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Civil Rights in Transition: Sections 1981 and 1982 Cover Discrimination on the Basis of Ancestry and Ethnicity

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CIVIL RIGHTS IN TRANSITION: SECTIONS 1981 AND 1982 COVER DISCRIMINATION ON THE BASIS OF ANCESTRY AND ETHNICITY*

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This article explores the significance of the recent United States Supreme Court decisions extending the scope of 42 U.S.C. sections 1981 and 1982 to discrimination on the basis of ancestry and ethnicity. While the article was in its final editorial stage, the Supreme Court, in Patterson v. McLean Credit Union, called for reargument as to whether the holding in Runyon v. McCrary, that section 1981 applies to private discrimination, should be reconsidered.

One of the points stressed in this article is that sections 1981 and 1982 are especially important vehicles for redressing societal discrimination because they apply to private as well as public parties. The authors believe that the value of these provisions will be seriously eroded should Runyon be overruled.

INTRODUCTION

The United States Supreme Court has determined that the discrimination prohibited by the contracts clause of 42 U.S.C. section 1981[1] and by 42 U.S.C. section 1982[2], encompasses discrimination

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1. 42 U.S.C. § 1981 (1982). The statute provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

2. 42 U.S.C. § 1982 (1982). The statute 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." *Id.*

on the basis of ancestry and ethnicity. The Court reached this result in the companion cases of *Saint Francis College v. Al-Khazraji*[3] and *Shaare Tefila Congregation v. Cobb*.[4] Ironically, the two cases coupled an Arab college professor contesting Saint Francis College's denial of tenure allegedly because he "was of the Arabian race,"[5] with a Jewish congregation contesting the desecration of its synagogue with "large anti-Semitic slogans, phrases and symbols" motivated by discrimination against Jews.[6] The Court found that Professor Al-Khazraji stated a proper claim for relief under section 1981 and that Shaare Tefila Congregation stated a proper claim under section 1982. In two brief decisions, authored by Justice White, the Court unanimously determined that, in enacting the predecessors of these provisions, "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."[7]

The original versions of sections 1981 and 1982 were enacted shortly after the ratification of the thirteenth amendment as section 1 of the Civil Rights Act of 1866 (hereinafter the 1866 Act).[8] While the Supreme Court has consistently described the discrimination prohibited by the 1866 Act as "racial,"[9] until the decisions in *Saint Francis College* and *Shaare Tefila Congregation* the Court had resolved only that the 1866 Act included discrimination against blacks and whites.[10] Beyond this the Court provided no guidance as to what it or Congress meant by "racial."[11] It took more than a hundred years after the enactment of the 1866 Act for the Court to determine that Congress intended that the prohibited racial discrimination encompasses intentional discrimination on the basis of ancestry and ethnicity. While a long time in coming, the Court has brought

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3. 107 S. Ct. 2022 (1987).

4. 107 S. Ct. 2019 (1987).

5. *Saint Francis College*, 107 S. Ct. at 2024.

6. *Shaare Tefila Congregation*, 107 S. Ct. at 2021.

7. *Saint Francis College*, 107 S. Ct. at 2028.

8. 42 U.S.C. §§ 1981-1982 (1982); J. TEN BROEK, EQUAL UNDER LAW 125, 177 (1965). Following ratification of the fourteenth and fifteenth amendments, Congress passed the Enforcement Act of 1870 which essentially reenacted the 1866 statute. Act of May 31, 1870, ch. 114, 16 Stat. 140, 140-46. *See generally* Kaufman, *A Race By Any Other Name: The Interplay Between Ethnicity, National Origin and Race for Purposes of Section 1981*, 28 ARIZ. L. REV. 259 (1986).

9. *See infra* text accompanying notes 93-99.

10. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

11. Commentators have long debated the intended scope of the 1866 Act. *See generally* Evrén, *When Is a Race Not a Race?: Contemporary Issues Under the Civil Rights Act of 1866*, 61 N.Y.U. L. REV. 976 n.3 (1986) (citing authorities that discuss the legislative history of, and the rights enumerated in, the Civil Rights Act of 1866).

within the protections of sections 1981 and 1982 large numbers of persons of every possible ethnicity and ancestry, including the approximately "29 million blacks, 17 million Hispanic Americans, 6 million Jews and 2.5 million people of Arab descent in the United States population of 239 million as of 1985."[12]

This development is especially significant because both the contract clause of section 1981 and section 1982 apply to public and private defendants.[13] There is no state action requirement. Sections 1981 and 1982 thus stand in marked contrast to 42 U.S.C. section 1983,[14] the congressional machinery designed primarily to enforce the fourteenth amendment.[15] Section 1983 applies only against those who act under color of state law and the fourteenth amendment only reaches state action; the fourteenth amendment does not cover "private conduct, 'however discriminatory or wrongful.' "[16] Significantly, the Supreme Court's expansion of sections 1981 and 1982 to cover ethnicity and ancestry comes at the same time that the Court continues its drastic cutting back of the state action rulings and principles developed by the Warren Court.[17] During the same term that the Court expanded the protection of sections 1981 and 1982, it refused to extend the protection of the due process clause of the fifth amendment to alleged discrimination against homosexuals by the United States Olympic Committee. According to the Court, the Committee's refusal to allow a nonprofit group to use the word "Olympic" to sponsor the "Gay Olympic Games" did not constitute governmental action.[18] The Court's restrictive approach to state action thus inten-

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12. Taylor, *High Court Holds 1866 Race Bias Law is a Broader Tool*, N.Y. Times, May 19, 1987, at A1, col. 1. Americans of Arab descent represent more than one percent of the population. *Id.* at A30, col. 1.

13. *See infra* text accompanying notes 20-40.

14. 42 U.S.C. § 1983 (1982). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

15. *See* District of Columbia v. Carter, 409 U.S. 418, 423 (1973).

16. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)). While a finding of state action satisfies the color of state law requirement of section 1983, action under color of state law may not be sufficient to constitute state action. Lugar v. Edmundson Oil Co., 457 U.S. 922, 935 n.18 (1982).

17. *See infra* text accompanying notes 441-69.

18. San Francisco Arts and Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2971, 2986-87 (1987); *see infra* text accompanying notes 441-43.

sifies the importance of the breadth the Court has given to sections 1981 and 1982. Racial discrimination which is not redressable under the fourteenth amendment and section 1983 because of an absence of state action may be redressable under sections 1981 or 1982.

This article explores the Supreme Court's interpretation of sections 1981 and 1982 prior to the decisions in *Saint Francis College* and *Shaare Tefila Congregation*, describes the disparate lower court decisional law concerning the meaning of "racial" discrimination under the 1866 Act, analyzes the two recent decisions of the Supreme Court and examines their significance in light of other federal remedies that may be available under twentieth century civil rights acts and under the Constitution pursuant to section 1983.

I. SUPREME COURT PRECEDENT

The decisions in *Saint Francis College* and *Shaare Tefila Congregation* should be viewed as the latest pieces of a puzzle which the Supreme Court did not seriously attempt to put together until 1968.

Sections 1981 and 1982 were "little used"[19] from the time of their enactment in 1866 until the Supreme Court's 1968 landmark decision in *Jones v. Alfred H. Mayer Co.*[20] It was generally assumed during this period that the statutes reached only governmental action, thereby rendering them superfluous in view of the Civil Rights Act of 1871.[21] In a dramatic turn of events, the Court in *Jones*, in an opinion by Justice Stewart, ruled unequivocally that "§ 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[22] Relying upon the close historical relationship between sec-

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19. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 241 (1969) (Harlan, J., dissenting) (describing section 1982 as "a little-used section of a 100-year old statute"); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968) (quoting the statement of the United States Attorney General that the statute "lay partially dormant for many years"); 2 J. COOK & J. SOBIESKI, CIVIL RIGHTS ACTION ¶ 6.01 (1987).

20. 392 U.S. 409 (1968).

21. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1982)); *see* 2 J. COOK & J. SOBIESKI, *supra* note 19, ¶ 5.13. The Supreme Court in 1948 had stated that "governmental action" is required under the Civil Rights Acts of 1866 and 1870. Hurd v. Hodge, 334 U.S. 24, 31 (1948).

22. *Jones*, 392 U.S. at 413 (emphasis in original). The statement in *Hurd*, 334 U.S. at 31, that section 1982 reached only "governmental action" was described in *Jones* as dictum. Prior Supreme Court decisions also contained dicta indicating that section 1982 was limited to governmental action. *Jones*, 392 U.S. at 419; Civil Rights Cases, 109 U.S. 3, 16-17 (1883); Virginia v. Rives, 100 U.S. 313, 317-18 (1879).

tions 1981 and 1982,[23] subsequent Supreme Court decisions stated that the two provisions should be given a similar interpretation[24] and specifically found *Jones* applicable to section 1981.[25]

The Court in *Jones* employed a traditional mode of analysis of congressional intent, relying on the language,[26] legislative history, and historical context of section 1982. Unlike section 1983, which by its terms is limited to those who act under color of state law, section 1982 does not limit the range of potential violators. The legislative history of section 1982, which is "replete with references to private injustices against Negroes," confirms that "Congress meant exactly what it said,"[27] namely to prohibit all racially motivated refusals to rent or sell "by private owners as well as discrimination by public authorities."[28] It was significant that the 1866 Act was originally enacted pursuant to Congress' power to enforce the thirteenth amendment because, unlike the fourteenth amendment, the thirteenth amendment is not limited to state action.[29] While the 1866 Act was reenacted in 1870,[30] two years after ratification of the fourteenth amendment, Congress did not alter its scope.[31]

The conditions existing in 1870 made it unlikely that Congress intended to limit the 1866 Act to state action. As the Court in *Jones* explained,

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23. Runyon v. McCrary, 427 U.S. 160, 170 (1976); *id.* at 187 (Powell, J., concurring); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-40 (1973); *see also* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 383-84 (1982) (referring to section 1981 "and its companion, 42 U.S.C. § 1982"); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 471 (1975) (Marshall, J., concurring in part and dissenting in part) ("§ 1982, a sister provision to § 1981"). *But see Runyon*, 427 U.S. at 213 (White, J., dissenting).

24. *See* Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2625 (1987) (Brennan, J., dissenting); *Tillman*, 410 U.S. at 439-40.

25. *General Bldg. Contractors Ass'n*, 458 U.S. at 387; *Runyon*, 427 U.S. at 168; *Johnson*, 421 U.S. at 459-60.

26. *Jones*, 392 U.S. at 437 (The Act should be accorded "a sweep as broad as its language.").

27. *Id.* at 422.

28. *Id.* at 421.

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

30. Enforcement Act of 1870, ch. 114, 16 Stat. 140 (original version at ch. 31, 14 Stat. 27).

31. *Jones*, 392 U.S. at 436. While some members of Congress supported the fourteenth amendment in order to eliminate doubt as to the constitutionality of the 1866 Act as applied to the states, "it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were meant somehow to *limit* its application to state action" and the Act's legislative history furnishes no basis for such "speculation." *Id.* (emphasis in original).

