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Plaintiffs, black children, were denied admission to defendants' private schools solely on the basis of race. The children's parents had made applications for admission in response to brochures mailed to "resident" and advertisements directed to the general public.\(^1\) Alleging that defendants had violated 42 U.S.C. § 1981\(^2\) by denying plaintiffs the same right to enter into contracts that was enjoyed by white applicants, plaintiffs filed a class action suit in federal district court.\(^3\) The district court enjoined defendants and intervenor Southern Independent School Association from further racial discrimination in their admission practices.\(^4\) A divided Court of Appeals for the Fourth Circuit upheld the injunction.\(^5\) The Supreme Court affirmed in a 7–2 decision.\(^6\) Held: Because section 1981 reaches private acts of discrimination, it provides a remedy against a commercially operated, nonsec-

\(^1\) Two actions were consolidated for trial. In the first, Michael McCrary and Colin Gonzales, both black children, were refused admission to Bobbe's Private School in Arlington, Virginia. Colin's father had responded to a brochure from Bobbe's Private School mailed to "resident." Michael's mother had telephoned the school in response to a yellow page advertisement. Both were told that only members of the Caucasian race were admitted.

In the second action, Colin Gonzales was denied admission to Fairfax-Brewster School in Fairfax County, Virginia. Prompted by the school's direct mail campaign and yellow page advertising, Mr. and Mrs. Gonzales arranged by telephone to visit Fairfax-Brewster School. After the visit, the school rejected the Gonzales' application, explaining that the school was not integrated.


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, to 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.

\(^3\) Gonzales v. Fairfax-Brewster School, 363 F. Supp. 1200 (E.D. Va. 1973). The district court did not allow the case to be tried as a class action, but it did allow the Southern Independent School Association to intervene as a party defendant. At the time of the suit, the Association represented 395 private schools, many of which denied admission to blacks. 427 U.S. at 164.

\(^4\) Neither Bobbe's Private School nor Fairfax-Brewster School had ever admitted a black child since its opening (1958 and 1955, respectively). 427 U.S. at 165.


\(^6\) Justice Stewart wrote the opinion for the Court. Justices Stevens and Powell each filed concurring opinions. Justice White, joined by Justice Rehnquist, dissented.

Runyon is the most recent addition to a line of cases which have revitalized the Civil Rights Act of 1866, of which 42 U.S.C. § 1981 is a part. These cases have construed the statute so as to prohibit various private acts of discrimination in addition to discrimination of a public nature. The process of revitalization has not, however, produced any clear limit on the ultimate scope of the statute. The manner in which the Court has rejected potentially limiting constitutional principles makes difficult the task of drawing a line between presumably protected private discriminatory acts and discriminatory acts barred by the 1866 Act. The focus of this Note is upon the development of constitutional arguments which will permit the drawing of such a line in a principled and rational fashion.

I. THE CIVIL RIGHTS ACT OF 1866 AND ITS REBIRTH

In determining the source of section 1981, the Runyon Court concluded that the statute is a codification of section 1 of the Civil Rights Act of 1866.8 Because the Court had previously decided in Jones v. Alfred H. Mayer Co.9 that another clause of section 110 prohibits private discrimination in the sale of real property, its conclusion that the statute also bars discrimination in the formation of contracts was the result of considerable reliance upon that holding. Thus, both the 1866 Act and the Jones decision which revitalized it are important to an understanding of the Court's analysis in Runyon.

A. The Civil Rights Act of 1866

The Civil Rights Act of 1866 was enacted pursuant to Congress' power to enforce the thirteenth amendment.11 Congress enacted the

7. The Court also held that the plaintiffs' claim for damages was barred by the Virginia statute of limitations for personal injury claims, and that an award of attorney's fees had been properly reversed by the court of appeals. 427 U.S. at 179–186.
8. See note 28 infra.
10. 42 U.S.C. § 1982 (1970). a codification of part of § 1 of the 1866 Act, states: "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."
11. The 13th amendment provides that "neither slavery nor involuntary servitude
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statute partly because of doubts about the status of newly freed slaves. Furthermore, many members of Congress believed that the enactment of "Black Codes" throughout the South in 1865 and 1866 threatened to nullify the thirteenth amendment. These codes continued many incidents of slavery by restricting employment opportunities for blacks, limiting their right to testify, and disabling blacks from owning real property. In so doing, the Black Codes threatened to

... shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Section 2 gives Congress the power to enforce that declaration by appropriate legislation. The congressional debates on the 1866 Act make it plain that Congress was exercising its § 2 powers. See, for example, the opening remarks of Sen. Lyman Trumbull, Chairman of the Judiciary Committee and sponsor of the bill: "I regard the bill ... as the most important measure... since the adoption of the constitutional amendment abolishing slavery. 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." Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

12. Although the 13th amendment had ended slavery, it was not clear whether former slaves were United States citizens or citizens of the states in which they lived. The 1866 statute declared that all persons born in the United States were citizens thereof. A number of senators attacked this provision as unconstitutional. For example, Garret Davis of Kentucky, a leading spokesman for the Southern cause, argued that a constitutional amendment would be required to make former slaves citizens. See Cong. Globe, 39th Cong., 1st Sess. 523–24 (1866). Citing the constitutional provision, giving Congress the power to establish "an uniform Rule of Naturalization," U.S. Const. art. I, § 8, he argued that only foreigners could be naturalized. Therefore, because blacks were not foreigners, only a constitutional amendment would enable Congress to declare them citizens. At the other extreme, Sen. Lot Morrill, floor leader of a number of pieces of Reconstruction legislation, took the view that the newly freed blacks were citizens by virtue of the 13th amendment alone. He thought the declaration of citizenship in the 1866 Act had no force as an enactment, being simply a declaration. Cong. Globe, supra at 570.

