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INTRODUCTION

Since the passage of the 1866 Civil Rights Act and the passage of the fourteenth amendment, courts have made some fundamental errors in interpretation of both, largely because of a failure to distinguish adequately two very different questions. Courts have confused who has a right under either the Act or the amendment with the scope of those rights. The result has led to such anomalies as assertions that only blacks were protected under both. This article focuses on the 1866 Civil Rights Act and its misinterpretations, particularly as to the scope of persons covered. The argument will conclude that whites as well as blacks (and for certain rights, aliens) are covered. The result is that for certain limited rights, particularly the rights of contract, the 1866 Civil Rights Act constitutes a species of equal protection law that protects some sort of federal contractual rights in and among the states. Unlike the fourteenth amendment, which insures that the rights a state makes available to its citizens generally are available to all residents but guarantees nothing in the way of minimal rights, the 1866 Civil Rights Act does for some purposes constitute a floor of rights. One example would be that whites who move to white suburbs and purchase houses at inflated


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1. Legislative and judicial confusion about the entire period may to some extent be traced to the assumptions of the drafters of the Civil Rights Act of 1866 and the post-Civil War constitutional amendments. Jacobus tenBroek concludes his examination of 1837 debates over the abolition of slavery in the District of Columbia:

The meaning of the equal protection requirement which eighty years of Supreme Court decisions has made primary, namely, that it enjoins improper classification, never occurred to the abolitionists in this debate. The failure of protection, the unequal protection in the case of slavery, was so gross that refinements of this sort were irrelevant.

J. TENBROEK, EQUAL UNDER LAW 54 (1965) [hereinafter cited as EQUAL UNDER LAW]. The judicial and legislative refinements superimposed upon the period tend to obscure the fact that the collective effort was to secure simple justice.
prices because of the "artificial racial character" of the suburb might have causes of action against various parties for the damages caused. A buyer might, for example, allege that a consortium of banks in their willingness to make loans in white suburbs only had made money overly available, artificially inflating the market prices. The banks are liable for such artificial inflation.

If sound, that conclusion is startling enough, but the argument goes further. The initial assumption that the 1866 Civil Rights Act pertained only to discrimination on the basis of race should be reexamined; it is possible that other sorts of discrimination by private parties may be reached. Acceptance of that argument would lead to substantial federalization of areas of private law that up to now had purportedly been subject to state law, except insofar as Congress specifically acted under its other powers such as the commerce power.

Only after jurisdiction is settled under the 1866 Civil Rights Act does the real job of federal courts begin, the job of delimiting the scope of that "new" area of federal law. The suggestion is that discrimination by private parties made on the basis of articulated reasons (or in the context of situations that are tantamount to the same) when these reasons are contrary to national policy, gives rise to a cause of action under the 1866 Civil Rights Act. Courts might conclude, for example, that the firing of an employee because of the exercise of his free speech rights by a private employer is actionable. In the context of the case that touched off this entire analysis, some attempt will be made to suggest the sorts of analysis that courts could undertake to resolve such questions. However, even if courts reject the argument that discrimination based on grounds beyond race (and alienage) is actionable under the 1866 Civil Rights Act, the duty still remains upon federal courts to perform similar analysis to delimit the scope of the federal rights under the Act. This last term the Supreme Court decided *McDonald v. Santa Fe Trail Transportation Co.* and in doing so held squarely for the first time that both the 1866 Civil Rights Act as well as Title VII of the Civil Rights Act of 1964 protects whites against discrimination on the basis of race when contracting for employment with a private employer. In *McDonald*, three employees of the Santa Fe were accused of misappropriating 60 one-gallon cans of anti-freeze,

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2. The state action requirement of the fourteenth amendment does not apply to the 1866 Civil Rights Act, since it was passed under the authority of the thirteenth amendment.
part of a Santa Fe rail shipment. Within a week the two white employees were fired while the black employee was retained. Nothing suggested any difference in guilt on the part of the employees, nor did Santa Fe claim that the different treatment was part of an affirmative action program. The white employees first lodged a grievance pursuant to their collective bargaining agreement, and when that produced no relief brought suit in federal district court. Both the district court and the Fifth Circuit held the petitioners lacked standing under § 1981 and no cause of action had been stated under the Civil Rights Act of 1964, since there was no allegation that the plaintiffs were falsely charged. These decisions were reversed by the Supreme Court. However, given the posture of the case, none of the claims were decided on the merits; the holding of lack of standing under § 1981 and the failure to state a claim under Title VII precluded any decision on the merits. This article focuses primarily on the implications and ramifications of standing under § 1981 for white persons. It will, however, attempt to provide some suggestions toward the resolution of the substantive issue.

THE STANDING ISSUE

The Supreme Court held in *McDonald* that a district court has jurisdiction to entertain an action brought pursuant to § 1981 by a white person. Section 1981 states:

6. This appears to have been the posture at the district court level as well as in the Fifth Circuit. However, in the briefs to the Supreme Court much was made of a statement by McDonald that he "did not steal [sic] anything." Brief for McDonald at 5 nn.7-8, *McDonald v. Santa Fe Trail Trans. Co.*, 96 S. Ct. 2574 (1976).

7. 96 S. Ct. at 2578.

8. Id. at 2576-77.


Other cases have held that whites have a right to sue. *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969); *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894
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.¹⁰

Respondents contended in McDonald that the phrase "as is enjoyed by white citizens" as well as the statutory history limits the application of § 1981 to non-white persons.¹¹ The Supreme Court rejected the mechanical reading of the phrase "as is enjoyed by white citizens" to limit the application of § 1981. Justice Marshall wrote for the court:

[T]he statute explicitly applies to "all persons" (emphasis added), including white persons. See, e.g. United States v. Wong Kim Ark, 169 U.S. 649, 675-676 (1898). While a mechanical reading of the phrase "as is enjoyed by white citizens" would seem to lend support to respondents' reading of the statute, we have previously described this phrase simply as emphasizing "the racial character of the rights being protected." Georgia v. Rachel, 384 U.S. 780, 791 (1966). In any event, whatever ambiguity there may be in the language of section 1981 . . . is clarified by an examination of the legislative history of § 1981's language as it was originally forged in the Civil Rights Act of 1866.¹²

The Mechanical Reading of the Face of the Statute

In McDonald, the lower courts held,¹³ in effect, that the statute protected non-whites by assimilating them to the "preferred status

¹¹ 96 S. Ct. at 2581.
¹² Id.
¹³ Judge Bue reversed himself in a subsequent case decided after McDonald had been affirmed by the Fifth Circuit, but before the Supreme Court decided McDonald. Spiess v. C. Itoh & Co., 408 F. Supp. 916 (S.D. Tex. 1976).
of white citizens." The words "the same rights . . . as is enjoyed by white citizens" serves to establish the standard against which the rights of all others (i.e. non-white citizens) will be measured.

Another possible mechanical approach would be to shift emphasis from the word "white" to the word "citizens." The sentence would then read, "All persons shall have the same right . . . as is enjoyed by white citizens." The word "white" becomes incidental, and the standard against which the rights of all persons would be measured would be those rights enjoyed by citizens.

The problem with both readings, and the reason in part that the Supreme Court rejected them, is that they assume mutually exclusive categories, or at least a situation in which either category (either "white citizens" or "white citizens") defines a class of persons with certain rights that are being enlarged as a class by the force of the statute. Thus, no white citizen received any rights under the statute.

