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COMMENTS

MEXICAN AMERICANS: ARE THEY PROTECTED BY THE CIVIL RIGHTS ACT OF 1866?

INTRODUCTION

In 1968, in the landmark case of Jones v. Alfred Mayer Co., the United States Supreme Court held that section 1982 of Title 42 of the United States Code which provides that all citizens have the same right to "inherit, purchase, lease, sell, hold and convey real and personal property," prohibits private racial discrimination with respect to the rights enumerated in the statute. The Court's holding was soon extended to include section 1981 of Title 42 in Johnson v. Railway Express Agency. In Johnson, the Court held that section 1981 provided a remedy against racial discrimination in private employment. Essentially, section 1981 provides that all persons within the jurisdiction of the United States have the same right to make and enforce contracts. Both sections were derived from the Civil Rights Act of 1866 that was passed pursuant to Congress' power under the thirteenth amendment to the Constitution.

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2. Title 42 U.S.C. § 1982 (1976) 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.

3. Id.
4. 392 U.S. at 436.
5. Title 42 U.S.C. § 1981 (1976) 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 exaction of every kind and no other.

7. Id. at 459-60.
9. U.S. Const. amend. XIII provides:
These decisions transformed the century-old and dormant Civil Rights Act of 1866 into a viable tool for combating private racial discrimination despite the developments in fourteenth amendment equal protection doctrine and the presence of Title II and Title VII of the Civil Rights Act of 1964. The reasons for this renewed vitality are clear: sections 1981 and 1982 are considerably more inclusive than their modern-day counterparts. In substantive terms, they are broader in both scope of coverage and in types of relief obtainable. Procedurally, sections 1981 and 1982 provide longer statutes of limitations and less stringent exhaustion of remedies requirements.10

Mexican American citizens, however, who have encountered severe deprivation of civil rights in the United States,11

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.

10. The prohibitive provisions of Title VII (42 U.S.C. § 2000e, -2, 3) are applicable only to employers, employment agencies, and labor organizations while section 1981 has been read by at least some courts to include all persons who interfere with contracting on racial grounds. WRMA Broadcasting Co. v. Hawthorne, 365 F. Supp. 57 (M.D. Ala. 1973). Moreover, section 1981 applies to the making of all contracts, not only those related to employment. Under Title VII, the defendant-employer must have at least fifteen employees to come within the scope of the Act; section 1981 does not have such a requirement. Under section 1981, the aggrieved individual need not exhaust the administrative remedies required under Title VII. Johnson v. Railway Transp. Co., 421 U.S. 454 (1975). Furthermore, the type of relief obtainable under section 1981 is substantially broader than that under Title VII. The Court in Johnson declared that under section 1981 the plaintiff was entitled to "both equitable and legal relief, including compensatory, and in certain circumstances, punitive damages . . . ." Id. at 460. Title VII, on the other hand makes no provision for the recovery of compensatory or punitive damages, except for back pay for a period of two years prior to the violation.

Similarly, 42 U.S.C. section 1982, in providing that "all citizens of the United States shall have the same right . . . to inherit, purchase, lease, sell, hold and convey real and personal property," 42 U.S.C. § 1981 (1976), presumably places no restriction on the type of property within the ambit of the statute. On the other hand, the coverage of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601-31 (1976), and Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1976), is substantially narrower. For example, Title VIII extends only to dwellings and lots upon which dwellings may be built. 42 U.S.C. §§ 3602(b), 3603, 3604 (1976). More importantly, owners of single-family dwellings, 42 U.S.C. § 3603(b)(1) (1976), or buildings with four or fewer dwelling units, id. (b)(2), are exempt from coverage. Title II primarily involves personal property transactions but was passed pursuant to Congress' power under the commerce clause. 42 U.S.C. § 2000a (1976). This creates an impediment to the full and beneficial use of this statute as a means of civil rights protection.

11. For an examination of the discrimination which Mexican Americans have
have not necessarily been afforded the protection of the broad proscriptions of sections 1981 and 1982. The Supreme Court, in dicta, has limited the proscriptions of these sections to racial discrimination only. This standard, when applied to Mexican American plaintiffs, has resulted in a confusing array of lower court opinions.

Some district courts have allowed Mexican Americans, or other Hispanic persons, to proceed under sections 1981 and 1982 only if they can prove that the discrimination was racially motivated. A few courts have held that Mexican Americans may sue for national origin discrimination. Others have held that persons of Hispanic origin have no cause of action on either theory under sections 1981 or 1982. And some lower courts have recognized a practical and logical reason to extend the protection of these sections to Mexican Americans in order to ensure that they, as a group, enjoy the same protection as the "white majority."

