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# Civil Rights Act; Section 1981; Title VII; Reverse Discrimination; Equal Protection; McDonald v. Santa Fe Trail Transp. Co.

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tion of actions under zoning regulations and the proper use of referendum. The lack of analysis of the effect of the provisions of the Eastlake charter on the people is a significant defect in the decision.

Laws, including zoning regulations, should be enacted for the general welfare and be applied fairly to the people they are promulgated to serve. Laws which allow arbitrary results and impede the accomodation of growth threaten the democratic process more severely than does the elimination of mandatory referenda which may achieve an exclusionary or illegitimate goal. In determining the constitutional validity of a law, its purpose and effect on society should be analyzed. Adherence to legal principles in a vacuum is meaningless.

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## CONSTITUTIONAL LAW

### *Civil Rights Act • Section 1981 • Title VII • Reverse Discrimination • Equal Protection*

*McDonald v. Santa Fe Trail Transp. Co.*, 96 S.Ct. 2574 (1976)

THE UNITED STATES SUPREME COURT in *McDonald v. Santa Fe Trail Transportation Co.*[1] held that Title VII[2] prohibits racial discrimination by both employers and unions against white persons upon the same standards as it prohibits racial discrimination against nonwhites. The Court further held that Section 1981[3] is applicable to racial discrimination in private employment against white persons as well as nonwhites.

In *McDonald*, petitioners, two white employees of respondent trans-

[1] 96 S.Ct. 2574 (1976).

[2] 42 U.S.C. §2000e-2 (1970), provides in part that:
(a) It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
(c) It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[3] Civil Rights Acts, 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. (emphasis added.)

portation company along with a black employee, were charged with the misappropriation of sixty one-gallon cans of antifreeze which were part of a shipment Santa Fe was carrying for one of its customers. Petitioners were fired by Santa Fe, while the black employee was retained. A grievance was promptly filed with Teamsters Local 988, representing Santa Fe's Houston employees, but the grievance proceedings secured no relief for petitioners. They next filed complaints with the Equal Employment Opportunity Commission (EEOC), charging that Santa Fe had discriminated against both petitioners on the basis of their race in firing them, and that Local 988 had discriminated against McDonald on the basis of his race by failing to represent properly his interest in the grievance proceedings, all in violation of Title VII of the Civil Rights Act of 1964. The EEOC notified petitioners in July 1971 of their right to initiate a civil action in federal district court within thirty days, since agency process did not secure relief for petitioners. This suit followed, petitioners joining their Section 1981 claim to their Title VII allegations.[4]

The District Court dismissed petitioners' claims under both Title VII and Section 1981, holding that Section 1981 was inapplicable to discrimination against whites, and that the facts alleged by petitioners failed to state a claim upon which Title VII relief could be granted. The Court of Appeals affirmed the dismissal.[5]

The Supreme Court's main grounds for reversal were based upon an examination of the legislative histories of both Title VII and Section 1981.[6] As a result of the examination of the legislative histories, the Court concluded that the district court erred in dismissing both petitioners' Title VII and Section 1981 claims against Santa Fe, and petitioner McDonald's Title VII and Section 1981 claims against Local 988.[7]

The two principal issues presented in *McDonald* were: (1) whether a complaint alleging that white employees were dismissed from employment based on a charge of misappropriating property from their employer, while a black employee similarly charged was not dismissed, states a claim under Title VII, and (2) whether Section 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." affords protection from racial discrimination in private employment to white persons as well as nonwhites.[8]

[4] 96 S.Ct. at 2576-77.

[5] McDonald v. Santa Fe Trail Transp. Co., 513 F.2d 90 (5th Cir. 1975) (per curiam).

[6] The legislative history of the original Civil Rights Bill of 1866 regarding the applicability of Section 1981 to actions by white persons is discussed in length by the Court. 96 S.Ct. at 2582-86.

[7] 96 S.Ct. at 2580.

[8] *Id.* at 2576.

Turning first to the Title VII issue, the Court reached the conclusion that petitioners had stated a claim under Title VII. The Court relied heavily upon *Griggs v. Duke Power Co.*,[9] which did not involve discrimination against whites, in its interpretation of the scope of Title VII. In *Griggs*, black employees at respondent's plant challenged respondent's requirement of a high school diploma or passing of intelligence tests as a condition of employment in, or transfer to, jobs at the plant. The Court in *Griggs* found that the primary "objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that had operated in the past to favor an identifiable group of white employees over other employees."[10] Chief Justice Burger stated:

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. *Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.* What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[11] (emphasis added.)

