MAY DESEGREGATION REMEDIES INFRINGE THE RIGHTS OF INNOCENT WHITES? THE IMPLICATIONS OF *RUNYON V. McCRARY* FOR REVERSE DISCRIMINATION

I. INTRODUCTION

A large number of segregated academies grew up in the South in the 1960s and hampered the Supreme Court's efforts to carry out the mandate of *Brown v. Board of Education*[1] to abolish racial discrimination in education. In 1976, the Court held in *Runyon v. McCrary*[2] that section 1981,[3] derived from the 1866 Civil Rights Act[4] and the enforcement clause of the thirteenth amendment,[5] prohibits racially discriminatory admissions procedures in commercially operated, non-sectarian private

1. 347 U.S. 483 (1954). Despite the 1954 decision that separate but equal education is innately unequal and a violation of the equal protection clause, Department of Health, Education, and Welfare statistics indicated in 1973 that approximately 50% of the black students in the United States attended public schools that were more than 80% black. U.S. DEP'T OF HEALTH, EDUC., & WELFARE, DIGEST OF EDUCATIONAL STATISTICS 154 (1973).

2. 427 U.S. 160 (1976).

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. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981 & 1982 (1970)). Section 1 of the Act provided:

> 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, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

5. U.S. CONST. amend. XIII provides: "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation."

schools. By employing section 1981 and the thirteenth amendment to attack segregation in these schools, the Court remained faithful to its course of self-restraint in applying the fourteenth amendment's equal protection clause.[6] Yet, it also provided Congress with a constitutional basis to enact nation-wide, remedial legislation to abolish the consequences of past and present racial discrimination in education, employment, and housing.[7]

This Note discusses the problem of racially segregated private schools, examines the constitutional theories under which the Court could have prohibited racial discrimination in private academies, and offers an explanation for the Court's choice of section 1981 and the thirteenth amendment. The implications of the Court's holding in *McCrary* for the constitutionally protected rights of association, privacy, and liberty are then considered. This Note concludes by exploring the ramifications of the Court's reasoning for court-ordered and legislative affirmative action and racial quota programs in education, housing, and employment.

II. THE SETTING

A. *Jones v. Alfred H. Mayer Co.*

In 1968, the Supreme Court held in *Jones v. Alfred H. Mayer Co.*[8] that section 1982,[9] derived from section 1 of the 1866 Civil Rights Act, "bars *all* racial discrimination, private as well as public, in the sale or rental of real property."[10] This decision gave new meaning to the thirteenth amendment, the 1866 Civil Rights Act, and sections 1981 and 1982.

The Court reasoned that although section 1 of the thirteenth amendment only outlawed slavery and involuntary servitude, section 2 empowered Congress to determine the badges and incidents of slavery and enact "all laws necessary and proper for their abolition."[11] As long as the congressional determination was rational, the Court would uphold it.[12] *Jones* held that Congress, in 1866, rationally could have concluded

6. *See* notes 39-44, 72-123 *supra* and accompanying text.

7. *See* notes 217-63 *supra* and accompanying text.

8. 392 U.S. 409 (1968) (real estate company refused to sell house to plaintiff because he was black).

9. 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."

10. 392 U.S. at 413.

11. *Id.* at 439 (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)).

12. The Court stated the test:

that racial discrimination in the sale or lease of private property was a badge or "relic of slavery"[13] and thus prohibited it in section 1 of the 1866 Civil Rights Act.[14]

In reaching its decision, the *Jones* Court overruled *Hodges v. United States*.[15] The trial court in *Hodges* had held that a conspiracy by a group of whites to prevent several blacks from contracting for employment[16] violated section 1981. Although the Supreme Court recognized that the inability to make contracts was a badge of slavery, it reversed and held that Congress was only empowered by the thirteenth amendment to proscribe conduct that enslaved.[17] Because "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery,"[18] the Court concluded, section 1981 did not proscribe the defendants' conduct.

Subsequent cases held that Congress' power under the thirteenth amendment extended only to the abolition of "enforced compulsory service."[19] In 1948, the Court held in *Hurd v. Hodges*[20] that the 1866 Civil Rights Act was constitutionally based on the fourteenth amendment and, therefore, only applied to state action.[21] By overruling *Hodges v.*

Representative Wilson of Iowa was the floor manager in the House for the Civil Rights Act of 1866. In urging that Congress had ample authority to pass the pending bill, he recalled the celebrated words of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat 316 . . .: " 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional.' The end is legitimate," the Congressman said, "because it is defined by the Constitution itself. The end is the maintenance of freedom . . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. . . . This settles the appropriateness of this measure, and that settles its constitutionality." We agree.

392 U.S. at 443-44.

13. *Id.* at 443.

14. *Id.* at 444.

15. 201 U.S. 1 (1906).

16. *Jones*, 392 U.S. at 441 n.78.

17. 201 U.S. at 16-17.

18. *Id.* at 18.

19. *See, e.g.*, Corrigan v. Buckley, 271 U.S. 323, 330 (1926) (restrictive covenant not prohibited by § 1981).

20. 334 U.S. 24 (1948).

21. *Id.* at 30 n.7. The Court held that § 1977, now § 1981, derived from § 16 of the Act of 1870, enacted after the fourteenth amendment had been adopted, and was only patterned after § 1 of the 1866 Civil Rights Act. *Id.* In fact, the Court explained:

Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-Ninth Congress. Frequent references to the Civil Rights Act are to be

United States, the *Jones* majority held that section 1981, like section 1982, was derived from the 1866 Act and the thirteenth amendment. The Court failed to consider, however, whether section 1981 prohibited racial discrimination in private contracting and what constituted a contract.[22]

B. *The 1964 Civil Rights Act and the "New" Equal Protection Analysis*

During the 1960s and early 1970s, the Court, for several reasons, was able to prohibit racial discrimination in extensive areas of private conduct without extending its highly criticized *Jones* reasoning[23] to private

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found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land.

Id. at 32.

22. 392 U.S. at 441 n.78. The Court simply stated:

> The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled.

Id.

23. Justice Harlan, dissenting in *Jones*, concluded that the language of § 1982 is ambiguous. *Id.* at 452-53. The statute either guaranteed a right of equal status to all under the law and therefore prohibited only state sanctioned discrimination, or was an absolute right enforceable against private discrimination as well. In terms of the language alone, he concluded that the former interpretation was more convincing. *Id.* at 453. Furthermore, the alternative interpretation was "open to the most serious doubt" in view of the individualistic ethic of most of the legislators who enacted the thirteenth amendment, and the 1866 Civil Rights Act from which § 1982 is derived. *Id.* at 473. He noted:

> It seems to me that most of these men would have regarded it as a great intrusion on individual liberty for the Government to take from a man the power to refuse for personal reasons to enter into a purely private transaction involving the disposition of property, albeit those personal reasons might reflect racial bias. It should be remembered that racial prejudice was not uncommon in 1866, even outside the South.

Id. at 473-74. The following commentators support the majority's position in *Jones*: Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last*: Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272 (1969); Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 450-79 (1974); Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024 (1972). Authorities supporting the dissent's interpretation include: Casper, Jones v. Mayer: *Cleo Bemused and Confused Muse*, 1968 SUP. CT. REV. 89; Ervin, Jones v. Alfred H. Mayer Co.: *Judicial Activism Run Riot*, 22 VAND. L. REV. 485 (1969); Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 82-91 (1968); Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1295-1300 (1969).

contracting. The 1964 Civil Rights Act,[24] particularly Titles II[25] and VII[26] which are constitutionally based on the commerce clause[27] and prohibit discrimination in public accommodations and employment, was broadly construed by the Court.[28] Many lower courts assumed the 1964 Act, which provides a comprehensive remedy for private discrimination, replaced the 1866 Civil Rights Act.[29] In addition, the Court's expansion of the state action[30] and public function[31] doctrines during the 1960s and early 1970s enabled it to strike down private racial discrimination that violated the fourteenth amendment's equal protection clause.[32] Furthermore, the Court creatively employed its "new" equal protection analysis[33] to outlaw state and federal legislation that infringed fundamental

24. Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 5, 28, & 42 U.S.C.).

25. 42 U.S.C. §§ 2000a(b)(1)-(4), (c)(1)-(4) (1970). The public accommodations section has a private club exemption, 42 U.S.C. § 2000a(e) (1970), which provides:

> The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

26. 42 U.S.C. § 2000e-2000e-17 (Supp. V 1975). Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. It covers only employers in interstate commerce with fifteen or more employees, and it establishes administrative procedures for conciliation and redress of grievances.

27. U.S. CONST. art. 1, § 8, cl. 3, empowers Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

28. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

29. *See* Note, *Desegregation of Private Schools: Is Section 1981 the Answer?*, 48 N.Y.U.L. REV. 1147, 1160-61 (1973).

30. The Court has held that when the state is sufficiently involved with otherwise private entities, those entities can be held accountable under the fourteenth amendment. The Court, however, has required varying levels of "sufficient" state involvement. *Compare* Hunter v. Erickson, 393 U.S. 385 (1969), Reitman v. Mulkey, 387 U.S. 369 (1967), *and* Bell v. Maryland, 378 U.S. 226 (1964), *with* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), *and* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

31. The Court has ruled that otherwise private entities can be subjected to fourteenth amendment limitations when they exercise powers or functions governmental in nature. *See* Evans v. Newton, 382 U.S. 296, 299 (1966); Marsh v. Alabama, 326 U.S. 501, 506-07 (1946). *See generally* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 35-38 (1977); Yackle, *The Burger Court, "State Action," and Congressional Enforcement of the Civil War Amendments*, 27 ALA. L. REV. 479, 479-507 (1975).

32. U.S. CONST. amend. XIV, § 1 provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

33. *See generally* Barrett, *Judicial Supervision of Legislative Classification—A More Modest Role for Equal Protection?*, 1976 B.Y.U.L. REV. 89; Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62

interests[34] and suspect classifications,[35] absent a compelling governmental interest to justify it.[36] Although a fourteenth amendment violation requires proof of an intent or purpose to discriminate,[37] the Warren Court

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CORNELL L. REV. 494 (1977); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

34. Interests that the Court has held to be fundamental include the right to procreate (Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942)); the right to vote (Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965)); the right to travel (Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969)); and, arguably, some aspects of privacy (Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967)). *See* Goodpaster, *The Constitutional and Fundamental Rights*, 15 ARIZ. L. REV. 480 (1973).

35. The Court has held that groups with certain characteristics have been peculiarly burdened and are entitled to special protection. Therefore, classifications based on race (Loving v. Virginia, 388 U.S. 1 (1967)); alienage (Indiana Real Estate Comm'n v. Satoskar, 417 U.S. 938 (1974)); nationality (Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948)); and illegitimacy (Jimenez v. Weinberger, 417 U.S. 628 (1974)) are closely scrutinized.

36. Absent a compelling reason for the infringement, the state action will be held unconstitutional; only rarely has a state met this burden. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (Burger, C.J., dissenting): "To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." *Id.* at 363-64. *But see* Korematsu v. United States, 323 U.S. 214 (1944) (holding race classification was necessary for national security during World War II); Crane v. New York, 239 U.S. 195 (1915) (holding restriction on employment of aliens was necessary for welfare of unemployed U.S. citizens). Several recent cases involving relatively minor inhibitions on fundamental interests such as petition requirements have survived the compelling state interest-strict scrutiny requirement. *See* American Party v. White, 415 U.S. 767 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); 53 N.C.L. REV. 430 (1974).

37. *See* Washington v. Davis, 426 U.S. 229 (1976). The Court stated:

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.
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> [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id. at 239, 242. *See* Alexander v. Louisiana, 405 U.S. 625 (1972); Akins v. Texas, 325 U.S. 398 (1945); Strauder v. West Virginia, 100 U.S. 303 (1880) (proof of intent to discriminate required in jury selection cases).

willingly inferred a discriminatory intent from statistical evidence demonstrating that an act or program had a racially disproportionate effect.[38]

Since 1973, however, the Court has demonstrated a renewed appreciation for the principles of "Our Federalism,"[39] and great deference to state legislative choices.[40] It is no longer expanding its fundamental interest[41] and suspect classification[42] analyses, nor its state action and

38. *See* Wright v. Council of Emporia, 407 U.S. 451 (1972), in which the Court indicated that in certain circumstances, a law's racial impact, rather than its purpose, established an equal protection violation. In Palmer v. Thompson, 403 U.S. 217 (1971), the Court warned against deciding cases on the basis of anything as ambiguous and elusive as legislative intent or motive. Clearly, if legislative purpose could not be considered, the Court would be forced to rely on the challenged statute's effect or impact. This tendency was especially evident in the school desegregation decisions. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

39. *See* Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1118 (1977). Justice Black, for the Court in Younger v. Harris, 401 U.S. 37 (1971), held that a criminal prosecution pending in a state court barred a defendant from seeking injunctive relief under 42 U.S.C. § 1983 in federal court except in the most extraordinary cases. "Our Federalism," a concept derived from the Anti-Injunction Statute, 28 U.S.C. § 2283 (1970), made any interference by the federal judiciary in state court proceedings a "serious matter;" therefore, only if a defendant would suffer irreparable injury "both great and immediate" would federal equitable relief be granted. 401 U.S. at 42-46.

The Court recently extended the *Younger* holding to cases in which state *civil* prosecutions are pending, Trainor v. Hernandez, 431 U.S. 434 (1977); Wooley v. Maynard, 430 U.S. 705 (1977); Juidice v. Vail, 430 U.S. 327 (1977), and read in an exhaustion of state remedies requirement, Huffman v. Pursue, 420 U.S. 592 (1975). *Cf.* Stone v. Powell, 428 U.S. 465 (1976) (if convicted defendant had an opportunity to litigate a fourth amendment claim in a state court proceeding, it can not be relitigated in federal court on a writ of habeas corpus).