Instead, the Supreme Court adopted its own version of a mechanical test by reading the words "white citizens" to limit the application of § 1981 to discrimination based upon race.\textsuperscript{4} The Court's citation to \textit{Georgia v. Rachel}\textsuperscript{5} is to a page that includes the critical sentence: "That phrase ['as is enjoyed by white citizens'] was later added in committee in the House, apparently, to emphasize the racial character of the rights being protected."\textsuperscript{6}

The statutory history of § 1981 is anything but clear, but there is one interpretation of the language that yields a different result. Insofar as there is a standard of rights being conferred by the statute, that standard is the "right . . . as is enjoyed by white citizens." "White citizens" describes the scope of the rights conferred under the statute, not the persons who receive those rights. The crucial language under this interpretation would be, "all persons shall have the same right." This interpretation assumes that the drafters of the 1866 Act intended to confer upon all free men the broadest class of rights possible, and those were clearly the rights enjoyed by the most preferred group, white citizens. Using this analysis, the racial nature of the rights would become unimportant, for the proper interpretation of the statute would be, "all persons shall have the same rights as are enjoyed by the best of our citizens." Only examination of the statutory history sheds light on this problem.

\textsuperscript{14} See text accompanying note 11 supra.
\textsuperscript{15} 384 U.S. 780 (1966).
\textsuperscript{16} \textit{Id.} at 791.
The Statutory History of the 1866 Civil Rights Act

One of the most heated debates about legislative history in recent times was touched off by the Supreme Court’s decision in Jones v. Alfred H. Mayer Co. dealing with a sister statute to § 1981. Jones held that 42 U.S.C. § 1982 prohibited all racial discrimination, public or private, in the sale or rental of real estate. The court so held even though the Civil Rights Act of 1968 contained a fair housing title that substantially expanded the federal commitment to open housing for blacks, and even though the decision effectively “extended the coverage of federal ‘fair housing’ laws far beyond that which Congress in its wisdom chose to provide in the Civil Rights Act of 1968.”

That debate was revived last term in the Supreme Court’s opinion in Runyon v. McCrary which held that § 1981 prohibits private schools from excluding qualified children solely because they are Negroes. Two justices dissented, Justices White and Rehnquist, and another two justices concurred, Justices Powell and Stevens. Both concurred primarily on grounds of stare decisis. Justice Stevens in his concurring opinion posed the problem as, “whether to follow a line of authority which I firmly believe to have been incorrectly decided.” Justice Powell indicated that much of Justice White’s dissenting opinion is “persuasive” and that he might be inclined to agree with him, but that it comes too late. On balance, the Supreme Court most likely erred in interpreting the legislative history to require the result reached in Jones. However, this conclusion suggests the inherent difficulty of interpreting the legislative history of the Civil Rights Act of 1866.

The debate is summarized by Justice White in Runyon v. McCrary:

[T]he legislative history of . . . § 1981 confirms that the statute means what it says and no more, i.e., that it outlaw any legal rule disabling any person from making or enforcing a contract, but does not prohibit private racially motivated refusals to contract.

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20. 392 U.S. at 478 (Harlan, J., dissenting).
22. Id. at 2603.
23. Id. at 2601-02.
25. 96 S. Ct. at 2606.
That dispute, however, turned more on the content of the rights protected by the Civil Rights Act of 1866 than what persons have rights under the Act. Although Justices White and Rehnquist also dissented in *McDonald*, they did so on the grounds asserted in *Runyon v. McCrary*, that § 1981 does not cover private activity. A fair reading of the legislative history of the Civil Rights Act demonstrates conclusively that whites are within the scope of persons protected by the statute.

A. Legislative History of the White Citizen Language

Amidst all of the confusion in the legislative history, some things are completely clear, particularly that the class of intended beneficiaries of the 1866 statute included blacks. Indeed, some critics of the bill in Congress maintained that the Congress neither could nor should do what it purported to do in the initial drafts of the bill: make the black man a citizen.

It is a white man's Government. I say the Negro is not a citizen. He may be made a citizen by power, but it will be in disregard, I think, of principle. I deny that this is a government of amalgamation.

The principal discussion of the classes of beneficiaries turned around not blacks, who were clearly in, or whites, who were rarely mentioned, but other special classes of persons, particularly Indians, foreigners and other minority groups. The tone of the debate is reflected in a speech by Senator Davis, a staunch opponent of the bill:

I say it [the Constitution] ignored the black man: it paid no attention to him; it was made by a different race of beings; it did not comprehend him; he had nothing to do with it any more than the Indian of the forest had, any more than the Chinaman in California had in the foundation of the constitution of that State.

Treatment of white citizens as a class is obscure largely because of the overwhelming preoccupation of congressmen with the "everlasting, inevitable Negro." Otherwise, three fundamental questions preoccupied Congress: first, the power of Congress to confer

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26. *Id.* at 2586.
27. *Cong. Globe*, 39th Cong., 1st Sess. 528 (1866) (remarks of Senator Davis). The passage of the fourteenth amendment making "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," was largely in response to such doubts. *Id.*
28. *Id.*
citizenship upon blacks under the thirteenth amendment;\textsuperscript{30} second, the scope of "civil rights" in the absence of any definition in the first version of the bill; third, the inter-relationship between federal and state power in the area of enforcement. In effect, the discussion suggested grafting federal rights on the states through the fourteenth amendment’s due process clause. In light of the debates in Congress in 1866, Jacobus tenBroek has characterized this controversy as one concerning national citizenship.\textsuperscript{31}

Only when the debates reach the general issue of equality are they useful for extrapolating the treatment of the white citizen in the statute. For example, in an earlier draft of the bill which did not contain any limitation on the definition of civil rights, the question did arise as to who the bill would protect. In the Senate, it was suggested that:

\ldots It is not confined to persons of African descent \ldots that is to say, that no state shall discriminate at all between any inhabitants within her limits on account of any race to which they may belong, white or black, on account of color, if they are previously in the state of slavery, so that the white as well as the black is included in this first section \ldots. \textsuperscript{32}

Two days later, Senator Davis, in the context of his argument that state power was being usurped unconstitutionally, commented that the bill provides all inhabitants of every race and color the enumerated rights.\textsuperscript{33} He considered this outrageous from the point of view

\begin{footnotes}
\item[30] See note 28 and accompanying text supra.
\item[31] \textsc{Equal Under Law}, supra note 1, passim.
\item[32] \textsc{Cong. Globe}, 39th Cong., 1st Sess. 505 (1866) (remarks of Senator Johnson)(emphasis added). This speech is an interpretation of the first section of the bill as originally submitted. Initially, the first clause read: "That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery." That was later dropped, largely because of the problem inherent in defining civil rights. This clause was stricken by the House of Representatives prior to its passage of the bill on March 13, 1866. Representative Wilson accepted the amendment commenting, "I do not think it materially changes the bill \ldots." \textsc{Cong. Globe}, 39th Cong., 1st Sess. 1386 (1866). There is no indication that the deleted portion of the bill was intended to alter the scope of its coverage. For example, see the discussion by Representative Bingham (later a prime mover in the passage of the fourteenth amendment): "Can Congress declare no discrimination in civil rights in any state on account of race? What are civil rights?" \textsc{Cong. Globe}, 39th Cong., 1st Sess. 1267 (1866). See also \textsc{Cong. Globe}, 39th Cong., 1st Sess. 1290 (1866)(remarks of Rep. Schellaberger).
It has been found impossible to settle or define what are all the indispensable rights of American Citizenship. But it is perfectly well settled what are some of these \ldots the right of petition and the right of protection in such property as is lawful for that particular citizen to hold.
\textit{Id.}
\item[33] \textsc{Cong. Globe}, 39th Cong., 1st Sess. 598-99 (1866).
\end{footnotes}
of states' rights. Senator Trumbull's response to this provides one of the most succinct statements of the entire debate on the question of who is protected. His statement was made in a spirit of sarcasm, punctuated by the laughter of his colleagues:

He (Davis) denounces this bill as "outrageous," "monstrous," "abominable," "oppressive," "iniquitous," "unconstitutional," "void."

... It is a bill providing that all people shall have equal rights. Is not that abominable? Is not that iniquitous? Is not that monstrous? Is not that terrible on white men? (Laughter) When was such legislation as this ever thought of for white men?

Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness: and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when the very object of the bill is to break down all discrimination between black men and white men?34

Although Senator Trumbull was somewhat carried away by his own rhetorical flourish, the substance is quite clear. Whites were so obviously never to have fewer rights than blacks, that the suggestion of the opposite was ludicrous. The bill then written protected whites as well as blacks.

Had the text of the bill remained unchanged there would have been no problem. However, the phrase "as is enjoyed by white citizens" was not added until a month later. Representative Wilson, the Chairman of the Judiciary Committee and House Floor Manager, suggested the addition on March 1.35 In that context, however, Mr. Wilson said:

Mr. Speaker, if all our citizens were of one race and one color we should be relieved of most of the difficulties which surround us.

34. Id. at 599. Justice Marshall quoted the last paragraph of this passage. 96 S. Ct. at 2583. See also 96 S. Ct. at 2582 n.19. Section 4 of the 1866 Civil Rights Act protects "all persons in their constitutional rights of equality before the law, without distinction of race or color." Id.

35. CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866).
This bill would be almost, if not entirely, unnecessary, and if the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards to civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, as we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men.\footnote{34}

At the minimum, Representative Wilson intended that equal treatment be accorded the various races.

Justice Marshall in \textit{McDonald} noted that the bill was routinely viewed by opponents and supporters alike as applying to the civil rights of whites as well as non-whites.\footnote{37} Moreover, he noted that the respondents had been unable to find any congressional debate from any stage of the bill that contradicts the plain language of Senator Trumbull, and others, that anti-white discrimination was also prohibited by the bill.\footnote{38} The amendment by Congressman Wilson was a technical amendment to perfect the bill which was accepted without objection or debate.\footnote{39} When this amendment was discussed on the floor of the Senate, some suggested that it was superfluous.\footnote{40} Senator Trumbull responded and, in essence, agreed:

\begin{quote}
Senator Van Winkle: There seems to be an incongruity in this language . . . This clause commences with the words “and such citizens.” As I understand those words, they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that “such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude shall have the same right to make and enforce contracts . . . as is enjoyed by white citizens.” It seems to me these words are superfluous. The idea is that the rights of all persons shall be
\end{quote}

\footnote{37. 96 S. Ct. at 2582.}
\footnote{38. \textit{Id.} at 2582-83 n.20. Justice Marshall stated:
\begin{quote}
[In later dialogue Wilson made quite clear that the purpose of his amendment was not to affect the act’s protection of white persons. Rather he stated, “the reason for offering [the amendment] was this: it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors.” \textit{CONG. GLOBE}, House App., 157. Thus the purpose of the amendment was simply “to emphasize the racial character of the rights being protected,” \textit{Georgia v. Rachel}, 384 U.S. at 791, not to limit its application to non-white persons.
\end{quote}}
\footnote{96 S. Ct. at 2584.}
\footnote{39. 96 S. Ct. at 2583, \textit{citing CONG. GLOBE}, 39th Cong., 1st Sess. 1115 (1866).}
\footnote{40. \textit{CONG. GLOBE}, 39th Cong., 1st Sess. 1413 (1866).}
equal; and I think the clause, leaving out these words, would attain the object. . . . I think the bill is incongruous in expression as it stands.

Trumbull: I quite agree with the Senator from West Virginia that these words are superfluous. *I do not think they alter the bill.* I think the bill would be better without them, but they have been adopted by the House of Representatives. *We did not think they altered the meaning of the bill;* and we did not think it worthwhile to send the bill back just because these words were inserted by the House . . . . They thought there was some importance in them and have inserted them: *and as in the opinion of the committee they did not alter the meaning of the bill, the committee thought proper to recommend a concurrence,* and I hope the Senate will concur in it."

B. Protecting Whites in the South

Much of that argument is, however, negative argument. The amendment did not change anything, because no one said it did. The bill protected whites because no one said it did not.

There is, however, an even stronger argument that the intention was to protect white as well as black citizens. That relates to considerations of the white man in the South during Reconstruction. Not only were there "carpetbaggers," but also whites who had remained loyal to the North. One week later, Representative Broomall commented:

I nevertheless maintain and hold myself ready to prove that white men, citizens of the United States, have been, and are now being punished under color of State law for refusing to commit treason against the United States at the bidding of Democratic candidates for the Presidency; that white men, soldiers of the Republic, have been arraigned in state courts, under State laws, for the crime of shooting down traitors on the field of battle by command of their military superiors, and only saved from being hanged, on conviction of murder, by the interposition of that branch of the military forces of the Government known as the Freedman's Bureau. I maintain further, that white men, citizens of the United States, have been driven from their homes, and have had their lands confiscated in State courts, under State law, for the crime of loyalty to their country, and that now they are begging in vain for a redress of wrongs in the courts of the reconstructed South.

* * *

41. *Id., quoted in 96 S. Ct. at 2583* (emphasis added).
The people of the South were not all traitors. Among them were knees that never bowed to the Baal of secession, lips that never kissed his image. Among the fastnesses of the mountain in the rural districts, far from the contagion of political centers, the fires of patriotism still burned, sometimes in the higher walks of life, often in obscure hamlets and still oftener under skins as black as the hearts of those who claimed to own them.\textsuperscript{2}

As Representative Moulton stated: "The Union men now are being compelled to leave the rebel states to save their property and lives."\textsuperscript{4} One of the reasons advanced by President Johnson in vetoing the bill was that "the distinction of race and color is, by the bill, made to operate in favor of the colored and against the white race."\textsuperscript{4}\textsuperscript{4} That objection goes less to the particular issue here than to the issue of congressional power to pass the bill at all.

Representative Wilson's response in the debate of March 8, 1866 undercuts most of the objections of this nature made by President Johnson. The debate was whether Congress had the power to enable Negroes to testify in state courts:

Mr. Niblack: If the gentleman will permit me, I will respond to the gentleman from Iowa (Wilson). I ask whether under most of the State laws the wife is not prohibited from testifying against the husband, or vice versa? Now, would not his objection as well apply to that?

Mr. Wilson of Iowa: It is not so in many of the State laws; but then I answer the gentlemen in the language of the bill referred to by the gentleman from Ohio . . . a few moments ago, these rights are to be the same as are enjoyed by white citizens.\textsuperscript{4}\textsuperscript{5}

The real dispute concerned the scope of the rights to be granted, not the person to whom they were granted. Those rights accorded white citizens were to be accorded to all. The Supreme Court was correct then, when it held in 	extit{McDonald} that, "... the Act was meant, by its broad terms, to proscribe discrimination in the mak-

\textsuperscript{2} CONG. GLOBE, 39th Cong., 1st Sess. 1263-65 (1866). See also CONG. GLOBE, 39th Cong., 1st Sess. 1618 and passim (1866)(remarks of Rep. Moulton).
\textsuperscript{4} I have already said that the Government was bound to protect the rights of the loyal white people and the loyal colored people of the south, for a government which either cannot or will not protect those who sustain it, when in peril, is not worth fighting for.
\textsuperscript{5} CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866).
ing or enforcement of contracts against, or in favor of, any race.”

On the other hand, Justice Marshall neglects the congressional history about the position of whites in the South when he asserts:

Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuades us that the Thirty-ninth Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.

To illustrate how likely the unlikely is, the *McDonald* trial judge overruled his own holding in a case decided after the Fifth Circuit’s affirmance of *McDonald*, but before its reversal by the Supreme Court. In *Spiess v. C. Itoh & Co. (America) Inc.*,

Judge Bue held that white plaintiffs have standing under § 1981. *Spiess* involved white plaintiffs suing on behalf of themselves and all other non-secretarial personnel of non-Japanese origin, who are, have been, or might have been employed by a wholly owned subsidiary of a Japanese corporation. Judge Bue, commented on President Johnson’s veto message:

Nevertheless, even he [President Johnson] recognized that the real intention of the bill as to race discrimination was to provide for the equal treatment of all races before the law: “Thus a perfect equality of the white and black races is attempted to be fixed by the Federal law, in every State of the Union, over the vast field of State jurisdiction covered by these enumerated rights. In no one of these can any State ever exercise any power of discrimination between the different races.”