13. Within weeks after the adoption of the 13th amendment in December, 1865, every confederate state except Arkansas and Texas had enacted Black Codes. See C. Fairman, VI History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–88, Part One 105–06 (1971). Although the Codes appear oppressive today, they were relatively moderate for their time and place. See C. Fairman, supra at 110; 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).

The Mississippi Code, the first enacted, and the most stringent, was treated by Congress as a typical example of Southern recalcitrance. It permitted blacks to own personal, but not real, property. Land could not be leased to them except in incorporated areas. Persons with one-eighth or more Negro blood could testify in court only when another black was a party to the action. Nevertheless, this was a liberalization of former statutes which had denied blacks any right to testify. If a black charged a white with a crime, the court could impose a heavy fine or imprisonment if the charge proved false and malicious. Blacks were required to find work by January, 1866, and to bind themselves for a year's labor. Quitting resulted in forfeiture of all wages. The penal sections of the old slave codes were reenacted so as to apply to freedmen. Every black between eighteen and sixty was taxed one dollar for the support of the Freedmen's Pauper Fund, and failure to pay the tax was prima facie evidence of vagrancy. In general, the goal of the Mississippi legislature was to retain as much of the institution of slavery as possible, abandoning only so much of it as
make the thirteenth amendment nothing but an empty statement of a technical change in legal status.

Congress employed language in the 1866 Act to insure that local authorities would be unable to deprive the newly freed slaves of equality in civil rights. Nevertheless, there were some people, including President Andrew Johnson, who believed that the attack on local discriminatory statutes rendered the Act unconstitutional. Lingering congressional doubts concerning the statute's constitutionality may explain Congress' reenactment of the statute in the Civil Rights Act of 1870 after passage of the fourteenth amendment. That amendment gave Congress clear authority to disable the states from enacting discriminatory statutes such as the Black Codes.

The 1866 statute is subject to two different interpretations. The first is that the statute guarantees nothing more than equality of civil
status. It invalidates any legal rule that disables a nonwhite from owning property or that renders void or voidable a contract entered into by a nonwhite unless the same disability is visited upon whites. Under this interpretation, the statute would not apply to the facts in Runyon. It would apply to a case in which a defendant seeks to avoid his contractual obligation by offering the defense that the contract under the law of that jurisdiction is voidable because of plaintiff's race. Viewed this way, the statute is aimed at states and state action, not at the acts of private individuals.\textsuperscript{18} Under the second interpretation, the statute gives nonwhites a right\textsuperscript{19} to enter contracts which is "absolute" in the sense that a refusal to contract on the basis of race is unlawful. Thus, a section 1981 right to contract entails a correlative duty to contract for the breach of which the law will provide a remedy. In Jones, a decision rendered more than a century after the statute had been enacted, the Court gave to the 1866 Act this second construction.

B. Jones v. Alfred H. Mayer Co.

Prior to Jones, the Court had discussed the reach of section 1 of the Civil Rights Act of 1866 in dictum only, concluding each time that the statute did not reach private acts of discrimination.\textsuperscript{20} The Jones

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\textsuperscript{18} The dissent adopted this view, which is consistent with its conclusion that § 1981 derives its constitutional support from the 14th amendment alone. 427 U.S. at 213. See note 28 infra.

\textsuperscript{19} The ambiguity of the term "right" in the context of §§ 1981 and 1982 is developed by Justice Harlan in his dissent in Jones v. Alfred H. Mayer Co., 392 U.S. at 449. He notes that the ambiguous statement in § 1982 that all citizens have a "right" to contract or to own property gives rise to two interpretations. Id. at 452-53. First, the right may be "absolute," in which case it entails a correlative duty in someone else not to refuse, e.g., to contract. See Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 30 (1913). Second, the right may only denote legal capacity. In this sense, a right to own property or to contract refers only to the lack of any legal disability to enter such relations.

\textsuperscript{20} The Reconstruction Court discussed the statute in dictum in two cases. See Rives v. Virginia, 100 U.S. 313 (1877); The Civil Rights Cases, 109 U.S. 3 (1883). In Rives the Court construed a section of the 1866 Act in connection with §§ 1981 and 1982. In general, the Court indicated that the various sections of the Act were intended to limit official action only. 100 U.S. at 317-18. Even as dictum, however, that statement is of little value. The text of the opinion makes clear that the Court thought that these provisions derived from the Act of 1870, not the 1866 Act.

In the Civil Rights Cases the Court discussed the 1866 Act and observed: At that time (in 1866) congress did not assume, under the authority given by the thirteenth amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or depriva-

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Court adopted a contrary position, holding that the 1866 Act prohibits a seller of real property from refusing to sell to a prospective black buyer because of the buyer's race. The Court determined that the statute derives constitutional support from the thirteenth amendment.

The *Jones* decision caused considerable controversy. Critics charged that the Court examined the legislative history of the Act selectively and out of context to reach a result that would have shocked the Congress of 1866. Those who agreed with the *Jones* decision cited the 1866 Act as a model of constitutional restraint. For example, in *Civil Rights Cases* (1883), the Court held that the Fourteenth Amendment applied only to actions of state officials, not actions of private individuals. In *Little v. United States* (1883), the Court held that the Fourteenth Amendment did not apply to private individuals. In *Hodges v. United States* (1906), the Court held that the use of physical violence to prevent blacks from performing an employment contract was not prohibited by the 1866 Act. The Court indicated that such conduct could not be reached under Congress' 13th amendment enforcement powers: "It was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man, and yet justified in a condition of slavery." In *Corrigan*, the Court cited *Hodges* for the proposition that the 13th amendment which prohibits "enforced compulsory service of one to another does not in other matters protect the individual rights of persons of the negro race." In holding that the 1866 Act does not prohibit restrictive racial covenants, the Court stated that the statute does not "in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property." *Hodges* was explicitly overruled by *Jones*. More recently, the Court considered 42 U.S.C. § 1982 in *Hurd v. Hodge*, 334 U.S. at 441 n.78.