> by that time most, if not all, of the former Confederate States, then under the control of 'reconstructed' legislatures, had formally repudiated racial discrimination, and the focus of congressional concern had clearly shifted from hostile statutes to the activities of groups like the Ku Klux Klan, operating wholly outside the law.[32]

Given these conditions, it is not reasonable to assume that Congress wanted to limit the reach of important civil rights legislation to the area where it was needed the least, and to deny its application where the need was most urgent.

Having found that Congress intended to reach public and private discrimination, the question remained whether it had the power to do so. The Court in *Jones* found a source of power in the enabling clause of the thirteenth amendment.[33] Employing forceful language, the Court determined that this provision gives Congress the power to abolish the "badges and incidents of slavery," and that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."[34] The thirteenth amendment would be a mere "paper guarantee" to Negroes

> if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[35]

There has been academic[36] and judicial criticism of the analysis of congressional intent in *Jones v. Alfred H. Mayer Co.* In his dissenting opinion in *Jones*, Justice Harlan, joined by Justice White, expressed serious reservations concerning the Court's reading of the 1866 Act and its legislative history.[37] Unlike the majority, the dis-

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32. *Id.* at 436.

33. *Id.* at 439-43; *see infra* text accompanying notes 87-91.

34. *Jones*, 392 U.S. at 442-43.

35. *Id.* at 443.

36. *See* Ervin, Jr., *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485 (1969); Henkin, *The Supreme Court, 1967 Term, Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 82-87, 101 (1968); Thagard, Jr., *The Making of A Civil Rights Case: Jones v. Alfred H. Mayer Company*, 30 ALA. L. REV. 438, 439-40, 452-55, 459 (1969).

37. The dissenting opinion took the position that the Court should have dismissed the writ of certiorari as having been improvidently granted because Congress' enactment of fair housing legislation, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, diminished the public importance of the case. Nevertheless, the dissent went on to analyze the legislative

senters found the language of the 1866 Act to be ambiguous[38] and, engaging the majority in a battle of quotations from the legislative history,[39] opined that Congress intended to limit the reach of the Act to state action.[40]

By 1976, four members of the Court, Justices White, Rehnquist, Powell and Stevens, were on record expressing the view that *Jones* had been wrongly decided.[41] Justices White and Rehnquist took the position that section 1981 "outlaws any legal rule disabling any person from making or enforcing a contract, but does not prohibit private racially motivated refusals to contract."[42] While Justices Powell[43] and Stevens[44] were convinced that this was the correct construction of section 1981, they took the position that the Court should continue to follow the holding in *Jones* and apply the 1866 Act to private as well as public racial discrimination because it "is now an important part of the fabric of our law."[45]

The influence of *Jones* in the development of civil rights law comes not only from its private action holding, but also from its rec-

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history of section 1982 and concluded that the majority opinion "is almost surely wrong, and at the least is open to serious doubt." *Jones*, 392 U.S. at 450 (Harlan, J., dissenting).

38. "The 'right' referred to [in section 1982] may either be a right to equal status under the law, in which case the statute operates only against state-sanctioned discrimination, or it may be an 'absolute' right enforceable against private individuals." *Id.* at 453 (Harlan, J., dissenting).

39. It has been said that looking at the legislative history to find support for one's position is like looking out over a crowd of people and picking out your friends. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (citing conversation with Hon. Harold Leventhal).

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> [T]he most which can be said with assurance about the intended impact of the 1866 Civil Rights Act upon purely private discrimination is that the Act probably was envisioned as prohibiting official, community-sanctioned discrimination in the South, engaged in pursuant to local 'customs' which in the recent time of slavery probably were embodied in laws or regulations.

Jones, 392 U.S. at 453 (Harlan, J., dissenting). Limiting the 1866 Act to state action would bring it into line with the fourteenth amendment. *Id.* at 476. This is desirable, according to the dissent, because "a major purpose of the Fourteenth Amendment, at least in the minds of its congressional proponents, was to assure that the rights conferred by the then recently enacted Civil Rights Act could not be taken away by a subsequent Congress." *Id.*

41. Runyon v. McCrary, 427 U.S. 160, 186-214 (1976) (White, J., dissenting).

42. *Id.* at 195 (White, J., dissenting). While Justice White stated that there was no reason to give section 1981 the same interpretation as section 1982 because of their different roots, namely, section 1981 is a thirteenth amendment statute while section 1982 is a fourteenth amendment statute, *id.* at 213, it is apparent that he disagrees with the basic reasoning and holding of *Jones*. *See* Bhandari v. First Nat'l Bank, 829 F.2d 1343, 1348-49 (5th Cir. 1987) (en banc), *petition for cert. filed*, 56 U.S.L.W. 3542 (U.S. Feb. 2, 1988) (No. 87-1293).

43. *Runyon*, 427 U.S. at 186 (Powell, J., concurring).

44. *Id.* at 189 (Stevens, J., concurring).

45. *Id.* at 190.

ognition of the independence of the section 1982 remedy. Faced with the fact that Title VIII of the Civil Rights Act,[46] a comprehensive fair housing statute, would soon take effect,[47] the Court felt obliged to discuss the interplay between section 1982 and Title VIII, and found that section 1982 was neither repealed nor limited by Title VIII.[48]

This paved the way for later Supreme Court rulings that Title II of the Civil Rights Act of 1964,[49] which prohibits various forms of discrimination in places of public accommodations, does not preempt federal remedies under the 1866 Act,[50] and that Title VII of the Civil Rights Act of 1964,[51] which prohibits various forms of employment discrimination, does not preempt the section 1981 remedy.[52]

While *Jones* opened the door to civil rights claimants, a host of substantial unsettled questions remained to which the Court began to turn its attention. The Court was asked to determine the types of transactions encompassed in sections 1981 and 1982, and responded with a fairly generous interpretation of the property and contractual interests within the scope of the statutes. In *Sullivan v. Little Hunting Park, Inc.*[53] and *Tillman v. Wheaton-Haven Recreation Association*,[54] the Court ruled that membership in a recreational facility is protected by the 1866 Act.

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46. Civil Rights Act, Pub. L. No. 90-284, §§ 801-819, 82 Stat. 81, 81-89 (1968) (codified at 42 U.S.C. §§ 3601-3631).

47. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 477-78 (1968) (Harlan, J., dissenting).

48. The Court described the differences between the section 1982 and Title VIII remedies:

> [There are] vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.

Id. at 417. For an analysis of the distinctions between section 1982 and Title VIII, see *infra* text accompanying notes 321-437.

49. 42 U.S.C. §§ 2000a to 2000a-6 (1982).

50. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); *see also* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). The public accommodations provision of the Civil Rights Act of 1964 contains a private club exemption. 42 U.S.C. § 2001e (1982). The Court has not decided whether the exemption should be read into the 1866 Act, finding in each case in which the issue arose that the entity in question was not, in fact, a private club. Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976); *Tillman*, 410 U.S. at 438; *Sullivan*, 396 U.S. at 236.

51. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

52. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

53. 396 U.S. 229 (1969).

54. 410 U.S. 431 (1973).

In *Sullivan*, one of the plaintiffs owned a home and a share in the defendant corporation which operated a community park and playground facilities. Under the corporate bylaws, a person with a membership share who rents her home is entitled to assign the share to her tenant subject to the approval of the board of directors. When Sullivan leased his home to Freeman, he assigned his membership share to him, but the Board refused to approve the assignment because Freeman was black. Sullivan was expelled from the corporation for protesting the Board's refusal to approve the assignment. Sullivan and Freeman brought suit under sections 1981 and 1982 to redress the discrimination practiced against them.

Dealing only with the section 1982 claim, the Court found that the membership share was a form of property within the protection of section 1982.[55] It was unnecessary to classify the share as realty or personalty because the language of section 1982 explicitly covers both "real and personal property." The Board's refusal to approve the assignment for racial reasons violated Freeman's section 1982 right to be free of racial discrimination in "lease" transactions.[56] In addition, Sullivan, who was white, was allowed to contest his expulsion under section 1982 because the 1866 Act was held to prohibit the punishment of an individual for attempting to vindicate another person's section 1982 right to be free of racial discrimination.[57]

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55. Under its bylaws, residents of a limited geographical area in which the pool was located were given a preference in applying for membership.

56. The Court stated that "[t]he right to 'lease' is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor." *Sullivan*, 396 U.S. at 237.

57. *Id.* ("Such a sanction would give impetus to the perpetuation of racial restrictions on property."); *see also* Albert v. Carovano, 851 F.2d 561, 572-73 (2d Cir. 1988) (en banc) (citing DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 311-12 (2d Cir.), *modified on other grounds*, 520 F.2d 409 (1975)); Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984) (section 1981 encompasses retaliation for filing EEOC charge or instituting civil rights racial discrimination suit). The Court in *Sullivan* spoke of the "rights of minorities protected by § 1982." The Court subsequently ruled that racial discrimination against white persons is within section 1981. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). *See infra* text accompanying notes 95-99 (discussion of *McDonald*).

The Court in *Sullivan* also held that the public accommodations provision of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6, does not preempt section 1982, that there was no evidence that defendant was a private club, and that while the computation of damages under section 1982 should be based on federal rules, in determining the appropriate federal rule under 42 U.S.C. § 1988 (1982) "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." *Sullivan*, 396 U.S. at 240.

Justice Harlan's dissenting opinion, which was joined by Chief Justice Burger and Justice White, took the position that the writ of certiorari should have been dismissed as improvidently granted because of the enactment of Title VIII which specifically covers discrimination

A similar situation was presented to the Court in *Tillman v. Wheaton-Haven Recreation Association.*[58] Defendant was a recreational club furnishing swimming and related facilities. Under its by-laws, residents of a limited geographical area in which the pool was located were given preference in applying for membership. A resident-member who sells her home and turns in her membership confers on the purchaser a first option to purchase a membership. The Court unanimously determined that under *Sullivan*, the membership was property within the meaning of section 1982:

> When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U.S.C. section 1982 then operates to guarantee a nonwhite resident, who purchases, leases, or holds this property, the same rights as are enjoyed by a white resident.[59]

Defendant argued that it was exempt from section 1982 liability because it was protected by the private club exemption of Title II of the Civil Rights Act of 1964[60] which, it argued, was applicable to section 1982. The Court found it unnecessary to resolve this issue because the record did not support the argument that the club was private.[61] To this day, the Supreme Court has not resolved this potential interplay between Title II and section 1982.[62]

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in the "provision of services or facilities." 42 U.S.C. § 3604(b) (1982). The dissenters also (1) criticized the majority for failing to articulate standards for deciding what is "property" within section 1982, *Sullivan*, 396 U.S. at 248; (2) opined that lurking in the background are grave constitutional issues "should § 1982 be extended too far into some types of private discrimination," *id.*; (3) criticized the Court for not articulating the legal standards which should be used to determine when one party may assert another's section 1982 rights, *id.* at 254; and (4) took the position that since *Sullivan* had been litigated in state court it was improper to rely on section 1988 which deals with the "remedial deficiencies" only of the federal courts, *id.* at 256-57.