The purpose of this comment is to determine the extent of protection afforded Mexican Americans by sections 1981 and 1982 of the United States Code. The comment will demonstrate that the framers of sections 1981 and 1982 envisioned broad and far-reaching remedies under the statutes in the area of civil rights and did not intend to limit their application to racial discrimination alone. Rather, they intended that these statutes would afford a remedy to any person who was discriminated against because he or she was not a member of the historically most-favored group, white citizens.


12. In Jones the court stated that "the statute in this case [§ 1982] deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin." 392 U.S. at 413.


THE LEGISLATIVE INTENT—BROADER THAN RACIAL CLASSES

Senate Bill No. 61

Both section 1981 and section 1982 originated in the Civil Rights Act of April 9, 1866,17 that was passed pursuant to Congress' power under section 2 of the thirteenth amendment.18 On January 5, 1866, Senator Trumbull of Illinois introduced Senate Bill No. 61, later to become the Civil Rights Act of 1866, as a bill “designed to protect all persons in the United States in their civil rights and furnish the means of their vindication.”19 The Senator later described the relationship between his bill and the thirteenth amendment: “That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom.”20 With this historical setting in mind, the focus of the inquiry must now shift to a consideration of the forms of discrimination prohibited by the statutes.

Mexican Americans: What Color?

Before 1976 and the Supreme Court's decision in McDonald v. Santa Fe Trail Transportation Co.,21 lower courts were split on the issue of the applicability of sections 1981 and 1982 to persons other than blacks. In McDonald, the plaintiffs were white employees of Santa Fe who were discharged for misappropriating cargo from one of the company’s shipments.

17. The Civil Rights Act of 1866 provided in relevant part:
That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, or 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 of 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, and to 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, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Act of April 9, 1866, ch. 31, 14 Stat. 27.

18. For the text of the thirteenth amendment see note 9 supra.


20. Id. at 474.

A black employee, also charged with the same offense, was not discharged. The Court held that the plaintiffs had stated a cause of action under section 1981 in that the section prohibited racial discrimination against white as well as non-white persons.22

In so ruling, the Court answered the question of who could be protected by the statutes: any person, white or non-white, can bring suit for a violation of section 1981. At first glance, this would seem to answer the question of whether Mexican Americans have a cause of action under the statutes. The Court in McDonald, however, held simply that whites and non-whites are protected from racial discrimination by section 1981. This holding is problematic. Are Mexican Americans “white” for the purposes of sections 1981 and 1982 who must accordingly be discriminated against as members of the “white” race in order to maintain a cause of action? Since they clearly are not black, would the Court view Mexican Americans as a separate race?23 Or is the Court’s assumption that racial discrimination is the only form of prohibited discrimination under sections 1981 and 1982 inaccurate?

“As is Enjoyed by White Citizens” and the Racial Character of Rights’ Protection

The conclusion that sections 1981 and 1982 bar only racial discrimination is derived primarily from the phrase “as is enjoyed by white citizens” that appears both in the Civil Rights Act of 18661” and in sections 1981 and 1982.24 In Georgia v. Rachel,25 the Court read this phrase as describing the “racial character of the rights being protected”26 by the statutes. This reading was reaffirmed by the Court in McDonald when it disregarded the argument that this phrase necessarily excluded whites from protection under the statute. The Court reasoned:

22. Id. at 296.
24. Ch. 31, 14 Stat. 27 (1866).
25. For text of statutes, see notes 2 & 5 supra.
27. Id. at 791.
While a mechanical reading of the phrase "as is enjoyed by white citizens" would seem to lend support to respondents' reading of the statute [that whites are excluded from coverage], we have previously described this phrase as emphasizing "the racial character of the rights being protected."

The Court's reliance on the phrase "as is enjoyed by white citizens" is misplaced when used for the proposition that racial discrimination alone is prohibited by sections 1981 and 1982 of Title 42. As detailed below, an inquiry into the meaning that Congress attributed to these words when it drafted the Civil Rights Act of 1866 reveals that the words were regarded as superfluous; they neither add nor detract from the otherwise "color-neutral" language of the bill. Thus, the phrase "as is enjoyed by white citizens" forms no basis for concluding that the statutes protect rights of a racial character only.