Judge Bue concluded:

At most, therefore, this phrase constituted, in 1866, a comparative instrument by which to measure the relative protection from abridgment of enumerated civil rights on account of racial discrimination to be accorded to all persons, including white citizens, in exercise of rights then enjoyed solely by white citizens.

In part, Judge Bue attributed his shift in position to the decision by Judge Blumenfeld in *Hollander v. Sears, Roebuck and Co.*.

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46. 96 S. Ct. at 2585.
47. Id. at 2585-86.
49. Id. at 235.
50. Id. at 236.
Judge Blumenfeld held that a white student stated a cause of action under §1981 when he alleged that the defendant refused to consider him for a position in its Summer Internship Program for Minority Students. Judge Blumenfeld concluded, "In light then, of this legislative history, it is quite clear that §1981 should not be read as only providing a cause of action for non-whites. The phrase—'as is enjoyed by white citizens'—was apparently intended only 'to emphasize the racial character of the rights being protected.'" 52

C. Court Treatment of Whites Under Section 1982

Prior to McDonald, the Supreme Court had recognized white standing under §1982 in a number of contexts, most importantly in Sullivan v. Little Hunting Park, Inc. 53 The Supreme Court held, inter alia, that a white person who was expelled from a recreation association for the advocacy of a Negro's cause had standing because he suffered by his association with a cause designed to eradicate the "badges and incidents" of slavery. 54

The holding in Sullivan was further extended in Tillman v. Wheaton-Haven Recreation Ass'n. 55 Tillman challenged an eligibility preference system at a private club. Preference was given to home owners within a particular defined area. The black home owner was clearly entitled to recovery, since "when an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area." 56 There were also white plaintiffs in Tillman, Murray and Rosalind Tillman, who had on one occasion invited Grace Rosner, a black, as their guest. At a special meeting held the following day, the board of directors changed the guest policy to limit guests to relatives of the members. The Tillmans' claims, as well as Mrs. Rosner's, were brought under both §1982 and §1981. The court stressed the "historical interrelationship between section 1981 and section 1982", and saw "no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club." 57 Not only did the whites apparently have standing under §1981 as well as §1982, but the holding strongly suggested that the state action limitation 58 does not apply in §1981

52. Id. at 94.
54. Indeed, his position was analogous to that of the whites in the post-bellum South.
56. Id. at 437.
57. Id. at 440.
58. See note 17 and accompanying text supra.
actions. In *Johnson v. Railway Express Agency, Inc.*, the Supreme Court explicitly adopted that suggestion:

> Although this Court has not specifically so held, it is well settled among the federal courts of appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race.

In each of these cases, however, the assumption has been that § 1981's scope extends to discrimination based on race.

**Is Only Racial Discrimination Covered?**

Curiously enough, the thirteenth amendment does not mention race, although it does refer to “slavery or involuntary servitude.” The present version of § 1981, as well as § 1982, refers to race only through the inclusion of the white citizen standard. Both sections are amended codifications of the 1866 Civil Rights Act which provided in pertinent part:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same rights enumerated . . . as is enjoyed by white citizens . . . .

The 1866 Act was reenacted with slight alterations in 1870, as section 16 of *An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes* which in relevant part provided:

That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States . . . as is enjoyed by white citizens . . . .

Section 18 provided that:

> The act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April

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60. *Id.* at 460.
61. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968): “[T]he statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.”
62. See note 11 *supra* and accompanying text, and notes 46 through 52 *supra* and accompanying text.
63. Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27.
64. Civil Rights Act of 1870, ch. 114, §16, 16 Stat. 144.
nine, 1866, is hereby re-enacted; and sections 16 and 17 hereof shall be enforced according to the provisions of said act.\textsuperscript{65}

The principal change in the reenactment was the substitution of "persons" for "citizens." This was, however, coupled with a determination that only some of the rights covered by the 1866 Civil Rights Act were to be accorded to non-citizens. All of the property rights contained in the 1866 Act, "to inherit, purchase, lease, sell, hold, and convey real and personal property,"\textsuperscript{66} were not included within the enumeration of section 16 rights.\textsuperscript{67} This can be traced directly to floor discussion indicating clearly that Congress intended to extend to aliens all but the specific property rights of the 1866 Act.\textsuperscript{68} Senator Stewart, the sponsor of the Bill that was eventually passed, explained the text of an almost identical bill by stating:

This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of our laws. It extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States.\textsuperscript{69}

In response to questioning, Senator Stewart amplified this point:

Mr. Stewart: If the Senator will examine this bill in connection with the original civil rights bill, he will see that it has no reference to inheriting or holding real estate.

Mr. Pomeroy: That is what I was coming to.

Mr. Stewart: The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, not citizens, the protection of our laws where the State laws, deny them the equal civil rights enumerated in the first section.\textsuperscript{70}

The 1870 changes had the effect of broadening the class of persons protected, but narrowing the scope of rights protected by § 1981. Section 1982 extends property rights only to citizens. Hence, there is authority in the legislative history of § 1981 that the prohibited

\textsuperscript{65} Civil Rights Act of 1870, ch.114, §18, 16 Stat. 144.
\textsuperscript{66} Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.
\textsuperscript{68} See text accompanying notes 69 through 75 infra.
\textsuperscript{69} Cong. Globe, 41st Cong., 2nd Sess. 1536 (1870). Senator Stewart, commenting on collateral problems in the voting rights area, stated:

Now while I am opposed to Asians being brought here, and will join any reasonable legislation to prevent anybody from bringing them, yet we have got a treaty that allows them to come to this country . . . . While they are here I say it is our duty to protect them.

\textsuperscript{70} Cong. Globe, 41st Cong., 2nd Sess. 1536 (1870).
discrimination reaches beyond race to at least discrimination based on alienage.\(^7\)

Except for the white citizen's standard that persisted through the vagaries of the reenactment process, the language referring to "citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude" disappeared. The significance of this deletion depends upon whether the words had any restrictive meaning in the first place. In the various civil rights bills, these words did not specifically restrict the scope of the language to protect persons who suffered specific injuries. The words may be read as emphatic, i.e., all citizens (later persons), and particularly ex-slaves, shall have the same rights as white citizens. Once again the plight of the carpetbagger or the Northern sympathizer must be recalled.\(^7\) Either could have been seriously affected by state actions or private action in the South not because of their race, but because of their sympathies, and both would have been fully protected with respect to the basic rights enumerated in § 1981 and § 1982.

The judicial justification for the commonplace statement that § 1981 and § 1982 cover only racial discrimination is seldom more than a superficial assumption. For example, one of the most detailed treatments of the issue appears in Baca v. Butz\(^7\) which cites at least five cases in a footnote.\(^7\) Baca involved a suit by a Mexican-American employee of the Soil Conservation Service against the government on behalf of himself and all others similarly situated. The court first cited Jones v. Alfred H. Mayer Co.,\(^7\) but Jones was a § 1982 action which assumed that the racial limitation applied. The next case cited, Georgia v. Rachel,\(^6\) is predicated upon the same misleading mechanical interpretation of the statutory history that led to Judge Bue's first opinion in McDonald and his later reconsideration:

>[Als originally proposed in the Senate, §1 of the bill that became the 1866 Act did not contain the phrase, "as is enjoyed by white citizens." That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected.\(^7\)]


\(^{72}\) See text accompanying notes 42 through 45 supra.

\(^{73}\) 394 F. Supp. 888 (D.N.M. 1975).

\(^{74}\) Id. at 889.

\(^{75}\) 392 U.S. 409, 413 (1968).

\(^{76}\) 384 U.S. 780, (1966).