21. In *Jones*, a developer of a planned residential community refused to sell a house to a black couple solely on account of their race. The couple sued on the theory that their § 1982 right to purchase property had been violated. Section 1982 provides that all citizens shall have the same right as white citizens to "inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1970). The Court had to decide whether that language simply removed any legal disabilities or whether it imposed upon sellers a duty not to refuse to sell to potential purchasers solely on the basis of race.

22. See the comments of Justice Stevens, concurring in *Runyon*: There is no doubt in my mind that [the Court's] construction of the statute would have amazed the legislators who voted for it. Both its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence. Moreover, since the legislative history discloses an intent not to outlaw segregated public schools at
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decision argued that it is at least permitted if not compelled by the statutory language.\textsuperscript{23} Although there is good reason to believe that the

\footnotesize{that time, it is quite unrealistic to assume that Congress intended the broader result of prohibiting segregated private schools.}

427 U.S. at 189–90.

The Court's reading of the legislative history is extensively criticized in C. \textit{FAIRMAN}, \textit{supra} note 13, at 1218. He notes that the Court found a number of speeches in the legislative record indicating that the purpose of the statute was to abolish racial discrimination, both official and private. These speeches, however, were addressed to a clause in the first section which was later deleted. The clause in question read: "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery." \textit{CONG. GLOBE, 39th Cong., 1st Sess.} 474 (1866). The remarks of Rep. Wilson in defense of this clause indicate that "civil rights and immunities" did not mean "that all citizens shall sit on the juries, or that their children shall attend the same schools." \textit{id.} at 1117. Rather, the expression was to be limited to the narrow range of rights and immunities later adopted in the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 76 (1872). Nevertheless, critics of the bill were concerned that the statute might be read too broadly by the courts. Despite assurances that the statute could not be used to override state regulation of voting, qualification for office, jury service, or school attendance, the critics prevailed and the provision was deleted. \textit{See C. \textit{FAIRMAN}, \textit{supra} note 13, at 1219.}

It is interesting that the Court in \textit{Jones} was aware of this history. Justice Stewart, the author of the \textit{Jones} opinion, had noted the deletion of the first clause of § 1 of the 1866 Act in Georgia v. Rachel, 384 U.S. 780 (1966).

\textit{Fairman} chides the Court for construing the statute as if it were a constitutional provision and concludes that the construction of the statute developed in \textit{Jones} is without historical foundation. For other incisive criticisms of the Court's statutory holding in \textit{Jones}, see Jones v. Alfred H. Mayer Co., 392 U.S. at 449 (Harlan, J., dissenting); Casper, \textit{supra} note 13; Ervin, \textit{Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot}, 22 \textit{VAND. L. REV.} 485 (1969); Henkin, \textit{The Supreme Court, 1967 Term, Foreword: On Drawing Lines}, 82 \textit{HARV. L. REV.} 63, 95 (1968).

23. Commentators have generated three arguments in support of the result reached in \textit{Jones}. The first of these is that the language employed in § 1 of the 1866 Act indicates that Congress intended to reach private acts of discrimination. The Act grants the rights conferred, "any law, statute, ordinance, regulation, or \textit{custom} to the contrary notwithstanding." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (emphasis added). The use of the term "custom" is said to indicate congressional intent to go beyond official action and to attack and prevent private acts of discrimination. \textit{See Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment}, 12 \textit{HOUS. L. REV.} 1, 16 (1974); Kohl, \textit{The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.}, 55 \textit{VA. L. REV.} 272, 284 (1969). Kohl's argument is that the Black Codes were not the chief concern of Congress in passing the legislation. Rather, Congress wished to insure that the institution of slavery would not be continued through private action. That result was to be prevented through the 1866 Act's attack on private discrimination. Kohl, \textit{supra} at 276. There is considerable evidence, however, that the term "custom" referred not to private action but to customary official action. \textit{See Jones v. Alfred H. Mayer Co.}, 392 U.S. at 457 (Harlan, J., dissenting); C. \textit{FAIRMAN}, \textit{supra} note 13, at 1238–44. Although Professor Kohl concedes that there is evidence on both sides of the question, he concludes that "on balance the legislative history clearly justifies the Court's application of the Act. . . . If the Court erred, it erred on the side of caution. . . . [B]y using the legislative history properly, the Court could have extended the Act still further." Kohl, \textit{supra} at 300.

II. THE REASONING OF THE RUNYON COURT

Before analyzing the issues presented by the case, the Court took care to list the issues that were not presented. Accordingly, the Court stated that the case did not involve the right of private social organizations to exclude prospective members on racial grounds; the right of private schools to limit their clientele along religious or gender-based
determination is applicable to a case like Jones because “the herding together of black men, women and children into the great ghettos of America is a remnant of the supposedly outlawed system of human slavery.” Id. at 479.

A third argument in support of the Jones decision is that, because the 1866 Act is quasi-constitutional, its interpretation need not be limited by the intent of its framers. See Levinson, New Perspectives on the Reconstruction Court, 26 Stan. L. Rev. 461 (1974) (book review of C. Fairman, supra note 13); Note, The Desegregation of Private Schools: Is Section 1981 the Answer?, 48 N.Y.U.L. Rev. 1147 (1973). Conceding that the Court’s opinion was “thoroughly slipshod in its analysis of the legislation’s context,” Levinson compares the statute to such seminal pieces of legislation as the Judiciary Act of 1789, the Sherman Act, and The National Labor Relations Act. Levinson, supra at 482. He concludes that the “Civil Rights Act of 1866 did manifest, however imperfectly and ambivalently, a new order of freedom for the black man....