58. 410 U.S. 431 (1973).

59. *Id.* at 437.

60. 42 U.S.C. § 2000a(e) (1982).

61. The club had no select element other than race. *Tillman*, 410 U.S. at 438; *see also Sullivan*, 396 U.S. at 236. In view of the "historical interrelationship" between sections 1981 and 1982, the Court in *Tillman* found that the analysis regarding the alleged private nature of the club was equally applicable to both provisions. *Tillman*, 410 U.S. at 440.

62. In Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976), the Court stated that the case did not raise the issue whether Title II's private club exemption applied to section 1981. *Runyon* held that Title II did not apply to private schools. *Id. See infra* notes 82-92 and accompanying text (discussion of *Runyon*). The lower courts have reached conflicting results on this issue. 2 J. COOK & J. SOBIESKI, *supra* note 19, ¶ 5.19.

The Court had another opportunity to define the property interests protected by section 1982 in *City of Memphis v. Greene*.[63] The plaintiffs, residents of a black area, challenged the closing of a city street that traversed a white residential community. The Court found that the record did not support plaintiffs' claim that the street closing adversely affected their ability to hold and enjoy their property.[64] Justice Marshall's dissenting opinion, which was joined by Justices Brennan and Blackmun, found that a proper reading of the record demonstrated that the street closing would burden plaintiffs' ability to enjoy their property and would depress its value, and that "the carving out of racial enclaves within a city is precisely the kind of injury that [section 1982] was enacted to prevent."[65]

While the majority in *City of Memphis* was perhaps not overly generous in its reading of the record, it purported to maintain the Court's broad interpretation of section 1982, stating it protected "not merely the enforceability of property interests acquired by black citizens but also their right to acquire and use property on an equal basis with white citizens."[66] Justice Stevens' opinion for the Court posited three types of municipal conduct, not present in *City of Memphis*, which might be actionable under section 1982:

> [1] . . . the statute would support a challenge to municipal action benefitting white property owners that would be refused to similarly situated black property owners. For official action of that kind would prevent blacks from exercising the same property rights as whites[;]
> [2] . . . the statute might be violated by official action that depreciated the value of property owned by black citizens[;]

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63. 451 U.S. 100 (1981). For a scathing criticism of *City of Memphis v. Greene*, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-20, at 1508 (2d ed. 1987). *See also* Farish, *The Intent Requirement at the Crossroads: Racial Discrimination and City of Memphis v. Greene*, 34 BAYLOR L. REV. 309 (1982); Guzik, *Constitutional Law—Civil Rights—Memphis Street Closing: Minimal Inconvenience Or Monument To Racial Hostility? City Of Memphis v. Greene, 451 U.S. 100 (1981)*, 22 SANTA CLARA L. REV. 931 (1982); Hall, *Exclusionary Zoning—City of Memphis v. Greene*, 8 BLACK L. J. 138 (1983); Josephs, *City of Memphis v. Greene: A Giant Step Backwards In The Area Of Civil Rights Enforcement*, 48 BROOKLYN L. REV. 621 (1982); Krawec, *Constitutional Law—Racial Discrimination—Thirteenth Amendment—42 U.S.C. 1982*, 20 DUQ. L. REV. 87 (1981); Laska, *Civil Rights—42 U.S.C. 1982—Badges Of Slavery And The Thirteenth Amendment—Discriminatory Purpose Or Disparate Impact?—Memphis v. Greene*, 28 N.Y.L. SCH. L. REV. 477 (1983); Yonover, *Dead-End Street: Discrimination, The Thirteenth Amendment, and Section 1982*, 58 CHI.[—]KENT L. REV. 873 (1982); Note, *The Supreme Court, 95* HARV. L. REV. 91, 310-19 (1981).

64. *Memphis*, 451 U.S. at 117-19.

65. *Id.* at 149-50 (Marshall, J., dissenting).

66. *Id.* at 120.

> [3] the statute might be violated if the street closing severely restricted access to black homes because blacks would then be hampered in the use of their property.[67]

Just as the Court has given a generally broad interpretation to the property interests covered by section 1982, it has given a relatively generous construction to the contractual relationships protected by section 1981. The Court in *Johnson v. Railway Express Agency*[68] explicitly acknowledged "that section 1981 affords a federal remedy against discrimination in private employment on the basis of race,"[69] and ruled that the section 1981 remedy is independent of the employment discrimination remedies of Title VII of the Civil Rights Act of 1964.[70] This is significant because compensatory and punitive damages are available under section 1981 though not under Title VII. Title VII exempts some employers who are within section 1981, and the various procedural prerequisites for filing suit under Title VII do not apply to section 1981.[71]

Employment contracts give rise to the greatest number of section 1981 claims.[72] In the recent case of *Goodman v. Lukens Steel Co.*,[73] the Court found that a union violated section 1981 and Title VII by pursuing a policy of refusing to file its employees' racial discrimination claims, while pursuing other grievances.[74] The Court found that

> [t]hose provisions do not permit a union to refuse to file any and all grievances presented by a black person on the ground that the employer looks with disfavor on and resents such grievances. It is no less violative of these laws for a union to pursue a policy of rejecting disparate treatment grievances presented by blacks solely because the claims assert racial bias and would be very troublesome to process.[75]

As a result of the Court's decision in *Brown v. General Services Administration*,[76] however, federal employees are precluded from asserting employment discrimination claims under section 1981. *Brown*

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67. *Id.* at 123.

68. 421 U.S. 454 (1975).

69. *Id.* at 460-61.

70. *Id.* at 462 (remedies available under Title VII are separate, distinct, and independent of a section 1981 claim); 42 U.S.C. § 2000e (1982).

71. *See infra* notes 265-320 and accompanying text (analysis of distinctions between Title VII and section 1981).

72. Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2630 n.12 (1987) (Brennan, J., concurring in part and dissenting in part) ("claims made pursuant to § 1981 usually arise out of employment contract relationships . . ."); 2 J. COOK & J. SOBIESKI, *supra* note 19, ¶ 5.03.

73. 107 S. Ct. 2617 (1987).

74. *Id.* at 2625.

75. *Id.*

76. 425 U.S. 820 (1976).

determined that when Congress brought federal employees within the scope of Title VII in 1972,[77] it intended that Title VII would be their exclusive employment discrimination remedy, thereby precluding resort to other remedies, including section 1981.[78] *Johnson v. Railway Express Agency*[79] was distinguished as a case involving private employees.[80]

Section 1981 is not limited to employment contracts but is potentially applicable to any type of contractual arrangement.[81] A major issue which came before the Court in 1976 in *Runyon v. McCrary*[82] is whether there are circumstances in which the application of section 1981 to private contractual arrangements violates the constitutionally protected rights of privacy and association. The Court in *Runyon*, in an opinion by Justice Stewart, ruled that section 1981 barred private schools from excluding qualified children solely because they are black.[83] Such exclusion is a "classic violation" of section 1981 because the parents of the students had sought to enter into "contractual relationships" with the schools and had been prevented from doing so for racially discriminatory reasons.[84]

The schools argued, however, that application of section 1981 to these circumstances violates the constitutionally protected rights of association and privacy of white parents who choose to send their

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77. 42 U.S.C. § 2000e-16 (1972). Personnel actions affecting federal employees and applicants for federal employment "shall be made free from any discrimination based on race, color, religion, sex, or national origin." *Id.*

78. Prior to the 1972 amendment, Title VII did not protect federal employees. *Brown*, 425 U.S. at 825. The Court in *Brown* indicated that prior to the amendment, claims against federal agencies under section 1981 for damages and promotion would have been barred by sovereign immunity. *Id.* at 827 n.8. The Court has stated that section 1982 applies to the federal government and the District of Columbia. District of Columbia v. Carter, 409 U.S. 418, 422-23 (1973) (dicta); Hurd v. Hodge, 334 U.S. 24 (1948).

79. 421 U.S. 454 (1975).

80. *Brown*, 425 U.S. at 833-34.

81. The lower federal courts have applied section 1981 to a wide array of agreements. *See* 2 J. COOK & J. SOBIESKI, *supra* note 19, ¶ 5.11 (citing cases involving housing, schools, restaurants and bars, recreational facilities, public facilities, and the sale of goods and services including a commercial day care center, insurance, funeral services, haircutting services, and medical services); T. EISENBERG, CIVIL RIGHTS LEGISLATION, CASES AND MATERIALS 581 (2d ed. 1987) (referring to cases dealing with health services, insurance, eating and recreation facilities, mortuaries and child care agencies).

82. 427 U.S. 160 (1976).

83. *Id.* at 170 (referring to the holding in *Jones v. Alfred H. Mayer Co.*, that § 1982 reaches purely private acts of racial discrimination). The Court found it "well settled" that section 1981 reaches private discrimination and thought it persuasive that Congress had specifically considered and rejected a proposal to limit section 1981 to state action. *Id.* at 168-74. In Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988), the Court requested argument on the question of whether *Runyon's* interpretation of section 1981 should be reconsidered.

84. *Id.* at 172.

children to a racially segregated school, and of their right to direct the education of their children.[85] The Court was unimpressed. While it was willing to assume that parents have a first amendment right to send their children to educational institutions that promote the view that racial segregation is desirable, it simply "does not follow that the *practice* of excluding racial minorities from such institutions is also [constitutionally] protected by the same principle."[86] And, while prior Supreme Court decisions establish the constitutionally protected liberty interest of a parent to send his or her children to a private school,[87] this right is not absolute but is subject to reasonable government regulation.[88] *Runyon* is perhaps best understood as being based on the fact that the governmental interest in eradicating racial discrimination, which underlies section 1981, outweighs the associational and privacy interests of the schools and parents.[89]

Justice Powell's concurring opinion in *Runyon* argues that section 1981 should not be applied to contractual relationships which are highly personal and individualized and that, in such circumstances, the associational rights of the contracting party might override the application of section 1981.[90] But that was not the situation in *Run-*

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85. *Id.* at 175. The Court found that "the schools have standing to assert these arguments on behalf of their patrons." *Id.* at 175 n.13 (citing Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925)).

86. *Id.* at 176 (emphasis in original).

87. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

88. The Court found it significant that both the schools and parents remained "free to inculcate whatever values and standards they deem desirable." *Runyon*, 427 U.S. at 177-78; *see* L. TRIBE, *supra* note 63, ¶ 5-21, at 986-87.