*Griggs* clearly points out that the purpose of Title VII was to do away with all discrimination in employment practices.

Title VII has also been applied to preferential quota hiring cases. In *Watkins v. Steelworkers, Local* 2369[12] plaintiffs, who were black, alleged racial discrimination because of a negotiated seniority system which used the principle of "last hired first fired" in making determinations in layoffs. The court found that there was no showing of past discrimination against minorities and that the system affected both whites and blacks alike, although admittedly more blacks were affected by the system. Relief was denied the plaintiffs because "Title VII was not designed to nurture . . . reverse discriminatory preferences."[13]

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[9] 401 U.S. 424 (1971).

[10] *Id.* at 429-30.

[11] *Id.* at 430-31. *See also* Ripps v. Dobbs House, 366 F. Supp. 205, 208 (N.D. Ala. 1973), where the court states in reference to Title VII:

> The statutory language makes abundantly clear that an employer may not arbitrarily penalize an employee because of his race, or any other protected characteristic.

[12] 516 F.2d 41 (5th Cir. 1975).

[13] *Id.* at 48. In *McDonald* preferential treatment was not used by respondents as a justification for their action. Title VII does not preclude preferential quota hiring as reverse discrimination against nonminorities where such an action is necessary to break the chain of past discriminatory practices. *See* Franks v. Bowman Transportation Co., 423 U.S. 814 (1976). *See generally,* Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Protection,* 27 RUTGERS L. REV. 675 (1974); Comment, *The Use of the "Bumping" Remedy to Alleviate Effects of Past Sex and Race Discrimination,* 28

The question of whether Title VII proscribes racial discrimination in private employment against whites on the same terms as against nonwhites had not been directly faced and decided by any of the circuits prior to *McDonald*. In *Parks v. Brennan*[14] the court held that a white career employee of the Department of Labor could seek relief under Title VII where he had been the victim of reverse discrimination. One decision to the contrary is *Haber v. Klassen*,[15] where the court decided that members of the white race may not seek relief for racial discrimination under Title VII unless the discrimination also operated against nonwhites. However, this decision was later reversed.[16] Furthermore, the EEOC consistently has interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites.[17]

The Court in *McDonald* taking cognizance of these decisions and stating that they were in accord with the "uncontradicted" legislative history of Title VII, concluded that there is nothing in the Act that would limit its application only to discrimination against blacks. On the contrary, Title VII prohibits the discharge of "any individual" because of such individual's race.[18]

After stating that Title VII was not limited by its terms to discrimination against members of a particular race, the Court addressed itself to respondents' contention that even though Title VII was generally applicable to whites, it afforded petitioners no protection because their dismissal was based on a serious criminal offense against their employer.[19] The Court rejected respondents' argument, as it was directly contrary to *McDonnell Douglas Corp. v. Green*,[20] where the Court held that while participation in a crime or other misconduct may be a sufficient criterion to discharge an em-

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RUTGERS L. REV. 1285 (1975). But an absolute preference for any group, minority or majority, is forbidden by law. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Watkins v. Steelworkers, Local 2369, 516 F.2d 41 (5th Cir. 1975); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (absolute preference held to operate as a present infringement on those nonminority persons who were equally or superiorly qualified). The use of quotas and ratios in hiring have been upheld where there has been past racial discrimination, and where the effect of using quotas and ratios in hiring is not concentrated on an identifiable group of nonminorities. *See* Kirkland v. New York State Dep't of Correctional Serv., 520 F.2d 420 (2d Cir. 1975); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974). *See generally* Note, 42 TENN. L. REV. 397 (1975).

[14] 389 F. Supp. 790 (N.D. Ga. 1974), *rev'd sub. nom. on other grounds,* Parks v. Dunlop, 517 F.2d 785 (5th Cir. 1975).

[15] 10 EMPL. PRAC. DEC. ¶10,387 (N.D. Ohio 1975).

[16] Haber v. Klassen, 12 EMPL. PRAC. DEC. ¶11,089 (6th Cir. 1976). *But see* Mele v. United States, 395 F. Supp. 592 (D.N.J. 1975).

[17] 96 S.Ct. at 2578.

[18] *Id. See* note 2 *supra. See also* 1 W. CONNOLLY, A PRACTICAL GUIDE TO EMPLOYMENT OPPORTUNITY 8 (1975).

[19] 96 S.Ct. at 2578.