24. See note 22 supra.

25. Prior to Runyon, the Supreme Court had twice indicated that it would give the Jones construction to § 1981. See Tillman v. Wheaton-Haven Recreation Ass’n, 410 U.S. 431, 440 (1973); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (dictum). The statement in Tillman is arguably dictum. See Runyon v. McCrory, 427 U.S. at 214 n.16 (White, J., dissenting). The Runyon Court refers to its decision in Johnson as a holding that § 1981 reaches private conduct. 427 U.S. at 168 n.8. In that case, however, the § 1981 claim was dismissed as barred by the statute of limitations; the language construing the statute is therefore dictum.

Prior to these decisions, the courts of appeals had extended the Jones holding to § 1981. The statute has been used most extensively in employment contracts. See, e.g., Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of Int’l Harvester Co., 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970); Payne v. Ford Motor Co., 461 F.2d 1107 (8th Cir. 1972); Macklin v. Specter Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973).

There are a number of decisions applying § 1981 in other areas of racial discrimination. The chief problem in these cases is not one of statutory construction, but one of determining whether a contractual relation is involved. See Scott v. Young, 421 F.2d 143 (4th Cir.), cert. denied, 398 U.S. 929 (1970) (denial of admission to private recreational facility); Grier v. Specialized Skills, Inc., 326 F. Supp. 856 (W.D.N.C. 1971) (denial of admission to private technical school); United States v. Medical Soc’y of S.C., 298 F. Supp. 145 (D.S.C. 1969) (denial of admission to private hospital); cf. Cook v. Advertister Co., 458 F.2d 1119 (5th Cir. 1972) (refusal to print plaintiff’s social announcement on all-white society page not a violation of § 1981 because no contractual relation involved).
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lines; or the right of private schools to practice racial exclusion on religious grounds. The Court’s analysis was limited to two issues: “whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied.”

A. The Applicability of Section 1981

The Court first determined that section 1981 was derived from the same source as section 1982—section 1 of the Civil Rights Act of 1866. The Court then had little trouble concluding that the “absolute rights” interpretation which Jones gave to section 1982 should

26. 427 U.S. at 167. Because of its 13th amendment foundation, § 1981 is deemed to reach only racial discrimination. Racial exclusion practiced for religious reasons might be exempt from the statute by virtue of the free exercise clause of the first amendment. Id. at 167 n.6.

27. Id. at 168.

28. The apparent cause of the uncertainty concerning the legislative source of § 1981 is a note appended to the Revised Statutes of 1874 which indicates that § 1977 (now codified at 42 U.S.C. § 1981 (1970)) was derived from the Civil Rights Act of 1870. Indeed, § 16 of the 1870 Act is substantially identical to § 1981. On the other hand, the note appended to § 1978 of the Revised Statutes (now codified at 42 U.S.C. § 1982 (1970)) indicates that that section was derived from the Civil Rights Act of 1866.

The historical notes following 42 U.S.C. §§ 1981 and 1982 also reflect this difference. They state that § 1981 derives from the 1870 Act while § 1982 derives from the 1866 Act. On the basis of that difference, the dissent would have held that § 1982 was intended to reach private conduct under the 13th amendment while § 1981 reaches only state action under the 14th amendment. 427 U.S. at 213. The dissenters thus concluded that the construction given § 1982 by the Court in Jones did not apply to § 1981.

In a lengthy footnote, 427 U.S. at 168 n.8, the Court met the historical argument raised by the dissent. First, the Court noted that § 18 of the 1870 Act reenacted the entire Civil Rights Act of 1866. Because § 16 of the 1870 Act likewise reenacted certain portions of § 1 of the 1866 Act (from which §§ 1981 and 1982 derive), the Court concluded that the revisors of 1874 either overlooked § 18 or thought it superfluous to mention this additional source.

The response of the dissenters to this point is that 42 U.S.C. § 1981 codifies a former code section that had been repealed. 427 U.S. at 206–07. The argument is as follows: Section 1977 of the Revised Statutes of 1874, giving to all persons “the same right . . . 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” was derived by the revisor of the 1874 Code from the 1870 Civil Rights Act. Section 1978, which survives today as 42 U.S.C. § 1982, provides that “[a]ll 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.” The revisor’s notes indicate that this section was derived from the 1866 Act.

Therefore, reasoned the dissent, only part of the first section of the 1866 Act was
also apply to section 1981. Thus, by refusing to enter into a contract for educational services solely because of plaintiffs' race, defendants denied plaintiffs the same opportunity to enter into contracts as they extended to white offerees. Section 1981, however, guarantees to all citizens the same right to enter into contracts which white citizens enjoy. Because Jones holds that this right creates a correlative duty not to refuse to contract solely for racial reasons, defendants were obliged not to refuse to contract. Their refusal to enter a contract with plaintiffs solely for racial reasons constituted a "classic violation of Section 1981."  

B. The Constitutionality of Section 1981 as Applied

Defendants raised three constitutional issues, all of which the Court rejected. They argued that section 1981, as applied to the conduct at issue, infringed on defendants' freedom of association and right to privacy, and violated parental rights to send children to private schools offering specialized instruction. With respect to the parental

codified in the Revised Statutes of 1874—the part which is now codified as § 1982, but not the part now codified as § 1981. Section 5596 of the Revised Statutes of 1874 provides, however, that all acts of Congress passed prior to December 1, 1873, any part of which appear therein, are repealed and replaced by the 1874 Code. The dissent concluded, therefore, that because part of the Civil Rights Act of 1866 was codified, the remainder was repealed in 1874.