40. *See* National League of Cities v. Usery, 426 U.S. 833 (1976) (tenth amendment, which embodies principles of federalism, affirmatively limits commerce power); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Justice Powell noted the delicate questions of local autonomy and federalism and upheld the local property tax system of financing public education). *See generally* Karst, *supra* note 31; Yackle, *supra* note 31.

41. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Marshall v. United States, 414 U.S. 417 (1974); 89 HARV. L. REV. 95 (1975); 1977 WASH. U.L.Q. 140.

42. A possible exception to this is classification on the basis of sex. In Frontiero v. Richardson, 411 U.S. 677 (1973), a plurality opinion held that sex was a suspect class. In subsequent cases the Court retreated, but its analysis in Craig v. Boren, 425 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); and Kahn v. Shevin, 416 U.S. 351 (1974), implicitly holds that sex is a suspect class. *See* Barrett, *supra* note 33; Ginsberg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); Karst, *supra* note 31, at 54-55; *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70 (1977); 89 HARV. L. REV. 95 (1975). *But see* Karst, *supra* note 31, at 31 (although the Supreme Court is not expanding the fundamental interest category under the fourteenth amendment, it has retained and expanded the suspect classification category under the fourteenth amendment's due process clause).

public function doctrines;[43] moreover, proof of actual intent or purpose to discriminate is required to establish an equal protection violation.[44] Because the Court thus limited the fourteenth amendment, discrimination in private contracting could be attacked only under the 1964 Civil Rights Act and, if the Court was willing, section 1981.

C. *Title VII, Section 1981, and the Equal Protection Clause: A Problem of Proof*

The Supreme Court held in *Griggs v. Duke Power Co.*[45] that the purpose of Title VII was not only to punish an intent to discriminate, but also to rectify the consequences of discriminatory employment practices.[46] Courts, therefore, had to examine "practices, procedures, or tests neutral in terms of intent" and invalidate any that had the effect of "[freezing] the status quo of prior discriminatory employment practices."[47] Under the *Griggs* test, a plaintiff establishes a prima facie case of employment discrimination by showing that a hiring or promotional test or policy had a racially disproportionate impact.[48] Courts will infer an intent to discriminate[49] and outlaw the challenged action unless the

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43. *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Karst, *supra* note 31, at 37-39; Yackle, *supra* note 31, at 507-26; Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

44. *See* Austin Independent School Dist. v. United States, 429 U.S. 990, 991(1977) (vacating and remanding) (Powell, J., concurring); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Washington v. Davis, 426 U.S. 229 (1976); Hills v. Gautreaux, 425 U.S. 284 (1976); Milliken v. Bradley, 418 U.S. 727 (1974). *But see* Castaneda v. Partida, 430 U.S. 482 (1977) (Court relied almost entirely on disproportionate racial impact in holding Texas county had discriminated in grand jury selection).

45. 401 U.S. 424 (1971).

46. *Id.* at 432.

47. *Id.* at 430. The Court stated that an employer's subjective good intent was immaterial if the employment procedure or testing device operated as a "built-in headwind" for minority groups and was unrelated to job performance or ability. *Id.* at 432.

48. *Id.* at 431. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1382 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

49. As the Fourth Circuit noted in Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972), proof of overt racial discrimination in employment is almost never direct. To require alleged victims of employment discrimination to prove intent or purpose to discriminate would effectively emasculate Title VII. Therefore, courts have interpreted the statute to allow them to examine facially neutral patterns, practices, general policies, and statistics for evidence of racially discriminatory effect. The Supreme Court affirmed this practice in Washington v. Davis, 426 U.S. 229 (1976), stating: "[E]mployees or applicants proceeding under [Title VII] need not concern

defendant employer demonstrates a significant relationship between the practice and job performance.[50]

Title VII, however, contains significant statutory limitations. It applies only to employers engaged in interstate commerce who employ fifteen or more workers[51] and excludes private clubs.[52] In addition, although Title VII offers investigative, conciliatory, and legal assistance, as well as waiver of court costs and attorneys' fees, it requires a plaintiff alleging a Title VII violation to conform to onerous procedural requirements.[53] As a result of these limitations, plaintiffs gradually brought employment discrimination claims under section 1981 and forced lower federal courts to consider its scope and relationship to Title VII.[54] Relying on the Court's reversal of *Hodges v. United States* in *Jones*,[55] these courts held that section 1981 prohibited racial discrimination in private[56]—especially

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themselves with an employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices." *Id.* at 238-39. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Robinson v. Lorillard Corp., 444 F.2d 791, 794-800 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 983, 996-97 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

50. *See* Griggs v. Duke Power Co., 401 U.S. at 432. In Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971), the court articulated the test:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

51. 42 U.S.C. § 2000e(b) (1970).

52. *Id.*

53. *See* Peck, *The Equal Employment Opportunity Commission: Developments in the Administrative Process 1965-1975*, 51 WASH. L. REV. 831 (1976); Note, *Limitation Periods for Filing a Charge with the Equal Employment Opportunity Commission Under Title VII of the Civil Rights Act of 1964*, 56 B.U.L. REV. 760 (1976).

54. The language of §§ 1981 and 1982 are so similar that plaintiffs, citing Jones v. Alfred H. Mayer, Co., 392 U.S. 409 (1968), brought § 1981 actions charging discrimination in private contracting. In a leading case, Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970), the Seventh Circuit held that § 1981 was derived from the 1866 Civil Rights Act and prohibited private employment discrimination because the legislative history of that Act contained specific references to labor contracts. 427 F.2d at 483. *See generally* Larsen, *The New Law of Race Relations*, 1969 WIS. L. REV. 470; Note, *Is Section 1981 Modified By Title VII of the Civil Rights Act of 1964?*, 1970 DUKE L.J. 1223; Note, *supra* note 29; Note, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615 (1969).

55. *See* notes 15-19 *supra* and accompanying text.

56. Section 1981 and Title II were made alternate grounds for holdings in Scott v.

employment[57]—contracting.[58] In *Johnson v. Railway Express Agency, Inc.*,[59] the Supreme Court confirmed that section 1981 provided an independent remedy for discrimination in private employment.[60]

Following *Johnson*, courts began defining the proof required to establish a statutory violation. Because section 1981 contains no "intent to discriminate" requirement and, like section 1982, affords all people an equal opportunity to obtain the "benefits of American life," courts held

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Young, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970) (privately owned recreation facility prohibited from admitting whites for a fee while excluding blacks); Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182 (D. Conn. 1974) (private fraternal organization may exclude blacks under private club exception of Title II and under § 1981, which court held to contain by implication a similar exception); Sims v. Order of United Commercial Travelers, 343 F. Supp. 112 (D. Mass. 1972) (defendant not a private club and could not refuse to enter into an insurance contract with plaintiff for racial reasons); United States v. Medical Soc'y, 298 F. Supp. 145 (D.S.C. 1969) (private hospital may not racially discriminate in admitting patients). *See* Grier v. Specialized Skills, Inc., 326 F. Supp. 856 (W.D.N.C. 1971) (barber school that refused to admit blacks either as students or as customers violated § 1981 and, under the public function doctrine, the fourteenth amendment's equal protection clause. *But see* Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd*, 458 F.2d 1119 (5th Cir. 1972) (right of newspaper to maintain all white society page does not violate § 1981 because statute applies only to state action).

57. *See* Faraca v. Clements, 506 F.2d 956 (5th Cir.), *cert. denied*, 422 U.S. 1006 (1975); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); Young v. IT&T, 438 F.2d 757 (3d Cir. 1971); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Long v. Ford Motor Co., 352 F. Supp. 135 (E.D. Mich. 1972), *modified*, 496 F.2d 500 (6th Cir. 1974).

58. *See* cases cited in notes 56-57 *supra*. Although a few courts held that § 1981 prohibited sex discrimination in employment, *see, e.g.*, Parmer v. National Cash Register Co., 346 F. Supp. 1043, 1047 (S.D. Ohio 1972), *aff'd per curiam*, 503 F.2d 275 (6th Cir. 1974), most courts restricted § 1981 to race. *See generally* Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412 (1976).

59. 421 U.S. 454 (1975).

60. *Id.* at 459-60, 470-77. Justice Marshall, concurring, stated:

> A full exposition of the statutory origins of § 1981 with respect to prohibition against private acts of discrimination is set out in *Jones v. Alfred H. Mayer Co.* In construing § 1982, a sister provision to § 1981, we concluded that Congress intended to prevent private discriminatory deprivations of all the rights enumerated in § 1 of the 1866 Act, including the right to contract. The Court's recognition of a proscription in § 1981 against private acts of employment discrimination . . . reaffirms that the early Civil Rights Acts reflect congressional intent to "speak . . . of *all* deprivations . . . whatever their source."

Id. at 471 (emphasis in original) (quoting Griffin v. Breckenridge, 403 U.S. 88, 97 (1971)). *But see* Runyon v. McCrary, 427 U.S. 160, 193-95 (White, J., dissenting).

that section 1981 prohibited subtle as well as blatant discrimination.[61] Evidence sufficient to establish a prima facie claim under Title VII, which prohibited similar discrimination, would therefore establish a section 1981 claim and cause a similar burden of proof shift to the employer.[62]

During the late 1960s and early 1970s, the proof required to establish a prima facie case of racial discrimination in contracting in violation of a plaintiff's fourteenth amendment or statutory rights was virtually identical.[63] Recently, however, the Court has narrowed the scope of the equal protection clause and is requiring proof of a discriminatory intent or purpose to sustain a fourteenth amendment violation.[64] It has thus distinguished, in terms of proof, a violation of a statute based on the commerce clause or thirteenth amendment from a fourteenth amendment violation.

In *Washington v. Davis*,[65] the Court articulated this distinction.[66]

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

> When an employer, public or private, places more stringent requirements on employees because of their race, Section 1981 is violated. The purpose for which the section was enacted—to afford equal opportunities to secure the benefits of American life regardless of race—requires that courts adopt a broad outlook in enforcing Section 1981. Schemes of discrimination, whether blatant or subtle, are forbidden.

Id. at 505; Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

62. *See* Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974). "Although *McDonnell Douglas* was a Title VII case, the principles governing these procedural matters apply with equal force to a § 1981 action." *Id.* at 505 n.11.

> A person alleging a § 1981 violation must first establish that his employment terms vary from those which his employer accords to similarly situated white workers. This can be shown by proof either that intentional racial prejudice entered into his treatment or that a facially neutral practice . . . operates discriminatorily against minority employees.

Id. at 505-06. "If the plaintiff establishes a *prima facie* case of dissimilar treatment due in part to racial discrimination, the defendant employer must establish some legitimate, nondiscriminatory reason for its action." *Id.* at 501.

In Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976), the court emphasized the need for similar treatment of § 1981 and Title VII:

> Relief under § 1981 is limited to correcting racial discrimination . . . . But apart from this, Title VII and § 1981 provide complementary remedies for employment discrimination . . . . Moreover, "in fashioning a substantive body of law under § 1981, courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction."

Id. at 270 (quoting Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

63. *See* notes 37-38, 48-50, 61-62 *supra* and accompanying text.

64. *See* notes 39-44 *supra* and accompanying text.

65. 426 U.S. 229 (1976).

66. *Id.* at 242-44. The Court acknowledged that its decisions in Palmer v. Thompson,

Plaintiffs claimed that a qualifying test required of all applicants for the position of police officer in the District of Columbia Metropolitan Police Department violated the equal protection clause because, although facially neutral, it had a disproportionate racial impact. Whereas the plaintiffs could establish a prima facie case of racial discrimination under Title VII[67] by showing that four times as many blacks failed the entrance examination as did whites, the Court held that plaintiffs had to demonstrate that the defendants *intended* to engage in racial discrimination to prove a fourteenth amendment violation.[68]

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[69] the Court elaborated on factors that might be sufficient to prove discriminatory intent. Although an official act resulting in a disproportionate racial impact is sufficient to alert a court to a possible violation, the court must consider the history of the challenged act, the specific antecedent events, any departures from normal procedures, and contemporary statements of decisionmakers to determine whether a racially discriminatory intent exists.[70] The Court concluded that "[a]bsent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence."[71]

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403 U.S. 217 (1971), and Wright v. Council of Emporia, 407 U.S. 451 (1972), might have suggested that "in proper circumstances, the racial impact of a law, rather than its discriminatory purpose," was the controlling factor. *Id.* at 243. But surely Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), signalled "[t]hat neither Palmer nor Wright was understood to have changed the prevailing rule . . . ." Washington v. Davis, 426 U.S. at 243.

67. Although *Davis* is a Title VII case, lower courts have held that proof sufficient to establish a Title VII claim is adequate to establish a § 1981 violation, *see* note 62 *supra*. It would therefore seem to follow that, in distinguishing Title VII from the fourteenth amendment, the Court also distinguished a § 1981 violation, based on the thirteenth amendment, from the fourteenth amendment.

68. 426 U.S. at 238-39. Absent this requirement, the Court reasoned, a parade of tax, welfare, regulatory, and licensing statutes that disproportionately burden the poor and blacks would be invalid. *Id.* at 248 n.14.

69. 429 U.S. 252 (1977).

70. *Id.* at 264-68.

