48 (Douglas, J., dissenting).

a double-edged sword in the law of civil rights, advancing black rights in some areas, contracting them in others.

McCrary AND FUTURE §1981 LIABILITY: "THERE'S NO TELLING WHAT THE COURT WILL DO NEXT"[35]

The sequence of events leading to the outlawing of segregation in private schools in *Runyon v. McCrary* began with the random mailing of advertising brochures from two all-white academies in Virginia. Addressed to 'Resident,' they were received by two black families who sought to enroll their sons. Michael McCrary and Colin Gonzales were refused admission solely on account of their race. A federal district judge, relying on *Jones* and its progeny, found that the private refusals of contract violated section 1981.[36] Although it evoked a vigorous dissent in the Fourth Circuit Court of Appeals,[37] this conclusion was approved by a seven member majority of the Supreme Court.[38]

In applying section 1981 to the facts of *McCrary*, the Court continued to accord the statute a "sweep as broad as its language."[39] If continued, this theme will produce farreaching results.[40] Section 1981 provides that, "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . .

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33. Cases granting whites §1981 standing included Balc v. United Steelworkers, 6 EPD ¶8948 (W.D. Pa. 1973); Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205 (N.D. Ala. 1973); Perkins v. Banster, 190 F. Supp. 98 (D.C. Md. 1960). *Contra* Carter v. Gallagher, 452 F.2d 315, 325 (8th Cir. 1971); Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D.C. Conn. 1975); WRMA Broadcasting Co., Inc. v. Hawthorne, 365 F. Supp. 577 (M.D. Ala. 1973); Gannon v. Action, 303 F. Supp. 1240, 1244-45 (E.D. Mo. 1969), *aff'd in part and remanded*, 450 F.2d 1227 (8th Cir. 1971); Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894, 901 (E.D. Mo. 1969). The Court noted that the district judge in *McDonald* has changed his view since the decision, and held that §1981 was applicable to white persons. Spiess v. C. Itoh & Co., 408 F. Supp. 916 (S.D. Tex. 1976).

34. The availability of Title VII relief to whites was also considered for the first time in *McDonald*, 96 S. Ct. 2577-80. The Court held that whites were clearly entitled to this remedy citing the interpretations by the Equal Employment Opportunity Commission and dicta from Griggs v. Duke Power Co., 401 U.S. 424 (1971).

35. Statement by George S. Leonard, attorney for Southern Independent School Association, defendant in *McCrary*, quoted in Ayres, *South's "Seg" Schools Are Now Part of the System*, N.Y. Times, June 27, 1976, §4 at 1, col. 4.

36. Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973). The case heard by the Supreme Court represented a consolidation of Colin Gonzales' action against both the Fairfax-Brewster and Bobbe's private schools, and Michael McCrary's suit against Bobbe's School. The Southern Independent School Association, representing 395 private schools, intervened as a party defendant.

37. Runyon v. McCrary, 515 F.2d 1082 (4th Cir. 1975). Four judges voted to affirm and three dissented, citing the need for diversified education.

38. Justice Stewart wrote the majority opinion; Justices White and Rehnquist dissented based upon a complicated analysis of the legislative history of §1981. They found the statute to be a fourteenth amendment enactment reaching only public discrimination. It was thus distinguished from §1982, a statute authorized by the thirteenth amendment, which has a well-settled application to private discrimination. 96 S. Ct. at 2604-13 (White, J., dissenting).

39. This was the canon of construction for the 1866 Civil Rights Act established in *Jones*, 409 U.S. at 437.

as is enjoyed by white citizens."[41] Arguably, discrimination in any contractual context is thus forbidden by federal law. The range of activities that may be deemed contractual is vast, possibly extending beyond purely commercial dealings into more personal relations such as church membership,[42] private clubs,[43] babysitting arrangements[44] and, perhaps, even marriage.[45] It is not clear when the Court will halt the extension of section 1981 into private discriminatory conduct. Normally, congressional intent should guide the judicial delineation of the scope of federal law. However, the language of the impassioned Reconstruction Era congressional debates is of limited value today.[46] Moreover, as many critics have pointed out,[47] the seminal decision in *Jones* has moved the Court so far from the original meaning of the 1866 Act that to return to legislative intent for refinement of section 1981's current applicability would be pointless. Another potential guide in construing the statute, prior judicial opinions, is likewise unavailable since the few cases

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40. The Court in *McCrary* viewed its holding as a logical extension of *Jones* and its progeny. 96 S. Ct. at 2595. It is more than that. This is the first occasion where the 1866 Act has been extended significantly beyond modern civil rights legislation. For example, the prohibition of housing discrimination in *Jones* coincided with the enactment of the Fair Housing Title of the Civil Rights Act of 1968. 42 U.S.C. §§3604-06, 3631 (Supp. 1975) (amending 42 U.S.C. §§3601-19, 3631 (1970)). When the Court applied §1981 to employment discrimination in *Johnson*, Title VII had been in effect for over a decade. No current scheme of Congress, however, has even approached segregation in private schools.