The Court rejected this argument on the ground that it could not believe that Congress intended to repeal a major piece of Reconstruction legislation on the basis of a failure by the revisors of 1874 to include a reference to it in the notes. 427 U.S. at 168 n.8.

29. See note 19 and accompanying text supra.
31. Id. at 172.
34. See Wisconsin v. Yoder, 406 U.S. 205 (1972) (state may impose educational standards on private schools even though it may not require attendance at public schools); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state law requiring parent or guardian to send child to public school unconstitutional); Meyer v. Nebraska, 262 U.S. 390 (1923) (state law prohibiting the teaching of foreign languages deprives teachers and parents of liberty).
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right to send children to private schools, the Court noted that the right is extremely limited and involves no right to be free of reasonable government regulation. As to the remaining defenses, the Court observed that private discrimination has never been held to derive affirmative support from the constitution in the face of legislation directed against it. The Court declined to extend any of the rights relied upon by defendants so as to authorize private discrimination.

C. The Powell Concurrence

Justice Powell indicated that he might well have voted to reverse if the line of authority beginning with Jones had not stood in the way.


37. First, as to freedom of association, the Court agreed, 427 U.S. at 175, that defendants' clientele have a right to associate "for the advancement of beliefs and ideas." NAACP v. Alabama, 357 U.S. 449, 460 (1958). The Court pointed out that the right to associate to advance the idea that racial segregation is beneficial does not entail the right to practice racial discrimination. 427 U.S. at 176. Apparently, defendants relied too heavily on dictum in Norwood v. Harrison, 413 U.S. 455 (1973), that "[i]nvibious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment." Id. at 470. That same opinion qualified the statement by noting that such discrimination may be unlawful when it becomes the subject of remedial legislation enacted pursuant to Congress' power to enforce the 13th amendment. Because Runyon leaves the schools free to teach the desirability of racial segregation, the Court did not perceive their inability to practice such discrimination as a violation of any constitutional right of association.

Second, as to the constitutional right to send one's children to private school, the Court noted the narrow scope that has been given to that right. 427 U.S. at 176-77. See cases cited in note 34 supra. The right to send a child to private school has been held not to entail a right to be free from reasonable state regulation. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court commented that while the state "may not pre-empt the educational process by requiring children to attend public schools," neither may parents "replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society." Id. at 239.

Defendant's third attempt to reach a constitutional issue involved the application of cases finding a right to privacy in areas of abortion, home consumption of obscene materials, and birth control. See cases cited in note 33 supra. The Court commented, however, that this case "does not represent governmental intrusion into the privacy of the home or a similarly intimate setting." 427 U.S. at 178. The Court noted that, although parental interests in educating children are related to the procreative rights protected in the privacy cases, the former have been given far less protection than the latter. Id.

38. Justice Stevens, who also filed a separate concurring opinion, left no doubt that he too would have voted to reverse but for Jones. He stated that for him "the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided." 427 U.S. at 189. Although he considered his misgivings concerning the validity of Jones, two considerations of greater force per-
Because he felt bound by precedent, however, Justice Powell directed the thrust of his concurrence toward cautioning against interpreting the majority opinion in *Runyon* too broadly. Thus, his opinion is helpful in identifying those private acts of discrimination which are prohibited under section 1981.

Justice Powell observed that private action is an ambiguous term; it is used to refer to nonstate action as well as to truly private nonpublic action. The schools in *Runyon* were private in the first sense, but not in the second. They were private in terms of their organization and financing, but public in terms of their potential constituency. This distinction, in Powell's view, can provide the basis for a valid limitation of the *Jones-Runyon* holdings to public offers in which the offerors do not appear to have "any special reason for exercising an option of personal choice among those who responded to their public offers." On the other hand, a small instructional group open only to pre-identified invitees is private in the nonpublic sense. Justice Powell's view is that a nonpublic offeror is not within the scope of section 1981. Although he realized that the line between the two types of private action might be difficult to draw in particular cases, he considered the distinction to be a workable one.

### III. THE SCOPE OF THE 1866 ACT

All the cases in the *Jones-Runyon* line have in common the fact that the discriminatory act occurred in a course of public dealings. It remains to be seen whether the Court will apply the 1866 Act to situations in which the discriminatory act occurs in a private setting.

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39. 427 U.S. at 188–89 (Powell, J., concurring). See also McCrary v. *Runyon*, 515 F.2d 1082, 1089 (4th Cir. 1975). The majority also indicated in a footnote that the public nature of the school's actual and potential constituency was significant. 427 U.S. at 172 n.10. The majority's point, however, was that the schools' public nature rendered unnecessary a discussion of the applicability of the private club exemption in the 1964 Civil Rights Act, 42 U.S.C. § 2000a(e) (1970). Justice Powell's point was that the public constituency of the schools could provide the basis for limiting the application of the 1866 Act.

40. 427 U.S. at 188.

41. *See note 57 infra.*
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The distinction between a commercial, public-oriented discriminator and a truly private discriminator is intuitively appealing. However, the positions adopted in Jones and Runyon undermine the doctrinal bases upon which a principled distinction could be built. The first two sections of this Part will demonstrate that the Court's treatment of the constitutional and statutory issues involved in the adjudication of this area provides no basis for effectively limiting the scope of the 1866 Act. The third section will suggest an alternative analysis which provides a suitable limiting principle.