89. The government has a vital interest in eradicating racial discrimination. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (Powell, J.) ("The State certainly has a legitimate and substantial interest in ameliorating or eliminating where feasible, the disabling effects of identified discrimination."); *see also* Board of Directors of Rotary Int'l v. Rotary Club, 107 S. Ct. 1940, 1947 (1987) ("the State's compelling interest in eliminating discrimination against women").

90. *Runyon*, 427 U.S. at 187 (Powell, J., concurring). Justice Powell referred to instances in which "the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association (such as, for example, that between an employer and a private tutor, babysitter, or housekeeper). . . ." *Id.*

Potential conflicts have arisen in an analogous setting involving the right of state and local governmental entities to prohibit discrimination in certain private organizations. In two recent Supreme Court cases the state's compelling interest in eradicating gender-based discrimination superceded the associational rights of the organizations. *See* Board of Directors of Rotary Int'l v. Rotary Club, 107 S. Ct. 1940 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984); *see also* New York State Club Ass'n. v. City of New York, 108 S. Ct. 2225 (1988) (facial challenge to antidiscrimination law failed as it may be constitutional as applied to individual clubs). These decisions, however, leave open the possibility that a particular association may be sufficiently private or personal that its associational interests might override the inter-

yon because the schools were operated on a "commercial basis" and "extended a public offer open, on its face, to any child meeting certain minimum qualifications who chose to accept."[91] To this date, the Supreme Court has never determined whether either section 1981 or the Constitution places any limitation on the types of private contracts to which section 1981 may be applied.[92]

The Court has consistently described the discrimination prohibited by sections 1981 and 1982 in racial terms.[93] Thus, the Court has stated that the 1866 Act deals only with racial discrimination and does not cover discrimination on the basis of religion, national origin or gender.[94]

In *McDonald v. Santa Fe Trail Transportation Co.*,[95] a unanimous Court resolved that the racial discrimination prohibited by section 1981 includes discrimination against whites as well as blacks.[96] The phrase in section 1981 "as is enjoyed by white citizens" was intended to emphasize the racial character of the rights protected,[97] rather than to limit the statutory protection solely to nonwhites.[98] Thus, section 1981 was intended to bar "discrimination in the making or enforcement of contracts against, or in favor of, any race."[99]

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est in eradicating discrimination. The Supreme Court may provide added guidance in New York State Club Ass'n v. City of New York, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987), *prob. juris. noted*, 108 S. Ct. 62 (1987).

91. *Runyon*, 427 U.S. at 187 (Powell, J., concurring).

92. Some lower federal courts have refused to apply section 1981 because of a potential conflict with privacy concerns. *See, e.g.*, Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974); *see also* 2 J. COOK & J. SOBIESKI, *supra* note 19, ¶ 5.19; Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.—C.L.L. REV. 29, 114-20 (1980).

93. *See* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 384 (1982) ("racial equality"); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) ("racial discrimination"); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413, 421-22 (1968) ("racial discrimination" and "racially motivated").

94. *See Jones*, 392 U.S. at 413 (Section 1982 "does not address itself to discrimination on [the] grounds of religion or national origin."); *Runyon*, 427 U.S. at 167 (dicta) (section 1981 does not cover discrimination on the basis of gender or religion). Nor does the 1866 Act cover discrimination against the handicapped, Duncan v. AT&T Communication, Inc., 668 F. Supp. 232, 235 (S.D.N.Y. 1987), or discrimination against homosexuals, Albert v. Carovano, 824 F.2d 1333 (2d Cir. 1987), *modified on other grounds*, 851 F.2d 561 (2d Cir. 1988) (en banc).

95. 427 U.S. 273 (1976).

96. *Id.* at 280.

97. *See* Georgia v. Rachel, 384 U.S. 780, 791 (1966).

98. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295 (1976). Congress intended a "broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *Id.* at 296.

99. *Id.* at 295. *McDonald* left open whether affirmative action programs would violate section 1981. *Id.* at 281 n.8; *see* Comment, *supra* note 92, at 78-83; 2 J. COOK & J. SOBIESKI, *supra* note 19, ¶¶ 5.06, 5.13 [B][5].

While the Supreme Court decisions reviewed above generally give the 1866 Act a generous interpretation, many gains accomplished by civil rights claimants were effectively negated by the Court's decision in *General Building Contractors Association v. Pennsylvania.*[100] In that case, the Court read the legislative history behind section 1981 as indicating an intent to limit the statute to racially motivated discrimination, and as not encompassing practices which result in a disproportionate impact on a particular class.[101] This reading of section 1981 harmonizes it with the fourteenth amendment.[102] Given the congruent interpretation the Court has afforded sections 1981 and 1982, the clear import of *General Building Contractors* is to limit both of these provisions to purposeful discrimination.[103] As the Court recognized, its interpretation of the 1866 Act is in sharp contrast to its construction of Title VII, which reaches employment practices that are neutral in terms of intent but which have a disproportionate adverse effect on racial and other minorities.[104]

Justice Marshall's dissenting opinion, joined by Justice Brennan, argued that Congress was concerned not only with blatant intentional discrimination, but also with "more subtle forms of discrimination which might successfully camouflage the intent to oppress through facially neutral policies."[105] While discriminatory intent

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100. 458 U.S. 375 (1982).

101. *Id.* at 386-87.

> The principle object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen. Most of these laws embodied express racial classifications and although others, such as those penalizing vagrancy, were facially neutral, Congress plainly perceived all of them as consciously conceived methods of resurrecting the incidents of slavery.

Id. (footnotes omitted).

102. The 1866 Act was reenacted by Congress in 1870 following ratification of the fourteenth amendment "as a means of enforcing the recently ratified Fourteenth Amendment." *General Bldg. Contractors Ass'n*, 458 U.S. at 390-91.

103. Little Earth of United Tribes, Inc. v. United States Dep't of Hous. and Urban Dev., 675 F. Supp. 497, 532 n.5 (D. Minn. 1987) ("Justice Rehnquist's decision in *General Building Contractors Association*, . . . strongly suggests that a finding of discriminatory purpose is a prerequisite to a successful section 1982 claim."). The Court in *General Building Contractors*, while not resolving whether respondeat superior may give rise to section 1981 liability, did hold that section 1981 did not impose nondelegable duties on employers and trade associations to insure that local unions not discriminate on the basis of race. 458 U.S. at 395-97.

104. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). For a comparison of section 1981 and Title VII, see *infra* text accompanying notes 265-320.

105. *General Bldg. Contractors Ass'n*, 458 U.S. at 412 (Marshall, J., dissenting). "Today, although flagrant examples of intentional discrimination still exist, discrimination more often occurs 'on a more sophisticated and subtle level,' the effects of which are often as cruel and 'devastating as the most crude form of discrimination.'" *Id.* (quoting Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 469 F. Supp. 329, 337 (E.D. Pa. 1978) (Higginbotham, Cir. J., sitting by designation)).

may be shown by circumstantial or direct evidence,[106] the Court's fifth, fourteenth and fifteenth amendment decisions show that it is very difficult to prove discriminatory intent.[107] Under these circumstances one cannot overestimate the significance of the Court's decision in *General Building Contractors*.

The Supreme Court decisional law prior to *Saint Francis College* and *Shaare Tefila Congregation* thus established that sections 1981 and 1982 reach public and private intentional racial discrimination against blacks and whites. The Court also ruled that section 1981 prohibits state-based discrimination against aliens.[108] The Court, however, had not previously determined whether the prohibited racial discrimination encompassed discrimination on the basis of ancestry, ethnicity or national origin. Thus, the core question of what forms of discrimination were prohibited by sections 1981 and 1982 remained unresolved for more than one hundred and twenty years after the statutes' enactment.

II. RACIAL PARAMETERS OF THE STATUTES

A. Lower Court Treatment of the Race Issue

Prior to the Supreme Court's decisions in *Shaare Tefila Congregation* and *Saint Francis College*, the lower federal courts wrestled with the issue of whether ethnic and national origin discrimination constituted racial discrimination within the meaning of the 1866 Act. Large numbers of suits were filed by Syrians,[109] Indians,[110]

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106. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Foster v. Tandy Corp., 828 F.2d 1052, 1056 (4th Cir. 1987).

107. *See, e.g.*, McCleskey v. Kemp, 107 S. Ct. 1756 (1987); City of Mobile v. Bolden, 446 U.S. 55 (1980); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); *see also* Burns, *The Activism Is Not Affirmative*, in THE BURGER YEARS 101 (H. Schwartz ed. 1987).

108. Graham v. Richardson, 403 U.S. 365, 377 (1971); Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419 n.7 (1948); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). It is not settled whether section 1981 applies to private discrimination against aliens. *See* Kaufman, *supra* note 8, at 264 n.58. The Fifth Circuit, sitting en banc, recently ruled by an eight to six vote that section 1981 does not cover private discrimination against aliens. Bhandari v. First Nat'l Bank, 829 F.2d 1343 (5th Cir. 1987) (en banc) (overruling Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974)), *petition for cert. filed*, 56 U.S.L.W. 3542 (U.S. Feb. 2, 1988) (No. 87-1293).

109. *See* Abdulrahim v. Gene B. Glick Co., 612 F. Supp. 256 (D.C. Ind. 1985).

110. *See* Jatoi v. Hurst-Euless-Bedford Hosp. Auth., 807 F.2d 1214 (5th Cir. 1987); Shah v. Mount Zion Hosp. and Medical Center, 642 F.2d 268 (9th Cir. 1981); Shah v. Halliburton Co., 627 F.2d 1055 (10th Cir. 1980); Sethy v. Alameda County Water Dist., 545 F.2d 1157

Mexican-Americans,[111] Iraqis,[112] Iranians,[113] Spanish-surnamed Americans,[114] Hispanics,[115] Slavics,[116] Italians,[117] Chinese,[118]

(9th Cir. 1976); Naraine v. Western Elec. Co., 507 F.2d 590 (8th Cir. 1974); Banker v. Time Chem., Inc., 579 F. Supp. 1183 (N.D. Ill. 1983); Baruah v. Young, 536 F. Supp. 356 (D. Md. 1982); Patel v. Holley House Motels, 483 F. Supp. 374 (S.D. Ala. 1979); Jawa v. Fayetteville State Univ., 426 F. Supp. 218 (E.D.N.C. 1976); Sud v. Import Motors, Ltd., 379 F. Supp. 1064 (W.D. Mich. 1974); Trehan v. International Business Machines Corp., 24 Fair Empl. Prac. Cas. (BNA) 443 (S.D.N.Y. 1980); Rajender v. University of Minn., 24 Fair Empl. Prac. Cas. (BNA) 1051 (D. Minn. 1979); Anandam v. Fort Wayne Community Schools, 19 Fair Empl. Prac. Cas. (BNA) 773 (N.D. Ind. 1978).