Representative Wilson offered the phrase "as is enjoyed by white citizens" as an amendment to Senate Bill No. 61. During the Senate debate on the new House version of the bill, Senator Van Winkle offered this criticism of the added phrase:

The clause commences with the words "and such citizens." As I understand these words, they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that "such citizens of every race and color, without regard to any previous condition of servitude, shall have the same right to make and enforce contracts," &c "as is enjoyed by white citizens." It seems to me that these words are superfluous. The idea is that the rights of all persons shall be equal; and I think leaving out these words would attain the object.

Senator Trumbull, the author of the bill, agreed with Van Winkle's assessment that the added language was unnecessary.

30. Senator Van Winkle was referring to the second clause of the Act which begins "and such citizens" and ends with "as is enjoyed by white citizens."
32. Id.
Nowhere in the debates was there reference to the idea that the phrase "as is enjoyed by white citizens" limited the rights being protected to racially oriented rights. In light of the prevailing view that the phrase was superfluous, it would be difficult to argue that these words alone limit the application of sections 1981 and 1982 to racial discrimination.

It is important to note that the Supreme Court has never directly addressed the issue of whether the scope of the statutes extend beyond racial discrimination. The cases wherein the Supreme Court, in dicta, limited the form of prohibited discrimination to racial discrimination were simply set in a black/white context.

For example, in *Jones v. Alfred Mayer Co.*, the plaintiff was a Negro who had been refused housing by whites because of his race. In *McDonald*, the plaintiff was a white male who was discharged for misappropriating his employer's cargo while two black employees, guilty of the same conduct, were not. And in *Georgia v. Rachel*, the respondent blacks were arrested when they sought service in a whites-only Georgia restaurant. *Rachel*, the case most often cited for the proposition that the statutes protect only racial rights, did not directly involve either section 1981 or 1982. Instead, it was a case in which the defendants sought removal to federal court under section 1443(1) of Title 28 that provides for such removal jurisdiction when the action is "[a]gainst any person who is denied or cannot enforce" in the state courts "a right under any law providing for . . . equal civil rights." Incidental to the holding that removal was proper, the Court noted that section 1981 protected racial rights and therefore provided for "equal civil rights."

Thus, in each of the cases noted above, the statement that the statute prohibited racial discrimination flowed naturally from the black/white factual situation. The Court was not called upon to examine the full effect that the limitation to racial discrimination would have. It was perhaps an un-
examined assumption that this statute would extend to all groups pragmatically or commonly deemed to be a separate race. Nevertheless, many lower courts have interpreted the dicta of Jones, McDonald and Rachel as excluding all other forms of discrimination from the statutes' purview.  

At least one lower court, however, has not adopted the dicta so readily. In Lafore v. Emblem Tape and Label Co., the district court rejected the contention that the phrase in question set up a racial standard for unlawful discrimination. In that case, the Mexican American plaintiff brought suit against the defendant company under Title VII of the 1964 Civil Rights Act and section 1981 for employment discrimination based on race, color, and national origin. The court held that LaFore had stated a cause of action under section 1981. The opinion emphasized that “[e]quating 'white citizens' with a racial classification is utterly lacking in sophistication. There is no scientific justification for the equation and its use inevitably leads to irretrievable confusion.” The court reasoned further that:

If we understand the term “white citizen” in the statute to mean that group which was most favored, the rule becomes understandable. All persons are entitled to the same rights and benefits as the most favored class.  

(1977). In that case, Mexican American plaintiffs brought suit on behalf of a class of Mexican American and black employees under Title VII and section 1981. Although the Supreme Court vacated the fifth circuit's certification of the class, it did not do so on the ground that Mexican Americans cannot bring suit under section 1981. If it was a firm ruling of the Court that Mexican Americans are not proper plaintiffs under section 1981, the Court presumably would have so stated in its decision.


40. Id. at 826.
41. Id.
"White Citizens": The White Majority

The legislative intent of the framers of the Civil Rights Act of 1866 was to protect the rights of those classes of citizens who historically had been deprived of the civil rights accorded the favored "white citizens," or more precisely the original incorporators of the United States, the Europeans. Under this reading of the statute, Mexican Americans, traditional victims of class-based discrimination, necessarily fall within the protection of the statutes.