[20] 411 U.S. 792, 804 (1973).

ployee, Title VII requires that such criterion be "applied, alike to all members of all races."

In *Green*, the respondent, a black civil rights activist, protested vigorously when he was laid off in the course of a general reduction in the petitioner's work force. As a part of this protest, respondent participated in stalling cars on the main roads leading to the plant at the time of morning shift change. Later, when his employer was advertizing for mechanics, respondent applied for employment and was turned down on the basis of his past participation in the "stall-in". The Court pointed out that Title VII does not permit an employer to use an employee's conduct as a pretext for the sort of discrimination prohibited by the Act.[21] The employee must be given an opportunity to show that the employer's reason for not retaining or rehiring an employee was discriminatory.[22] Where the employee can show that any of the employer's employment practices are not applied uniformly to minorities and nonminorities alike, he probably will successfully rebut the employer's claim that dismissal was for some other reason than invidious discrimination.[23] In response to *McDonald*, employers may begin to feel the urgency of eliminating any inequities in their employment practices.

In deciding whether Section 1981 prohibits racial discrimination in private employment against whites as well as nonwhites, the Court in *McDonald* examined the legislative history of the provision.[24] Respondents

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[21] 96 S.Ct. at 2579, *citing* 411 U.S. at 804.

[22] *Id.* at 2579, *citing* 411 U.S. at 807.

[23] 411 U.S. at 802-05. The Court stated that:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.*

The Court in *McDonald* noted that this pattern of proof was intended by the Court in *Green* to be merely illustrative of the "most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination." 96 S.Ct. at 2578 n.6, *citing* 411 U.S. at 802 n.13.

[24] 96 S.Ct. at 2581. The Court in *McDonald* did not present a discussion of the lower federal court cases which have dealt with the applicability of Section 1981 to reverse discrimination. Cases holding that Section 1981 is not available to white persons: Balc v. United Steelworkers, 6 EMP. PRAC. DEC. ¶8948 (W.D. Pa. 1973); Ripp v. Dobbs House, Inc., 366 F. Supp. 205 (N.D. Ala. 1973); Perkins v. Banster, 190 F. Supp. 98 (D. Md. 1960). Cases supporting the availability of Section 1981 to white persons: Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971); Spiess v. C. Itoh & Co., 408 F. Supp. 916 (S.D. Tex. 1976) (this is the same district judge who reached the opposite view in deciding *McDonald* at the trial court level); 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); Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969); Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969), *aff'd on other grounds*, 450 F.2d 1227 (8th Cir. 1971).

argued that the terminology employed in Section 1981, stating that minorities should enjoy "the same rights . . . as is enjoyed by white citizens," unambiguously limited the protection against discrimination to nonwhites. Secondly, they contended that such a reading was consistent with the legislative history of the provision.[25] Both of these contentions were rejected by the Court.

The Court in *McDonald* began its analysis of the legislative history by pointing out that the Civil Rights Act of 1866 was introduced by Senator Trumbull to protect the civil rights of United States citizens.[26] While the Court recognized that the "immediate impetus" for the bill was to provide further relief for the former black slaves, it did not construe the language in Section 1981 to be limited solely to the realization of this goal.[27] In reaching the conclusion that the Senate intended the enactment to apply to both whites and blacks, the Court made reference to a speech by Senator Trumbull during the final senatorial debates wherein he emphasized the nonracial character of the bill.[28] With this discussion of the legislative history, the Court stated that "it was clear that the bill, as it passed the Senate, was not limited in scope to discrimination against nonwhites."[29]

Next, the Court reviewed the purpose for the addition of the words "as is enjoyed by white persons" in Section 1981. It is precisely this phrase that has led to the question of whether or not a white person has standing under Section 1981. The Court found that in the debates of the Senate this phrase was treated as a technical adjustment not intended to restrict the scope of the bill.[30]

The judge who decided *McDonald* at the district court level had a second opportunity to look at the availability of Section 1981 to white persons in *Speiss v. C. Itoh & Co.*[31] prior to the Supreme Court's decision in *McDonald*. In that case, the district court judge pointed out that there were at least three possible interpretations of the statute when the first phrase,

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[25] 96 S.Ct. at 2581.

[26] *Id.* at 2582.

[27] *Id.* Contrary to *McDonald*, other sources indicate that the real issue during the debates was not whether the bill provided the same rights for all persons, but whether the bill would take away the power of the states to legislate for all persons within their individual borders. *See generally* Larson, *The New Law of Race Relations*, 1969 WISC. L. REV. 470; Comment, *Private Discrimination Under the Civil Rights Act: In Search of Principled Constitutional and Policy Limits*, 7 TOLEDO L. REV. 139 (1975); Note, 18 DEPAUL L. REV. 284 (1968).