A. Potential Constitutional Limitations

In Jones, the Court adopted the view that congressional regulation of discriminatory conduct may be sustained under the thirteenth amendment's enforcement clause unless the congressional determination that the conduct is a "badge and incident of slavery" is irrational. Moreover, the Court's liberal reading of the statute in Jones commits it to the view that Congress in 1866 made such a determination, and that the determination is not irrational. It follows that the thirteenth amendment, enforced by the Act, reaches all acts of racial discrimination, absent any countervailing considerations. The two most reasonable countervailing factors are the discriminator's right of association and his right to privacy. The Court's analysis of these two rights, however, renders them ineffective as limiting principles.

1. Right of association

The right to associate for the advancement of ideas has been identified by the Court as a derivative of the first amendment right of freedom of expression. In addition, the Court has indicated in dictum that associations are constitutionally protected even though

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42. 392 U.S. 409, 440 (1968).
43. "On its face ... [the statute] appears to prohibit all discrimination against Negroes .... Our examination of the relevant history, however, persuades us that Congress meant exactly what it said." Id. at 421–22 (emphasis in original).
44. Defendants in Runyon also relied on parental rights to send children to private schools. The Court's treatment of their contention will not be analyzed here, because parental rights cannot provide a limitation on the 1866 Act outside the specific Runyon context. Even in that context, parental rights were rejected by the Court as a limiting principle. 427 U.S. at 176–77. See note 37 supra.
45. See, e.g., cases cited in note 32 supra.
the associational purpose does not include the advancement of ideas. In Runyon, the Court ignored its statements from earlier cases and restricted the right to associate to a first amendment context. Since the 1866 Act as interpreted in Runyon does not attempt to prevent discriminators from gathering together to advocate racial discrimination, the right to associate cannot provide a limit on the scope of the statute. A broader interpretation of associational rights would have given the Court the chance to limit the statute through case by case balancing of the discriminator's associational interest against the government's interest in eliminating the vestiges of slavery. If the statute is to be limited, alternative approaches will need to be developed.

2. Right of privacy

A liberal reading of cases like Griswold v. Connecticut and Roe v. Wade discloses a right to be free from government regulation in making decisions of personal and familial concern. After Runyon, that interpretation must be limited. The Court in effect limited Griswold and Roe v. Wade to their facts by stating that they apply only to procreative decisions. Moreover, the Court indicated that the privacy cases will not be extended beyond "governmental intrusion into the home or similarly intimate setting."

The apparent effect of the Court's treatment of the privacy cases is that all activities which take place outside the narrow class of intimate settings can be reached by the 1866 Act, and, therefore, the search for limits on the scope of the 1866 Act must begin outside such intimate settings. The refusal of the Court to rely upon the rights of association

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46. See Griswold v. Connecticut, 381 U.S. 479, 483 (1965), in which the Court suggests that associations which provide social, legal, or economic benefits to members are constitutionally protected.
47. 427 U.S. at 178. See also note 37 supra.
48. Even if the Court were to accept such a generalized right of association, it is not clear that that right could provide a suitable limiting principle. It may be difficult for private social and recreational groups to convince a court that their interest in associational purity outweighs the countervailing governmental interest in eliminating the vestiges of slavery. See, e.g., Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 COLUM. L. REV. 449 (1974); Note, Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination, 84 YALE L.J. 1441 (1975). Moreover, it would be anomalous for a derivative constitutional right to outweigh an explicit constitutional proscription.
49. 381 U.S. 479 (1965).
51. 427 U.S. at 178.
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and privacy to balance parental interests in sending children to specialized private schools against the governmental interest in enforcing the thirteenth amendment suggests that these constitutional doctrines do not limit the reach of the statute.

B. Statutory Limitations

The Powell concurrence is an attempt to develop a statutory analysis that limits the 1866 Act to impersonal, commercial relationships. In Powell's view, an offer is governed by the 1866 Act if it is part of a widely offered commercial relationship which is not of such a personal nature that the offeror's selectivity is justified.\(^{52}\)

Justice Powell offered no authority in support of his distinction, and indeed, it appears that none is available. Reliance on the legislative history has been foreclosed by the majority's statutory holdings.\(^{53}\) Any reading of the legislative history sufficiently detailed to indicate that the Act does not apply to personal relationships would also indicate that it does not apply to private sales of real property\(^{54}\) or to private schools.\(^{55}\)

An additional problem with the Powell analysis lies in the fact that

\(^{52}\) 427 U.S. at 188–89 (Powell, J., concurring).

\(^{53}\) It is significant that the two concurring opinions indicate that the legislative history suggests that Jones was incorrectly decided. The concurrences are based largely on stare decisis grounds. 427 U.S. at 186 (Powell, J., concurring); id. at 189 (Stevens, J., concurring). Jones has acquired sufficient precedential weight to insure its vitality without additional references to the 1866 Act's legislative history.

\(^{54}\) The excerpts from the legislative history collected by Justice Harlan in his Jones dissent, 392 U.S. at 449–80, establish that Congress was aiming at official, not private, discrimination. E.g., The Act "will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race." Cong. Globe, 39th Cong., 1st Sess. 476 (1866) (remarks of Sen. Trumbull); "This bill in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property." Id. at 1761 (remarks of Sen. Trumbull); "The bill does not reach mere private wrongs, but only those done under color of State authority . . . . [T]he whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof . . . . of the rights enumerated in this act. That is the whole of it." Id. at 1294 (remarks of Rep. Shellabarger).

The legislative history relied upon by the Court in Jones is chiefly from the debates concerning a section of the Act which was deleted prior to passage. See C. Fairman, supra note 13, at 1219. See generally Jones v. Alfred H. Mayer Co., 392 U.S. 409, 449–80 (1969) (Harlan, J., dissenting); C. Fairman, supra note 13, at 1207. See also notes 22–23 supra.