Evidence that the legislative intent extended beyond the elimination of racial discrimination can be found in statements made by opponents of the 1866 Act. The Civil Rights Act of 1866, in addition to providing equality of civil rights to all citizens, bestowed citizenship upon all persons born in the United States, excluding non-taxed Indians. Senator Cowan expressed great fear that this grant would have the effect of making citizens of, and giving civil rights to, the "barbarian races"—the Chinese and the Gypsies. He stated:

[If they are to be made citizens and enjoy political power in California, then sir, the day may not be very far distant when, California, instead of belonging to the European race, may belong to the Mongolian, may belong to the Chinese.]

Senator Trumbull, the bill's author, maintained that the Act would "undoubtedly" have the effect of naturalizing the children of Chinese and Gypsies born in the United States for the "law makes no such distinction; and the child of an Asiatic is just as much a citizen as the child of a European." Trumbull also noted:

We are passing a law declaratory of what, in my judgment the law now is; and for that reason I think it better to retain the words "without distinction of color" that there be no dispute that the word "persons" means everybody.

The statements above set forth a clear distinction between the European incorporators of the colonies and all others. The belief that the Trumbull bill would give civil

42. CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (emphasis added).
43. Id. at 498 (emphasis added).
44. Id. at 574 (emphasis added).
rights to "all others" indicates that the discrimination at which the Act was aimed was not just racially-based but all-class based. That is, the protections are activated whenever a class of people is treated differently from the "white" citizenry. The standard for civil rights is that accorded to the European incorporators, the white majority, and any deprivation of civil rights in violation of this standard suffered by a member of an ethnic group which has suffered widespread discrimination would give rise to a cause of action.

While it is true that the Senators frequently used the word "race" when referring to different ethnic groups, one should be careful to note that the word was used in an archaic and non-scientific sense. This is apparent from the record of the Senate debate. Senator Cowan, an opponent of the Trumbull bill, asked,

[W]hat is meant by the word "race," and where [is it] settled that there are two races of men, and if it is settled that there are two or more, how many? Where is the line to be drawn? What constitutes the distinctive characteristics and marks which limit and bound these races? . . . I only notice [this] as an indication of the loose manner in which we legislate about these subjects.46

Moreover, Trumbull’s concern about retaining the words "without distinction of color"46 evinces a concern that extends beyond clear racial discrimination. Since there was no discussion in the Senate about eliminating the words "without distinction of race" and they presumably would have remained in the Act, Trumbull was obviously concerned about those who may be discriminated against for other than racial reasons. It seems logical to conclude that Mexican Americans could be one class of citizens who may not have been perceived as a different race entirely but who were nevertheless a different color.47

Further support for the position that the Act was di-

45. Id. at 499.
46. See text accompanying note 44 supra.
47. The distinction between color and race was made by other Senators at the time. Senator Davis, an opponent, noted:
Here the honorable Senator [Trumbull] in one short bill breaks down all the domestic system of law that prevail in all the states, so far not only as the negro, but as any man without regard to color is concerned . . . .
rected at eradicating discrimination against all traditionally deprived ethnic classes can be found in Senator Cowan's comments on the operation of the Civil Rights bill. In the passage below, Senator Cowan again speaks in terms of "races." He may, however, actually be distinguishing between that race that he labels "European" and all other peoples:

Mr. President, I am asking with quite an air of certainty on the part of the Chairman of the Judiciary Committee whether the children of persons of barbarian races, born in this country are not from that very fact citizens of this country. . . . Who was it that established this Government? They were people who brought here the charter of their liberties with them . . . . By the terms of the charters they were the actual possessors of the political power of the colonies, and they alone had the right to say whom they would admit to a co-enjoyment of that power with them. It is true that the colonists of this country, when they came here and established their governments, did open the door . . . to men of their own race from Europe. They opened it to the Irishman, they opened it to the Germans, they opened it to the Scandinavian races of the north. But where did they open it to the barbarian races of Asia or of Africa? Nowhere.48

Cowan's understanding that the Civil Rights Act of 1866 would give civil rights to those other than the "Europeans" (the original incorporators of the United States) was well-founded; no supporter of the Act ever disagreed with Cowan's interpretation but only reiterated that the bill declared that "all persons in the United States have the same civil rights."49

Moreover, Trumbull's statements about the general purpose and effect of the Act50 manifest a clear intention to eliminate all arbitrary class prejudice based on ethnic origin, not just prejudice that is racially motivated. On April 4, 1866, Senator Trumbull responded to President Johnson's veto of the Civil Rights Act. Answering a charge that the Act discriminated in favor of the Negroes, Trumbull replied,

Does that discriminate in favor of the colored people? Why, sir, the very object and effect of the section is to prevent discrimination, and language, it seems to me,

48. Id. at 499 (emphasis added).
49. Id. at 498 (emphasis added).
50. See text accompanying notes 42-44 supra.
could not more plainly express that object and effect. It may be said that it is for the benefit of the black man because he is now in some instances, discriminated against by State laws; but that is the case with all remedial statutes. They are for the relief of the persons who need the relief . . . ."