In taking a century old law to reach an otherwise immune bastion of intolerance, the Court was clearly influenced by policy concerns. Segregated schools in the South had developed a troubling importance that squarely defied the judicial commitment to integrated education. At the time *McCrary* was decided, some 3,500 "seg" academies were flourishing, largely in response to Court ordered integration in public schools. See Ayres, *South's "Seg" Schools Are Now Part of the System*, N.Y. Times, June 27, 1976, §4, at 1, col. 4. Additionally, one commentator has examined the impact of white flight on the funding of local public education. Documenting the loss of school revenues, the author observed a corresponding threat to the quality of public education. See Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1453-58 (1973).

41. See note 3 *supra*.

42. Two cases have found a contractual relationship between a church and its white members and applied §1981 to protect them from outside interference by blacks. Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969), *aff'd in part, rev'd in part*, 450 F.2d 1227 (8th Cir. 1971); Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969). *See also* Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1198 (D. Conn. 1974) (private clubs and marriage entail contracts).

43. *Id.*

44. 96 S. Ct. at 2613 (White, J., dissenting).

45. See note 42 *supra*.

46. Compare the *Jones* majority's analysis of the congressional debates, 392 U.S. at 422-35, with the examination by dissenters Harlan and White, 392 U.S. at 457-72.

47. The leading work among many criticizing the Court's version of the legislative intent behind the 1866 Civil Rights Act is C. FAIRBANKS, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1971). Although both Justices Powell and Stevens indicated their disagreement with the holding in *Jones*, they concurred in the *McCrary* holding. Justice Stevens observed, "even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today." 96 S. Ct. at 2604 (Stevens, J., concurring).

decided since the law's rebirth offer little illumination.[48] Thus, in promoting the 1866 Act, the Court has led itself into a quandary. Lacking legislative intent and judicial precedent, it must construe an amorphous statute with wide-ranging implications. In forging principles to define the coverage of section 1981 and thus prescribe future parameters of liability for racial discrimination, at least three options are open to the Court.

Several commentators and lower courts have contended that the force of the 1866 Act should be restricted to the same array of discriminatory activities outlawed by modern civil rights legislation.[49] Congress' passage of more recent acts can be construed as having impliedly repealed the older law to the extent that the 1866 Act was inconsistent. This view offers substantial clarity and predictability for the potential litigant who needs only to look to the compartmentalized proscriptions of the 1964 law to determine the reach of section 1981. This rationale is undermined, however, by Court holdings that section 1981 provides a remedy independent of Titles II and VII of the 1964 Act.[50] Additionally as the Court noted in *McCrary*, in 1972 the Senate rejected a proposal to repeal the 1866 legislation, thereby suggesting current congressional support for the separate vitality of the older law.[51]

A second approach for defining the scope of section 1981 was offered by Justice Powell in his concurring opinion in *McCrary*.[52] Justice Powell advocated limiting section 1981 to discriminators making an open offer to contract with the general public. He found that the Fairfax-Brewster and Bobbe's private schools clearly extended a public invitation when they advertised through random mailing and listed themselves in the yellow pages.[53] Seeking to direct section 1981 against commercial rather than personal contractual relationships, Powell reasoned that "one fairly could construe their open-end invitations as offers that matured into binding contracts when

48. Certainly in an evolving area of law, the Court is justified in proceeding cautiously before asserting rigid rules. Some guidance is needed; however, the present uncertainty invites frivolous litigation. *See*, Wells v. George Peabody College for Teachers, 377 F. Supp. 1108 (M.D. Tenn.), *aff'd*, 487 F.2d 1403 (6th Cir. 1973). In *Wells*, a student was unable to complete her Ph.D. after she flunked her oral examinations. Despite the fact that no evidence of bias could be offered (indeed, the college had previously graduated a number of black Ph.D's) a §1981 suit was filed. Plaintiff's claim was rejected.

49. Comment, *Private Discrimination Under the 1866 Civil Rights Act: In Search of Principled Constitutional and Policy Limits*, 7 U. TOLEDO L. REV. 139, 161 (1975); Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 525 (1974); *see also* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1316 (7th Cir. 1974); ("[C]ourts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction."). Implied repeal was also advocated by the dissent in the Fourth Circuit's treatment of *McCrary*, 515 F.2d 1082 (4th Cir. 1975), and in Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1201 (D. Conn. 1974).