111. Gomez v. Great Lakes Steel Div., 803 F.2d 250 (6th Cir. 1986); Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250 (6th Cir. 1985); Garcia v. Rush-Presbyterian-St. Lukes Medical Center, 660 F.2d 1217 (7th Cir. 1981); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980); Gonzalez v. Stanford Applied Eng'g, 597 F.2d 1298 (9th Cir. 1979); Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975); Madrigal v. Certainteed Corp., 508 F. Supp. 310 (W.D. Mo. 1981); LaFore v. Emblem Tape and Label Co., 448 F. Supp. 824 (D. Colo. 1978); Vazquez v. Werner Continental, Inc., 429 F. Supp. 513 (N.D. Ill. 1977); Gomez v. Pima County, 426 F. Supp. 816 (D. Ariz. 1976); Gradilla v. Hughes Aircraft Co., 407 F. Supp. 865 (D. Ariz. 1975); Baca v. Butz, 394 F. Supp. 888 (D.N.M. 1975); Cervantes v. Dobson Bros. Constr. Co., 19 Empl. Prac. Dec. (CCH) ¶ 8979 (D. Neb. 1978).

112. *See* Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2022 (1987); Anooya v. Hilton Hotels Corp., 733 F.2d 48 (7th Cir. 1984).

113. Alizadeh v. Safeway Stores, Inc., 802 F.2d 111 (5th Cir. 1986); Tayyari v. New Mexico State Univ., 495 F. Supp. 1365 (D.N.M. 1980).

114. Apodaca v. General Elec. Co., 445 F. Supp. 821 (D.N.M. 1978); National Ass'n of Gov't Employees v. Rumsfeld, 413 F. Supp. 1224 (D.D.C. 1976), *aff'd sub nom.* National Ass'n of Gov't Employees v. Brown, 556 F.2d 76 (D.C. Cir. 1977); Jones v. United Gas Improvement Corp., 383 F. Supp. 420 (E.D. Pa. 1975).

115. *See* Cervantes v. IMCO, Halliburton Servs., 724 F.2d 511 (5th Cir. 1984); Davis v. Boyle-Midway, Inc., 615 F. Supp. 560 (N.D. Ga. 1985); Ramos v. Flagship Int'l, Inc., 612 F. Supp. 148 (E.D.N.Y. 1985); Garza v. Deaf Smith County, 604 F. Supp. 46 (N.D. Tex. 1984); Garcia v. Gardner's Nurseries, Inc., 585 F. Supp. 369 (D. Conn. 1984); Pollard v. City of Hartford, 539 F. Supp. 1156 (D. Conn. 1982); Carrillo v. Illinois Bell Tel. Co., 538 F. Supp. 793 (N.D. Ill. 1982); Badillo v. Central Steel & Wire Co., 89 F.R.D. 140 (N.D. Ill. 1981); Aponte v. National Steel Serv. Center, 500 F. Supp. 198 (N.D. Ill. 1980); Martinez v. Bethlehem Steel Corp., 496 F. Supp. 1002 (E.D. Pa. 1979); Ridgeway v. International Bhd. of Elec. Workers, Local No. 134, 466 F. Supp. 595 (N.D. Ill. 1979); Plummer v. Chicago Journeymen Plumbers', Local Union No. 130, 452 F. Supp. 1127 (N.D. Ill. 1978), *rev'd on other grounds sub nom.* Eggleston v. Chicago Journeymen Plumbers, 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186 (D. Md. 1977); Enriquez v. Honeywell, 431 F. Supp. 901 (W.D. Okla. 1977); Ortega v. Merit Ins. Co., 433 F. Supp. 135 (N.D. Ill. 1977); Puerto Rican Media Action & Educ. Council v. Metromedia, 10 Fair Empl. Prac. Cas. (BNA) 1009 (S.D.N.Y. 1975); Miranda v. Clothing Workers, Local Union No. 208, 10 Fair Empl. Prac. Cas. (BNA) 557 (D.N.J. 1974).

116. *See* Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977).

117. *See* Ricci v. Key Bancshares, Inc., 768 F.2d 456, 467 (1st Cir. 1985); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977); Petrone v. City of Reading, 541 F. Supp. 735 (E.D. Pa. 1982).

118. *See* Cheng v. GAF Corp., 566 F. Supp. 350 (S.D.N.Y. 1982), *rev'd*, 713 F.2d 886 (2d Cir. 1983).

Cubans,[119] Puerto Ricans,[120] Ukrainians,[121] Jews,[122] Israelis,[123] Pakistanis,[124] Maylays,[125] Hebrews,[126] Egyptians,[127] Arabians,[128] Ethiopians,[129] and Koreans.[130]

The lower federal court opinions essentially divided along three disparate analyses. One line of cases categorically required plaintiffs asserting claims under sections 1981 and 1982 to allege and prove racial discrimination against nonwhites or whites and dismissed complaints based on national origin or ethnic discrimination.[131] These decisions limited the scope of the 1866 Act to discrimination based on membership in a scientifically recognized and anthropologically

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119. *See* Torres v. Gianni Furniture Co., 1986 WL 6407 (N.D. Ill. June 4, 1986) (Westlaw, Allfed Library); Cubas v. Rapid Am. Corp., 420 F. Supp. 663 (E.D. Pa. 1976).

120. *See* Rodriguez v. Chandler, 641 F. Supp. 1292 (S.D.N.Y. 1986); Garcia v. Gardner's Nurseries, Inc., 585 F. Supp. 369 (D. Conn. 1984); Ortiz v. Bank of Am., 547 F. Supp. 550 (E.D. Cal. 1982); Vera v. Bethlehem Steel Corp., 448 F. Supp. 610 (M.D. Pa. 1978); Maldonado v. Broadcast Plaza, Inc., 10 Fair Empl. Prac. Cas. (BNA) 839 (D. Conn. 1974); Miranda v. Clothing Workers, Local 208, 10 Fair Empl. Prac. Cas. (BNA) 557 (D.N.J. 1974).

121. *See* Kurylas v. United States Dep't of Agric., 514 F.2d 894 (D.C. Cir. 1975); Hiduchenko v. Minneapolis Medical & Diagnostic Center, 467 F. Supp. 103 (D. Minn. 1979).

122. Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), *rev'd*, 107 S. Ct. 2019 (1987).

123. *See* Ben-Yakir v. Gaylinn Assocs., 535 F. Supp. 543 (S.D.N.Y. 1982).

124. *See* Khawaja v. Wyatt, 494 F. Supp. 302 (W.D.N.Y. 1980).

125. *See* Lopez v. Sears, Roebuck & Co., 493 F. Supp. 801 (D. Md. 1980).

126. *See* Wald v. International Bhd. of Teamsters, 24 Fair Empl. Prac. Cas. (BNA) 617 (C.D. Cal. 1980).

127. *See* Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987); Ibrahim v. New York Dep't of Health, 581 F. Supp. 228 (E.D.N.Y. 1984).

128. *See* Saad v. Burns Int'l Sec. Servs., 456 F. Supp. 33 (D.D.C. 1978).

129. *See* Black Grievance Comm. v. Philadelphia Elec. Co., 36 Empl. Prac. Dec. (CCH) ¶ 35,108 (E.D. Pa. Dec. 21, 1984).

130. *See* Doe v. St. Joseph's Hosp., 788 F.2d 411 (7th Cir. 1986).

131. *See* Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), *rev'd* 107 S.Ct. 2019 (1987); Anooya v. Hilton Hotels Corp., 733 F.2d 48 (7th Cir. 1984); Shah v. Mount Zion Hosp. and Medical Center, 642 F.2d 268 (9th Cir. 1981); National Ass'n of Gov't Employees v. Rumsfeld, 413 F. Supp. 1224 (D.D.C. 1976), *aff'd sub nom.* National Ass'n of Gov't Employees v. Brown, 556 F.2d 76 (D.C. Cir. 1977); Kurylas v. United States Dep't of Agric., 514 F.2d 894 (D.C. Cir. 1975); Davis v. Boyle-Midway, Inc., 615 F. Supp. 560 (N.D. Ga. 1985); Ibrahim v. New York Dep't of Health, 581 F. Supp. 228 (E.D.N.Y. 1984); Petrone v. City of Reading, 541 F. Supp. 735 (E.D. Pa. 1982); Patel v. Holley House Hotels, 483 F. Supp. 374 (S.D. Ala. 1979); Hiduchenko v. Minneapolis Medical & Diagnostic Center, 467 F. Supp. 103 (D. Minn. 1979); Saad v. Burns Int'l Sec. Servs., 456 F. Supp. 33 (D.D.C. 1978); Plummer v. Chicago Journeymen Plumbers', Local Union No. 130, 452 F. Supp. 1127 (N.D. Ill. 1978), *rev'd on other grounds sub nom.* Eggleston v. Chicago Journeymen Plumbers, 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); Martinez v. Bethlehem Steel Corp., 78 F.R.D. 125 (E.D. Pa. 1978); Vera v. Bethlehem Steel Corp., 448 F. Supp. 610 (M.D. Pa. 1978); Vazquez v. Werner Continental, Inc., 429 F. Supp. 513 (N.D. Ill. 1977); Gradilla v. Hughes Aircraft Co., 407 F. Supp. 865 (D. Ariz. 1975); Jones v. United Gas Improvement Corp., 68 F.R.D. 1 (D.C. Pa. 1975). The lower court cases discussed the issue in terms of ethnicity and national origin without giving separate recognition to ancestry.

classified race.[132] Plaintiffs who asserted that they were discriminated against because they were Hispanics, Mexican-Americans, Puerto Ricans, Spanish-surnamed Americans, dark skinned Indians, Italians, Arabians, Syrians, or Cubans suffered defeat because of their inability to meet this requirement.[133]

The second line of cases, recognizing the potential overlap between claims based on national origin or ethnicity and those based on race, perceived the problem, in part, to be one of pleading.[134] Thus, "a complaint articulating discrimination on the basis of national origin may constitute a complaint on the basis of race when it is clear that the plaintiff is alleging that he 'belongs to a group that is distinct from "white citizens" as a matter of race or color.' "[135] Cases in this category either refused to dismiss complaints for mere failure to plead racial as opposed to national origin or ethnic discrimination,[136] or granted leave to replead in order to express the claim in racial terms.[137] This category of cases is thus less restrictive than the first grouping because plaintiffs were at least afforded a reprieve beyond the initial pleading stage. However, plaintiffs were still required to prove discrimination based on race and not solely on national origin or ethnicity in order to claim the protection of the statute.[138]

The third line of cases expansively interpreted the Civil Rights Act of 1866 to prohibit discrimination against claimants commonly perceived to be different from whites. This analysis, which rested in large part on the difficulty and ultimate futility of attempting to rely on contradictory and necessarily variable anthropological classification systems, permitted section 1981 claims asserted by Mexican-

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132. *See supra* note 131 and accompanying text.

133. *See id.*; *see also* Kaufman, *supra* note 8, at 277-78.

134. Kaufman, *supra* note 8, at 278.

135. Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348, 352 (7th Cir. 1987) (quoting Doe v. St. Joseph's Hospital, 788 F.2d 411, 418 (7th Cir. 1985)).

136. Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987); Gonzalez v. Stanford Applied Eng'g, 597 F.2d 1298 (9th Cir. 1979); Abdulrahim v. Gene B. Glick Co., 612 F. Supp. 256 (D. Ind. 1985); Garcia v. Gardner's Nurseries, Inc., 585 F. Supp. 369 (D. Conn. 1984); Pollard v. City of Hartford, 539 F. Supp. 1156 (D. Conn. 1982); Lopez v. Sears, Roebuck & Co., 493 F. Supp. 801 (D. Md. 1980); Cubas v. Rapid Am. Corp., 420 F. Supp. 663 (E.D. Pa. 1976); Anandam v. Fort Wayne Community Schools, 19 Fair Empl. Prac. Cas. (BNA) 773 (N.D. Ind. 1978).

137. Doe v. St. Joseph's Hosp., 788 F.2d 411 (7th Cir. 1986); Carrillo v. Illinois Bell Tel. Co., 538 F. Supp. 793 (N.D. Del. 1982); Apodaca v. General Elec. Co., 445 F. Supp. 821 (D.N.M. 1978); Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186 (D. Md. 1977); Trehan v. International Business Machines Corp., 24 Fair Empl. Prac. Cas. (BNA) 443 (S.D.N.Y. 1980).

138. *Doe*, 788 F.2d 411; *Carrillo*, 538 F. Supp. 793; *Apodaca*, 445 F. Supp. 821; *Martinez*, 430 F. Supp. 186; *Trehan*, 24 Fair Empl. Prac. Cas. 443.

Americans, Iraqis, Iranians, Puerto Ricans, Hispanics, Indians, and Pakistanis.[139]

B. Al-Khazraji and Shaare Tefila Congregation in the Lower Courts.

The sharp divergence of views in the lower federal courts was crystallized in the two cases presented to the Supreme Court.[140] *Al-Khazraji v. Saint Francis College*[141] was brought by a United States citizen, born in Iraq, and a member of the Muslim faith, who claimed that Saint Francis College's denial of his tenure application constituted discrimination based on race, national origin, and religion.[142] Plaintiff's Title VII claims were dismissed as untimely,[143]

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139. *See* Jatoi v. Hurst-Euless-Bedford Hosp. Auth., 807 F.2d 1214, 1218 (5th Cir. 1987); Alizadeh v. Safeway Stores, Inc., 802 F.2d 111 (5th Cir. 1986); Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2022 (1987); Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 660 F.2d 1217 (7th Cir. 1981); Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979); Rodriguez v. Chandler, 641 F. Supp. 1292 (S.D.N.Y. 1986); Ramos v. Flagship Int'l, Inc., 612 F. Supp. 148 (E.D.N.Y. 1985); Banker v. Time Chem., Inc., 579 F. Supp. 1183 (N.D. Ill. 1983); Ortiz v. Bank of Am., 547 F. Supp. 550 (E.D. Cal. 1982); Badillo v. Central Steel & Wire Co., 89 F.R.D. 140 (N.D. Ill. 1981); Madrigal v. Certainteed Corp., 508 F. Supp. 310 (W.D. Mo. 1981); Aponte v. National Steel Serv. Center, 500 F. Supp. 198 (N.D. Ill. 1980); Khawaja v. Wyatt, 494 F. Supp. 302 (W.D.N.Y. 1980); Tayyari v. New Mexico State Univ., 495 F. Supp. 1365 (D.N.M. 1980); Ridgeway v. International Bhd. of Elec. Workers, 466 F. Supp. 595 (N.D. Ill. 1979); LaFore v. Emblem Tape and Label Co., 448 F. Supp. 824 (D. Colo. 1978); Enriquez v. Honeywell, 431 F. Supp. 901 (W.D. Okla. 1977); Ortega v. Merit Ins. Co., 433 F. Supp. 135 (N.D. Ill. 1977); Sud v. Import Motors Ltd., 379 F. Supp. 1064 (W.D. Mich. 1974); Cervantes v. Dobson Bros. Constr. Co., 19 Empl. Prac. Dec. (CCH) ¶ 879 (D. Neb. 1978); Puerto Rican Media Action & Educ. Council v. Metromedia, 10 Fair Empl. Prac. Cas. (BNA) 1009 (S.D.N.Y. 1975); Maldonado v. Broadcast Plaza, 10 Fair Empl. Prac. Cas. (BNA) 839 (D. Conn. 1974); Miranda v. Clothing Workers, Local Union No. 208, 10 Fair Empl. Prac. Cas. (BNA) 557 (D.N.J. 1974).

140. Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987); Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987).

141. 523 F. Supp. 386 (W.D. Pa. 1981), *aff'd*, 784 F.2d 505 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2022 (1987).

142. *Id.* at 386-87. The following exchange took place during plaintiff's deposition:

Q. Are you also taking the position that you were denied tenure because of your race?
A. Yes.
Q. What is your race?
A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion.
Q. What other reasons did you say you feel you were discriminated against?
A. National origin and religion or a combination of the two.
Q. What is your national origin?
A. Arabian and Iraqie.
Q. Are both Arabian and Iraqie—
A. And Moslem.
Q. Are both Arabian and Iraqie national origin designations?

but plaintiff was allowed to proceed on his section 1981 claim despite the college's argument that the discrimination alleged was based on national origin and not on race.[144] The district court stated:

> Moreover, we observe that the distinction between 'race' and 'national origin' is an elusive one, and frequently turns on semantics rather than significant differences. Although the exact word 'race' may not appear in plaintiff's third complaint, which raised the claim under 42 U.S.C. section 1981, plaintiff's position from the outset has been that he was subject to disparate treatment because of 'national origin, religion, and/or race.' We therefore decline to dismiss plaintiff's action under section 1981 simply because he omitted the word 'race' in his third complaint. In our view, it is a technical defect of little significance. The thrust of plaintiff's claim, namely, that he was denied tenure by St. Francis College because he is an Arabian born in Iraq, is clear to all concerned, and may serve as the basis for a civil rights action under 42 U.S.C. section 1981.[145]

The Third Circuit Court of Appeals[146] affirmed the district court's determination that an Iraqi, who claimed he was denied tenure because he was an Arab, could seek protection under section 1981 even though he could not demonstrate membership in an anthropologically defined race.[147] Relying on the lack of precision in the scientific community regarding the meaning of "race," and drawing heavily upon the broad legislative history of the 1866 Act, the Third Circuit concluded that section 1981 encompasses claims asserted by plaintiffs who belong to a group which is "ethnically and physiognomically distinctive."[148]

In contrast, plaintiff's claim in *Shaare Tefila Congregation v. Cobb* did not fare as well in the lower courts. In that case the members of a Jewish congregation claimed that the desecration of their

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A. Iraq is part of Arabia.
Q. Are you treating Arabia as a place of national origin?
A. You may say so. This is what we call the Arabian peninsula.
Q. That is the geographical area?
A. That's right. This separates it from Iraq, Pakistan and so forth. It makes the Arabian peninsula separate.

Petitioner's Brief at 9-10, Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987) (No. 85-2169).

143. The court held that the statute of limitations starts to run from the date the denial of tenure was communicated to the claimant, not the date of the claimant's last employment. *Saint Francis College*, 523 F. Supp. at 387-88 (citing Delaware State College v. Ricks, 449 U.S. 250 (1980)), *aff'd*, 784 F.2d 505 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2022 (1987).

144. *Id.* at 391-92.

145. *Id.* (footnote omitted).

146. 784 F.2d 505 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2022 (1987).

147. *Id.* at 517-18.

148. *Saint Francis College*, 784 F.2d at 517.

synagogue constituted a form of anti-Semitism prohibited by section 1982.[149] Plaintiffs alleged that defendants had spray-painted their synagogue with anti-Semitic slogans including swastikas, a burning cross, the words "DEAD JEW," "DEATH TO THE JUDE," and "IN, TAKE A SHOWER JEW."[150] Before desecrating the synagogue, the same defendants had allegedly spray-painted nearby property with a burning cross, the slogans "White Power," "Arian [sic] Brotherhood," "KKK," an eagle with a swastika, and a Star of David with an arrow through it.[151] Defendants also allegedly painted a swastika on a car owned by a member of the congregation.[152] During the course of discovery, defendants freely admitted that their actions were based on their racial animus towards Jews[153] and that the words and symbols chosen reflected Nazi and Ku Klux Klan ideology.[154] Despite these admissions, plaintiff's section 1982 claim was dismissed by the district court, which held that plaintiff's claim of racial misperceptions by the defendants did not constitute racial discrimination within the meaning of section 1982:

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149. Shaare Tefila Congregation v. Cobb, 606 F. Supp. 1504 (D. Md. 1985), *aff'd*, 785 F.2d 523 (4th Cir. 1986), *rev'd*, 107 S. Ct. 2019 (1987).

150. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 524-25 (4th Cir. 1986), *rev'd*, 107 S. Ct. 2019 (1987).

151. Petitioner's Brief at 3, Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987) (No. 85-2156).

152. *Id.*

153. *Id.* The following exchange took place at Respondent Cobb's deposition:

> Q. Mr. Cobb, are you familiar with the term anti-Semitic?
>
> A. Something like racism or something.
>
> ****
>
> Q. Racism against whom?
>
> A. Against different races, I guess, different people.
>
> ****
>
> Q. You said it's a term that signifies racism of some sort. I'm asking you racism against whom?
>
> A. I guess against Jewish people or the blacks or whoever.

Id. at 8 n.14.

154. *Id.* Plaintiffs described the significance of each of the symbols:

> The swastika was the symbol of the Nazi Party from its inception, and the phrases "DEAD JEW," "DEATH TO THE JUDE" and "IN, TAKE A SHOWER JEW" refer to the Third Reich's 'final solution to the Jewish problem'—the Holocaust. . . . The phrase "TOTEN KAMF RABAND" next to the skull and crossbones painted on the synagogue is a garbled reference to the Totenkopfverbande, the 'death head units' of Nazi concentration camp guards from 1936 through World War II. . . . The skull and crossbones was the insignia of the Totenkopfverbande. . . . The burning crosses which respondents emblazoned on the synagogue walls are the symbol of the Ku Klux Klan.

Id. at 4-5 (citations omitted).