Trumbull’s statement suggests that he viewed the statute as having a remedial function not confined to the particular historical context in which it was set. Had he intended to confine it to the Negro problem, he would not have been so adamant about the fact that the statute did not discriminate in favor of blacks. The statute is “for . . . [those] who need the relief”; there is nothing in the statute or in Trumbull’s explanation of it that limits those who may obtain “relief” to victims of racial discrimination.

The conclusion, therefore, that the Civil Rights Act of 1866, and hence sections 1981 and 1982 of Title 42, extend to Mexican American citizens is inescapable. While the immediate concern was the vindication of the civil rights of blacks, Congress was well aware of the deprivations of civil rights suffered by other ethnic groups. The statements concerning Gypsies, Chinese, and Indians manifest an intent to provide a cause of action for victims of ethnic-origin discrimination—cases where class members are not accorded the same rights as the original European incorporators. The Mexican American is undeniably a member of one of these groups.

CONGRESSIONAL POWER UNDER THE THIRTEENTH AMENDMENT: THE BADGES OF SLAVERY CONCEPT

In the preceding pages, this comment established that Congress, in 1866, intended its novel and forceful Civil Rights Act to extend beyond the newly-free slaves to eradicate discrimination against all ethnic groups that had been traditional victims of discrimination by the white majority. As noted above, the Civil Rights Act of 1866 was passed pursuant to section two, the enabling clause, of the thirteenth amendment that empowers Congress to put into effect the substantive provisions of the amendment. The question remains whether

51. Id. at 1758 (emphasis added).
52. Id.
53. For text of amendment, see note 9 supra.
Congress, regardless of its intentions, had the authority to reach non-racial classes under the thirteenth amendment. After examining the Supreme Court's view of the extent of congressional authority as well as various theories of constitutional interpretation, this comment concludes that Congress is empowered, via the thirteenth amendment, to eradicate private discrimination against Mexican Americans.\(^{64}\)

Congress' powers to remedy discrimination under the thirteenth amendment are delineated by the pseudonym "the badges and incidents of slavery."\(^{65}\) This concept first appeared in the *Slaughter House Cases*,\(^{56}\) the first decision in which the Court interpreted the anti-slavery amendment. The Court stated, with respect to the amendment:

> We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system

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54. The Civil Rights Act of 1866 was re-enacted in 1870 pursuant to Congress' power under the fourteenth amendment. Congress undoubtedly has the power under that amendment to protect non-racial classes. The fourteenth amendment, however, carries with it a requirement of state action. Thus, in considering the question of Congress' power to eradicate private discrimination against Mexican Americans, this comment must focus on congressional authority under the thirteenth amendment.

On the other hand, it is clear that Congress has the power generally to reach private discrimination on the grounds of race, religion, color, national origin, and sex. Title VII, which addressed each of these grounds was passed pursuant to the commerce clause, and the thirteenth and fourteenth amendments. Some courts have indicated a willingness to construe liberally Congress' power to reach non-racial classes in instances of private discrimination pursuant to the thirteenth and fourteenth amendments if power to do so exists somewhere else in the Constitution; others have not been so willing. Compare Guerra v. Manchester Terminal Transp. Corp., 498 F.2d 641, n.32 (5th Cir. 1977)(even if Congress is not empowered to reach private discrimination against aliens under the thirteenth and fourteenth amendments, it can reach it under its exclusive powers over naturalization and immigration and, therefore, section 1981 should be read to prohibit private discrimination in employment against aliens) with DeMalherbe v. International Union of Elevator Constructors, 438 F. Supp. 1121 (N.D. Cal. 1977) (provision in section 1981 protecting aliens was passed pursuant to fourteenth amendment only; thus, an alien must allege state action in order to maintain a cause of action for employment discrimination under section 1981).