50. *See* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439 (1973) (Sections 1981 and 1982 are independent of Title II); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 466 (1975) (Section 1981 independent of Title VII).

51. 96 S. Ct. at 2596 n.11.

52. 96 S. Ct. at 2601-03 (Powell, J., concurring).

53. *Id.* at 2603.

accepted. . . ."[54] He conceded the potential difficulty in distinguishing between private and public offers.[55] Indeed, determining how public an invitation must be to invoke section 1981 seems as difficult as measuring how much governmental involvement constitutes state action for purposes of equal protection.[56] Nonetheless, several circuits have apparently adopted an approach similar to Justice Powell's[57] and no Court decision has explicitly rejected a public invitation test for section 1981.

The majority in *McCrary*, however, appeared to lean toward a third basis for defining the scope of section 1981 liability. This approach entails a two-step process: first, determining whether a discriminatory practice denies a contract; and second, establishing whether any constitutional privileges shield the discrimination. Such an expansive application of section 1981 recognizes as limitations only constitutionally guaranteed rights such as privacy and freedom of association, religion, speech and press.[58] There are significant advantages to such an approach. In defining the range of activities encompassed by contract, and in assessing the availability of constitutional defenses to section 1981 actions, litigants could rely on existing case law.[59] More importantly, an expansive approach would best fit the long range requirements of national policy. Allowing only constitutional restrictions on the ability of federal law to obliterate racial barriers would add considerable force to the proposition that there is no longer any place for racial discrimination in our society.

Tacitly adopting this third approach in *McCrary*, the Court first considered whether the racial exclusion practiced by segregated schools denied blacks

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54. *Id.*

55. "I do not suggest that a 'bright line' can be drawn that easily separates the types of contract offer within the reach of §1981 from the type without." *Id.*

56. As the Court observed in connection with state action and equal protection: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1966).

57. There are two circuits that appear to favor the "public invitation" test advocated by Powell. The Fourth Circuit emphasized the lack of a discernable rule of exclusivity other than race in their affirmance of *McCrary*. 515 F.2d at 1088-89. The Fifth Circuit adopted a "standing offer" test in their disposition of Cook v. Advertiser Co., 458 F.2d 1119, 1122 (5th Cir. 1972).

58. Regarding religious freedom in a related context, *see* Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 607 (D. S.C. 1974) (fundamentalist school's refusal to admit blacks not protected by freedom of religion; as a result, students denied Veteran's Administration benefits). The possibility of litigants compelling admission to religious schools under §1981 was specifically left open in *McCrary*, 96 S. Ct. at 2592. Considering lower court determinations that church memberships entail rights of contract, see note 42 *supra*, it is arguable that religious freedom would protect a congregation's refusal to allow blacks to join.

Freedom of the press was invoked against a §1981 challenge to a newspaper's policy of putting black wedding announcements on a separate but equal page. Cook v. Advertiser Co., 485 F.2d 1119, 1122 (5th Cir. 1972).

59. Neither the law of contracts nor the status of many constitutional privileges lend themselves to clear-cut principles. At least they offer a basis in law, rather than pure policy, as a starting point for the §1981 litigant.

a relationship of contract. This threshold requirement was easily met: "the schools would have received payment for services rendered, and the prospective students would have received instruction in return for those payments."[60] The Court[61] next focused on the specific claims of constitutional immunity made by the school administrators. Freedom of association, the Court reasoned, should be available only when necessary for "effective advocacy of both public and private points of view."[62] Here the privilege failed because there was "no showing that [the] discontinuance of discriminatory admissions policies would inhibit in any way the teaching in these schools of any ideas or dogma."[63] The Court interpreted the parental rights doctrine established in *Meyer v. Nebraska*[64] as merely establishing privileges to operate private schools and to teach certain subjects or values. Since neither privilege was invoked by the defendants in *McCrary*, the Court found the doctrine unavailable to protect challenged discrimination.[65]

The right of privacy was accorded more deference than the other constitutional claims made in *McCrary*. The Court acknowledged a relation between the procreative rights protected in previous decisions and the interest of a parent in his child's education.[66] This nexus was insufficient, however, to shield private school education from reasonable government regulation.[67] The summary rejection of associational and parental rights in *McCrary*, and the more careful consideration of privacy rights, suggests that the latter will emerge as the prime limitation on the use of section 1981.[68] Indeed, the Court hinted that the right of privacy might yet immunize purely private behavior such as racial exclusion from private clubs.[69]

60. 96 S. Ct. at 2595.

61. The opinion also initially discounted any applicability of the private club exemption to private schools. 96 S. Ct. at 2595 n.10.