> The Court is unwilling to adopt an interpretation which relies so entirely on the idiosyncracies of individual defendants in civil rights cases. As defendant notes, such an approach would have the practical effect of extending section 1981 and section 1982 to apply to any group, however defined, merely by virtue of alleging that an individual defendant perceived the group as racially inferior, however irrational that perception might be.[155]

This holding was affirmed by the Fourth Circuit Court of Appeals in *Shaare Tefila Congregation v. Cobb*,[156] which implicitly rejected the expansive reading of section 1982, adopted by the Third Circuit in *Al-Khazraji*. Despite the fact that the defendants' actions were based on their belief that Jews constituted a separate and decidedly inferior race, the Fourth Circuit held that the plaintiff could not assert a claim under section 1982 because "plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants."[157]

Judge J. Harvie Wilkinson III, dissenting in *Shaare Tefila Congregation*, reasoned that while it is true that "Jews are not, under any legitimate view, a distinct race, but are in fact members of a religious community. . .[,]"[158] they are commonly misperceived to be a separate race, and section 1982 should be construed to prohibit discrimination motivated by "racial misperceptions."[159]

C. The Cases in the Supreme Court

It was against this backdrop of conflicting lower court decisional law that the Supreme Court addressed the issue of what types of discrimination are encompassed by sections 1981 and 1982.

The two cases were argued in tandem and more closely resembled a debate among sociologists or philosophers than a legal argument turning on what is fundamentally a matter of statutory construction. In the course of oral arguments, the Court raised a series of questions probing the racial as opposed to religious content of anti-Semitic discrimination and a host of questions exploring the meaning of the term "race."[160] In *Shaare Tefila Congregation*, Justice Marshall repeatedly alluded to the difficulty of classifying persons racially, and asked what book one should use to determine one's race

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155. Shaare Tefila Congregation v. Cobb, 606 F. Supp. 1504, 1508 (D. Md. 1985).
156. 785 F.2d 523 (4th Cir. 1986), *rev'd*, 107 S. Ct. 2019 (1987).
157. *Id.* at 526 (emphasis in original).
158. *Id.* at 530 (Wilkinson, J., dissenting).
159. *Id.* at 533 (Wilkinson, J., dissenting).
160. Record at 49-52, Shaare Tefila Congregation (No. 85-2156).

and how persons like his father (blue eyes, white skin) and Sammy Davis Jr. should be classified.[161] Justice Powell raised similar questions, asking what should be done in cases involving children of mixed marriages, a particularly important question in a heterogenous society.[162]

Plaintiffs in *Shaare Tefila Congregation* took the position that the Civil Rights Act of 1866 prohibits "all acts of racism" and does not distinguish "between 'true' and 'false' racist doctrine."[163] Their position was thus not dependent on a determination that Jews are or were considered to be a separate race in 1866, a concept the plaintiffs vigorously rejected. In fact, at oral argument, plaintiffs resisted the Court's suggestion that the legislative history could be read to indicate that the 1866 Congress believed that Jews were a separate race and therefore within the ambit of the statute's protection.[164] Rather, plaintiffs argued that their claim was encompassed by section 1982 based on a test that determines the scope of the 1866 Act's protection by the subjective racial motivation of the defendants.[165] At oral argument, several of the Justices indicated their belief that such a test would be unworkable and would produce inequitable, if not bizarre, results.[166] Justice Scalia indicated the anomaly of determining the breadth of the statute by the intelligence of the defendant.[167] He posited the example of one defendant who discriminated against a German believing that Germans constitute a separate race and a second defendant who discriminated against Germans knowing full well that Germans do not constitute a separate race.[168] According to plaintiff's argument, the first defendant's actions would be prohibited by section 1982 but the second defendant's actions would not.[169] Justice Scalia observed that such an approach would only reach ill-educated discriminators. Justice O'Connor agreed, noting that nothing in the legislative history supported linking coverage of the 1866 Act to the sophistication of the discriminator.[170]

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161. *Id.* at 34.

162. *Id.* at 31.

163. Petitioner's Reply Brief at 3, Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987) (No. 85-2156); Record at 5-6.

164. Record at 5-6.

165. *Id.* at 7.

166. *Id.* at 9-11.

167. *Id.* at 12.

168. *Id.* at 7-9.

169. *See* 55 U.S.L.W. 3579, 3579-81 (March 3, 1987) (discussion of the arguments before the Court in Saint Francis College and Shaare Tefila Congregation).

170. *Id.* at 3580.

Instead of relying on a test keyed to the subjective motivation of the defendants, counsel for plaintiffs in *Saint Francis College* argued for a test based on ancestry as opposed to the rigid racial classifications urged by defendants.[171] Several Justices attempted to explore the outer reaches of plaintiff's expansive interpretation of the 1866 Act by inquiring whether it would encompass discrimination between Norwegians and Swedes, discrimination against children of felons, discrimination between New Englanders and Southerners,[172] or even discrimination between the Hatfields and McCoys.[173]

Saint Francis College countered that Al-Khazraji was a Caucasian, that section 1981 prohibits discrimination only between members of different anthropologically recognized races and "does not encompass claims of discrimination by one Caucasian against another."[174]

The Court explicitly rejected defendant's argument. The Court's major analysis is set forth in the *Saint Francis College* opinion which affirmed the judgment of the Third Circuit.[175] The Court then relied upon *Saint Francis College* in *Shaare Tefila Congregation v. Cobb* to reverse the Fourth Circuit's determination.[176]

In rejecting Saint Francis College's argument, the Court recognized that there are a variety of ethnic groups that may now be "considered to be part of the Caucasian race."[177] But, while "[t]here is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid[,] [m]any modern biologists and anthropologists . . . criticize racial classifications as arbitrary and of little use in understanding the variability of human beings."[178]

More importantly, whether a particular plaintiff belonged to a taxonomical race was quite beside the point. According to the Court, the issue was not what is currently meant by race but rather what was meant by race in 1866. In this question, the Court, coupling a reliance on nineteenth century dictionaries and encyclopedias with an analysis of the legislative history of the 1866 Act, accepted plaintiff's view that racial discrimination within the meaning of the 1866

171. *Id.* at 3581.

172. *Id.*

173. *Id.* (Justice Stevens interrupted the attorney's response to say "You have to know who the real McCoy is.").

174. *Saint Francis College*, 107 S. Ct. at 2026.

175. *Id.* at 2028.

176. *Shaare Tefila Congregation*, 107 S. Ct. at 2021-22.

177. *Id.* at 2022.

178. *Saint Francis College*, 107 S. Ct. at 2026 n.4.

Act was properly understood to encompass discrimination based on ancestry as well as race. Nineteenth century reference books described race in terms of "stock," "ancestor" and "ethnic groups."[179] Encyclopedias of that era referred to Finns, Gypsies, Basques, Hebrews, Swedes, Norwegians, Germans, Greeks, Italians, Spaniards, Mongolians, Russians, Arabs, Hungarians, and Jews as races.[180] These definitions were reflected in and consistent with the legislative history which is laden with references to groups intended to be protected, including Scandinavians, Chinese, Latins, Spaniards, Anglo-Saxons, Jews, Mexicans, Blacks, Mongolians, Gypsies, and Germans.[181] In light of this history, the Court concluded that the racial discrimination Congress intended to prohibit includes intentional discrimination against groups identifiable by their ancestry or ethnicity, and there is no requirement that plaintiff demonstrate "a distinctive physiognomy."[182]

Applying this conclusion to each of the two cases, the Court concluded that if plaintiff Al-Khazraji can prove that he was subjected to intentional discrimination because he was "born an Arab," he will have made out a claim under section 1981.[183] Similarly, if Shaare Tefila Congregation can prove that it was victimized by intentional discrimination against Jews, it will have made out a claim under section 1982.[184]

The Court thus made it clear that both Jews and Arabs were among the groups which the 1866 Congress considered to be distinct races within the protections of sections 1981 and 1982. While these decisions have paved the way for suits based on anti-Semitism, the Court's decision in *Shaare Tefila Congregation* explicitly rejected plaintiff's subjective motivation theory. The Court ultimately concluded that the test proferred by Shaare Tefila "would unacceptably extend the reach of the statute"[185] to merely require an allegation that defendants acted out of racial animus without also alleging that the animus was "directed towards the kind of group that Congress intended to protect."[186]

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179. *Id.* at 2026-27.

180. *Id.* at 2027 (referring to the Encyclopedia Americana, the New American Cyclopaedia and the Encyclopedia Britannica).

181. *Id.*

182. *Id.* at 2028.

183. *Id.*

184. *Shaare Tefila Congregation*, 107 S. Ct. at 2022.

185. *Id.* at 2021.

186. *Id.*

There is troublesome language in the final sentence of the opinion in *Saint Francis College* which draws a distinction between claims based on ethnicity or ancestry and those based on national origin or religion, implying that claims based solely on national origin may not be given statutory protection.[187] This has already spawned a new wave of litigation, reminiscent of the turmoil of the past two decades, turning on the often elusive distinction between national origin and ancestry.[188] Indeed, inclusion of this proviso in the opinion prompted Justice Brennan to file his concurrence in which he observed that the distinction between discrimination based on ethnicity or ancestry and discrimination based on national origin "is not a bright one."[189] Although the two concepts are not necessarily identical, they often are identical as a factual matter, e.g., when "one was born in the nation whose primary stock is one's own ethnic group."[190]

This elusive distinction between national origin and ethnicity or ancestry has already caused confusion in the lower courts. In *Quintana v. Byrd*,[191] the court observed that

> [t]he distinction between ethnicity and national origin is somewhat fuzzy in a case involving a person born in a foreign country. In such a case, it may be difficult to discern that discrimination has been motivated by ethnicity (or ancestry) as opposed to national origin, (i.e., the country of birth).[192]

That case involved a claim that plaintiff was discriminated against in violation of section 1981 because she was Hispanic. Defendants argued that such a claim amounted to national origin discrimination which was the explicit basis of plaintiff's EEOC charge and Title VII claim.[193] The court rejected defendant's argument in part because "[i]t is not surprising that the pro se litigant, who is of Hispanic descent, might equate racial discrimination with national origin discrimination."[194] In denying defendant's motion for summary judgment, the court indicated that distinguishing between national

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187. *Saint Francis College*, 107 S. Ct. at 2028.

188. *See* Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987); Quintana v. Byrd, 669 F. Supp. 849 (N.D. Ill. 1987); Bauge v. Jernigan, 671 F. Supp. 709 (D. Colo. 1987).

189. *Saint Francis College*, 107 S. Ct. at 2028 (Brennan, J., concurring).

190. *Id.*

191. 669 F. Supp. 849 (N.D. Ill. 1987).

192. *Id.* at 850 n.1.

193. *Id.* at 850.