56. 83 U.S. (16 Wall.) 36 (1872). In the *Slaughter House Cases*, the Court sustained a Louisiana legislative enactment establishing a slaughter house monopoly against a thirteenth and fourteenth amendment attack.
shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.77

The early Supreme Court decisions narrowly construed the power of Congress under section two of the thirteenth amendment. Although conceding that Congress had the power to “eradicate all forms and incidents of slavery,”58 the Court in the Civil Rights Cases found that mere discrimination on account of race or color was not a badge of slavery.86 Eighty-five years later in Jones, however, the Court recognized broad congressional authority under the thirteenth amendment to eliminate acts of private discrimination that do not amount to slavery per se.60 According to the Court, the badges of slavery include “restraints upon ‘those fundamental rights which are the essence of civil freedom . . . ’.”61

Moreover, the Court in Jones stated, “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”68 Although the Jones Court assumed that Congress’ concern was with racial discrimination,69 note that Senator Trumbull’s conception of the “badges and incidents of slavery” extended well beyond private acts of racial discrimination. Trumbull asserted:

I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment on his liberty; and is, in fact, a badge of servitude which, by the

57. Id. at 72 (emphasis added).
59. Id. at 21.
60. 392 U.S. at 437-43.
61. Id. at 441.
62. Id. at 440.
63. The Court in Jones began by noting that section 1982 was not a comprehensive fair housing act, in that among other things, it did not address itself to discrimination on grounds of religion or national origin. But see text accompanying note 12 supra, discussing the significance of this dictum with regard to Mexican Americans.
Constitution is prohibited.\textsuperscript{64}

Thus, to the extent that the Court is willing to defer to Congress to determine what constitutes a badge of slavery, it is clear that Congress did seek to eradicate civil rights discrimination against ethnic groups that are not necessarily delineated by bright racial lines.

Significantly, the Supreme Court has never directly addressed the issue of whether Congress can extend the badges of slavery concept to non-racial classes. The Court itself, however, extended the protection of section 1981 to whites in McDonald v. Santa Fe Trail Transportation Co.\textsuperscript{66} In so doing, it liberated thirteenth amendment interpretations from any restraints based on an intimate link with slavery as it actually existed in the ante-bellum South. The Court has thereby opened the door for the interpretation that the enabling clause of the thirteenth amendment is a grant of expansive remedial powers, allowing Congress to reach forms of discrimination that are not necessarily the central thrust of the amendment itself. In McDonald, the Court stated:

\begin{quote}
Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.\textsuperscript{66}
\end{quote}

In light of the McDonald case, a strong equitable argument certainly exists in favor of extending protection to those groups that have suffered from the same attitudes of white supremacy that were at the root of the American slavery system and the various kinds of discrimination against non-whites that followed and still exist today.

While it is true that the substantive text of the thirteenth amendment merely abolished slavery, Jones established that the enabling clause permits Congress to reach conduct that is not prohibited by section one, the self-executing force, of the

\begin{footnotes}
\item 64. Cong. GLOBE, 39th Cong., 1st Sess. 474 (1866).
\item 65. 427 U.S. 273 (1976).
\item 66. Id. at 295-96 (emphasis added).
\end{footnotes}
This generous power accorded Congress to define the substantive scope of the amendment is limited only by a requirement that the conduct prohibited bear a rational relationship to a badge and incident of slavery. Legal scholars have urged various theories of constitutional construction which, when applied to the problem of the scope of congressional authority under the thirteenth amendment, compel the conclusion that Congress can "rationally" prohibit discrimination against non-racial ethnic groups.

General constitutional principles. The first of these theories depends primarily upon the Constitution's broad language and concern for general categories. This theory, in effect, argues that the Constitution is composed of general principles, rather than "minute specifications of its powers," in order "to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence." The Constitution thus bestows upon Congress the power to "adopt its own means to effectuate legitimate objects and to mould and to model the exercise of its powers, as its own wisdom, and the public interest, should require."

In applying this first theory of construction to the thirteenth amendment, Professor Buchanan made the following perceptive and persuasive argument:

Viewed accurately, slavery constituted class prejudice writ large. In its functional impact, slavery institutionalized a particular form of class prejudice, prejudice based on race. Spurred by this concrete manifestation of class prejudice, the framers of the thirteenth amendment and

67. In Jones, the Court stated:
"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." Civil Rights Cases, 109 U.S. 3, 20. Whether or not the Amendment itself did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass all laws necessary and proper for abolishing all badges and indicents of slavery in the United States." Ibid.

392 U.S. at 439 (emphasis in original).

68. Id. at 440.


71. Id.

72. Id. at 327.
Professor Buchanan concludes that Congress undoubtedly has the power to reach non-racial classifications under the thirteenth amendment.