71. *Id.* at 266. *See* Castaneda v. Partida, 430 U.S. 482 (1977), a fourteenth amendment case involving a challenge to Texas' system of selecting grand juries, which seemed to treat disproportionate impact differently. This case may, however, fit within the exception specifically reserved in *Village of Arlington Heights*, 429 U.S. at 266 n.13, and in *Davis*, 426 U.S. at 241. The Court held that because jury selection is supposed to be random, a substantial racial disproportion in jury selection establishes a prima facie case of discriminatory intent, constituting an equal protection violation unless rebutted. *See The Supreme Court, 1976 Term, supra* note 42, at 163-76 (1977).

III. THE PROBLEM

The tremendous growth of private schools in the South correlated directly with the vigor of federal enforcement of racial desegregation in public schools.[72] Although *Brown v. Board of Education*[73] mandated a unitary public school system, the Court did not begin to enforce this mandate aggressively until 1968 in *Green v. County School Board*.[74] Finding a discriminatory intent with relative ease in *Green* and subsequent school desegregation cases,[75] the Court authorized broad remedial orders aimed at eliminating segregation in southern public schools.[76] In response to these desegregation efforts, the estimated enrollment in southern private schools increased from approximately 25,000 in 1966, to approximately 535,000 in 1972.[77] The transfer rate to these "segrega-

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72. For a discussion of the problem of segregated private schools, see J. PALMER, THE IMPACT OF PRIVATE EDUCATION ON THE RURAL SOUTH (1974); Note, *Desegregation of Private Schools: Section 1981 as an Alternative to State Action*, 62 GEO. L.J. 1363 (1974); Note, *supra* note 29; Note, *Post-Brown Private White Schools—An Imperfect Dualism*, 26 VAND. L. REV. 587 (1973); Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441 (1975) [hereinafter cited as *Section 1981 and Private Groups*]; Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973).

73. 347 U.S. 483 (1954).

74. 391 U.S. 430 (1968). In *Green* the Court confronted a "freedom-of-choice" plan for desegregating the two public schools of New Kent County, Virginia. After operating the plan for three years, 85% of the black students in the school system continued to attend all-black schools. The Court held that "a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is . . . intolerable. . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Id.* at 438-39 (emphasis in original).

75. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 201-05 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6-14 (1971); notes 37-38 *supra* and accompanying text.

76. From 1965 to 1973 the percentage of southern blacks who attended all-black public schools dropped from 84.9 to 9.2 percent. Note, *Segregation Academies and State Action, supra* note 72, at 1436.

77. *See* Terjen, *Close-up on Segregation Academies,* NEW SOUTH 50 (Fall 1972), *cited in* Note, *Segregation Academies and State Action, supra* note 72, at 1441. The Wall Street Journal reported that total enrollment in private schools in the South rose from 610,000 to 859,000 students—a 41% increase—in the four years after *Green*. Wall St. J., Dec. 17, 1973, at 17, col. 3.

M. Giles, D. Gatlin, & E. Cataldo, Executive Summary Determinants of Resegregation: Compliance/Rejection Behavior and Policy Alternatives (National Science Foundation RANN—Research Applications Directorate, Division of Advanced Productivity Research and Technology, April 29, 1976) undertook a four year project to examine factors influencing parental resistance to school desegregation in seven desegregated school districts in Florida. They noted:

tion academies"[78] occasionally produced a significant alteration in the school district's racial composition and thwarted court attempts to eliminate all-black public schools.[79] Withdrawal of white students frequently resulted in a decrease in state funds for public schools, a reduction of discretionary educational programs by local school boards, and a rejection by the electorate of bond issues previously readily approved.[80] Despite court efforts, therefore, the pre-*Brown* separate but equal facilities remained substantially separate and grew increasingly unequal.[81]

The Court was confronted with a dilemma: *Brown* held that a dual school system was innately unequal. Yet, in the face of white student flight to private schools, a unitary public school system could be achieved only by increasingly drastic desegregation orders, including extensive busing plans. Such orders in turn hastened the white student exodus to private schools.[82] The Court, to be faithful to *Brown*, was compelled to find a constitutional basis on which it could directly attack private school segregation.[83]

> [T]here is evidence of a linkage between desegregation and private school growth in Florida. At the start of school in Fall, 1971, fifty-eight new private schools opened their doors, all in areas where desegregation was an issue. From 1969-1973, the period of Florida's most significant advances in desegregation, total private school enrollment was estimated to have increased approximately 16 percent. By contrast, total public school enrollments increased 8.6 percent over the same period. (footnotes omitted).

Id. at 5, 7.

78. The court in Coffey v. State Educ. Finance Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969) defined "segregation academy" as a private school "operated on a racially segregated basis as an alternative available to white students seeking to avoid desegregated public schools." *Id.* at 1392.

79. *See* Norwood v. Harrison, 413 U.S. 455 (1973). Plaintiffs charged, and the defendants conceded, that:

> Private schools in Mississippi have experienced a marked growth in recent years. As recently as the 1963-1964 school year, there were only 17 private schools other than Catholic schools; the total enrollment was 2,362 students. In these non-public schools 916 students were Negro, and 192 of these were enrolled in special schools for retarded, orphaned, or abandoned children. By September 1970, the number of private non-Catholic schools had increased to 155 with a student population estimated at 42,000, virtually all white. . . . "[T]he creation and enlargement of these [private] academies occurred simultaneously with major events in the desegregation of public schools . . . ."

Id. at 457 (quoting Brief for Appellants at 8-9).

80. *See* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 460-61 (1974).

81. *See* sources cited in note 72 *supra*.

82. *See* Note, *Segregation Academies and State Action*, *supra* note 72, at 1452.

83. The Court could have left the problem to individual states, many of which have prohibited discrimination in at least some private schools. No southern states, however,

One possibility was to bring private schools under fourteenth amendment restrictions by finding the states were substantially involved with the schools. Indeed, when states provided these schools with tuition grants,[84] free textbooks,[85] exclusive use of recreational facilities,[86] or other benefits,[87] courts held the state action in segregated academies violated the equal protection clause and enjoined further state support. No court brought the private schools under state-wide desegregation orders after finding state action.[88] A broader state action doctrine, however, would have enabled the court to fashion such a remedy. State officials, for example, who acquiesced in the deterioration of the public school system to the extent that segregated private schools offered the only viable educational system, arguably circumvented their constitutional obligation to maintain a unitary school system.[89] A suitable remedy for the inferred complicity between state officials and private schools would have been to require the private schools to desegregate or close; this would have forced the state officials to provide the *Brown* mandated unitary public school system.

Alternatively, the Court could have held that segregated academies perform a public function by offering a basic and important service to the

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have done so. *See* Dorsen, *Racial Discrimination in "Private" Schools*, 9 WM. & MARY L. REV. 39, 47 (1967); Fox, *Discrimination and Antidiscrimination in Massachusetts Law*, 44 B.U.L. REV. 30, 64 (1964). *See generally* Note, *Fair Educational Practices Acts: A Solution to Discrimination?*, 64 HARV. L. REV. 307 (1950).

84. Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

85. Norwood v. Harrison, 413 U.S. 455 (1973).

86. Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

87. Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (federal tax exemptions to segregated private schools); United States v. Tunica County School Dist., 323 F. Supp. 1019 (N.D. Miss. 1970), *aff'd per curiam*, 440 F.2d 377 (5th Cir. 1971) (payment of salaries to teachers refusing reassignment pursuant to school desegregation plan); *see* Note, *Post-Brown Private White Schools—An Imperfect Dualism*, *supra* note 72.

88. *See* Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 478 (M.D. Ala.), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967). *See generally* Yackle, *supra* note 31, at 487-507; Note, *Segregation Academies and State Action*, *supra* note 72, at 1450-60.

89. *See* Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, 230-31 (1964) (while noting the fact of state subsidy, the Court stressed the unconstitutional motivation of the county in abandoning its public schools). These officials arguably encouraged discrimination, in violation of the equal protection clause, by effectively delegating their responsibility to provide education to private persons known to discriminate. *Cf.* Reitman v. Mulkey, 387 U.S. 369 (1967) (Justice Douglas pointed out that by enacting Proposition 14, the state effectively delegated its zoning authority to private persons who discriminated on the basis of race). *See generally* Yackle, *supra* note 31.

community which the state is typically expected to perform.[90] Under the public function doctrine, which focuses on the nature of the activity rather than the extent of the state's involvement with the acting entity, a private entity that exercises governmental functions is considered an instrument of the state subject to fourteenth amendment restrictions.[91] Segregated academies, thriving in the midst of a declining public school system, arguably perform a public function.[92] Despite its apparent logic, however, the Court has not adopted this expansion of the public function doctrine.[93]

In light of the Burger Court's approach to the fourteenth amendment—narrowing its scope,[94] requiring proof of official purposeful discriminatory acts,[95] and tailoring the remedy to correct only segregative results specifically attributable to the violation[96]—it would have been wholly inconsistent for the Court to embrace a state action or public function definition that would bring private schools under the equal protection clause. In *Runyon v. McCrary*[97] the Court was confronted with the problem of how to remain faithful to *Brown* and the national commit-

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90. *See* Note, *supra* note 29, at 1151-52.

91. Cases finding that a private entity performed a public function include: Evans v. Newton, 382 U.S. 296 (1966) (maintenance of park); Terry v. Adams, 345 U.S. 461 (1953) (primary elections held by private political club); Marsh v. Alabama, 326 U.S. 501 (1946) (first amendment rights in a company town).

92. *See* Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La.), *vacated on procedural grounds*, 207 F. Supp. 554 (E.D. La.), *aff'd*, 306 F.2d 489 (5th Cir. 1962). Judge J. Skelly Wright concluded:

> [O]ne may question whether any school . . . can ever be so 'private' as to escape the reach of the Fourteenth Amendment. . . . No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution . . . . Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state . . . . [A]re they not then . . . subject to the constitutional restraints on governmental action . . . .

203 F. Supp. at 858-59.

93. *See* Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968). The court rejected the argument "that Columbia [University] performs a 'public function' in 'educating persons' which may be likened to a 'company town' or a party primary system," noting that "[i]f the law were what plaintiffs declare it to be, the difficult problem of aid to 'private schools'—specifically, parochial schools—would not exist . . . . Indeed the very idea of a parochial school would be unthinkable." *Id.* at 549 & n.19.

94. *See* notes 39-43 *supra* and accompanying text.

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

96. *See* Austin Independent School Dist. v. United States, 429 U.S. 990, 991 (1976) (vacating and remanding) (Powell, J., concurring); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). *See* note 98 *infra*.

97. 427 U.S. 160 (1976).

ment to desegregation, which required an end to segregated private schools, without expanding the fourteenth amendment to prohibit racial discrimination in private action.[98]

IV. THE SOLUTION

The *Jones* rule[99] was applied in two subsequent cases in which membership in community recreation associations was denied to blacks who owned or leased homes in the area served by the recreational facilities. The Court's decisions indicated that section 1982 would be broadly interpreted. In *Sullivan v. Little Hunting Park, Inc.*,[100] a private recreational facility, organized for the benefit of owners and lessees of property in a prescribed area, refused to approve a white member's transfer of his assignable share in the park to his black lessee. The Court held that the racially motivated refusal deprived the black lessee of his "same right" to lease property protected by section 1982.[101]

In 1973, a unanimous Court in *Tillman v. Wheaton-Haven Recreational Association*[102] granted relief under section 1982 to a black

98. The problem was compelling for other reasons. Absent a solution, the increasing number of and enrollment in private schools threatened the Court's policy of narrowly tailoring desegregation orders to correct the specific effects of a constitutional violation and of employing limited busing plans. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Austin Independent School Dist. v. United States, 429 U.S. 990, 991 (1976) (vacating and remanding). Justice Powell, concurring in *Austin*, stated that unless the evidence indicated that "absent those constitutional violations, the Austin School System would have been integrated to the extent contemplated by the plan," the sweeping busing plan was overbroad. *Id.* at 994. He noted that in light of the significant interests involved, only the narrowest desegregation order that could remedy the violation was required:

> A related equitable principle, also applicable in fashioning a desegregation remedy, is that a court has the duty to 'balanc[e] . . . the individual and collective interests.' *Milliken v. Bradley*, 418 U.S., at 738. The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their children—especially those of tender age. Families share these interests wholly without regard to race, ethnic origin, or economic status. It also is to be remembered, in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action but, rather, upon innocent children and parents.

Id. at 995 n.7.

99. *See* notes 8-14 *supra* and accompanying text.

100. 396 U.S. 229 (1969).

101. *Id.* at 234-37. The Court said that assignment of a membership share in the park was incidental to the leasehold interest that the tenant purchased from the lessor. The tenant, however, did not possess a leasehold interest in the park; rather, under the park's bylaws, he possessed only a contingent claim to the lessor's membership share assignable to lessees and subject to approval by the park's board of directors.

102. 410 U.S. 431 (1973).

homeowner denied use of the community pool due to his race. Because the opportunity to use the pool was an attractive feature of home ownership in that area, the Court reasoned that the pool association's refusal to admit black members abridged the plaintiff's right to own a home in that area.[103] Finding that the recreational associations in *Sullivan* and *Tillman* had no defined membership selection criteria, the Court held that they did not constitute private social organizations within the private club exception of Title VII.[104] It therefore declined to decide whether section 1982 was subject to a private club limitation.[105]

In addition to discriminating against blacks in property transactions, the Wheaton-Haven Association had a racially discriminatory guest policy which plaintiffs claimed infringed their section 1981 "same right to contract."[106] The Court agreed, noting the "historical interrelationship" between sections 1981 and 1982, and could discern no reason to construe them differently.[107] In 1975, the Court held in *Johnson v. Railway Express Agency, Inc.*[108] that section 1981, like section 1982, extended to private conduct.[109]

The Court, having read section 1982 literally in *Jones*,[110] having applied it to highly speculative "property" interests in *Sullivan* and *Tillman*,[111] and having held in *Johnson* that sections 1981 and 1982 must

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103. *Id.* at 437. The Court extended the notion that rights incidental to property ownership are themselves property interests protected by § 1982. Under Wheaton-Haven's bylaws, as in *Little Hunting Park*, residents in the geographical preference area did not have to be endorsed by current members and received preferential standing on the waiting list if membership were full. In addition, a resident-member could confer a first option on the purchaser of his home. All applicants, however, still had to be approved by Wheaton-Haven's board of directors. *Id.* at 438-39.