62. 96 S. Ct. at 2596.

63. *Id.* at 2597.

64. 262 U.S. 390 (1923) (court struck down state law forbidding the teaching of the German language in certain situations). *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925). In *Pierce* the Court applied the rationale of *Meyer* to invalidate a statute outlawing private schooling for children between eight and sixteen.

65. 96 S. Ct. at 2597.

66. *Id. See* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (privacy gives woman a constitutional right to have an abortion); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (state laws against birth control violate a married couple's right of privacy).

67. 96 S. Ct. 2598.

68. Well before the emergence of *Jones* and its progeny, one commentator identified privacy as the proper basis for determining when a prerogative to discriminate should be sanctioned. "The right of the government to *compel* personal associations . . . is surely not subject in resolution in terms of a blanket right of association or non-association. . . . [It] must be framed in terms of drawing the line between the public and the private sectors of our common life. The question is, in short, one of the right of privacy . . . ." Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 20 (1964). Thus, while the Court has never recognized an independent right to discriminate, discrimination apparently can, if asserted as a privacy right, gain some affirmative constitutional sanction.

69. In *McCrary*, the Court continued its careful avoidance of considering whether private clubs are immune from §1981. 96 S. Ct. 2592. The Court intimated, however, that a private club's best defense will be to assert the privacy rights of its patrons. In reasoning

Whatever the final resolution of the privacy-discrimination paradox, it seems clear that the Court is willing to construe section 1981 broadly and will continue to advance black freedom from discrimination at the cost of white freedom of choice. This seems just; while the need for minority access to all spheres of endeavor is great, the societal value attached to the personal desires of a bigot is minimal. Other white sacrifices, however, cannot be so lightly dismissed. The forfeiture of the prerogative to refuse to deal with blacks involves considerably less cost than the loss of a job or a chance to attend a professional school in order to accelerate minority economic progress.[70] In the allocation of such limited resources, the balancing of black and white needs becomes far more difficult.

McDonald And White Freedom From Reverse Discrimination

In *McDonald v. Santa Fe Trail Transportation Co.*,[71] the Supreme Court may have limited preferential resource allocation as a means of effectuating black progress. The farreaching implications of *McDonald* arise from sparsely detailed circumstances. Three workers were charged with the same act of misappropriating company cargo. Two employees, both white, were fired. The third, a black, was retained. Curiously, no explanation for the apparent racial preference is in the record.[72] It is certain, however, that the employer did not defend its actions as being part of a minority advancement program.[73] The white dischargees, I.N. McDonald and Raymond L. Laird, claimed discrimination on account of race and sought redress under section 1981. The

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that a private school was not protected by privacy, the opinion observed that schools do not involve "the privacy of the home or a similarly intimate setting . . . ." 96 S. Ct. at 2598, citing to the Court's discussion of private clubs. *Id.* at 2595 n.10. Thus, a "similarly intimate setting" includes a private club for the purpose of invoking privacy and escaping §1981 liability.

Lower courts have consistently upheld segregation in private clubs by applying to §1981 the private club exemption in the 1964 Act. 42 U.S.C. §2000a(e) (1970). *See* McDonald v. Shawnee Country Club, Inc., 438 F.2d 632, 634 (6th Cir.), *cert. denied*, 403 U.S. 932 (1971) (alternative holding); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1196-1203 (D. Conn. 1974) (holding emphasizes need for harmonizing §1981 and the 1964 Act); Solomon v. Miami Women's Club, 359 F. Supp. 41, 44 (S.D. Fla. 1973); Sims v. Order of United Commercial Travelers of America, 343 F. Supp. 112, 113-14 (D. Mass. 1972). There is no direct authority contradicting these holdings. *But see*, McGlotten v. Connally, 338 F. Supp. 448 (D. D.C. 1972) (no charitable deduction allowed for gifts to fraternal orders excluding blacks), and Sigma Chi Fraternity v. University of Colorado, 258 F. Supp. 515 (D. Col. 1966) (no constitutional right of fraternity to keep out blacks).

70. There are undoubtedly many who feel that a right to discriminate should be maintained as a matter of principle. Probably few whites, in obediance to such a principle, have quit lucrative jobs rather than work or deal with blacks. Similarly, civil rights laws have probably resulted in no white abandonment of economic opportunities in order to effectuate the principles of segregation.

71. 96 S. Ct. 2574 (1976).

72. Equally curious is the Court's decision to address the complex issue of discrimination against whites on the basis of such limited facts.