\(^{77}\) Id. at 791 (emphasis added). There is subsequent reference to the deletion of the broad
Snowden v. Hughes,8 the next case relied upon as authoritative, is clearly distinguishable not only on its facts, but also upon the legal basis of the decision. Snowden concerned a claim by a candidate for nomination to the Illinois House that the Illinois Canvas Board improperly refused to certify him as nominated for purposes of getting onto the final ballot. Instead of going to state court, the candidate brought suit in federal district court.79

Most of Chief Justice Stone's opinion for the Court dwells upon the equal protection claim and the absence of any allegation of discrimination necessary to raise an equal protection issue. However, Justice Frankfurter, in a separate concurrence, summed up the basis of the decision: "All questions pertaining to the political arrangements of state governments are, no doubt, peculiarly outside the domain of federal authority."80 Nothing could be further from the truth today. Even then, a dissenting Justice Douglas suggested that the petitioner ought to be given an opportunity to prove the fact of discrimination, whatever the basis, for purposes of the equal protection claim under the fourteenth amendment. Justice Frankfurter treated the issue more as procedural than substantive. "A different problem is presented when a case comes here on review from a decision of a state court as the ultimate voice of state law."81 Moreover, large parts of the opinion by Justice Stone for the Court are predicated upon the view of the thirteenth and fourteenth amendments which emerged from the Slaughterhouse Cases,82 particularly the privileges and immunities clause of the fourteenth amendment. This view minimized the impact of the thirteenth amendment and its subsidiary legislation. In substantial part, the decision in Jones v. Mayer undercuts this analysis. Also, it seems clear that the petitioner in Snowden never argued that the limitation to racial discrimination should be curtailed, and again the Court never seriously considered the issue.

86. See supra note 24, at 1172 and passim. "The bill simply gives to persons who are of different races or colors the same civil rights... That's its full extent; it goes no further." Id. at 1180 (remark of Senator Howard of Michigan). However, part of the context of that speech is whether one race's rights could be greater than another as well as the definition of the rights.


88. 321 U.S. 1 (1943).

89. This case arose long before the extensive intervention in state elections touched off by Baker v. Carr, 369 U.S. 186 (1962).


91. Id. at 17.

92. 83 U.S. (16 Wall.) 36 (1873).
In *Hague v. C.I.O.*, the Court stated: "[T]he major purpose of . . . [the Civil rights Act of 1866] was to secure to the recently freed negroes all the civil rights secured to white men." That is the very problem at issue, and even then the Court only said "major."

Lastly, the district court in the *Baca v. Butz* opinion cited *Buchanan v. Warley*, which not only failed to reach the issue, but arguably hints at an opposite conclusion and confers upon a white plaintiff a right based upon the 1866 Civil Rights Act. *Buchanan* involved a contract for the sale of real estate between a white seller and a black buyer. The black refused to perform, and raised as a defense in a suit for specific performance the state law that prohibited a black or white from moving onto a block that was already occupied by a majority of the other race. The irony of the defense was further heightened by the black defendant's reliance on *Plessy v. Ferguson*. By prohibiting the use of such a defense, the effect of the decision was to benefit the white seller. To be sure, *Buchanan* does involve racial discrimination on the part of the state. Unlike the *Slaughterhouse* aside by Justice Miller, Justice Day in *Buchanan* notes: "While a principle purpose of the [Fourteenth Amendment] . . . was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States." The *Buchanan* Court never considered why all discriminations, whether racially based or not, should not be protected by the 1866 Civil Rights Act. The analysis of the *Buchanan* Court with respect to the fourteenth amendment would then mean "All persons shall have the same rights to make contracts. . . ." The substantive basis for discrimination is irrelevant, only justifiable discrimination or differences are permissible. This would have the effect of substantially converting the 1866 Civil Rights Act into an enforcement statute tantamount in many cases to defining the content of the fourteenth amendment equal protection clause. Moreover, since these federal "substantive" equal protection rights would exist in a federal stat-

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83. 307 U.S. 496 (1939).
84. Id. at 509.
85. 245 U.S. 60 (1917).
86. Id.
87. 163 U.S. 537 (1896).
88. 83 U.S. (16 Wall.) at 81: "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be heard to come within the purview of this provision."
89. 245 U.S. at 76.
ute, they would also be applicable to the particular state, and from state to state.

In view of the hesitancy of the judiciary to deal with the issue in any great detail, what support is there for the proposition that the discriminatory practices which prompted § 1981 are not limited solely to those based on race? Three principal points of argument may be advanced. First, frequent and consistent rejection in the Civil Rights Act of 1866 debates that blacks were being given special advantages suggest that race was not the central issue; it was equality of treatment. Second, there were references in the debates to discriminations beyond race, particularly regarding political views. Third, there is a "higher law background" in both the fourteenth amendment and the Civil Rights Act of 1866. This argument is particularly effective with respect to the Civil Rights Act because of the presumption by some of the participants in Congress that they were acting in the context of such rights.

**Congressional History**

Equal treatment was the presumed basis for congressional debate. Throughout the congressional debates, charges were made that various provisions in the enforcement statutes were particularly advantageous to freed negroes to the exclusion of whites. Time and again such charges were refuted:

Rep. Cox: This bill discriminates in favor of the black and against the white.

... .

If you turn to section five of the bill you will see that it allows hinderance, control, and intimidation of a white voter; but it makes it a crime to hinder, control, or intimidate a black citizen. . .

Representative Bingham later responded to this allegation:

Gentlemen seem to intimate that this bill protects the elective franchise only in citizens of color, as they are called; they intimate that the equal right of the citizen of the United States to vote, having like qualifications under the laws of the several states, is not protected by it from disfranchisement on account of race! Sir, men will look in vain for a single utterance from any gentlemen who puts forth this unconsidered denunciation of the bill for a single reference to any line in it that justifies their denunciation.\(^90\)

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The subject of discussion was part of the text of the 1870 enforcement bill that contained section 16, later § 1981. Section 5 read in pertinent part:

That if any person shall prevent, hinder, control, or intimidate any person from exercising or in exercising the right of suffrage to whom the right of suffrage is secured or guaranteed by the fifteenth amendment to the Constitution . . . shall be deemed guilty of a misdemeanor . . . .

This text is substantially the same as section 16, with the exception of the white citizen standard. Yet, Representative Bingham clearly thought that it protected whites as well as freed men. He does refer to disenfranchisement on account of race. However, this is entirely consistent since this part of the bill was an attempt to enforce the fifteenth amendment, the only amendment that specifically is confined to discrimination “on account of race, color or previous condition of servitude.” Nevertheless, equality was the assumptive basis for drafting and debate.

Congressmen were well aware that discriminatory activities in the South might be directed against white, not only because of their racial attitudes, but also because of their political tendencies. Senator Howe discussed a number of practices and statutes in the South. A Mississippi statute included a provision that “all persons usually associating with freed men . . .” could be fined. Senator Howe asserted that:

under the provisions of [this statute] . . . every man on this floor would be a criminal if in the State of Mississippi, because we do, Mr. President - I am bound to make the confession - habitually associate with a man of another color, a Senator on this floor.

Subsequently, Senator Howe went a step further and discussed the attack by the notorious Yerger, of Ex parte Yerger fame, on an officer of the United States.