104. *See* note 25 *supra*. In Daniel v. Paul, 395 U.S. 298, 301-02 (1969), the Court held that a club must possess 1) a nonbusiness character, 2) membership control over its finances and governance, and 3) genuine selectivity over admissions in order to fit within the "private club" exemption and thus be permitted to discriminate under Title II.

105. 410 U.S. at 438-40; 396 U.S. at 236-37. *See* Sims v. Order of United Commercial Travelers of America, 343 F. Supp. 112, 114 (D. Mass. 1972). The court suggested that a private club limitation would necessarily apply to §§ 1981 and 1982 because if the benefit denied is an incident of membership in a club, refusal to confer that benefit does not constitute a refusal to sell or contract, protected by the statutes. It is rather a refusal to admit to membership, not guaranteed by their language or spirit.

106. 410 U.S. at 433, 440.

107. *Id.* at 440.

108. 421 U.S. 454 (1975). *See* notes 52-60 *supra* and accompanying text.

109. 421 U.S. at 459-60. "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." *Id.*

110. 392 U.S. 409 (1968). *See* notes 8-14 *supra* and accompanying text.

111. *See* notes 103-07 *supra* and accompanying text.

be construed similarly,[112] confronted the problem of segregated private schools in *Runyon v. McCrary*.[113] Justice Stewart, writing for a divided Court,[114] held that on the basis of *Jones*, section 1981 prohibited racially discriminatory admissions procedures in commercially operated, nonsectarian private schools.[115]

In *McCrary*,[116] the parents of black children learned about the private schools from the classified telephone directory and direct-mail advertisements addressed to "Resident." Upon inquiring about admission, they were informed that only white children were accepted.[117] The Court found that the private schools advertised their services to the general public and had no admissions criteria except race.[118] They essentially

112. *See* notes 52-60, 108-09 *supra* and accompanying text.

113. 427 U.S. 160 (1976). *See generally* Hirschoff, Runyon v. McCrary *and Regulation of Private Schools*, 52 IND. L. REV. 747 (1977); Note, *Section 1981 and Discrimination in Private Schools*, 1976 DUKE L.J. 25 [hereinafter cited as *Discrimination*]; Note, *supra* note 59; Note, *Civil Rights—Race Discrimination—Section 1981 Applicable to Private School Admissions*, 25 KAN. L. REV. 247 (1977); Note, *Discriminatory Admissions Policies and Federal Statutory Control of Contractual Relationships*: McCrary v. Runyon, 28 ME. L. REV. 269 (1976); Comment, *Private School Desegregation Under Section 1981*, 124 U. PA. L. REV. 714 (1976); 25 EMORY L.J. 209 (1976); 7 U. TOL. L. REV. 139 (1975).

114. Justice Stewart also authored the majority opinion in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *See* notes 8-19 *supra* and accompanying text. The Chief Justice and Justices Brennan, Blackmun, and Marshall joined Justice Stewart's majority opinion; Justices Powell and Stevens concurred separately; and Justice Rehnquist joined Justice White in dissent.

115. 427 U.S. at 168-75. The district court held that § 1981 prohibited racial discrimination in contracting for admission to a private school, but the state's statute of limitations barred the plaintiffs' claim for damages. Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973). On appeal, the Fourth Circuit reversed the award of attorney's fees but affirmed the rest of the decision. McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975).

116. *McCrary* is a combination of two cases with similar fact patterns. The parents of Colon Gonzales applied at Fairfax-Brewster School after receiving an advertisement in the mail and hearing of the school from a friend whose son attended there. After the application was returned, Mr. Gonzales inquired about the rejection and was informed that the school was not integrated. Both the Gonzaleses and Mrs. McCrary telephoned Bobbe's School about enrolling their sons and were informed that only members of the Caucasian race were accepted. The Southern Independent School Association representing more than 300 private, nonprofit schools in the South, some of which it concedes are racially discriminatory, intervened in both actions. The Association claimed that such discrimination was not prohibited by § 1981 and could not be constitutionally prevented. *Id.* at 164-65.

117. *Id.* at 165.

118. *Id.* at 172-73 & n.10. The significance of *McCrary* depends on the amount and kind of proof required to establish a § 1981 violation in private contracting. The Court did not discuss this issue. Rather, it accepted the trial court's finding that the children were refused admission solely on the basis of race. *Id.* at 173. The implications of the proof required in *McCrary* are examined at notes 180-97 *infra* and accompanying text.

offered the public a right to enter into a commercial contract whereby the school would provide educational services in return for a fee.[119] By prohibiting racial discrimination in the making of that contract, Justice Stewart reasoned, the Court was simply holding that " 'a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.' "[120]

The Court noted that *Jones* conclusively established that section 1 of the 1866 Civil Rights Act, from which both sections 1981 and 1982 were derived,[121] prohibited all racial discrimination with respect to the rights enumerated therein. Therefore, just as section 1982 outlawed discrimination in the sale or lease of private property, section 1981 prohibited discrimination in private contracting.[122] Furthermore, section 1981 as applied to discrimination in contracting for admission to private schools was constitutional under the thirteenth amendment. Congress could rationally have concluded, the Court held, that discrimination in educational contracting was as much a "badge of slavery" as discrimination in employment or in the purchase or lease of property; and, empowered by section 2 of the thirteenth amendment, it could legitimately have enacted a statute to forbid it.[123]

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119. *Id.* at 172-73. *See* Brief for the United States as Amicus Curiae at 23.

120. 427 U.S. at 179 (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968)). The dissent in the Court of Appeals and the petitioners in this action distinguished *McCrary* from *Jones* on two bases: first, the right to attend a private school involved a status relationship between pupil and teacher and only incidentally a contract; secondly, whereas the mere freedom from legal disabilities would be meaningless if a person could refuse to sell another property because of his race, freedom from legal disabilities in education was not meaningless because it required the state to provide equal public educational opportunities for all. *See* McCrary v. Runyon, 515 F.2d 1083, 1093-94 (4th Cir. 1975); Brief for Petitioners Runyon v. McCrary, 427 U.S. 160 (1976) at 6-8, Brief for the United States as Amicus Curiae, *Id.*, at 10 n.10, 19-20.

121. The Court in *Jones* overruled Hodges v. United States, 203 U.S. 1 (1906) which had interpreted § 1981 narrowly, and in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60, 470-71 (1975), unanimously confirmed that §§ 1981 and 1982 were "sister provisions" derived from § 1 of the 1866 Act and must be interpreted together. *See* notes 15-59 & 99-112 *supra* and accompanying text.

122. 427 U.S. at 173-75.

123. *Id.* at 179. *See* Brief for Respondents at 21:

> It has been suggested by more than one commentator that, in light of *Jones v. Mayer Co.*, it is necessary to view the principal of freedom established by the Thirteenth Amendment as one of those "[g]reat concepts . . . purposely left to gather meaning from experience." . . . The relics of slavery survive today in more forms than the Reconstruction Congress could have anticipated, and there is no reason why Section 1981 should be limited in application merely because Congressional spokesmen at that time did not foresee all the possible forms of contract to which the section might be applicable. Accordingly, decisional law to date reflects a literal reading of the section and its application to a wide variety of contracts.

The Court implied that section 1981 was limited by two factors. First, the Court emphasized that the private schools in *McCrary*, like the recreational associations in *Sullivan* and *Tillman*, openly appealed to all parents of children within the geographic area and were private only in that they received no state aid and were privately managed.[124] In so doing, the Court may have grafted a private club exception onto section 1981.[125] Secondly, the Court restricted section 1981 and the thirteenth amendment to racial discrimination claims and noted that it might have reached a different result if the school excluded applicants on the basis of sex or religion.[126]

Relying primarily on *Jones* and emphasizing the limitations of the Court's holding, Justice Powell reluctantly concurred.[127] He reasoned that the majority's decision did not require courts to investigate a private party's motives whenever he refused to contract with another person because some contracts were simply too personal to be included within section 1981.[128] Thus, when an individual personally chose his bargaining partners, Powell asserted, the choice reflected "a purpose of exclu-

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See generally Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on* Jones v. Mayer Co., 22 RUTGERS L. REV. 537 (1968); Note, *The "New" Thirteenth Amendment: A Preliminary Analysis, supra* note 23.

124. 427 U.S. at 172-73.

125. *Id.* at 172 n.10. *See* note 25 *supra*; Note, *Segregated Academies, Section 1981, and an Exemption for Truly Private Groups*: McCrary v. Runyon, 8 CONN. L. REV. 571 (1976).

126. 427 U.S. at 167-68. In fact, the Court noted that a different question would be presented by a private sectarian school that engaged in racial discrimination on religious grounds. *Id.* at 167. *See* United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977); Kermit v. Banco Credito y Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976). The use of § 1981 by a lower court in a sex discrimination case, Parmer v. National Cash Register Co., 346 F. Supp. 1043, 1047 (S.D. Ohio 1972), has apparently been overruled by *McCrary*.

The Fifth Circuit, in Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), considered the scope of the religious exception left open in *McCrary* and narrowly construed it. In a forceful concurring opinion, Justice Goldberg contended that society's interest in desegregation outweighed its first amendment interest in religious freedom. *Id.* at 314. *See* 53 NOTRE DAME LAW. 107 (1977).

127. 427 U.S. at 186.

128. *Id.* at 187. A close reading of Justice Powell's concurring opinion suggests that § 1981 is applicable only to private contracts that are essentially public even though they involve no real state action. He explained:

> But choices, including those involved in entering into a contract, that are "private" in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the 19th century Civil Rights Acts. The open offer to the public generally involved in the case before us is simply not a "private" contract in this sense.

Id. at 189.

siveness" made on subjective factors other than race. In such cases, the offeree's privacy and associational rights must be respected.[129]

Justice Stevens, in a separate concurring opinion,[130] concluded that the *Jones* Court had erroneously interpreted section 1982 and the 1866 Civil Rights Act to apply to private conduct; this interpretation, however, controlled that of section 1981. The real issue, therefore, was whether *Jones* and its progeny should be overruled.[131] He concluded that although *Jones* incorrectly interpreted congressional intent in 1866, it accurately reflected the "mores of today" and he therefore concurred.[132]

In dissent, Justice White, joined by Justice Rehnquist,[133] maintained that the *Jones* Court's interpretation of section 1982 was not applicable to section 1981. Justice White argued that the Court misinterpreted its holding in *Johnson v. Railway Express Agency, Inc.*,[134] and had not previously considered the legislative history of section 1981.[135] *Johnson*,

129. "A small kindergarten or music class, operated on the basis of personal invitations extended to a limited number of pre-identified students, for example, would present a far different case." *Id.* at 188.

130. *Id.* at 189.

131. *Id.* at 190.

132. *Id.* at 191-92.

Such reasoning is subject to criticism: First, should the Supreme Court decide important questions of constitutional law on the basis of incorrect judicial precedent simply because they believe that the result accords with society's current value system? Secondly, in view of recent congressional, executive, and judicial statements about freedom of association, privacy, and parental liberty rights to educate their children according to their values, it is debatable whether the overruling of *Jones*, or the opposite result in *McCrary* "would be so clearly contrary . . . to . . . the mores of today that . . . the Court is entirely correct in adhering to *Jones*." *Id.* at 191-92.

It is highly unlikely, given the popular mood in regard to the desegregation of public schools, that Congress would enact and the President sign a law prohibiting racial discrimination in private schools. *See* Wash. Post, June 7, 1976, at 1, col. 6 (quoting President Ford's deputy press secretary's clarification of Ford's response to a question concerning the right of parents to send their children to segregated private schools):

> "I think he clearly meant that a private school that does not accept federal funds or benefit from federal tax breaks should have the right to accept or reject students as it sees fit. That is his belief."
>
> Carlson added that Mr. Ford also supports the right of parents to send their children to the school of their choice.

Some members of the Court appear to be increasingly concerned over desegregation orders that infringe constitutionally protected parental rights. *See* Austin Independent School Dist. v. United States, 429 U.S. 990, 994 n.7 (1976) (Powell J., concurring).

133. 427 U.S. at 192.

134. 421 U.S. 454 (1975).

135. The majority and two concurring Justices assert that this Court has already considered the issue in this litigation and resolved it in favor of a right of action for private racially motivated refusals to contract. They are wrong . . . . [T]he

he contended, was really a Title VII employment discrimination case in which the Court simply noted that section 1981 also prohibited racial discrimination in private employment contracting. The section 1981 question, however, was neither raised nor briefed by the parties and, White argued, the Court's statement was merely dictum.[136]

Upon thoughtful consideration, White continued, the Court could hold that section 1981, unlike section 1982, was based on the 1870 Voting Rights Act[137] and the fourteenth amendment.[138] His argument was three-pronged: First, the 1866 statute applies to "*citizens* of every race and color,"[139] whereas section 1981, like the 1870 Act, applies to "all persons."[140] Secondly, unlike the 1866 Act, section 1981 and the 1870 Act protect against "taxes, licenses and exactions of every kind."[141] And finally, "the Revisers' notes to the 1874 Revisions—which notes were before Congress when it enacted the Revised Statutes into positive law—clearly designate section 16 of the Voting Rights Act of 1870 as the source for § 1977—the current 42 U.S.C. § 1981."[142]

Section 1981, constitutionally based on the fourteenth amendment, confers on all people the "same right" to contract "as is enjoyed by white citizens."[143] Because white citizens have no right to make contracts with unwilling second parties, the statute confers no such right on blacks. Rather, the statute guarantees to all people the same right to enter into contracts freely "with other willing parties and to 'enforce'

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only time the issue has been previously addressed by this Court it was addressed in [*Johnson v. Railway Express Agency, Inc.*] in which the Court had issued a limited grant of certiorari, not including the issue involved here; in which the issue involved here was irrelevant to the decision; and in which the parties had not briefed the issue and the Court had not canvassed the relevant legislative history.