[28] This speech was in response to remarks by Senator Davis where he alleged that "This [was] an act for the benefit of the free negro, not the white man. If there had been no free negro, this act never would have been heard of . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

[29] 96 S.Ct. at 2583.

[30] *Id.*

[31] 408 F. Supp. 916 (S.D. Tex. 1976).

"all persons", and the second phrase, "as is enjoyed by white citizens", are considered together. The three interpretations that suggest themselves are:

> (1) that the phrase . . . "all persons" . . . contradicts the phrase "as is enjoyed by white citizens"; (2) that the phrase "as is enjoyed by white citizens" qualifies and limits the protection of the statute to aliens and nonwhite American citizens; or (3) that the phrase "as is enjoyed by white citizens" represents a barometer with which to measure protection afforded to rights now to be enjoyed by all persons regardless of race which were enjoyed as a matter of law prior to 1866 only by white citizens, the group then racially "favored".[32]

Without this language there would be no question of whether white plaintiffs had standing under Section 1981.[33]

In *McDonald,* the respondents contended that the second interpretation was unambiguously clear, but the Court rejected this argument and attempted to clarify the ambiguity of the language. While the Court recognized the immediate impetus for the bill was to protect the freed man's new civil rights, it felt that the cumulative evidence of the legislative history made it clear that Congress had a broader intent, which was to provide the same rights for whites under Section 1981 as are afforded to blacks.[34] Thus, it appears that the Court in *McDonald* adopted the third interpretation suggested in *Speiss.*

*Jones v. Alfred H. Mayer Co.*[35] is another important case in this area

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[32] *Id.* at 919. *See* note 3 *supra.*

[33] Without the phrase "as is enjoyed by white citizens" the statute would read "[A]ll persons . . . shall have the same right to make and enforce contracts . . . ." The judge in *Spiess* decided that the phrase "as is enjoyed by white citizens" did not diminish the principle of equal treatment established by the legislative history.

> At most, . . . , this phrase constituted, in 1866, a comparative instrument by which to measure the relative protection from abridgment of enumerated civil rights on account of racial discrimination to be accorded to all persons, including white citizens, in the exercise of rights then enjoyed solely by white citizens. 408 F. Supp. at 924.

[34] 96 S.Ct. at 2586.

[35] 392 U.S. 409 (1968). This decision expressly overruled Hodges v. United States, 203 U.S. 1 (1906) in so far as *Hodges* was inconsistent with *Jones.* In *Hodges,* the Court had held that the 1866 Act, which penalized citizens who conspired to prevent citizens of African descent, because of their race or color, from entering into employment contracts, to be in excess of the enforcement powers vested in Congress by the Thirteenth Amendment, since "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery" *Id.* at 18. By analogy to *Jones,* it has been decided that Section 1981 applies to prohibit private racial discrimination in employment. *See* Brown v. Gaston County Oyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied,* 409 U.S. 982 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757, 759 (3d Cir. 1971). The United States Supreme Court has held that Section 1981 affords a federal remedy against discrimination in private employment on the basis of race. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). *See also* Gilliam v. City of Omaha, 459 F.2d 63 (8th Cir. 1972) (per curiam); Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1971); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970).

because of the Supreme Court's analysis of the legislative history of Section 1982, which was the companion provision to Section 1981 under the 1866 Act.[36] According to the Court in *Jones,* the underlying purpose of the Act was "to secure for all men, whatever their race or color," certain fundamental rights.[37] Furthermore, the Court pointed out that both houses of Congress were aware that they were approving a comprehensive statute, forbidding racial discrimination affecting the basic civil rights enumerated in the Act.[38] The Court noted that the Enabling Clause of the Thirteenth Amendment[39] empowered Congress to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. Hence, *Jones* may be read not only for the proposition that Section 1982 granted black citizens an action against purely private racial discrimination in the sale and rental of property, but also for the broader proposition that the 1866 Act was intended to be a comprehensive statute, forbidding all racial discrimination concerning the basic civil rights protected in the statute under both Sections 1981 and 1982.