[For what? Not for any personal injury—Yerger had received none at the hands of [the officer] . . . - but because they [Yerger and others like him] hate Radicals.}

91. CONG. GLOBE, 41st Cong., 2d Sess. 3689 (1870).
92. CONG. GLOBE, 41st Cong., 2d Sess. 2611 (1870).
93. Id.
94. 75 U.S. (8 Wall.) 85 (1869).
95. CONG. GLOBE, 41st Cong., 2d Sess. 2611-12 (1870). But note that Yerger had in fact been resisting the distraint of his wife's piano for unpaid taxes and in doing so killed a federal official. FAIRMAN, supra note 24, at 564.
In addition to the legislative history, there is case authority that suggests a similar conclusion. *Kentucky v. Powers* dealt with an allegation by a Republican that the juries had been constituted to be selected solely from Democrats. While holding that removal of such prosecutions to a federal court was permissible, the court discussed the application of the current version of § 1981:

But to say that it has reference thereto is not the same as to say that it is limited thereto. . . . Section 1977 so far as it confers rights, is not limited to negroes and colored persons. It confers rights on white persons. The persons on whom it confers rights are "all persons within the jurisdiction of the United States." It is only when it comes to define the rights which the section confers that they are referred to as such "as is enjoyed by white citizens." 97

It is well to remember that the Civil War was not fought in the first instance over slavery, but rather over issues of federalism. In that context, it is critical to examine post-Civil War legislation with an eye towards protecting "federal rights." For example, with respect to the fourteenth amendment Jacobus tenBroek concludes:

The Fourteenth Amendment was not intended to apply the Bill of Rights to the states. The rights sought to be protected were men's natural rights, some of which are mentioned in the first eight amendments and some of which are not. Life, liberty and property, substantively guaranteed by the due process clause of the Fifth Amendment, were certainly such. The Fifth Amendment's procedural guarantee of judicial process and jury trial like the Fourth Amendment's guarantee of personal security and the First Amendment's guarantee of speech, assembly, and religion, perhaps also were. These had commonly been claimed as natural rights during thirty years of abolitionist activity, but they were rarely mentioned in the final stages of congressional history. To the extent that the rights of the first eight amendments are natural rights, those amendments were regarded as already being on the states. State governments, like others were under a duty to protect such rights. The Fourteenth Amendment confirmed that duty and imposed it also on Congress. The rights of the Bill of Rights, however, which are of a lesser order were not within its scope. 98

Not only is there a persuasive argument for the existence of certain kinds of natural rights protected by the fourteenth amendment, but

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96. 139 F. 452 (C.C.E.D. Ky. 1905).
97. Id. at 495.
as Louis Henkin recently observed after quoting parts of the Declaration of Independence and the Virginia Declaration of Rights:

As the excerpts quoted above . . . suggest, our ancestors seem to have had two different notions: "reserved" or retained rights, and inalienable rights. Under the first conception, the people reserved for themselves that which they did not wish to submit to the authority of the government they created. Inalienable rights, cited in the Declaration of Independence, were presumably "natural rights" to which all are entitled under any form of government and do not necessarily depend on the principle of popular sovereignty . . . . (cite omitted) Reserved and natural rights, of course, come together if one assumes that the people would not and could not give away their natural rights, that they retained them because they wished to or had to. Of course, the people could retain rights in addition to their natural inalienable ones.

Presumably, these rights, retained or inalienable, are not necessarily absolute but may be outweighed by a sufficient public good. Or, perhaps, one can say that what is retained or inalienable are the rights that are not outweighed by sufficient public good.99

It takes far less imagination to hold that certain rights associated with the right to contract might be guaranteed through the § 1981 provision.100

Much of the debate demonstrates the failure on the part of the fourteenth amendment's principal drafter, Representative Bingham, to understand the holding of Barron v. Mayor and City Council of Baltimore.101 That case held that the Bill of Rights was inapplicable to the states. Bingham was of the opinion that the Bill of Rights applied.102 He objected to the Civil Rights Act of 1866, primarily because he believed that the federal government had no power to enforce it, although the states were obliged to enforce it.103

100. As well perhaps through another clause in the constitution that has been substantially vitiated, the impairment of contract clause of article I, section 10.
102. But I feel that I am justified in saying, in view of the text of the Constitution of my country, in view of all its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights, touching the life, liberty and property of every citizen of the Republic within every organized State of the Union, is of the reserved power of the States, to be enforced by State tribunals and by State officials acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States.
103. "You propose to make it a penal offense for the judges of the States to obey the constitution and laws of their States, and for their obedience thereto to punish them by fine and imprisonment as felons. I deny your power to do this. You cannot make an official act, done under color of law, and without criminal intent and from a sense of public duty, a
For years Bingham, and indeed, all Republican opponents of slavery and of the *Dred Scott* decision, had assumed every important constitutional right to be a privilege or immunity of citizens of the United States. Such had been the basic premise and the theory of the entire Amendment.  

This provides, however, an explanation for the curious juxtaposition of the privileges and immunity clause of the fourteenth amendment, and the fourteenth amendment’s definition of citizenship. During floor debate on the fourteenth amendment, the failure to define citizenship in the proposed text was criticized. Representative Bingham failed to notice the inconsistency introduced in the amendment by his inclusion of the first sentence: “All persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside.”

No one observed, apparently, that while citizenship was thus made dual in the first sentence, only the privileges and immunities of “Citizens of the United States” were specifically protected in the second sentence against abridgment by the State.  

This confusion was to have substantial and persisting impact in the *Slaughterhouse Cases.* There, Justice Miller’s opinion for the Court held that the privileges and immunities protected by the fourteenth amendment were only those that were already protectable federal rights. This had the effect of rejecting the argument that the Bill of Rights was part of the privileges and immunities applicable against the states, for *Barron* had already held to the contrary. Bingham’s confusion over *Barron* now had its revenge. However, the opinion in the *Slaughterhouse Cases* did more, for it also restrictively interpreted the thirteenth amendment (and implicitly the Civil Rights Act passed in furtherance of it) as limited to slavery or racial applications. Indeed, it is probably true that Miller was crime.” *Cong. Globe,* 39th Cong., 1st Sess. 1293 (1866). It is worth speculating what the result would have been with respect to the criminal sections of the Civil Rights Act of 1866 and the court adopted this test in *Screws v. United States,* 325 U.S. 91 (1945) where the conviction of a sheriff for killing a young Negro, Hall, by unjustifiably beating and crushing his body was overturned because of failure to require the jury find specific intent to infringe Hall’s constitutional rights in the first trial. On retrial Screws was acquitted. It is very difficult to see how Screws could have beaten and killed Hall out of a sense of public duty. The requirement of finding specific intent to infringe upon a person’s civil rights is, however, a difficult element to prove.

104. *Graham, Justice Field and the Fourteenth Amendment,* 52 Yale L.J. 851, 871-72 (1943) [hereinafter cited as *Graham*].

105. *Id.* at 871.

106. 83 U.S. (16 Wall.) 36 (1873).

107. See note 88 and accompanying text supra.
"convinced that statesmanship would be best served during Reconstruction by interpretations which upheld the legislature's capacity to govern and which at the same time restricted the discretionary powers of the courts." This view underemphasized the extreme position argued in dissent, particularly by Justice Field. Justice Field's dissent (as well as Justice Bradley's, albeit to a somewhat lesser extent) was the precursor to the development of the doctrine of substantive due process—the curtailment by the courts of the power of the legislatures to regulate entire areas of law. Justice Holmes suggested that the doctrine was based upon the mistaken assumption that Spencer's Social Statics had been enacted into the constitution and that it was the special duty of the Supreme Court to assure its implementation. Justice Field confused the issues of availability of rights and scope of rights. He argued that the privileges and immunities clause of the fourteenth amendment, as well as the thirteenth amendment, and its subsidiary legislation, the Civil Rights Act of 1866, prohibited the grant of the monopoly over slaughtering in this case, since "all monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law..." Later he wrote, quoting from the Case of Monopolies, which had held that a grant of a monopoly in playing cards in England was invalid:

[And it was adjudged that the [grant of the monopoly]... was against the common law, because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly, and, therefore, such ordinance... would be void.]" Field's argument here would later blossom into the theory of substantive due process which recognizes a worker's unfettered right to sell his labor to his employer for as little money and as many hours per day as he pleases. Only Justice Bradley, in dissent, takes the further step of discussing whether the monopoly grant was a "reasonable regulation." However, the Court's refusal to accept these arguments is not surprising, for they appeared incapable of limitation. In addition,
the Court recognized the tremendous potential for expansion of judicial power. Nevertheless, the dissenders were correct when they maintained that the Court's reading of the privileges and immunities clause made it, "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." However, this is partly Justice Field's fault because his assertion of the absolute nature of the right led the Court to deny the plaintiffs any rights at all. The result was a situation in which all rights under the statute and constitutional amendments were denied these white plaintiffs and apparently all white plaintiffs, although the only proper issue was whether this particular right existed.