427 U.S. at 192 n.1. This is perhaps the weakest part of White's dissent.

136. *Id.* at 213-14.

137. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144.

138. *Id.* at 195 n.6.

139. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981 & 1982 (1970) (emphasis added). *See* text quoted in note 3 *supra*.

140. 42 U.S.C. § 1981 (1970). *See* text quoted in note 3 *supra*. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144, provides in pertinent part:

> That all persons within the jurisdiction of the United States have the same right in every State and Territory in the United States 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 person 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 none other. . . .

141. *See* text quoted in notes 3 & 140 *supra*.

142. 427 U.S. at 195 n.6.

143. 42 U.S.C. § 1981 (1970).

those contracts in court."[144] Section 1981 also prohibits state statutes or court rules limiting this right for blacks.[145] To construe the 1866 Act and section 1981 as the majority had, White reasoned, unreasonably attributed to Congress an intent to define as "badges of slavery" racially motivated refusals to contract and to proscribe them in the exercise of their thirteenth amendment power.[146]

The dissent warned that the Court's decision in *McCrary* coupled with its decision in *McDonald v. Santa Fe Trail Transportation Co.*,[147] holding that section 1981 provided a cause of action to whites as well as blacks for racially motivated refusals to contract,[148] "threatens to embark the Judiciary on a treacherous course."[149] White predicted that fanciful definitions of "contract" would emerge in the future as the Court juggled the sensitive rights of association, privacy, and liberty with the new right and concluded that this task, involving delicate policy considerations, was legislative rather than judicial.[150]

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144. 427 U.S. at 204-05.

145. *Id.* at 194.

146. *Id.* at 211. There is nothing in the language of the statute to distinguish, as the majority and concurring opinions attempted to do, between the right to contract to attend a private school, to hire a babysitter, or to join a private association. If the language "meant exactly what it said" in one situation, Justice White pointed out, it must mean the same thing in all situations.

147. 427 U.S. 273 (1976). Two white employees of a transportation company were discharged for misappropriating cargo from a company shipment but a black employee similarly charged was retained. The white employees brought an action charging a violation of Title VII and § 1981. *Held*: § 1981 and Title VII prohibit racial discrimination in private employment against white as well as nonwhite persons.

148. 427 U.S. at 296. Prior to *McDonald*, the lower courts had split on the issue of whether whites could bring a claim of racial discrimination in employment under § 1981. *Compare* Balc v. United Steelworkers, 6 Empl. Prac. Dec. ¶ 8948 (W.D. Pa. 1973), Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973), *and* Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205 (N.D. Ala. 1973) (§ 1981 limited to blacks), *with* Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975), WRMA Broadcasting Co. v. Hawthorne, 365 F. Supp. 577 (M.D. Ala. 1973), *and* Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969) (whites can bring an action under § 1981).

149. 427 U.S. at 212. The decision in *McDonald* was clearly wrong and provided conclusive proof for Justice White that § 1981 guaranteed to all persons only *equal rights* under the law (guaranteed by the fourteenth amendment) to engage in and enforce contracts. To hold otherwise, as the Court did in *McCrary* and *McDonald*, White argued, leads to the anomolous and inconceivable result that Congress in the 1866 Civil Rights Act provided a cause of action to a former slave owner "against his former slave if the former slave refused to work for him on the ground that he was a white man." *Id.* at 211.

150. *Id.* at 212. Several law review writers have engaged in such "fanciful" definitions of "contract." *See Discrimination, supra* note 113, at 149-53; Note, *supra* note 58, at 423-29; Comment, *supra* note 116, at 746-48; Note, Runyon v. McCrary: *Section 1981 Opens the Door of Discriminatory Private Schools*, 34 WASH. & LEE L. REV. 179, 200-03 (1977).

V. COMPETING INTERESTS

The *McCrary* Court recognized that its decision impinged the constitutionally protected rights of association, privacy, and liberty.[151] After balancing these rights against the right to be free from racial discrimination in admission to private schools, the Court held that the thirteenth amendment limits the exercise of these constitutionally protected rights.[152]

A. *Freedom of Association*

The Court explicitly recognized the first amendment right of freedom of association in *NAACP v. Alabama*.[153] The right clearly protects association for the purpose of expressing beliefs and ideas,[154] and Justice Douglas indicated that "membership in a group,"[155] or "joining" a group is a form of expression.[156] The Court has also recognized that the freedom to associate can include the freedom to exclude.[157] By attending

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151. 427 U.S. at 175-79.

152. *Id.* at 178-79. *See* Note, *supra* note 59, at 438-40.

153. 357 U.S. 449 (1958) (forced disclosure of NAACP's membership list would unconstitutionally interfere with the group's ability to advance its beliefs). Although *NAACP* protected the individual's associational right to express political ideas, the right extends to the expression of social ideas as well. *See* Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Norwood v. Harrison, 413 U.S. 455 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). *See generally* Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963); Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964); Nathanson, *Freedom of Association and the Quest for Internal Security: Conspiracy from Dennis to Dr. Spock*, 65 NW. U.L. REV. 153 (1970); Comment, *Discrimination in Private Social Clubs: Freedom of Association and the Right to Privacy*, 1970 DUKE L.J. 1181; Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, 46 VA. L. REV. 730 (1960); Note, Runyon v. McCrary: *Section 1981 Opens the Door of Discriminatory Private Schools*, *supra* note 150.

154. Healy v. James, 408 U.S. 169 (1972); NAACP v. Button, 371 U.S. 415 (1963).

155. Griswold v. Connecticut, 381 U.S. 479 (1965). The right of association "includes the right to express one's attitudes or philosophies by membership in a group." *Id.* at 483.

156. Lathrop v. Donohue, 367 U.S. 820 (1961) (dissenting opinion). "Joining is one method of expression." *Id.* at 882.

157. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (Douglas, J., joined by Marshall, J., dissenting):

> My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups . . . . Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

Id. at 179-80.

In Norwood v. Harrison, 413 U.S. 455 (1973), referring to discrimination by private schools receiving state aid, the Court concluded: "Such private bias is not barred by the

a segregated school a student is, arguably, expressing his view that the Caucasian race is superior and that he desires racial separation.[158]

The right to associate, however, is not absolute; rather, it must be balanced against competing interests. In the case of private segregated schools, the Court must weigh society's interest in protecting its citizens' thirteenth amendment right to be free from racial discrimination against society's interest in preserving its citizens' first amendment associational rights.[159] When society's interest in nondiscrimination predominates, the Court held in *Norwood v. Harrison*,[160] Congress can act under its thirteenth amendment enforcement power to remedy the private discrimination.[161]

The *McCrary* Court disingenuously held that the right to associate for the purpose of expressing a belief in racial segregation was unaffected by its ruling because "there is no showing that discontinuance of discriminatory admission practices would inhibit in any way the teaching in these schools of any [segregationist] ideas or dogma."[162] It is difficult to conceive of an act that would have a greater chilling effect on such teaching. Indeed, the Court had noted in *Norwood* that discriminatory

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Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." *Id.* at 469.

> In Bell v. Maryland, 378 U.S. 226 (1964), Justice Goldberg concurred, stating: Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

Id. at 313.

158. *See* Brief for Petitioner, Southern Independent School Ass'n, Runyon v. McCrary, 427 U.S. at 23-27. Alternatively, whether a group of people can exclude others from their association for any reason is a right of non-association protected by the right of privacy, and not a first amendment issue. *See* Emerson, *supra* note 153.

Assuming arguendo that a student has a constitutional right to choose which school he will attend, as Evans v. Newton, 382 U.S. 296, 298 (1966), seems to hold, some contend that a problem exists because the child is not actually making an informed choice about which school to attend in the exercise of his associational rights. Rather, the right at stake is the *parents'* liberty to ensure that their children receive a racially segregated education. *See* Comment, *supra* note 153; Note, *Section 1981 and Private Groups, supra* note 72.

159. *Compare* Railway Mail Ass'n v. Corsi, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring) ("insistence by individuals on their private prejudices . . . ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination"), *with* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (Douglas, J., dissenting) ("The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed.").

160. 413 U.S. 455 (1973).

161. *Id.* at 470.

162. *Id.* (quoting McCrary v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975)).

admission procedures exert "a pervasive influence on the entire educational process."[163] And in *NAACP v. Alabama*,[164] the Court had stated, in a slightly different context, that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[165]

Although the Court in *McCrary* initially stated that associational rights of students attending private segregated academies were not infringed by its decision, it later acknowledged that they were and relied on its reasoning in *Norwood* to justify its conclusion: "[Although] the Constitution [does not proscribe private bias, it] places no value on discrimination . . . . [i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections."[166] Furthermore, some private discrimination was "subject to special remedial legislation . . . under § 2 of the Thirteenth Amendment . . . ."[167] Relying on this language, the *McCrary* Court effectively held that private school segregation, even if it were a form of freedom of association, had been legitimately proscribed by Congress under its thirteenth amendment power.[168] By upholding section 1981 as a valid exercise of Congress' power, the Court apparently held that one may associate and exclude to promote a belief, except on the basis of race.

B. *The Right to Privacy*

The Supreme Court has recognized a right to freedom from governmental interference in matters relating to the family, procreation, and the home.[169] But this privacy right has been narrowly defined by the

163. 413 U.S. at 469. *See* notes 160-61 *supra* and accompanying text.

164. 357 U.S. 449. *See* note 153 *supra*.

165. 357 U.S. at 462.

166. 427 U.S. at 176 (quoting Norwood v. Harrison, 413 U.S. at 469-70).

167. *Id. See* Comment, *supra* note 113 (courts must balance rights of privacy and association against thirteenth amendment interest). ***But see Discrimination, supra*** note 113 (rights of association and privacy not implicated in § 1981 actions).

168. *See* Note, ***Section 1981 and Private Groups, supra*** note 72.

169. *See* Carey v. Population Servs. Int'l, 431U.S. 678 (1977) (absolute prohibition on distribution of contraceptives to minors invalid); Planned Parenthood v. Danforth, 428 U S. 52 (1976) (parent has no absolute veto over minor's decision to obtain an abortion); Roe v. Wade, 410 U.S. 113 (1973) (right to obtain an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of unmarried couples to obtain contraceptives); Stanley v. Georgia, 394 U.S. 557 (1969) (right to possess obscene material in the home); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married couple to use contraceptives). *See generally*

courts.[170] In *McCrary*, although the Court acknowledged the existence of a right to privacy and affirmed the parental right to decide whether to bear a child and determine how that child would be educated, it held that the parental decision regarding a child's education was subject to "reasonable" governmental restrictions.[171] Prior to this case, however, the Court had not intimated that the states or the federal government could dictate the reasonable admission procedure of private schools.[172] By holding in *McCrary* that section 1981 was a reasonable restriction, the Court indicated that the thirteenth amendment right to be free from racial discrimination limits the parental privacy right.

C. *Liberty Interest of Parents to Direct Their Children's Education*

A parent who asserts an associational and privacy right to enroll his child in a segregated private school is claiming these rights on behalf of his child as well as himself. Yet the child may not share his parents' preferences.[173] The fourteenth amendment liberty right of parents to direct the education of their children, therefore, may provide a stronger argument against government prohibition of racially segregated private schools.[174] In *Pierce v. Society of Sisters*,[175] the Supreme Court struck

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Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *Symposium—Privacy*, 31 LAW & CONTEMP. PROB. 251 (1966); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973).

170. *See* Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Paul v. Davis, 424 U.S. 693 (1976). *See also* 1977 WASH. U.L.Q. 337.

The majority in McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), held that the right to privacy applied only in "certain instances when . . . a few people are involved in activity unintended for the public view [and in which] it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race." *Id.* at 1088. *See generally* Note, *supra* note 169.

171. 427 U.S. at 178. *See* Brief for Petitioners at 12: "The right of parents to rear and educate their children [is] subject, of course, to reasonable regulation to promote health, safety, and the general welfare."

172. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

173. *Id.* at 517 ("Young children do not discriminate against each other; that is a characteristic of maturity.").

174. The Court defined the parents' liberty interest in directing their children's education in *Pierce*:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535.

down an Oregon statute requiring all parents to enroll their children in public schools, and in *Meyer v. Nebraska*,[176] the Court invalidated a statute prohibiting the teaching of a foreign language to students below the ninth grade in public and private schools. Although these cases acknowledge a parent's right to send his child to a private school, they recognize that such schools are subject to "reasonable" state regulation.[177]

The *McCrary* Court held that the right to be free from racially discriminatory admissions to private schools, guaranteed by the thirteenth amendment and section 1981, was a reasonable restriction because it threatened neither the private schools' existence nor the content of classroom instruction.[178] The Court balanced the competing thirteenth and fourteenth amendment interests and in effect held that although a parent could send his child to a school that advocated segregation, he had no constitutionally protected right to send him to a segregated school.