73. The Court noted that the respondent employer disclaimed that the challenged actions were any part of an affirmative action program. 96 S. Ct. at 2578 n.8. Clearly, the opinion in *McDonald* did not purport to directly implicate benign discrimination.

district court, considering only the threshold question of whether whites can sue under the statute, barred the action, noting that the "better reasoned authorities" denied white standing.[74] The Fifth Circuit Court of Appeals affirmed *per curiam*.[75] Faced with a split of lower court decisions on the availability of section 1981 to whites,[76] the Supreme Court granted certiorari and reversed.

In granting standing to white victims of employment discrimination, the Court relied on its earlier decision in *Georgia v. Rachel*.[77] In *Rachel*, the Court held that section 1981 guarantees equal civil rights to both races; the language of the statute, "the same right . . . as is enjoyed by white citizens," was not intended to exclude white citizens from a remedy, but was rather to "emphasize the racial character of the rights involved."[78] Beyond a bare declaration that whites have section 1981 protection, the Court in *McDonald* did not clarify which forms of anti-white discrimination warrant a section 1981 remedy.[79] White challengers are thus granted standing to attack all forms of preferential treatment. The varying possibilities left open in *McDonald* may lead to critically different results for race relations.[80]

The most restrictive view of *McDonald* is that it compells redress only when Caucasians are subjected to invidious discrimination. "Invidious"

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74. 10 BNA Federal Employment Practices Cases 1162, 1163 (S.D. Tex. 1975). This type of white standing should be distinguished from the previously recognized ability of whites to sue as the only effective adversary of the civil rights of blacks. *See, e.g.*, Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969).

75. 513 F.2d 90 (5th Cir. 1975).

76. See sources cited note 32 *supra*. Justice Marshall authored the majority opinion in *McDonald*. Justices White and Rehnquist dissented citing their view expressed in *McCrary* that §1981 does not encompass private discrimination. 96 S. Ct. at 2586 (White, J., dissenting).

77. 384 U.S. 780 (1968). *Rachel* was one of the "luncheon counter" cases which lends credence to the adage that hard facts make for questionable law. Black civil rights demonstrators were arrested for trespassing and sought removal of the prosecution to federal court. Their escape from state authorities was predicated on the availability of a removal provision. 28 U.S.C. §1443 (1970), which can be invoked under a law enforcing equal civil rights. In this limited procedural context §1981 was held to provide equal civil rights for both races.

78. 384 U.S. at 791.

79. While not addressed in *McDonald*, concerns over the case's potential impact on affirmative action were expressed to the Court in several of the briefs submitted. *See* Brief for Petitioner at 42, McDonald v. Santa Fe Trail Transp. Co.; Brief for Respondent Employer at 16-22, McDonald v. Santa Fe Trail Transp. Co. *See generally*, Brief for the National Association for the Advancement of Colored People as *Amicus Curiae*, McDonald v. Santa Fe Trail Transp. Co.

80. Now that the question of white standing under §1981 is resolved, there may be questions of the statute's availability to other classes of discriminatees. Dictum in *McCrary* rejects extending §1981 to victims of religious or sexual discrimination. 96 S. Ct. at 2592. Aliens, on the other hand, are probably included. "The protection of this statute has been held to extend to aliens as well as citizens." Graham v. Richardson, 403 U.S. 365, 377 (1971). Another protected group may be Gypsies; *see* United States v. Wong Kim Ark, 169 U.S. 649, 697 (1897).

refers to burdens imposed by one race upon another without claim of justification. It is discrimination that excludes and stigmatizes the victim group.[81] Proscription of such conduct against blacks has been the invariable theme of *Jones* and its progeny, including *McCrary*. So limited, *McCrary* and *McDonald* can be reconciled as statements of a similar proposition: that unjustifiable racial discrimination must end, no matter which group is the perpetrator, and which group the victim.

A second explanation of the holding, however, would expand it to forbid benign as well as invidious discrimination against whites. Benign discrimination consists of sacrifices one group imposes upon itself in order to share limited resources with a disadvantaged group.[82] Widely implemented through affirmative action plans, benign discrimination seeks to insure participation of both races by guaranteeing access to allegedly less qualified members of a minority. Traditionally, authorities emphasizing policy considerations have maintained that while invidious discrimination against any group is clearly illegal, benign discrimination against a racial majority must be allowed.[83] Affirmative action, however, may be assuming an increasingly precarious legal posture. Lower court challenges are mounting. Preferential allocation of jobs,[84]

81. *See*, Baldwin, *Defunis v. Odegaard, The Supreme Court and Preferential Law School Admissions: Discretion is Sometimes Not the Better Part of Valor*, 27 U. FLA. L. REV. 343, 355-56 (1975). While Professor Baldwin and others have defined invidious protection in the context of equal protection analysis, such characterizations seem just as applicable to §1981. *See* Spiess v. C. Itoh & Co., 408 F. Supp. 916, 917 n.1 (S.D. Tex. 1976) (applies §1981 to invidious discrimination).