Since the sections were companion provisions, it would appear that the next logical step from this proposition is the recognition that Section 1981 is also applicable to incidents of reverse discrimination.[40] This is especially true in view of the fact that the rights to make and enforce contracts and to sue or be sued are protected under Section 1981.[41]

The general problem raised by reverse racial discrimination cases is whether the government or an employer has overstepped the ideal of equality for all, which is embedded in the Constitution, in an effort to redress past injustices against black citizens.[42] Employment is only one area where the

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[36] 392 U.S. at 422-37.

[37] *Id.* at 432.

[38] *Id.* at 435.

[39] U.S. CONST. amend. XIII, provides:

(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.

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

[40] 42 U.S.C. §1982 has language very similar to that in §1981. Section 1982 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. (emphasis added.)

In Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969) the judge relied on *Jones* in arriving at the conclusion that Section 1982 was applicable to discrimination against white citizens.

[41] *See* Roberto v. Hartford Ins. Co., 177 F.2d 811 (7th Cir. 1949), *cert. denied,* 339 U.S. 920 (1950).

[42] *See* Comment, *But Some Animals Are More Equal Than Others: A Look At the Equal Protection Argument Against Minority Preferences,* 12 DUQUESNE L. REV. 580 (1974) [hereinafter cited as Comment].

effects of past racial discrimination can be seen. The objective of Congress in the enactment of Title VII was to achieve equality of employment opportunities.[43] It has been held that an absolute preference in favor of one group over another as a method to achieve equality is forbidden by Title VII.[44] An employer is permitted to use quotas in hiring only where the requirements set out by the courts have been met.[45]

For the Court in *McDonald* to hold otherwise than it did would have been contrary to the principle of equality before the law. Such a decision would have lead to a consideration of the constitutionality of Section 1981. Note that *McDonald* is a case of private discrimination which has been challenged under federal statutes granting a private citizen the right to sue for private acts of discrimination. Whether a plaintiff has standing to bring a private discrimination action is determined by looking to these statutes. Any constitutional challenge to these statutes would be based on the Thirteenth Amendment, which gave Congress the power to enact laws for the purpose of abolishing all badges and incidents of slavery.[46] Nevertheless, the same basic principle of equality before the law which applies in discrimination cases involving state action should apply where there is only private discrimination. Thus, if there is to be a consideration of the constitutionality of these statutes, the Court would most likely rely on the principles it has laid down under the Fourteenth Amendment as guidelines.

The Fourteenth Amendment provides that ". . . no State shall . . . deny to any person within its jurisdiction of the equal protection of the laws".[47] A recent California case, *Bakke v. Regents of Univ. of California,*[48] dealt with the issue of reverse discrimination. In *Bakke,* the Court held that an admission program, which had not been shown to have previously discriminated against minorities, violated the constitutional rights of nonminority applicants because it afforded a preference on the basis of race to persons who, by the university's standards, were not as qualified for the study of medicine as nonminority applicants who were denied admission. In its analysis, the Court emphasized that classifications based on race were subject to strict scrutiny where the classification resulted in detriment to a person because of his race.[49] A contrary decision was reached in *Alevy v. Downstate*

[43] Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

[44] Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972).

[45] For a discussion of preferences, see note 13 *supra.*

[46] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Walker v. Pointer, 304 F. Supp. 56, 58-60 (N.D. Tex. 1969).

[47] U.S. CONST. amend. XIV.

[48] 132 Cal. Rptr. 680 (Cal. 1976).

[49] *Id.* at 690.

*Medical Center*,[50] where the court did not apply the strict scrutiny test. The judge in *Alevy* felt that "it would cut against the grain of the Fourteenth Amendment, were the equal protection clause used to strike down measures designed to achieve real equality for persons whom it was intended to aid.[51] In *Alevy* the white student would not have been admitted even if there were no special admission policy for minorities. On the other hand, *Bakke* was remanded in order that a determination be made as to whether or not the plaintiff would have been admitted absent a special admissions policy for minorities.

Both of these decisions, as well as *McDonald*, illustrate that it is extremely important for an employer or administrator to justify special treatment or conduct towards any individual or group on some basis which does not run afoul of present constitutional guidelines concerning race. Furthermore, these decisions are illustrative of the difficulty which the courts have in choosing an appropriate standard of review in reverse discrimination cases.[52] On the one hand, the courts must recognize that there is a legitimate goal of erasing the past and present effects of racial discrimination against minorities. But on the other hand, the courts must consider how these programs, developed to eradicate past discriminatory practices, affect nonminority persons, who were not associated with past discriminatory practices. Where the benefits of a classification outweight any injury to society, the classification will be upheld.