VI. THE SIGNIFICANCE

A. *Possible Limitations: The Proof Required to Establish a Section 1981 Violation*

The Court's holding in *McCrary* that section 1981 prohibits racially

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Other liberty interests protected by the due process clause of the fourteenth amendment include the right of extended families to live together (Moore v. City of East Cleveland, 431 U.S. 494 (1977)), the right to choose whether to bear and how to rear children (Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972)), and the right to personal choice in the decision of whether to marry (Zablocki v. Redhail, 98 S. Ct. 673 (1978)).

175. 268 U.S. 510 (1925).

176. 262 U.S. 390 (1923).

177. For example, state regulations establish the minimum entrance age for school, minimum number of years a child must attend, and the subject matter that must be taught. When the parental right concerns the religious as well as educational instruction of their children, however, the Court has indicated a willingness to weigh the parental due process right more heavily and uphold fewer "reasonable" governmental restrictions. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Ginsberg v. New York, 390 U.S. 629 (1968); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

> [The *Pierce* Court recognized] the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

268 U.S. at 534. *Pierce* did not seem to confer on the states any power to dictate admission practices of particular private schools.

178. 427 U.S. at 178.

discriminatory admissions procedures in private schools and is a valid exercise of Congress' thirteenth amendment enforcement power, may enable the Court to order broad remedial desegregation programs and uphold new affirmative action legislation. Whether this potential is realized depends largely on the kind and amount of proof required to establish a section 1981 violation.[179]

Although proof of discrimination is necessary to establish a thirteenth or fourteenth amendment violation, the Court has recently required plaintiffs to prove an intent or purpose to discriminate in fourteenth amendment cases and has refused to infer intent from statistical evidence of racially disproportionate impact.[180] In section 1981 employment discrimination cases, however, the Court has held that the less stringent Title VII test, articulated in *Griggs v. Duke Power Co.*,[181] applies. Statistical evidence that a hiring test or practice resulted in a disproportionate racial impact raises a prima facie case of discrimination;[182] the burden then shifts to the employer to demonstrate a business necessity for the policy and a direct relationship between the test or practice and job performance.[183] This burden is difficult to sustain and the employer, found guilty of racial discrimination, is subject to remedial court orders.[184]

In 1976, however, the Court discussed the Title VII test in *Washington v. Davis*[185] and hinted that it might narrow the gap between the proof required for an action derived from the thirteenth and fourteenth amendments. This would limit the impact of *McCrary*.[186] *Washington* substantially reduced the employer's burden established in *Griggs* by ruling that

179. *See* note 118 *supra*.

180. *See* cases cited in note 44 *supra*.

181. 401 U.S. 424 (1971).

182. *See* notes 61-62 *supra* and accompanying text.

183. *See* notes 45-50 *supra* and accompanying text.

184. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Douglas v. Hampton, 512 F.2d 976, 981-82 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 481 F.2d 1333, 1337 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); Payne v. Travenol Laboratories, Inc., 416 F. Supp. 248, 255-60 (N.D. Miss. 1976).

185. 426 U.S. 229 (1976).

186. Because lower courts have interpreted § 1981 and Title VII similarly in regard to proof required to establish a prima facie violation and rebuttal evidence by the defendant, it seems logical that a change in defendant's rebuttal evidence under Title VII will be read into § 1981 cases. *See* notes 63-64 *supra* and accompanying text. The Supreme Court, however, has not yet explicitly considered the kind of proof required by plaintiff to establish a § 1981 or § 1982 violation. *See* notes 188-197 *infra* and accompanying text.

an employer could demonstrate the job relatedness of a test or practice by showing that an employee's test performance correlated with his job training program performance rather than his job performance.[187] If a prima facie case of racial discrimination can thus be more easily rebutted, the advantages of Title VII's less stringent proof requirement will disappear. To succeed, a plaintiff would be forced to demonstrate a discriminatory intent or purpose.

The significance of *McCrary* may also turn on whether racial discrimination must be *one of* or the *sole reason* for a refusal to contract. Following *Jones*, the Seventh Circuit held, in *Smith v. Sol D. Adler Realty Co.*,[188] that a defendant violated section 1982 when race was one of several reasons for his refusal to contract with the plaintiff.[189] Although *Adler* is consistent with lower court Title VII and section 1981 employment discrimination cases, the Supreme Court has carefully noted in its 1866 Civil Rights Act decisions that the plaintiffs were denied their rights solely because of their color.[190] The Court continued this pattern in *McCrary* by accepting, without discussion, the trial court's finding that the plaintiffs were denied admission solely on the basis of race.[191] The

187. 426 U.S. at 249-51.

188. 436 F.2d 344 (7th Cir. 1971).

189. *Id.* at 349-50. *See* Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1974) (defendant refuted charge that race was a factor in his refusal to sell plaintiff property with subjective statement of his intent; dissent urged that rebuttal of prima facie case of racial discrimination under § 1981 or § 1982 should be governed by Title VII standards: "When a person announces withdrawal of property from the market after he, or his agent, learns that the prospective purchaser is black, I would require him to prove that withdrawal served a business or other rational purpose." *Id.* at 118); Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973) (on the basis of the number of blacks in the town and evidence of a racial slur having been made, court concluded race was a factor in the refusal to deal); Stevens v. Dobbs, Inc., 483 F.2d 82, 83-84 (4th Cir. 1973) (violation of § 1982 when race is an "important element" in a refusal to deal); Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055, 1056 (7th Cir. 1972) (if race was *a* factor in refusal to deal, § 1982 was violated).

190. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 455 (1975) (Court noted that EEOC " 'Final Investigation Report' supported petitioner's claims of racial discrimination"); Tillman v. Wheaton-Haven Recreational Ass'n, Inc., 410 U.S. 431, 438 (1973) (Court found "no plan or purpose of exclusiveness" except race); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969) (Court noted that there was "no selective element other than race"); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 412 (1968) (Court noted that "petitioners . . . alleged that the respondents refused to sell them a home . . . for the sole reason that petitioner . . . is a Negro").

191. 427 U.S. at 165-66. *See* Note, *supra* note 59, at 430-32.

Court may have accepted the district court's finding because it believed the lower court had determined that the children would have been admitted "but for" their race. *McCrary* would then limit section 1981 at least as it applies to contracts involving private schools; a plaintiff will rarely be able to meet this proof burden and a defendant, by demonstrating that it relied on subjective criteria such as recommendation letters, will escape liability under section 1981.[192]

If the Court is requiring a "but for" test in its 1866 Civil Rights Act cases, it is likely to require the same test in section 1981 and Title VII employment discrimination cases.[193] In view of the Court's recent contraction of the fourteenth amendment,[194] it is conceivable that it will similarly limit Title VII and section 1981 by increasing the plaintiff's initial burden of proof. The Fifth Circuit, however, interpreted *McCrary* more broadly in *Riley v. Adirondack Southern School for Girls*.[195] Like *McCrary*, the plaintiff claimed that she was denied admission to a private school because of her race. The court conceded that certain language in *McCrary* suggested the Supreme Court had incorporated a "but for" test into section 1981, but noted that at another point in its opinion the *McCrary* Court expansively defined the scope of section 1981: " 'It is now well established that § 1 of the Civil Rights Act of 1866 . . . prohibits racial discrimination in the making and enforcement of private contracts.' "[196] Because racial discrimination arises whenever race is *a factor* in the refusal to contract, the court held, *McCrary* required a finding of a section 1981 violation in all cases in which race was *one factor* motivating the defendant's refusal to deal with the plaintiff.[197]

192. *See, e.g.*, Riley v. Adirondack S. School for Girls, 368 F. Supp. 392 (M.D. Fla. 1973), *rev'd*, 541 F.2d 1124 (5th Cir. 1976). Although the district court recognized that race was one of several factors resulting in the plaintiff's rejection, it denied relief on the theory that, "[u]nless it can be found that, *but for* race the complainant would have succeeded, there is no denial of the rights assured by § 1981." *Id.* at 398. Employment of the "but for" test allows the defendant to justify the challenged action with subjective criteria that may be mere pretexts.

193. *See* notes 61-62 *supra* and accompanying text.

194. *See* notes 39-44 *supra* and accompanying text.

195. 541 F.2d 1124 (5th Cir. 1976).

196. *Id.* at 1126 (quoting Runyon v. McCrary, 427 U.S. at 168).

197. *Id.* at 1126. It must be noted, however, that the court closely scrutinized the defendant's nonracial reasons for refusing to admit the plaintiff and concluded they were all spurious. On the facts of *Riley*, therefore, the defendant's refusal to contract was based *solely* on racial grounds. *Id.*

B. *Implications of* McCrary *for Broad Court Ordered Desegregation Plans and Affirmative Action Legislation*

Assuming that a section 1981 violation may be established by the less stringent proof requirements discussed above, a court may then fashion a remedy to correct the effects of the statutory violation. In both Title VII and section 1981 employment cases, lower federal courts have fashioned broad remedies to make the injured party whole, even though the remedy may injure innocent persons.[198] The Eighth Circuit embraced an absolute hiring preference based on race in *Carter v. Gallagher*,[199] explaining:

> [W]e hesitate to advocate implementation of one constitutional guarantee by the outright denial of another. Yet we acknowledge the legitimacy of erasing the effects of past racial discriminatory practices. . . . To accommodate these conflicting considerations, we think some reasonable ratio for hiring minority persons who can qualify under the revised qualification standards is in order for a limited period of time, or until there is a fair approximation of minority representation consistent with the population mix in the area.[200]

These remedies include affirmative action programs,[201] racial preference

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198. 42 U.S.C. § 2000e-5(g) (Supp. V 1975) provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate.

The Fifth Circuit explained the "make whole" principle in Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976), as follows:

> In Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1364, 1367, we observed that "federal remedial legislation has created *a right of action ensuring that a discriminatee may be made whole for an employer's misconduct*." (emphasis added). . . . The rule . . . recently endorsed by the Supreme Court in *Franks v. Bowman* . . . is that blacks previously discriminated against must be given such remedial relief as to enable them to achieve their "rightful place" in an employer's employment hierarchy. The rightful place theory is an equitable accommodation between two countervailing interests. The first interest is that of prior discriminatees to achieve what would have been theirs in the absence of discrimination. The countervailing interests are those of employers, employees, and consumers—in maintaining safety and efficiency—and those of employees who acquired their positions within the discriminating system and would suffer unfairly if required to give up such positions to members of an affected class.

Id. at 1167-68. *See generally* Note, *Last Hired, First Fired—Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975).

199. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

200. *Id.* at 330.

201. *See, e.g.*, Morrow v. Crisler, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974); EEOC v. Local 2P, Litho. & Photoengravers I.U., 412 F. Supp. 530 (D. Md. 1976).

hiring quotas,[202] reinstatement,[203] back pay,[204] and constructive seniority.[205] Courts have also ordered the discontinuance of hiring and promotional policies that had a racially discriminatory effect[206] and held that under special circumstances relief could be extended to persons dissuaded from applying for a job because of discriminatory practices.[207]

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202. *See, e.g.*, NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Nowlin v. Pruitt, 417 F. Supp. 408 (N.D. Ind. 1976); Sherrill v. J.P. Stevens & Co., 410 F. Supp. 770 (W.D.N.C. 1975), *aff'd mem.*, 551 F.2d 308 (4th Cir. 1977).

203. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974).

204. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

205. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

206. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

207. *See* Acha v. Beame, 531 F.2d 648 (2d Cir. 1976). In this sex discrimination layoff case involving women police officers who had been last hired and first fired in accordance with the New York City Police Department seniority system, the court held that "[i]f a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand the current layoffs, then her layoff violates section 703(a)(1) of Title VII . . . ." *Id.* at 654. Although the court noted

> that the distinction between seniority from the date of hire and earlier, constructive seniority seems attractive because of the unstated moral premise that it is wrong to give seniority credit to one who did not work for it. . . . the limited number of employees who might get such seniority here were prevented by defendants' wrongdoing from attaining it before.

Id. at 655.

> A plaintiff could satisfy the burden of proof by demonstrating that she actually filed an application for employment or wrote a letter complaining about the hiring policy early enough during the period of discrimination, or offer proof that she had expressed a desire to enlist in the police force but was deterred by the discriminatory practice barring females. Relief will, of course, be limited to persons who eventually were accepted as police officers, so there is no question about their qualifications for the job.

Id. at 656. Although this burden was stiff, Chief Judge Kaufman, concurring, explained the equities involved in the constructive seniority relief at issue here:

> It is conceivable that the standard of proof we require may be difficult or impossible to meet for some female police officers who took no overt action with regard to employment in the Police Department during the years in which discrimination in hiring prevailed. Nor would it be appropriate to interpret our holding as stating that some female officers will be put into a favored position to claim that relief must be automatic even though they cannot establish that the prior discrimination in any way deterred them from, or interfered with their quest for, employment in the Police Department. The proof required should not pose a problem in the future, however, in view of the notice our opinion provides to all. Moreover, because of the male police officers' important countervailing interest, we believe it inappropriate to establish a special or double standard for the plaintiffs before us, even though they obviously had no notice, at the time they suffered discrimination, of the requirements we now impose.

Id. at 657.

The Supreme Court in *Franks v. Bowman Transportation Co.*[208] endorsed broad Title VII remedies for identifiable victims of employment discrimination even though white employees claimed the remedies subjected them to reverse discrimination.[209]

The *McCrary* Court, finding that racially discriminatory admissions procedures in private schools violated section 1981, could have remanded the case to the district court with instructions to fashion a remedy that would make the plaintiffs whole by placing them in the position they would have been in but for the discrimination.[210] In light of the creative remedies courts have devised in employment discrimination cases to effectuate the make whole principle,[211] the district court could have directed the private schools to admit not only the students actually discriminated against, but all black students who were discouraged from applying to the schools because of their notorious racial policies.[212] To ensure that the plaintiffs were made whole the court could also have required the schools to actively recruit black applicants because, had the schools not employed discriminatory admissions policies, other black

208. 424 U.S. 747 (1976).