82. "[T]he goal of preferential admissions is not to separate the races, but to bring them together . . . ." O'Neil, *Preferential Admissions Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 713 (1971).

83. See sources cited in notes 29, 80 and 81 *supra*. One district court recently allowed a white cause of action against invidiously discriminating Japanese. Spiess v. C. Itoh & Co., 408 F. Supp. 916 (S.D. Tex. 1976). There the court specifically stated that its holding had no effect on affirmative action. *Id.* at 917 n.1. This confinement of §1981 to invidious discrimination was rejected by another district court, however. *See* Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975). In this case, the court granted a §1981 cause of action to a white student excluded from a minority internship program. Apparently Sears had expanded its minority recruitment efforts in response to pressures by the Equal Employment Opportunities Commission. While the eventual outcome of the suit has not been reported, it portends future §1981 challenges to affirmative action, a possibility that the Court in *McDonald* has done nothing to discourage.

84. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976). In an action brought under Title VII, the court struck down an affirmative action program in a collective bargaining agreement. The decision emphasized that the company devised its quota system with a view toward complying with federal contract standards, not correcting the effects of past discrimination. *See also* Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976). In *Lige* hiring and promotion quotas had been imposed upon city police and fire departments by state civil rights authorities. The New Jersey supreme court found this attempt to remedy past, unintentional discrimination violative of the anti-discrimination provision in the state constitution. Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D. D.C. 1976). This action was filed under 42 U.S.C. §2000d (1975) which forbids discrimination by federally funded institutions. In sustaining a challenge to preferential allocation of financial assistance, the court reasoned that, "[t]here is no justification for saying that a 'minority' student with a demonstrated financial need of $2,000 requires more scholarship aid than a 'non-minority' student with

student loans,[85] and graduate school admissions[86] are among the recent targets of successful white claimants. Perhaps the commitment to black advancement launched in the prosperous mid-1960's is waning in the economic downturn of the '70's.[87] These pressures may suggest that the Court's long-standing silence on the legality of benign discrimination will soon be broken.[88]

If the Court chooses to exempt affirmative action and limit section 1981 to invidious discrimination, there are several supportive rationales available.[89] First, the Court could find that modern congressional and administrative sanctions of preferential treatment have impliedly repealed the older law insofar as it might have proscribed affirmative action.[90] This argument suffers, however, from the general disfavor of courts toward implied repeal contentions.[91] It may be significant here, as it was in *McCrary*, that Congress refused to expressly repeal or amend the 1866 Act.[92] A second analysis would look to the primary concerns of the thirteenth amendment and section 1981. While these enactments strike at incidents of slavery imposed on any group, they were principally motivated by a desire to complete the emancipation of the

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a demonstrated financial need of $3,000." 417 F. Supp. at 384. The court distinguished loan applications from the complex "social and cultural factors" present in admissions processes.

86. Bakke v. Regents of the Univ. of California, Cal.3d , 132 Cal. Rptr. 680, P.2d (1976). In *Bakke*, preferential standards in admissions to the state's medical school were held to violate equal protection. In its holding the California supreme court squarely rejected "the notion that racial discrimination may be more easily justified against one race than another . . ." *Id.* Two other recent cases are contrary to this view. In Stewart v. New York Univ. 44 L.W. 2481 (1976), the court rejected a §1981 claim finding that "[t]he law school's minority admissions policy is a good faith effort by the school to correct past discrimination." *See also* Alevy v. Downstate Medical Center of New York, 44 L.W. 2482 (N.Y. Ct. App. 1976) (medical school's minority admissions program survived equal protection attack, decision grounded in social policy).

87. In the related context of Title VII litigation, one commentator has observed the close relationship between economic developments and the national enthusiasm for black progress in employment and business. Note, *Plant Seniority and Minority Employees: Title VII's Effect on Layoffs*, 47 COLUM. L. REV. 73, 77-81 (1975).

88. A remedy under §1981 may include money damages as well as injunctive relief. Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969). Moreover, a recent Congressional enactment has made attorney's fees available to successful §1981 litigants. The Civil Rights Attorney's Fees Awards Act of 1976. Pub. L. No. 94-559, 90 Stat. 2642.

89. Socially conscious private citizens may be accumulating untold personal liability in seeking to encourage minority participation. Thus there is a need for prompt clarification of the capacity of §1981 to reach affirmative action.