\(^{55}\) Justice Stevens concludes that because the Act was intended to have no effect on segregated public schools (see Cong. Globe, 39th Cong., 1st Sess. 1294 (1866) (remarks of Rep. Wilson, House sponsor of the bill)), a fortiori it was intended to have no effect on segregated private schools. 424 U.S. at 189–90 (Stevens, J., concurring).
the Act, in his view, protects offerees and not those to whom no offer has been extended.\textsuperscript{56} If this is the case, the discriminator may avoid the Act by taking care in the selection of those to whom he extends invitations. For example, a small music class which routinely extends invitations to all white children within a small neighborhood area but which excludes nonwhites within that area would be outside the proscription of the Act because it is not part of a widely offered commercial operation and because the relationship between teacher and pupil in such a class is a personal one. At the same time, the discriminator's conduct indicates that he had no reason for exercising any personal choice; just as in Runyon, every white who wished to attend was able to do so. The loophole which results for the knowledgeable discriminator surely is inconsistent with the majority interpretation of the statute. Powell's suggestion as to how to limit the scope of the statute must be rejected.\textsuperscript{57}

\textsuperscript{56} Both Justice Powell and the Court refer to plaintiffs as offerees and to defendants as offerors. See, e.g., 427 U.S. at 170-71, 187. Although it is possible that the defendants' advertisements were requests for offers, the Court seemed to think that the ads were specific enough to constitute offers.

\textsuperscript{57} An alternative mode of analysis, suggested but not developed both by the Court and by Justice Powell, involves an analog of the recently abandoned public function doctrine. Both opinions agree with the court of appeals that these "'schools are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private.'" 427 U.S. at 172 n.10; id. at 188 (Powell, J., concurring) (quoting McCrory v. Runyon, 515 F.2d 1082, 1089 (4th Cir. 1975)). There is a strong parallel between several of the cases decided under the 1866 Act and the now-abandoned public function strand of state action analysis. Through a public function analysis, a nonstate actor may violate a 14th amendment right if the actor is performing a function sufficiently similar to one performed by the state that it can fairly be said that the state is acting. In the first public function case, Marsh v. Alabama, 326 U.S. 501 (1946), a company-owned town was not permitted to curtail freedom of expression despite the fact that the land on which the town was located was privately owned. A course of decisions gradually extended the doctrine. See Terry v. Adams, 345 U.S. 461 (1953) (private political organization which in fact has power of choosing public officials takes on attributes of government); Evans v. Newton, 382 U.S. 296 (1966) (private park could not be operated on racially restricted basis because parks perform a traditionally public function) (alternative holding); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) (privately owned shopping center may not prohibit picketing of employees). But see Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), limiting Logan Valley to cases in which the protest relates to the shopping center's function. The Lloyd dissenters' view that Logan Valley had been overruled was expressly confirmed in Hudgens v. NLRB. 424 U.S. 507 (1976). It now appears that the doctrine applies only to situations in which the government requires itself to provide a service. See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (utility company which is required by state statute to provide service does not violate due process clause of 14th amendment when it shuts off service to customer without a hearing).

Although the public function strand may have been abandoned (aside from the Marsh & Terry contexts) in state action cases, a similar principle has emerged in the
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C. A Second Look at the Thirteenth Amendment

The preceding examination of the posture of the constitutional and statutory issues surrounding the Civil Rights Act of 1866 indicates that no satisfactory limiting principle is forthcoming from the Court's statutory and constitutional analysis. That conclusion could have been avoided in one of two ways. First, the Court could have given to the 1866 statute an historically accurate construction. Second, the Court could have articulated the rational relation which a statute must bear to the continuing vestiges of the institution of slavery in order to be sustained as an enforcement of the thirteenth amendment. The first alternative would have required overruling Jones. Given the limitations imposed by stare decisis, that result is not to be expected in the near future. It is not too late, however, for the Court to indicate the contours of the rational relation first developed in Jones.

Ideally, the rational relation required of a congressional enactment under the thirteenth amendment should be something more than minimal rationality. The condition attacked by the statute should bear a real and substantial relation to the historical institution of involuntary servitude. The reasons for a narrow reading have been developed

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cases decided under the 1866 Act. Thus, Jones bears a family resemblance to Marsh. The fully planned community may be a functional equivalent to the company towns of yesterday. If it can be said that the development in Jones is performing a sufficiently public function to impose 14th amendment limits, it is clear that the developer's conduct would constitute a violation of equal protection. Similarly, the recreational facilities in Tillman v. Wheaton-Haven Recreational Ass'n, 410 U.S. 431 (1973), and Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), can be likened to the park in Evans v. Newton. Each facility was open to all persons within a given geographical area, provided such persons were white. The Court might have applied the public function doctrine in those cases upon the same basis as the alternative holding in Evans v. Newton, i.e., the operators were performing a traditionally municipal function. Finally, the private schools in Runyon were performing what has come to be a traditional public function. Indeed, the operation of schools is a function which the states require themselves or their subdivisions to provide.

Employment cases aside, any of these Jones-Runyon cases could have been decided under a public function analysis had the Court been so inclined. Indeed, it appears that something very similar to the public function analysis has emerged in the cases decided under the 1866 Act, but with an important difference—the doctrine has expanded the scope of the 14th amendment, but would operate as a limitation on the reach of the 13th. For a further discussion of the relationship of the public function doctrine to private school discrimination, see Note, The Wall of Racial Separation: The Role of Private and Parochial Schools in Racial Integration, 43 N.Y.U.L. Rev. 514, 517 (1968).

Although the public function doctrine marks the contours of the limitation which Justice Powell wishes to impose upon the 1866 Act, it must be concluded that, after Hudgens v. NLRB, it cannot provide the doctrinal base for the limitation.