The Brest theory. A second theory of constitutional interpretation that would support the position that Congress can rationally define discrimination against Mexican Americans to be a badge of slavery is delineated by Professor Brest. Professor Brest disfavors the use of strict constructionist, or what he labels "originalist," theories as the only acceptable means of constitutional review. The originalist approaches to constitutional construction, Brest asserts, suffer from the methodological problems of ascertaining the substantive and interpretive intent of the adopters and they often fail to further the ends of constitutional government—the protection of the democratic process and the rights of the individual.

Brest favors instead a theory of adjudication that treats the text of the Constitution and its history as presumptively

73. Buchanan, supra note 55, at 1076-77.
75. Professor Brest identifies two types of originalist interpretation—strict intentionalism and moderate originalism. The strict intentionalist construes phrases extremely narrow and precise. According to Brest moderate originalism forms the basis of much of American constitutional interpretation. Under this theory, the text plays a central role but is considered to be open-textured. Moreover, in assessing the original understanding, the general purposes of the adopters rather than their specific intentions with regard to the particular provision is the central concern. Id. at 204-05.

Yet, Brest claims that some central doctrines of constitutional law depend upon non-originalist theories of adjudication. He cites as examples the incorporation of the principles of equal protection into the fifth amendment, the incorporation of the Bill of Rights into the fourteenth amendment, the more general notion of "substantive due process," and the practice of judicial review of congressional enactments established in Marbury v. Madison. Id. at 224-28.
76. Id. at 229.
77. Id. at 226.
but not necessarily authoritative. Thus, an interpretation of a constitutional provision derived from the language of the text and its original understanding can be overcome in light of changing public values. Professor Brest notes that this is most likely to occur "in adjudication under broad clauses involving issues of equality and liberty, where legal and moral principles are closely intertwined," as opposed to provisions which are "contemporary and thus likely to reflect current values and beliefs" or "where they specify the procedures and numbers relating to elections, appointments to government offices, and the formal validity of laws . . . ."

The "non-originalist" theory of constitutional interpretation advanced by Professor Brest supports the view that Congress can seek to eradicate discrimination against Mexican Americans pursuant to its powers under the thirteenth amendment. The amendment certainly qualifies as a "broad clause" guaranteeing "individual liberties" where the presumption created by its text and original understanding may be overcome. Thus, due to the pervasive discrimination against Mexican Americans and the widely-held societal value that discrimination against any ethnic group because of ethnicity is unjust, a presumption that the thirteenth amendment protects only purely racial groups because of the historical context of Southern slavery should be overcome in favor of greater protection of the rights of the individual.

Furthermore, in Jones and McDonald, the Court recognized that section two of the thirteenth amendment empowered Congress to reach conduct that is not prohibited under section one, the substantive provision, of the amendment. The Court indicated a willingness to defer to Congress' determination of what constitutes a badge of slavery. The only limitation on this power—rationality—has never been viewed as imposing serious restraints on congressional decisionmaking authority.

Finally, strong equitable arguments in addition to well-considered theories of constitutional interpretation favor the proposition that Congress can prohibit private discrimination against Mexican Americans pursuant to its thirteenth amend-

78. Id. at 228.
79. Id.
80. Id. at 229.
81. Id.
RACE AS AN INADEQUATE AND DANGEROUS CLASSIFICATION

The preceding paragraphs have not exhausted all possible arguments that can be made for the proposition that Mexican American citizens are protected by sections 1981 and 1982. The argument can and has been made that Mexican Americans are victims of racial discrimination and therefore clearly come within the ambit of the statutes. In Budinsky v. Corning Glass Works, the district court held that section 1981 did not proscribe discrimination based on national origin. In dicta, however, the court argued that section 1981 should be interpreted to prohibit discrimination against what may "pragmatic[ally]" be deemed a race. The court stated:

The terms "race" and "racial discrimination" may be of such doubtful sociological validity as to be scientifically meaningless, but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding. These courts which have extended the coverage of § 1981 have done so on a realistic basis, within the framework of this common meaning and understanding. On this admittedly unscientific basis, whites are plainly a "race" susceptible to "racial discrimination;" Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination; and, however inaccurately or stupidly, are frequently and even commonly subject to a "racial" identification as "nonwhites." There is accordingly both a practical need and a logical reason to extend § 1981's proscription against exclusively "racial" employment discrimination to these groups of potential discriminatees.