209. The Court held:

> [D]enial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make whole" objective of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But . . . there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination . . . .

Id. at 774. Chief Justice Burger, concurring, expressed concern over such relief:

> [A]lthough retroactive benefit-type seniority relief may sometimes be appropriate and equitable, competitive-type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning. More equitable would be a monetary award to the person suffering the discrimination. . . . In every respect an innocent employee is comparable to a "holder-in-due-course" of negotiable paper or a bona fide purchaser of property without notice of any defect in the seller's title. In this setting I cannot join in judicial approval of "robbing Peter to pay Paul."

Id. at 780-81.

210. *See* Acha v. Beame, 531 F.2d 648 (2d Cir. 1976). The Second Circuit noted that the congressional intention in amending Title VII in 1972 was " 'to give courts wide discretion exercising their equitable powers to fashion the most complete relief possible' and to restore aggrieved persons 'to the position where they would have been if not for the unlawful discrimination.' " *Id.* at 654-55 (quoting legislative history of Equal Employment Opportunity Act). In fact, the *McCrary* Court simply affirmed the Court of Appeals decision in all respects, 426 U.S. at 186. *See* note 115 *supra*.

211. *See* notes 201-09 *supra* and accompanying text.

212. *See* Acha v. Beame, discussion, *supra* note 207.

students arguably would have been admitted and the plaintiffs would have been attending integrated schools.[213]

The implications of this discussion are obvious: a student denied admission to a university or professional school may, under *McCrary*, allege that race was one factor motivating the university's action in violation of his section 1981 "same right" to contract.[214] He could establish a prima facie case of racial discrimination by demonstrating that the school's admission procedures included use of a standardized test that had a racially disproportionate impact on admissions. The burden would then shift to the university to prove a necessity for the test and a

213. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (One of Title VII's purposes is "to make persons whole for injuries suffered on account of unlawful employment discrimination."). This position was generally endorsed in Franks v. Bowman Transp. Co., 424 U.S. 747, 764-66 (1976) ("Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application.").

214. Although a university may voluntarily adopt a preferential treatment-affirmative action program, the Court has not yet determined its constitutionality against an equal protection or § 1981 claim by an injured innocent person. *See* Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted* 429 U.S. 1090 (1977); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); note 253 *infra*.

In Germann v. Kipp, 429 F. Supp. 1323 (W.D. Mo. 1977), the court upheld a voluntary affirmative action program adopted by the Kansas City Fire Department to meet federal standards for the employment of women and minority groups. It subjected the department's program to very strict scrutiny, however:

> In the absence of a finding of specific past discrimination requiring specific relief, there can be no doubt that an employer must make a clear and convincing showing of an acceptable basis for the affirmative action plan which is temporarily imposed and reasonably drawn to meet the demonstrated need. While such a showing admittedly places a difficult burden of justification upon an employer, this Court believes that an employer who meets that burden may establish the validity of a plan which grants a preference to minorities even if it necessarily results in detriment to the majority. Whenever there is a limited pool of resources from which minorities have been disproportionately excluded, equalization of opportunity can only be accomplished by reallocation of those resources.

Id. at 1335.

The court in Detroit Police Officers Ass'n v. Young, 46 U.S.L.W. 2463 (E.D. Mich. Mar. 14, 1978), however, considered a similar Detroit Police Department voluntary affirmative action program that established a quota for the promotion of black police officers solely on the basis of race and struck it down as violative of Title VII, the fourteenth amendment, and § 1981. Absent proof of prior discrimination, a promotion plan based on race, whether voluntarily adopted or judicially mandated, violates section 703(a) of Title VII. Furthermore, even when proof of racial discrimination is present, only a court ordered remedy incorporating a racial quota is constitutional under section 706(g) because Congress was cognizant that courts alone are in a position to afford due process to all concerned in determining the necessity for relief from prior discriminatory practices. Because the promotion system discriminated against whites in violation of Title VII, the court held as a matter of law that it also violated § 1981.

relationship between it and academic performance.[215] If the defendant failed to meet the burden, the court, exercising its equity powers, could order a broad affirmative action or admissions quota program.[216]

Broader implications for affirmative action programs arise out of *McCrary*. In 1966, the Supreme Court in *South Carolina v. Katzenbach*[217] upheld the Voting Rights Act of 1965[218] as a legitimate exercise of Congress' remedial powers under section 2 of the fifteenth amendment.[219] The Court pointed to numerous litigated cases demonstrating racial discrimination in past administration of state voting qualifications and held that Congress could reasonably have concluded "that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effects of past discrimination in favor of unqualified white registrants."[220] Congress

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The court further held that the affirmative action program discriminated against whites in violation of the fourteenth amendment equal protection clause and that the defendant had not met its burden of showing the racial classification served a compelling state interest or that there was no less restrictive means of accomplishing this interest. The court, after closely scrutinizing the program, concluded:

> The evil of the departmental quota system lies in its effect, not in its "affirmative action" name. While the purpose of a quota system is generally compassionate its effect is intolerable because it denigrates individuals by reducing them to a single immutable birth characteristic—skin pigmentation. The concept of a quota disregards the fact that persons are not fungible goods and that special qualifications may be required for the job in question. It prefers some while excluding others on the basis of an attribute totally unconnected with the merits of the promotional candidate.
>
> Racial discrimination is as indefensible when practiced against whites as it is when practiced against blacks and does not become "reverse" merely because it is practiced against whites. "Reverse" discrimination is a misnomer as racial discrimination knows neither a course nor a direction. The keystone of a democratic government is the concept of equality, and to judge discrimination against whites in a different manner, when the same discrimination is practiced against blacks, would be to resurrect the "separate but equal" doctrine, a philosophy presumably buried long ago.

Id. at 2464.

To avoid application of this difficult test and a possible holding of unconstitutionality by the Supreme Court, blacks should attack the institution's policies under the less stringent proof requirements of § 1981 and obtain a decision that their constitutional rights have been violated.

215. *See* notes 45-50,180-87 *supra* and accompanying text.

216. *See* notes 198-209 *supra* and accompanying text.

217. 383 U.S. 301 (1966).

218. Act of Aug. 6, 1965, Pub. L. 89-110, 79 Stat. 437 (current version at 42 U.S.C. § 1973a-d (Supp. V 1975).

219. 383 U.S. at 327-28. U.S. CONST. amend. XV, § 2 provides that "Congress shall have the power to enforce this article by appropriate legislation."

220. 383 U.S. at 334. The Court reasoned:

> Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965. First: The

thus had the power to enact a statute, national in scope, to remedy the vestiges of past discrimination.[221]

A few months later, in *Katzenbach v. Morgan*,[222] the Court considered the scope of Congress' enforcement power under section 5 of the fourteenth amendment.[223] The Court relied on *South Carolina v. Katzenbach* and expansively interpreted Congress' section 5 power[224] to sustain the Voting Rights Act provision that compelled New York to extend the franchise to Puerto Ricans who, although illiterate in English, had completed the sixth grade.[225] Justice Brennan, writing for the Court, held that the issue was not "whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied," but rather, whether Congress could "prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth

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> measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions . . . . Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

Id. at 327-28.

The importance of legislative findings is discussed in Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

221. 383 U.S. 301, 327-28 (1966).

222. 384 U.S. 641 (1966). *See generally* Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79; Nichol, *An Examination of Congressional Powers Under § 5 of the Fourteenth Amendment*, 52 NOTRE DAME LAW. 175 (1976); Note, *Private Interference with an Individual's Civil Rights: A Redressable Wrong Under § 5 of the Fourteenth Amendment*, 51 NOTRE DAME LAW. 120 (1976).

223. U.S. CONST. amend. XIV, § 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *See generally* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964); Developments: *Congressional Power Under Section Five of the Fourteenth Amendment*, 25 STAN. L. REV. 885 (1975).

224. 384 U.S. at 648-51.

225. *Id.* at 658. Section 4(e)(2) of the Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 439 (codified at 42 U.S.C. § 1973b(e) (1970) (amended 1975)) provides in pertinent part:

> No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or Territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language . . . .

Amendment? In answering this question," the Court held, "our task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause."[226] The Court held that the superficial review standard established in *McCulloch v. Maryland*[227] was appropriate because "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[228] Because Congress had superior factfinding capacity and could engage in extensive legislative investigations, the Court would defer to a legislative determination, as long as

> *we perceive a basis upon which Congress might predicate a judgment* that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the

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226. 384 U.S. at 649-50.

The Seventh Circuit recently endorsed this expansive reading of § 5 of the fourteenth amendment in United States v. City of Chicago, 46 U.S.L.W. 2464 (7th Cir. Mar. 14, 1978). The city argued on the basis of the tenth amendment, endorsed in National League of Cities v. Usery, 426 U.S. 833 (1976), and Washington v. Davis, 426 U.S. 248 (1976), that Title VII, as applied to state and local governments by the 1972 amendments to the 1964 Civil Rights Act constitutionally based on § 5 of the fourteenth amendment, must incorporate the "intent to discriminate" requirement to state a valid racial discrimination-equal protection claim under the fourteenth amendment. The Court, quoting *Katzenbach v. Morgan*, rejected this claim, and held that the *Griggs* test (proof of discriminatory impact) was sufficient to prove a Title VII discrimination claim against a state as well as a private employer. The court reasoned that a statute enacted under § 5 was constitutional if it was "appropriate legislation" and was "plainly adapted to that end and . . . not prohibited by but is consistent with the letter and the spirit of the constitution." Therefore,

> [t]his case is governed by the same principles. The 1972 amendments were enacted to enforce the anti-discrimination prohibitions of the Equal Protection Clause and are plainly adapted to that end. It was well within the congressional authority to weigh the competing policy considerations and determine that public employees required the same safeguards against discrimination given to private employees by the Griggs standard. Thus, since the 1972 amendments are clearly rationally related to and consistent with the letter and the spirit of the Fourteenth Amendment, and since the means chosen were not unconstitutional, the court concludes that Congress could constitutionally incorporate the Griggs test into the 1972 amendments.

46 U.S.L.W. at 2465.

227. 17 U.S. (4 Wheat.) 316 (1819). The standard of review is: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

228. 384 U.S. at 651.

Equal Protection Clause.[229]

In *Oregon v. Mitchell*,[230] the Court retreated from this expansive definition of Congress' enforcement power under the Civil War Amendments. Justice Stewart, joined by the Chief Justice and Justice Blackmun,[231] agreed with Justices Black[232] and Harlan[233] that section 5 of the fourteenth amendment did not empower Congress to compel states to lower their voting age requirement to eighteen.[234] Justice Black, concurring separately, noted three limitations on Congress' section 5 power: first, it could not legislate to repeal other constitutional provisions; second, it could not strip the states of their power to govern themselves; and third, it could not deny to others the fourteenth amendment's guarantee of personal equality and freedom from discrimination.[235] The Court would, however, construe Congress' power under the Civil War Amendments broadly when it legislated against racial discrimination.[236]

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229. *Id.* at 656 (emphasis added).

230. 400 U.S. 112 (1970).

231. *Id.* at 293.

232. *Id.* at 129-30. Justice Black distinguished Katzenbach v. Morgan, 384 U.S. 641 (1966), and South Carolina v. Katzenbach, 383 U.S. 301 (1966), which upheld other sections of the 1965 Voting Rights Act:

> In *Katzenbach v. Morgan, supra*, the Court upheld a statute which outlawed New York's requirement of literacy in English as a prerequisite to voting as this requirement was applied to Puerto Ricans with certain educational qualifications. The New York statute overridden by Congress applied to all elections, and in *South Carolina v. Katzenbach* . . . the Court upheld the literacy test ban of the Voting Rights Act of 1965. That Act proscribed the use of the literacy test in all elections in certain areas. But division of power between state and national governments, like every provision of the Constitution, was expressly qualified by the Civil War Amendments' ban on racial discrimination. Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments.

400 U.S. at 129-30.

233. *Id.* at 210.

234. *Id.* at 293.

235. *Id.* at 128.

236. *Id.* at 126-27. Justice Black stated:

> The Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments have expressly authorized Congress to "enforce" the limited prohibitions of those amendments by "appropriate legislation."
>
> Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race . . . . While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discriminations other than those on account of race . . . . the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.

The *Mitchell* Court concluded that Congress could have determined that the continuing effects of documented voting and educational discrimination could be removed only by a nationwide statutory remedy.[237] Therefore, the Court held, under *South Carolina v. Katzenbach* and the fifteenth amendment, that the 1970 Voting Rights Act amendment, which imposed a five year nationwide ban on the use of literacy tests for voting qualifications, was a legitimate exercise of Congress' power.[238]

The Court specifically noted in *Katzenbach v. Morgan* that the Voting Rights Act was devised to grant fourteenth amendment rights to persons denied them because of the continuing effects of past discrimination. Moreover, the challenged provision did not deprive any person of his right to vote in order to extend the franchise to persons who otherwise would have been denied it by state law; it thus did not impinge the constitutional rights of innocent persons.[239] In *Mitchell*, Justice Black, concurring, concluded that Congress could not enact remedial legislation that would interfere with the rights of others;[240] he conceded, however, that the Court must interpret Congress' enforcement power more expansively when employed to remove the continuing effects of racial discrimination.[241]

It is, therefore, uncertain whether the Court would uphold a statute enacted under the enforcement clauses of the thirteenth, fourteenth, or fifteenth amendments, which, by granting preferential treatment to one race to eradicate the vestiges of discrimination, infringed the rights of another race.[242] Lower courts[243] have recently considered this question

237. *Id.* at 131-34.