DEVELOPING FEDERAL POLICY: THE LIMITS OF PRIVATE JUSTIFICATION

If the 1866 Civil Rights Act is read in a way that would emphasize its close connection with the equal protection clause of the fourteenth amendment, radical alterations in various areas of private law are possible. Santa Fe in McDonald asserted its ability to adopt virtually any policy it desired, so long as there was no violation of the explicit terms of applicable federal or state statutes. Section 1981 is, however, far from explicit. The Supreme Court not only rejected Santa Fe's position, but leaped to the opposite conclusion, namely, that the difference in treatment was impermissible on the facts as presented. The following is an attempt to suggest the

113. Id. at 96. One of the ironies of the situation is that the United States' first "red scare," the Paris Commune of 1870, may be responsible for both the curtailment of the rights under the Civil Rights Act of 1866 and the rise of substantive due process. Graham makes quite a credible case that the immediacy of the coverage by telegraph of the events of the commune, the first major international incident reported in the United States by telegraph, played an important role in Justice Field's movement towards \textit{laissez faire} doctrinarism. Justice Field was unwilling to accept the verdict of the court in the \textit{Slaughterhouse} case, and because of the effect of the elimination of appeals from habeas cases to the full court, was able to write his version of what the law should be on the Ninth Circuit over which he presided as Circuit Justice. See Graham, \textit{supra} note 104, at 884. The result was "Chinese aliens on the Pacific coast had rights superior to American citizens in Louisiana. The Chinese were secure in their constitutional rights to work in a quicksilver mine; yet New Orleans butchers were not similarly free to pursue their hallowed calling. A California mining corporation might hire and fire as it pleased, despite legislation to the contrary; yet a midwestern railroad or New York insurance company was required to submit to ceaseless legislative exactions." Id. at 887. Compare \textit{How Ah Know} v. Noonen, 12 F. Cas. 252 (C.C.D. Cal. 1879) where Justice Field invalidated the queue ordinance requiring that Chinese incarcerated in county jails in San Francisco have their hair cut within an inch of their scalp, with the decision in \textit{Kelley} v. Johnson, 96 S. Ct. 1440 (1976), a contrary result with respect to police officers. To the traditional Chinese, a queue or pigtail was a symbol of manhood.

114. See \textit{Moose Lodge} v. Irvis, 407 U.S. 163 (1972) (the contract to purchase a beer from a private bar was protected under § 1981).

115. At one point Justice Marshall speaks of the "illogic in retaining guilty employees of
sort of analysis that the court should engage in when interpreting § 1981 contractual rights.\footnote{116}

To simplify analysis, the more difficult cases have been excluded from consideration, particularly such cases as failures to promote existing employees. The presumption is that the Civil Rights Act entitles people to equal treatment, unless there is an articulable justification for different treatment; but the requirement of articulated justification increases as one moves from the sphere of private entities conferring benefits, such as gifts, upon particular persons, to the sphere of what a layman might describe as the imposition of penalties upon particular persons. In essence, this has some of the characteristics of the distinction in the public sector between rights and privileges as far as public goods are concerned. While the distinction in the public area has largely been discarded, the concept may yet serve a useful purpose in the non-public area. Moreover, there are justifications that are impermissible, not because they are irrational, but because they conflict with important federal policies.

Let us focus upon the two separate types of cases that may arise in the context of employment practices.\footnote{117} Succinctly, these are either failure to hire, or failure to fire. The cases are either failure to confer a benefit (the hiring decision), or failure to impose a detriment (firing decision). Although at first blush, there seems to be no reason for treating the cases differently, this is not the case.

If there is a failure to confer a benefit (i.e., failure to hire a white when a black is hired, assuming absolute equal ability), there is clear element of injustice on the surface. As a societal judgment, the result may be proper because blacks have, as a group, suffered deprivation. Even though in particular cases the black may not have specially suffered deprivation (or we cannot demonstrate specific one color while discharging those of another," and further on rejects a defense of the union suggesting that sometimes a compromise settlement might result in bargaining off an employee in return for retention of others. 96 S. Ct. at 2580. Only if one infers that the suggestion of racial discrimination presumptively invalidates all different treatment, is a complete shift from total employer discretion (as advanced by Santa Fe) to total impermissibility appropriate. 96 S. Ct. at 2580 n.14. Since it appears unlikely, despite Justice Douglas's opinion in DeFunis v. Odegard, 416 U.S. 312 (1974), that such a simplistic solution ought to or will in fact be obtained, a search for more explicit justification seems appropriate. Santa Fe, for example, noted in its brief to the Supreme Court that Laird was a supervisory employee, and suggested that the same offense by such employees was less tolerable. Brief for Sante Fe at 8-16, McDonald v. Santa Fe Trail Trans. Co., 96 S. Ct. 2574 (1976).

\footnote{116} See Justice White's dissenting opinion in Runyon v. McCrory, 96 S. Ct. 2586, 2604 (1976). He raises arguments which suggest that § 1981 simply disabled states from according different treatment to executory contracts. The full Court has, however, rejected these arguments.

\footnote{117} The analysis with respect to similar issues such as admission to law school or medical school and the expulsion from either entity would be similar.
causal links between individual deprivation and rewards conferred
by society), the resulting preference is arguably tolerable or “spe-
cially just,” at least for some transition period. The cost of such
preference is measured by three primary factors: (1) injustice per-
ceived by society as a whole; (2) injustice perceived from the black’s
perspective (i.e., “It isn’t worth much if Whitey gives it to me; or if
it is valuable, I am not really entitled to it”); (3) the injustice to the
white competitors who were not hired.

However, to the extent that the assumption about equal abilities
holds true, factors (2) or (3) should disappear. If the black is as
qualified as the white, his achievement (being hired) is as valuable
as it would be for the white. For a white who was not hired, the
argument differs but the conclusion remains the same. The white
was not entitled to be hired ahead of the black, so that his com-
plaint is not well founded. An external observer would say that
failure to hire him does not impose a special disadvantage, it simply
refuses to confer a benefit that he is not entitled to receive. In
addition, the white applicant is frequently in a position of being one
person in a pool of applicants. With reasonably high unemployment
the legitimately perceived injury would be spread among various
white applicants. Concededly, part of the reason each did not get
the job is that a black did, but just as important is that fact that
even if the black did not get this particular job, not every white
would be hired.

The paradigm situation shifts, however, in the case of failure to
fire a black who is equally entitled to be fired with the whites. The
two factors previously discussed are logically present and serious.
First, the black’s potential perception of his achievement as less
worthy need not rest upon general statements or beliefs about the
state of society. He knows that personal shortcomings would have
cost him his job. Society would agree that his self-perception ought
to be lowered. Indeed, the result of special treatment is likely to
encourage similar activity by both the individual and others who
see the determination by the employer as a “rule” that should con-

118. Of course perceptions become important here, as well as the general accuracy of the
major hypothesis. If less qualified blacks are frequently hired, admitted to schools, etc., then
even if equal ability obtains in the particular cases, perceived inferiority is likely to result.
See Slate, Preferential Relief in Employment Discrimination Cases, 5 LOY. CHI. L.J. 315, 321-
30 (1974).