90. An additional approach to shielding affirmative action has been urged upon the Court by the NAACP, which has argued for allowing past perpetrators of discrimination to utilize quotas in correcting their own mistakes without incurring §1981 liability. *See generally*, Brief for the National Association for the Advancement of Colored People as *Amicus Curiae*, McDonald v. Santa Fe Trail Transp. Co.

91. *See, e.g.*, an excerpt from an HEW regulation: "Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects and conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 45 C.F.R. §80.3(6)(ii) (1973). The Court's standard for finding implied repeal is a demanding one; it requires "irreconcilable conflict" between differing statutory schemes. McCrary v. Runyan, 96 S. Ct. at 2595 n.10.

92. 96 S. Ct. at 2596 n.11.

Negro slaves.[93] Thus it seems grossly anamolous to use these same legal tools to defeat forces which, a century later, seek to complete the still unfulfilled promise of social and economic equality for blacks.[94]

A third approach to safeguarding affirmative action would require a showing of compelling interest to justify benign discrimination. It is well-settled that alleged denials of equal protection will be defeated if a state can show a legitimate or compelling need for its classification. An attempt to superimpose this concept on section 1981 was recently made when a district court found the state interest in efforts to overcome the effects of past discrimination sufficient to foreclose a section 1981 challenge to preferential graduate school admissions.[95] Such reasoning, however, confuses an essential distinction between equal protection and section 1981. In an equal protection challenge, the issue is whether a state classification is constitutionally valid; state policy will be sustained if sufficiently justified. Section 1981 suits involve a different issue. Under the Supremacy Clause[96] the key question is whether section 1981 conflicts with an otherwise valid state policy. If so, the federal statute must supersede the state program no matter how substantial the state's justification.[97] Thus, where an equal protection challenge to affirmative action could be overcome by the compelling need for black advancement, a section 1981 claim would nonetheless prevail.

Perhaps the best clue as to where the Court is moving with section 1981 and affirmative action is found in dictum from *McDonald*, where it is asserted that "the [1866] Act was meant, by the broad terms, to proscribe discrimination in the making and enforcement of contracts against, *or in favor of, any group.*"[98] While the Court is unlikely to completely approve affirmative action, it will not necessarily refuse to consider special minority needs. In view of the great importance of the interests at stake, the Court may search for a middle ground.[99]

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93. This view of the post-Civil War enactments was originally enunciated in The Slaughter House Cases, 83 U.S. 36 (1873). The conclusion that black advancement was the chief concern behind these laws has never been seriously questioned.

94. See note 46 *supra.*

95. Stewart v. New York Univ., 44 L.W. 2481 (S.D. N.Y. 1976).

96. U.S. CONST. art. 6, §2.

97. That state policies will be swept aside when in conflict with constitutionally valid federal legislation has been settled since McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819). Such preemption will only occur, however, when there is a clear conflict between national and state laws. *See, e.g.*, Goldstein v. California, 412 U.S. 546 (1973). Thus, if §1981 were construed as reaching only invidious discrimination it would not conflict with and supersede affirmative action programs. The focus of such analysis would be statutory construction and the good faith or compelling interest of a state would be immaterial.

98. 96 S. Ct. at 2585 (emphasis added).

99. The Court opted for a compromise in another decision addressing conflicting black and white economic interests. In Franks v. Bowman Transp. Co., 96 S. Ct. 1251 (1976), the Court confronted the problem of disproportionate minority layoffs under "last hired, first fired" seniority systems. Despite the discriminatory impact of such mechanisms on black employment, the Court left "last hired, first fired" seniority intact. The holding in *Franks* mandated, however, that individual discriminatees be awarded seniority status retroactive to the date of discriminatory hiring refusals. The Court's position thus

A posture of compromise would outlaw the use of separate standards for different races. It would permit, however, a single, flexible standard compensating for the differing circumstances of particular groups.[100] The white Appalachian, the Nez Pierce Indian and the ghetto black could be lawfully classified in light of their unique backgrounds. Any cultural biases inherent in testing results of those from disparate backgrounds could be adjusted according to the realities of each.[101] There may be great difficulties in accurately measuring different human potential for success in job or education.[102] Indeed, objective evaluations might be totally impracticable and future selections could rely on subjective assessments of character instead of the LSAT.[103] Although this would entail administrative inconvenience, such a cost seems greatly outweighed by the need for an approach that reconciles assured minority participation with evenhanded racial justice. The concept of a single flexible standard was first advanced by Justice Douglas in his dissent to *Defunis v. Odegaard.*[104] It was also recently suggested by the California supreme court as an alternative to disparate standards for minority admissions.[105] While both cases dealt with equal protection claims, they provide

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allowed some black advantage but did not disturb the job security of the vast majority of white workers.