238. *Id.* at 118.

239. 384 U.S. at 656-59.

240. *See* note 235 *supra* and accompanying text. Justice White, joined by Justices Stevens and Rehnquist, reaffirmed this position in United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977), stating: "There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment . . . ." *Id.* at 165. *But see* Justice Brennan's concurring opinion in which he noted: "I believe, therefore, that the history of equitable decrees utilizing racial criteria fairly establishes the broad principle that race may play a legitimate role in remedial policies." *Id.* at 172 n.2.

241. *See* note 236 *supra*; Note, *The "New" Thirteenth Amendment: A Preliminary Analysis, supra* note 23, at 1308-20.

242. For a discussion of whether the effects of past discrimination suffered by one group may be remedied by preferential treatment that has an adverse impact on another group, see Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Griswold, *Some Observations on the DeFunis Case*, 75 COLUM. L. REV. 512 (1975); Kaplan, *Equal Justice in an Unequal World:*

while construing the constitutionality of the 1977 Public Works Employment Act provision that requires:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises.[244]

A federal district court in Pennsylvania,[245] denying an equal protection attack, held that the preferential treatment provision was an appropriate

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Equality for the Negro—The Problem of Special Treatment, 61 NW. U.L. REV. 363 (1966); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Nickel, *Preferential Policies in Hiring and Admission: A Jurisprudential Approach*, 75 COLUM. L. REV. 534 (1975); O'Neil, *Racial Preferences and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975).

243. *See, e.g.*, Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023 (D. Vt. 1977). The court upheld the use of quotas to remedy the injury caused by racial discrimination. After closely scrutinizing congressional findings justifying the Act, however, it concluded that because there was no racial discrimination in Vermont, the Act was unconstitutional as applied.

In Fullilove v. Kreps, 443 F. Supp. 253 (S.D.N.Y. 1977), the court endorsed the use of racial classifications to remedy the invidious effects of past racial discrimination in §§ 1981, 1983, 1984, and Title VII actions as well as in this Act. Although it acknowledged that the legislative findings of racial discrimination supporting the Act were ambiguous, the court inferred from available empirical data and congressional action in the past 10 years, that Congress intended by this Act to remedy the effects of prior discrimination against minority businesses seeking to participate in government contracting.

In Associated Gen. Contractors v. Secretary of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977), the court held that the 10% quota constituted a classification based on race and was subject to strict scrutiny. Under this test it was unconstitutional because it was supported by no compelling state interest and it was not the least restrictive alternative. Of quotas, the court emphatically stated: "Quotas are absolutely invidious and unconstitutional. . . . All discrimination solely on the basis of race or national origin, direct or reverse, converse or inverse, is invidious and unconstitutional." *Id.* at 966.

Three district courts have upheld the public works provision and eight have refused to grant preliminary injunctions to prohibit its enforcement. N.Y. Times, Apr. 2, 1978, § F, at 6, col. 2.

244. 42 U.S.C.A. § 6705(f)(2) (Supp. II, Sept. 1977).

> For the purposes of this paragraph, the term "minority business enterprises" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Id.

245. Constructors Ass'n v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977), *aff'd*, 46 U.S.L.W. 2549 (3d Cir. Apr. 18, 1978).

exercise of Congress' power to enforce the Civil War Amendments.[246] It acknowledged that whenever a legislative classification is based on race, courts must scrutinize it closely to determine whether the classification is justified by a compelling state need and the means chosen are the least restrictive.[247] In this case, Congress had made a finding of past racial discrimination in the construction industry and enacted the challenged provision to remedy it; the means chosen were necessary under the circumstances.[248] The Third Circuit affirmed.[249]

In *Associated General Contractors v. Secretary of Commerce*,[250] on the other hand, a California district court held the minority quota law unconstitutional and enjoined future allocation of federal funds subject to the quota requirement. The court stated that "[a]ll discrimination solely on the basis of race or national origin, direct or reverse, converse or inverse, is invidious and unconstitutional."[251] The only justification for the statutory provision, the court noted, was to prefer one race over another; "[i]t is not a permissible government objective to direct financial assistance to segments of the community which are classified solely on the basis of race to the exclusion of other segments."[252] The Supreme Court's forthcoming decision in *Bakke v. Regents of the University of California*, involving a challenge to a state medical school's *voluntary* adoption of a race preference admissions policy, may not be determinative of this issue.[253] Appeals of both Public Works Employment Act

246. 441 F. Supp. 947. The court noted that "Congress has a special responsibility for interpreting and enforcing the Civil Rights Amendments to the Constitution . . . and has in the past authorized expenditures for such measures, the most recent of which is the Public Works Employment Act . . . ." *Id.* It surveyed the several contexts in which Congress and the courts have recognized race as a permissible criterion to remedy the effects of past discrimination. *Id.* at 947-49.

247. *Id.* at 949-50.

248. *Id.* at 950-54. The court exhibited extreme deference to the congressional finding of past discrimination, noting: "While the lack of legislative history to support the purpose of the statute is troublesome, the court cannot say that the statute is so crude that we cannot discern its remedial purpose." *Id.* at 952.

249. 46 U.S.L.W. 2549 (3d Cir. April 18, 1978).

250. 441 F. Supp. 955 (C.D. Cal. 1977), *petition for cert. filed*, 46 U.S.L.W. 3497(U.S. Jan. 31, 1978) (No. 77-1078).

251. *Id.* at 966.

252. *Id.* at 965.

253. *See* Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977). The court held that a voluntary affirmative action program giving absolute preference to minority students for sixteen places in the first year class of a state university medical school on the basis of race violated the fourteenth amendment rights of nonminorities to be free from racial discrimination. The court noted, however, that when a court finds a defendant guilty of past

cases are being taken to the Court.[254]

The Court held in *McCrary* that Congress could define "badges of slavery" and, under the thirteenth amendment's enforcement clause,

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discriminatory acts, preferential treatment is permissible as a remedy for the equality that the plaintiff would have had but for the past discrimination. The court stated:

> Absent a finding of past discrimination—and thus the need for remedial measures to compensate minorities for the prior discriminatory practices of the employer—the federal courts, with one exception, have held that the preferential treatment of minorities in employment is invalid on the ground that it deprives a member of the majority of a benefit because of his race. [citations omitted]
>
> It is important to observe that all of these cases . . . hold that it is unconstitutional reverse discrimination to grant a preference to a minority employee in the absence of a showing of prior discrimination by the particular employer granting the preference. Obviously, this principle would apply whether the preference was compelled by a court or voluntarily initiated by the employer . . . . [T]here is no merit in the assertion of the dissent that there is some undefined constitutional significance to the fact that the University elected to adopt the special admission program and was not compelled to do so by court order. To the victim of racial discrimination the result is not noticeably different under either circumstance.

Id. at 57-59, 533 P.2d at 1168-69, 132 Cal. Rptr. at 696-97.

Because the affirmative action program challenged in *Bakke* was adopted voluntarily and is not a court ordered or legislatively enacted *remedy* to correct the effects of past discriminatory acts in violation of the Constitution, the Supreme Court's decision in *Bakke* may not resolve the constitutionality of the statutes discussed herein. Although the Supreme Court in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), generally endorsed broad Title VII *remedies* against claims by white employees that the remedies subjected them to reverse discrimination, it held in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), that whites as well as blacks could bring claims for discrimination in contracting under § 1981. If the preferential treatment program were *voluntarily* adopted, arguably an innocent individual injured by its operation could bring a Title VII (employment) or § 1981 claim. The court, in a footnote, acknowledged that its decision in *McDonald* raised such a possibility but withheld judgment on it. Justice White, for the majority, commented: "Santa Fe disclaims that actions challenged here were any part of an affirmative action program . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted." *Id.* at 281 n.8.

If the Court endorses the University of California's affirmative action program this Term against the claim of an injured white person, the constitutionality of the legislative and court ordered remedies discussed herein would seem ensured. Should the Court affirm the California Supreme Court's decision and strike down the program as violative of the equal protection clause, the constitutionality of *remedial* legislation, based on the enforcement clause of the thirteenth amendment, will remain unresolved.

254. Associated General Contractors v. Secretary of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977), *petition for cert. filed*, —; Construction Ass'n v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977), *aff'd*, — F.2d — (1978), *petition for cert. filed*, —. Although the Justice Department has urged the Court to deny certiorari on mootness grounds because all the money appropriated under the special public works program has been allocated, it seems unlikely that the Court will agree. As a practical matter, this result would leave the unconstitutionality decision in effect in central California and nowhere else. *See* N.Y. Times, Apr. 2, 1978, § F, at 6, col. 1.

enact appropriate legislation to abolish them. It further ruled that Congress could reasonably have determined that racial discrimination in contracting was such a badge, and therefore abolished it under section 1981.[255] Under the remedial theory developed in *South Carolina v. Katzenbach, Katzenbach v. Morgan*, and *Oregon v. Mitchell*,[256] Congress could find that the consequences of past and present racial discrimination in contracting are pervasive and that efforts to eliminate such discrimination have failed. It could also conclude that litigation under section 1981 would be ineffective because the denial of a right to contract to obtain quality education, employment, and housing in the past had such a debilitating effect on blacks that, regardless of how scrupulously section 1981 was enforced in the future, it could not remedy the invidious consequences of past discrimination.[257]

Congress could therefore enact a broad, nationwide, remedial statute to eliminate the effects of discrimination in contracting.[258] Finding that a limited number of blacks attend professional schools despite repeated federal government attempts to stimulate affirmative action admissions programs, Congress could require that, for a specified period, these schools must admit a certain percentage of minority students each year. A similar statute relating to employment and housing could be enacted.

Although the constitutionality of such statutes is unclear,[259] courts

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255. *See* notes 121-23 *supra* and accompanying text.

256. *See* notes 217-38 *supra* and accompanying text.

257. The Court deferred to legislative findings in South Carolina v. Katzenbach, 383 U.S. 301 (1966), and Katzenbach v. Morgan, 384 U.S. 641 (1966), and might do the same in the case proposed here. *See* notes 220 & 229 *supra* and accompanying text.

258. Justice Stewart noted in Oregon v. Mitchell, 400 U.S. 112 (1970), that Congress, in the interest of uniformity, could enact a nationwide remedy even if it did not find evidence of racial discrimination in every state:

> Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country. This in turn increases the likelihood of voluntary compliance with the letter and spirit of federal law. Nationwide application facilitates the free movement of citizens from one State to another, since it eliminates the prospect that a change in residence will mean the loss of a federally protected right. Nationwide application avoids the often difficult task of drawing a line between those States where a problem is pressing enough to warrant federal intervention and those where it is not. Such a line may well appear discriminatory to those who think themselves on the wrong side of it. Moreover the application of the line to particular States can entail a substantial burden on administrative and judicial machinery and a diversion of enforcement resources.
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> . . .
>
> In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records.

Id. at 283-84.

259. *See* notes 242-53 *supra* and accompanying text.

have recognized that Congress has wide discretion to remedy past discrimination and have upheld the specified percentage goals and time tables for minority hiring in the Philadelphia, Cleveland, Newark, and Illinois Ogilvie Plans.[260] In light of the Court's deference to Congress' legislative action under the Civil War Amendments in the past,[261] it is here suggested that the Court will uphold the constitutionality of the 1977 Public Works Employment Act[262] and, if enacted, the remedial statutes outlined above. Innocent persons who suffer discrimination as a result of these remedial statutes and court orders may more profitably argue that the infringement of their rights is so great in relation to the injury the statute was designed to remedy that their due process right to fair treatment under the law is violated.[263]

VII. CONCLUSION

The Court confronted the problem of "segregation academies" in *Runyon v. McCrary*[264] and held that section 1981, derived from the 1866 Civil Rights Act and the thirteenth amendment, prohibited discrimination in contracting for admission to private, commercially operated, nonsectarian schools. Intent on narrowing the scope of the fourteenth amendment, the Court chose not to reach private schools by expanding the state action or public function doctrines.

Although the Court admitted that the rights of privacy, association, and liberty were infringed by *McCrary*, it held that section 1981 was a valid exercise of congressional power. The Court thus implicitly held that

260. *See* Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972) (Illinois Ogilvie Plan); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970) (Newark Plan); Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1003 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971) (Philadelphia Plan); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970) (Cleveland Plan).

261. *See* notes 220 & 229 *supra* and accompanying text.

262. *See* notes 243-52 *supra* and accompanying text.

263. I am indebted to Professor Robert G. Dixon, Jr., Daniel Noyes Kirby Professor of Law, Washington University, for this observation. If the Court upholds remedial legislation that gives preferential treatment to blacks despite its necessary discriminatory effect on innocent whites, it would seem that an injured white could challenge the statute as violative of due process. He would argue that the benefit to the group aided by the legislation was insufficient to justify the resulting great deprivation to his liberty, that is, it was fundamentally unfair. *Cf.* Rochin v. California, 342 U.S. 165 (1952) (evidence obtained in violation of a defendant's fourth amendment rights that shocked the conscience and was repugnant to traditional notions of decency and fair play violated the due process clause).

264. 427 U.S. 160 (1976).

society's interest in nondiscrimination in private schools was sufficiently compelling to justify congressional action under the thirteenth amendment's enforcement clause despite its infringement of other constitutionally protected rights.

The *McCrary* decision may enable the Court to order broad remedial desegregation programs and uphold imaginative national remedial affirmative action legislation in employment, education, and housing. Whether this potential is realized depends on the proof required to establish a section 1981 violation and on the extent that remedies for constitutional violations will be allowed to impinge the rights of innocent parties.

Judith Barry Wish