The "pragmatic" racial approach established in Budinsky is in many ways similar to the approach advocated in the preceding sections of this comment. Most importantly, it recognizes the need to extend the protections of sections 1981 and 1982 to those who have been "traditional victims of group discrimination."

82. See generally Greenfield and Kates, supra note 11.
84. Id. at 789.
85. Id. at 788.
86. Id. (emphasis added).
Because of its adherence to the racial standard, however, it is more restrictive than the approach advocated by this comment.\textsuperscript{88}

The problem with the "pragmatic" racial approach of \textit{Budinsky} is that it is subject to varying interpretations. One district court, citing \textit{Budinsky}, found that discrimination against Hispanic persons is based on national origin, not race, and on that basis dismissed a section 1981 claim.\textsuperscript{89} In that case, the plaintiff alleged discrimination in employment based on his Puerto Rican heritage.\textsuperscript{90} The court, after an extensive review of other federal decisions, stated that while

\begin{quote}
\[\text{recognizing that Puerto Rican-Americans, Cuban-Americans, Mexican-Americans, and other Hispanic peoples have at times undergone a discrimination like unto racial discrimination, this Court is not prepared to hold that Plaintiffs, being of Puerto Rican background, have stated}\]
\end{quote}

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} The more restrictive approach may hold greater appeal to the courts because of its manageability. For example, in \textit{Budinsky}, the court refused to extend the protection of the statute to Budinsky who was Slavic. The court stated:

\begin{quote}
These groups [Slavic, Italian, Jewish] are not so commonly identified as "races" not so frequently subject to that "racial" discrimination which is the specific and exclusive target of § 1981.
\end{quote}

\textit{Id.}

Undoubtedly, both the approach advocated in \textit{Budinsky} and the one described in this comment share the problem of a judicially-manageable standard for determining who is a proper plaintiff. In this regard, it should first be noted that the lack of a definitive test should be no reason for not adopting the approach; administrative convenience is rarely perceived to be a sufficient obstacle to the effective enforcement of civil rights. Secondly, there are many questions common in our jurisprudence that involve less than a totally objective inquiry. For example, what precise standards guide a jury in determining if the defendant in a negligence case acted as a reasonable person, or in assessing the percentage of the plaintiff's fault in a comparative negligence action?

One possible method by which courts can determine whether a particular plaintiff is a member of any ethnic group entitled to section 1981 protection would be to consider sociological and historical evidence relevant to the experience of the particular group within the community in which the discrimination is alleged. This test is not unlike that used by courts to determine if there a class entitled to equal treatment under the fourteenth amendment. \textit{See} Hernandez v. Texas, 347 U.S. 475 (1954).

And it is important to consider that these restrictive, \textit{Budinsky}-type approaches are actually more difficult for the courts to administer. For example, a court applying a "racial" standard would have to consider anthropological evidence relating to the racial characteristics of the group and the attitudes within the community regarding the race of the group. In light of the intent of the legislature that drafted the Civil Rights Act of 1866, this additional difficult inquiry is undesirable.


\textsuperscript{90} \textit{Id.} at 612.
a cause of action for racial discrimination, as required under 42 U.S.C. § 1981.91

Decisions like the one cited above highlight the need to extend sections 1981 and 1982 beyond mere racial discrimination to other forms of discrimination that deprive any citizen of his or her civil rights because he or she is not a member of the more favored class of white citizens. Race, itself, is a dangerous and elusive classification. As the district court noted in *LaFore v. Emblem Tape & Label Co.*, the Encyclopedia Britannica lists at least nine races, delineated by characteristics such as blood traits, hair form, and chemical composition.93 More importantly, races are not static categories; some races vanish altogether while new ones appear and existing races merge.94 It is not within the capabilities of the courts to make a scientific inquiry into the taxonomic characteristics of each plaintiff suing under sections 1981 and 1982.

CONCLUSION

The framers of the Civil Rights Act of 1866 were undoubtedly concerned with the vindication of civil rights of the newly-freed slaves. While this was their immediate purpose, the congressional debates indicate that the drafters of the Act envisioned their action as extending well beyond the particular historical setting. The Civil Rights Act of 1866 was to extend to all citizens the rights that were accorded white citizens. This broad purpose, enunciated in the general language of the Act, should certainly encompass Mexican Americans who historically have been treated differently than the European incorporators. Thus, Mexican Americans and other persons of Hispanic origin should be allowed to proceed under sections 1981 and 1982 for the vindication of their civil rights.

*Patricia Serventi*

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91. *Id.* at 613.
94. *Id.* at 986.