Some of the objectives that the government has tried to achieve through affirmative action programs are: (1) to speed up integration; (2) to compensate the black citizens for past discrimination; (3) to remedy the effects of past discrimination; and (4) to restore the black citizen's sense of self-worth and personal respect.[53] In view of these objectives, the question is raised as to why these affirmative action programs are being challenged in the courts today.

First, the recession economy of the mid-70's with the corresponding scarcity of jobs for even the well-educated has encouraged criticism of these

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[50] 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

[51] *Id.* at 335, 348 N.E.2d at 545, 384 N.Y.S.2d at 89. The Court in *Alevy* applied a "substantial interest" test: (1) whether the policy has a substantial basis in actuality, and is not merely conjectural; (2) whether the scheme furthers some legitimate, articulated governmental purpose, but however, (3) the interest need not be compelling, urgent or paramount, but rather, only that on balance, the gain to be derived from the preferential policy outweighs its possible detrimental effects. *Id.* at 336, 348 N.E.2d at 545, 384 N.Y.S.2d at 90.

[52] For discussion on the question of which standard of review should be applied in reverse discrimination cases, see Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Comment, *Reverse Discrimination*, 45 MISS. L.J. 467 (1974); Developments, *Equal Protection*, 82 HARV. L. REV. 1065, 1104-17 (1962).

[53] *See* Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 962-66 (1974); Comment, *supra* note 42.

programs.[54] Secondly, preferential treatment of racial and ethnic minorities seems to be inconsistent with the nation's rejection of racism and the espousal of concepts of individuality, merit and self-achievement.[55] Finally, it has been suggested that "preference for the [black] is, in today's world, discrimination against the members of those groups which are most similar to the [black]."[56]

Even though *McDonald* is a case of an isolated incident of reverse racial discrimination where the respondents did not allege that they had a preferential program for blacks, in either cases of isolated incidents of reverse racial discrimination or preferential treatment, Title VII and Section 1981 forbid an employer from arbitrarily discriminating in his treatment of his employees. In the future it will not be enough for an employer to allege that he is dismissing any employee on the basis of his conduct without showing that he has uniformly dismissed employees regardless of race, sex,[57] religion or national origin, for the same conduct. Thus, *McDonald* requires uniformity of treatment for the same conduct. An employer can no longer disparately deal with his employees according to his own caprice; he must be aware of how he treats all employees, and he must make every attempt to avoid any discriminatory practices.

With this decision, white persons have an additional basis to bring a private action against an employer under Section 1981. This section does not have many of the procedural prerequisites for bringing an action against an employer as does Title VII, and failure to meet the requirements of Title VII will not bar a Section 1981 claim.[58]

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[54] Comment, *supra* note 42, at 581.

[55] Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 654 (1975).

[56] Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363, 373 (1966).

[57] No relief is available under Section 1981 for sex discrimination. Raether v. Phillips, 401 F. Supp. 1093 (D. Va. 1975); Thomas v. Firestone Tire & Rubber Co., 392 F. Supp. 373 (N.D. Tex. 1975).

[58] Under Title VII the procedural prerequisites include the following: a charge of discrimination must first be filed with a state or local fair employment agency for 60 days. 42 U.S.C. §2000e-5(b) (1970). Subsequently, a charge must be filed with the EEOC for another 60 days, for conciliation between the parties. *Id.* §2000e-5(e). The Commission will attempt to conciliate the parties after it has notified the employer of the charge and after it has investigated the charge to see if there is reasonable cause to believe the charge. In addition, the charge of discrimination must be filed within 90 days of the discriminatory act. *Id.* §2000e-5(a)(d) (1970). Finally, the employer will receive a "right to sue" letter from the EEOC to institute a court action, and the employee must file the complaint in federal district court within 30 days after receipt of the letter. *Id.* §2000e-5(e). Section 1981 provides the employee with direct access to the federal district court without having to exhaust either state or federal administrative remedies. Johnson v. REA, 421 U.S. 459 (1975); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971); James v. Ogilvie, 310 F. Supp. 661 (N.D. Ill. 1970). There has been some criticism of the use of a Section 1981 remedy for a discriminatory act in employment. *See* note, 26 CASE W. RES. L. REV. 889 (1976).

Nor is this decision limited in its application to situations where an employee is dismissed from his job. Section 1981 protects nonwhite persons' rights in numerous situations where they are being discriminated against, including housing. Therefore, it appears that white persons will be permitted to use Section 1981 as it has been traditionally used by nonwhite persons.

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