119. The custom has been that he was so entitled.

120. This was the case in the DeFunis problem. Not only were there applicants who had
higher grade point averages and LSAT scores than DeFunis but also applicants whose pre-
dicted first year averages excelled his. D. Ginger, DeFUNIS V. ODEGAARD AND THE UNIVERSITY
trol future cases. Society should not encourage such rules. In the McDonald¹²¹ case, the result would be to encourage theft by those minority group members who believe they could not be fired.

Second, from the viewpoint of the fired whites, their loss or detriment is particularized. No other whites compete for the privilege of being fired. The employer has implicitly told them that an offense has been committed serious enough to cause their termination, but not serious enough to terminate blacks in a similar situation. Either of three classes of offenses are possible. Offenses which result in termination; offenses which never result in termination; and an intermediate class. Presumably the latter is involved here (i.e., the theft was not so serious that all had to be fired). The whites have been terminated because they are culpable, but a black who is equally culpable is retained. The whites' complaint of unjust treatment is correct. Here, the employer asserts that an offense is serious and not serious.¹²² In these situations, when the employer has the power to fire the black, will society permit the employer the liberty to retain him?

There is, moreover, precedent for this sort of analysis, precedent for the assertion that justifications in the law are rational but unacceptable. For example, in Shapiro v. Thompson,¹²³ a case which dealt with state requirements of minimum periods of residency for purposes of eligibility for welfare payments, there was clearly a very rational and compelling state interest involved. The states wanted to curtail immigration into the state for the purpose of collecting welfare benefits and in so doing, save state money. This "purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible."¹²⁴ The national policy in favor of free movement of persons made that particular rational justification an unacceptable one. In a similar fashion, one might say that the national policy against theft in conjunction with the right of all persons to equal treatment, makes the particular action of the McDonald employer impermissible, whatever the reason.

¹²¹ In addition this same contradictory message goes out to all other current employees, for such a determination is highly visible by comparison with a refusal to hire, a routine event in the employment office of a large firm.
¹²² See notes 118 through 120 and accompanying text supra.
¹²⁴ Id. at 631 (emphasis added).
SALES OF HOUSES: THE EASY CASE

An expanded interpretation of § 1981, implying a federal right to equal contracting for all potential private plaintiffs against discriminatory treatment, could have significant application in the area of purchasing and selling real estate. All private justifications for different treatment of either sellers or buyers would become subject to federal court scrutiny. No private justification for unequal treatment would be permissible if that justification contravenes federal statutory or constitutional policy. The courts have the duty of determining which federal policies would “qualify” for such treatment and whether they had been contravened in a particular case.

For example, the simple purchase of a house normally involves a sequence of contracts with private parties; first by the buyer with the seller, then with one or more banks, an appraiser, a title insurance company and others. With respect to certain of these contractual relationships, there is clear federal statutory authority prohibiting discrimination. However, if the appraiser underappraises because of fear of the changing character of the neighborhood, and the bank lowers the amount it will lend as a result, it is far from clear that this activity reaches the level of proscribed discrimination. The existence of a private right to sue outside of § 1981 is even less clear. Moreover, the determination of damages poses serious problems even if discrimination can be proved.

It is worthwhile in this context to examine the holding of the Contract Buyers Cases. The court held that sellers of homes to blacks who take advantage of black buyers by charging exorbitant prices on real estate are liable for such excess profit. The measure of damages is the difference between “normal profit” and the total profit made on such sales. The cases developed from challenges to the blockbusting tactics of real estate brokers in the City of Chicago.

In Chicago, there has been a twofold phenomena taking place with respect to housing. First, whites have fled to the suburbs; and

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126. But see the suit filed by the Department of Justice against, inter alia, the Society of Real Estate Appraisers for this kind of practice. N.Y. Times, April 17, 1976, at 1, col. 5. The 1866 Civil Rights Act was not a basis for this suit. United States v. American Institute of Real Estate Appraisers, 76 C 1448 (N.D. Ill., filed April 16, 1976).
128. Chicago, it might be noted, is one of the most segregated cities in the North, both in terms of housing and its concomitant, schools. See GREENSTONE & PETERSON, RACE AND AUTHORITY IN URBAN POLITICS 19-24 (1974) [hereinafter cited as GREENSTONE]; DYE, THE POLITICS OF EQUALITY 71 (1971).
second, the cost of housing in white areas within the city has risen dramatically. This results in an inner city “gold coast” and peripheral white suburbs. Of course, the inner city gold coast is integrated to the extent that the high housing costs are within the reach of upper strata blacks. But the practical effects of minimum black political participation, 129 coupled with school deterioration, 130 fear of crime, and other urban ills, has escalated the value of suburban real estate. So far as both the white ring and the inner city gold coast areas are concerned, some part of the price rise could, at least in theory, be traced to the factor of discrimination. 131

If whites have standing under § 1981, and a white buyer has paid some part of the price of a house as a premium for living in a segregated area, he should be entitled to sue the seller and the banking groups that together concentrated loans for home purchases in certain areas. Conversely, a white seller in a changing area could sue the appraisers and banks whose underevaluation of the neighborhood effectively reduced his sale price. The person who could not purchase at an inflated price would have a good cause of action against the brokers who engage in block busting and racial steering, as well as the red lining banks. Many of these suits could be brought as class actions. Perhaps even elderly homeowners on fixed incomes would have a good cause of action against the entire class of persons active in their local real estate market on the theory that their taxes have disproportionately increased to reflect the “racially based” increment in local average market prices. It is little comfort to the elderly that their heirs may benefit from capital value gains when they can barely afford to live in that highly taxed property. 132

In the context of the Contract Buyers Cases, testimony was taken suggesting that roughly 20 percent of the sales price was excess profit. It was no defense that the sellers would have charged the

130. At least perceived school deterioration.
131. See Olson, Employment Discrimination Litigation: New Priorities in the Struggles for Black Equality, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 20, 22-23 (1970). There are reported studies that suggest variously that the cost of being black in terms of wages after controlling for various factors, such as education, may be measured as “[38% of the difference between the incidence of poverty for whites and negroes . . . .]” or “[to put it boldly, about two-fifths of the difference in average earnings of whites and non-whites is what it costs to be black]”; or “[that well over one-third of the income differential between whites and blacks could be eliminated by ending job discrimination with no expenditure of public funds for adult education.” Id. See generally Note, The Survival of “Last Hired, First Fired” under Title VII and Section 1981, 6 LOY. CHI. L.J. 386 (1975).
132. See Note, Redlining—The Fight Against Discrimination in Mortgage Lending, 6 LOY. CHI. L.J. 71, 75-78 (1975).
same price to white buyers. Similarly, wealthy blacks who can afford to buy in exclusive suburbs might pay the same price as a wealthy white person. That still does not excuse the artificial price inflation for all buyers attributable to racism. The Seventh Circuit stated:

It is no answer that defendants would have exploited whites as well as blacks. To accept defendants' contention would be tantamount to perpetuating a subterfuge behind which every slumlord and exploiter of those banished to the ghetto could hide by a simple rubric: the same property would have been sold to whites on the same terms. . . . We find repugnant to the clear language and spirit of the Civil Rights Act the claim that he who exploits and preys on the discriminatory hardship of a black man occupies a more protected status than he who created the hardship in the first instance. Moreover, defendants' actions prolong and perpetuate a system of racial residential segregation, defeating the assimilation of black citizens into full and equal participation in a heretofore all white society.133

To paraphrase part of the opinion above, the redliner and exploiter of those banished to the wealthy white ghetto are not entitled to hide by a simple rubric.134 Federal courts should not permit private contracting with respect to housing which fosters racial discrimination in the face of the clear federal commitment to open housing for all. Reviving the full import of the Civil Rights Act of 1866, and particularly § 1981 provides a partial answer to this problem.

133. Clark v. Universal Builders, Inc., 501 F.2d 324, 331 (7th Cir. 1974).
134. However, a jury returned a verdict for the defendants in one of the contract buyers cases. Chicago Sun Times, April 17, 1976, at 2, col. 3.