100. Most discussions of the need for new minority selection criteria have concerned challenges to disparate standards in graduate school admissions. It would seem that the same problems and possible solutions would apply equally to other areas of preferential resource allocation. Systems distributing jobs or state assistance on the basis of benign discrimination might similarly be forced to adopt a unitary, flexible approach to increasing minority participation.

101. While the question of cultural bias in the LSAT has received great attention, it is not resolved. *See, e.g.*, Comment, *A Racial Bias and the LSAT: A New Approach to the Defense of Preferential Admissions*, 25 BUFFALO L. REV. 439 (1975). Another commentator has examined the effectiveness of the test in predicting first-year law school success and found that the LSAT tested different groups with the same level of accuracy. Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. LEGAL ED. 293 (1975). He concluded, however, that "[g]reater emphasis needs to be placed on the selection and development of criterion measures that go beyond first-year grades." *Id.* at 323.

102. "Because of the weight of the prior handicaps [a] black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his achievement may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria. There is currently no test available to the admissions committee that can predict such possibilities with assurance, but the committee may nevertheless seek to gauge it as best it can and weigh this factor in its decisions." Defunis v. Odegaard, 416 U.S. 312, 331-32 (1973) (Douglas, J., dissenting).

103. "Interviews with the applicant and others who know him is a time-honored test. Some schools currently run summer programs in which potential students who likely would be bypassed under conventional admissions criteria are given the opportunity to try their hand at law courses, and certainly their performance in such programs could be weighed heavily." *Id.* at 340.

104. *Id.*

105. Bakke v. Board of Regents, 18 Cal. 3d 34, 132 Cal. Rptr. 680, P.2d (1976), *cert. granted* U.S. (1977). The court cited Justice Douglas' dissent in *Defunis*. *Id.* at 45, 132 Cal. Rptr. at 688. Should the Supreme Court rule on the merits of the regents' appeal, there would probably be a substantial impact on §1981 litigation. While there are important differences between equal protection and §1981 challenges, see notes

a valuable clue to where the Court may be heading in defining the "same right" of contract. A single flexible standard allows consideration of minority disabilities but avoids the imposition of separate and unequal criteria for resource allocation. This may provide the compromise needed to reconcile the great national commitments to black advancement and equal justice for all.

CONCLUSION

The latest Supreme Court successors to *Jones* are ambiguous and may pose a conflict. In *Runyon v. McCrary*, section 1981 was applied to outlaw segregation in private schools as the Court reaffirmed the importance of black access to all sectors of society. *McDonald v. Santa Fe Trail Transportation Co.* extended section 1981 to protect white discriminatees and thus implicitly proscribed some forms of anti-white discrimination. Viewed narrowly, these cases can be harmonized as broad declarations that invidious discrimination, wherever it occurs and to whomever it is directed, must be ended.

Benign as well as invidious discrimination may fall within the ambit of section 1981. The determination that section 1981 shields whites from racial discrimination cannot be confined to one species of racial preference without surrendering to doctrinal inconsistency. The Court's message could be that the increased minority access promised in *McCrary* should enable blacks to compete more equally on the nonpreferential basis pointed to by *McDonald*. With more doors being opened to blacks, they should be able to proceed on their own without further aid from benign discrimination. Past minority disabilities, however, cannot be extinguished by merely proscribing future discrimination. A clearer picture of what the Court is doing in *McCrary* and *McDonald* emerges upon analyzing the cases in terms of black advancement and its white cost. The goal of minority equality will readily supersede the majority prerogative to discriminate because the Court would hardly emphasize the goal of private racial discrimination. When more than white freedom of choice is at stake, when white sacrifices are demanded in allocating limited resources, black advancement will be slowed and carefully balanced against white interests. Thus, an increasing consciousness of the scarce supply of economic tangibles such as jobs may lead to a compromise of the promise of full equality to blacks.

This pressure seems to have led to a trade-off in the application of section 1981. Promoting expanded black access on the one hand and recognizing white economic interests on the other, the Supreme Court is cutting both ways in the law of civil rights. Such a trade-off robs black Americans of far more than it gives them. There is symbolic value in a black's ability to force his way into a segregated school and sit among bigoted whites. Of greater value to blacks are the now jeopardized affirmative action programs which have guaranteed minority participation in critical areas of social and economic endeavor. Even if the Court allows the use of a single flexible

95-98 *supra* and accompanying text, the policy considerations are indistinguishable. Significantly in *Bakke*, the California court cited *McDonald* as related authority for the proposition that preferential treatment is unlawful. *Id.* at 51, 132 Cal. Rptr. at 692.