58. See note 22 supra. But see note 23 supra.
elsewhere but may be summarized briefly. First, the purpose of the framers of the thirteenth amendment was to accomplish emancipation of slaves, not to end racial discrimination. Second, to achieve this purpose, the framers did not use general terms purposefully left to gather meaning over the decades; rather, they used the specific terms "slavery" and "involuntary servitude" to indicate that it was this particular institution, and no other, which they wished to destroy. Third, the amendment is a direct copy of a section of the Northwest Ordinance which itself had been narrowly construed to apply to slavery but not to racial discrimination.

Limiting the thirteenth amendment to conditions which are actual vestiges of the historical institution of slavery still permits Congress to reach certain nonstate acts of discrimination. Because the historical incidents of slavery included the inability to own property and to choose one's occupation, the results in several of the cases following Jones can be sustained on a narrow reading of the thirteenth amendment, assuming that appropriate legislation is enacted. At the same time, most private discriminatory acts of the type described by Justice Powell will not be within Congress' enforcement power because such truly private discriminatory acts cannot be said to bear a sufficiently strong relationship to the institution of involuntary servitude. Racial groups who were never enslaved have been the victims of such discrimination. Areas in which slavery was practiced in the past in some cases have more racially tolerant climates than others in which the institution never existed. While the relationship between slavery and private racial discrimination may be able to pass a minimum rationality test, it surely is not strong enough to pass a test based upon historical realities.

Limiting the thirteenth amendment to historical vestiges of slavery is a rational solution, but is practically impossible. Even though slavery and racial discrimination are not necessarily causally connected, any attempt to identify particular discriminatory acts as

61. E.g., Native Americans, Orientals, and Hispanics.
62. Compare the United States with Rhodesia, which never practiced slavery.
badges of slavery by receiving the opinions of historians and sociologists is likely to involve the courts in a monumental and unresolvable battle of experts. The problem for the Court is to identify some characteristic which is representative of the abuses of slavery, even though it is not demonstrably the fruit of that institution.

The position developed by the first Justice Harlan in his dissent in the Civil Rights Cases offers such a compromise. It was Justice Harlan's view that the enforcement clause of the thirteenth amendment authorizes Congress to enact laws which prohibit discriminators from denying anyone a legal right on account of race. Since the essence of the slave system was the deprivation of fundamental human liberties, the abolition of slavery "necessarily involved immunity from, and protection against, all discrimination against [former slaves], because of their race, in respect of such civil rights as belong to freemen of other races."

Limiting the thirteenth amendment to the protection of legal rights has two advantages. First, it enables the Court to draw a principled line between permissible and impermissible discrimination. Certainly those discriminatory acts which deny their victim something to which he is entitled are more offensive than those private acts which involve a refusal to confer a benefit. The implication of an act which denies someone a legal right is at least in part that the victim is not the civil equal of the discriminator. It is not difficult to detect the lingering odor of slavery in such an act. The refusal to confer a benefit upon members of other racial, ethnic, or religious groups—such as a refusal to extend invitations to Justice Powell's private music class—carries an implication considerably less strong. When one has been denied a benefit to which he had no legal right, it is difficult to argue that the constitutional proscription of slavery has been violated.

The second advantage of a legal rights test is the ease with which the courts can apply it. The conceptual equipment necessary to identify legal rights is possessed by the federal bench in abundance, and the newly revived thirteenth amendment and the 1866 Act could settle

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64. Id. at 36.
65. The distinction between a right and a privilege is hardly novel and has at times assumed constitutional dimensions. In the past, it has been held that a benefit may be denied without a hearing if the benefit is a privilege, but not if it is a right. See generally 1 K. Davis, Administrative Law Treatise §§ 7.11-20 (1958). However, the classification of an entitlement as a right or a privilege in this context no longer determines
into predictable, rational channels after a few cases had drawn the line between right and privilege in this setting.\textsuperscript{65}

IV. CONCLUSION

The decisions construing the 1866 Civil Rights Act have used language so broad as to suggest that there are no effective limits to the ban the statute imposes upon racially discriminatory acts. The Court has rejected two constitutional arguments—freedom of association and the right to privacy—which would limit the Act by protecting the discriminator. Limiting the scope of the statute by defining the constitutional prohibition of slavery is a rational alternative. Ideally, this process would involve a detailed case by case analysis of each condition attacked under the statute to determine whether that condition is an historical remnant of slavery. In practice, reasoned judgments on such questions are impossible. A suitable compromise is found in Justice Harlan's view that Congress is authorized by the thirteenth amendment to enact legislation which prohibits the denial of legal rights on account of race. If the 1866 Act applies only to the denial of legal rights, a workable balance of competing interests can be achieved. The power of the federal government will be available to remedy the outrage of racially motivated denials of legal rights. At the same time, that power will not be employed to adjust the relations of citizens in those areas of conduct within which members of our society have always exercised freedom of choice.

\textit{Gerald Bresslour}

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\textsuperscript{65} See, e.g., Perry v. Sinderman, 408 U.S. 593 (1972) (hearing may be required when non-tenured teacher at state university is denied reappointment after a series of one-year contracts); Bell v. Burson, 402 U.S. 593 (1971) (state may not suspend driver's license without a hearing, naming the entitlement to the license a right or a privilege irrelevant); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits may not be terminated without a hearing regardless of right/privilege classification).

Nevertheless, in other contexts, "some interests do not deserve legal protection and may properly be called 'privileges.' The concept of 'right' or 'legal right' cannot be abolished. It will continue. So will the concept of 'no right' or 'lack of right.'" K. Davis, Administrative Law of the Seventies § 7.00-8 at 264 (1976).

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