194. *Id.*

origin discrimination and discrimination motivated by ethnicity 'is a problem of proof, which is the plaintiff's to solve."[195]

Similarly, in a recent case involving a claim that plaintiff suffered discrimination because he was Norwegian, the court in *Bauge v. Jernigan*[196] opined that the distinctions between national origin and ethnicity or ancestry "make no sense . . . but they are made by the Supreme Court of the United States."[197] Despite that observation, the court rejected plaintiff's claim because it was based on "national animus," not "racial animus."[198] In explaining its ruling, the court posited that a claim "couched in terms of plaintiff being born Iranian could not sustain scrutiny under *Saint Francis College*, [whereas] a claim based upon plaintiff being an Arab could."[199] The court's ruling may also have been based on the trial judge's observation that "I have encountered, I know of no-one who has ever encountered, I have never heard of, and—aside from a modest aversion to Grieg or a bad experience in the Winter Olympics—can conceive no basis for, racially based antipathy towards Norwegians."[200]

In *Nieto v. United Auto Workers Local 598*, [201] the court interpreted *Al-Khazraji* to mean that "a person of Mexican descent who was born in Poland could be discriminated against because he was born in Poland without violating 1981, but not because his ancestors were Mexican."[202] In *Nieto*, the plaintiff was Hispanic, of Mexican descent. Her claim was based on a type of discriminatory attack known as the "wolf pack."[203] Eleven members of defendant United Auto Workers Local 598 surrounded plaintiff's desk and, in retaliation for her discipline of a union worker, "screamed profanities at her, told her they were from the 'border patrol,' and asked for her 'green card,' called her a 'wetback,' told her she was illegally in the

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195. *Id.* at 850 n.1.

196. 671 F. Supp. 709 (D. Colo. 1987).

197. *Id.* at 712 n.2.

198. *Id.* at 712.

199. *Id.*

200. To the extent that this observation constitutes the taking of judicial notice, it is improper because judicial notice may not be based upon the personal knowledge of the judge. M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, § 201.2, at 71-72 (2d ed. 1986). Moreover, the groups afforded protection by anti-discrimination statutes should not depend upon a judge's personal experiences. In addition, most discrimination is not based upon factual analysis but reflects prejudice based upon irrational stereotypes. *See* Shaare Tefila Congregation v. Cobb, 785 F.2d. 523, 530 (4th Cir. 1986) (Wilkinson, J., concurring in part and dissenting in part), *rev'd*, 107 S. Ct. 2019 (1987).

201. 672 F. Supp. 987, 989 (E.D. Mich. 1987).

202. *Id.*

203. *Id.* at 988.

United States, told her 'to go back to Miami,' and that they wished the boat she came on had sunk."[204] The court observed that this type of verbal harassment suggested national origin discrimination.[205] Ironically, the plaintiff was not actually born in Mexico, which made her section 1981 claim safer, if not stronger, because the court was able to conclude that the discrimination was targeted, not at her place of birth, but at "the ethnic group from which her parents descended" and was thus racial discrimination, not national origin discrimination.[206]

In contrast, in *Korpai v. A.W. Zengeler's Grande Cleaners, Inc.*,[207] the court found that a similar form of verbal abuse did not constitute the type of discrimination prohibited by section 1981, although it too recognized that the distinction between discrimination based on ancestry or ethnicity, as opposed to discrimination based solely on birthplace, is "difficult," requiring "a careful analysis of specific allegations of discrimination."[208] There, the plaintiff, a naturalized American citizen born in Hungary, was subjected to abuse from her co-workers who spat in her face, mocked her accent, and hurled offensive slurs at her, including "stupid foreigner, you come over here and take over the country," "stinky foreigner," "you dirty pig," and "go back where you came from."[209] The court concluded that plaintiff had failed to state a claim under *Saint Francis College* because "[d]iscrimination based on foreign immigration and speech with an accent is not discrimination based upon Hungarian ancestry or Hungarian characteristics, for purposes of Section 1981."[210]

The Supreme Court's attempt to distinguish between national origin and ancestry or ethnicity is likely to continue to cause confusion for at least three reasons. First, as the new wave of cases demonstrates, the distinction between national origin and ethnicity may be as elusive as the distinction between race and ethnicity.[211] "[T]he line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscern-

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204. *Id.* at 988 n.1.

205. *Id.* at 989.

206. *Id.*

207. 1987 WL 20428 (N.D. Ill. Nov. 24, 1987) (Westlaw, Allfed Library).

208. *Id.*

209. *Id.*

210. *Id.*

211. *See supra* text accompanying notes 134-39.

ible . . . ."[212] While the court in *Bauge* purported to find a meaningful distinction between a claim grounded on the plaintiff being born in Iran as opposed to a claim grounded on the plaintiff being an Arab, this distinction is no sharper than the "scientifically meaningless"[213] and "make believe"[214] distinction that was thought to exist between a claim brought by a black East Indian of African descent who was considered a Caucasian and a claim brought by a black skinned plaintiff who could prove membership in a taxonomically recognized "race."[215]

Indeed, the lower federal courts, in interpreting *Saint Francis College*, have already reached widely different conclusions concerning what is national origin discrimination and what is ancestral or ethnic discrimination. In *Aguirre-Molina v. New York State Division of Alcoholism and Alcohol Abuse*,[216] involving a claim brought by a Hispanic of Puerto Rican descent, the court concluded, without any discussion, that discrimination based on "Hispanic ancestry" is forbidden by section 1981.[217] Similarly, in *Lopez v. S.B. Thomas, Inc.*,[218] when confronted with a section 1981 claim based on "Puerto Rican descent," the Second Circuit concluded that "there can be no question that . . . [section 1981] includes persons like plaintiff who are of Puerto Rican descent."[219] In contrast, in *Pettman v. United*

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212. Enriquez v. Honeywell, Inc., 431 F. Supp. 901, 904 (W.D. Okla. 1977); *see also* Cubas v. Rapid Am. Corp., 420 F. Supp. 663, 666 n.2 (E.D. Pa. 1976).

> We are not aware of an authoritative and judicially manageable method for distinguishing between national origin discrimination and racial discrimination when both may be present at the same time. On the one hand, courts might attempt on a case by case basis to separate out the elements of racial and national origin discrimination. Another approach would be to consider sociological and historical evidence relevant to the experience of a particular national origin group in the community in which discrimination is alleged, together with anthropological evidence about the racial characteristics of the national origin group, and determine whether it should be rebuttably presumed that discrimination against that group is infected with racial discrimination.

Id.; Bullard v. Omi Georgia, 640 F.2d 632, 634 (5th Cir. 1981) (quoting from Spiess v. C. Itoh & Co., 408 F. Supp. 916, 928 n.17 (S.D. Tex. 1976): "In some contexts, 'national origin' discrimination is so closely related to racial discrimination as to be indistinguishable.").

213. Lundsgaarde, *Racial and Ethnic Classifications: An Appraisal of the Role of Anthropology in the Lawmaking Process*, 10 HOUS. L. REV. 651, 653 (1973).

214. J. KING, THE BIOLOGY OF RACE 55-57 (1981).

215. Shah v. Mount Zion Hosp. and Medical Center, 642 F.2d 268 (9th Cir. 1981).

216. 675 F. Supp. 53 (N.D.N.Y. 1987).

217. *Id.* at 61.

218. 831 F.2d 1184 (2d Cir. 1987).

219. *Id.* at 1188. In Brant Constr. v. Lomen Constr., 515 N.E.2d 868, 874 (Ind. App. 1987), the Court held that "[e]ven 'light-skinned' Hispanics . . . are entitled to § 1981 protection from discrimination."

States Chess Federation,[220] the court was unprepared to state that "Hispanics" constitute a race for purposes of section 1981 within the Court's definition in *Saint Francis College*.[221]

Second, the distinction virtually invites the same sort of pleading problem that existed prior to the Supreme Court's decisions in *Saint Francis College* and *Shaare Tefila Congregation*. Until that time, many lower courts dismissed complaints if they were not expressed explicitly in terms of racial discrimination.[222] Thus, even claimants who asserted that the discrimination resulted in part because of their skin color were unable to survive a motion to dismiss if the claim was one complaining of national origin or ethnic discrimination.[223] Contrast the case of a brown skinned Mexican plaintiff who claims discrimination based on his ancestry, with the case of a brown skinned Mexican plaintiff who claims discrimination based on his being born in Mexico. The former will survive a motion to dismiss whereas the latter may well face a dismissal of his or her complaint.[224] This pleading problem was recently recognized in *Sajous v. First National Bank of Chicago*,[225] involving a claim brought by a naturalized citizen who was born in Haiti of Haitian parents and who was part Caucasian and part Black. The court, in denying a motion to dismiss the complaint which alleged discrimination because of race and national origin, observed that "presenting a claim based on race, but not national origin presents practical proof and some conceptual problems, and perhaps that is the reason plaintiff has intertwined race and national origin in his complaint."[226] The pleading problem is likely to be exacerbated in those jurisdictions which require plaintiffs in civil rights cases to scrupulously adhere to

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220. 675 F. Supp. 175 (S.D.N.Y. 1987).

221. *Id.* at 176. The court failed to cite Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987) calling the issue one of "first impression in this circuit." *Pettman*, 675 F. Supp. at 177.

222. *See supra* text accompanying notes 134-38.

223. *See id.*

224. *Compare, e.g.*, Banker v. Time Chem., Inc., 579 F. Supp. 1183 (N.D. Ill. 1983) (claim sustained where plaintiff alleged he was of East Indian ancestry and was discriminated against on the basis of racial identification) *with* Carillo v. Illinois Bell Tel. Co., 538 F. Supp. 793 (N.D. Del. 1982) (claim dismissed where plaintiff alleged she was Hispanic but failed to allege her racial background).

225. 1987 WL 28403 (N.D. Ill. Dec. 21, 1987) (Westlaw, Allfed Library).

226. *Id.*; *see also* Ohemeng v. Delaware State College, 676 F. Supp. 65, 68-69 (D. Del. 1988) (claim by Black naturalized citizen born in Ghana within section 1981 to the extent it alleges racial discrimination, but not to the extent it alleges discrimination based upon national origin).

the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.[227]

Third, even to the extent that national origin discrimination can be distinguished from ethnic, racial, or ancestral discrimination, there is no reason to exclude national origin discrimination from the purview of the 1866 Act. If a Mexican employee is discriminated against by his employer who tells him to "go back to Mexico where you belong," his legal recourse should not depend on whether or not his parents were born in Mexico. But a literal reading of the Court's distinction would assign legal significance to that fact, because if his parents were born in Mexico the discrimination would be perceived as being based on ancestry and would thus be covered under the Court's reasoning in *Saint Francis College*. Moreover, there is no support for the Court's distinction in the legislative history. To the contrary, as the Court recognized in *Saint Francis College*, the legislative history contains extensive references to groups such as Germans, Irish, Swedes, Finns, Spanish, Chinese, and Mexicans who were meant to be protected by the 1866 Act.[228] An example of the extensive nature of the 1866 Act's protections can be found in Representative Shallabarger's comments:

> Who will say that Ohio can pass a law enacting that no man of the *German* race, and whom the United States has made a citizen of the United States, shall ever own any property in Ohio, or shall ever make a contract in Ohio. . . . If Ohio may pass such a law, and exclude a *German citizen*, not because he is a bad man or has been guilty of a crime, but *because he is of the German nationality or race*, then may every other state do so; and you have the spectacle of an American Citizen admitted to all its high privileges and entitled to the protection of his government in each of these rights, and bound to surrender life and property for its defense and yet that citizen is not entitled to either contract, inherit, own property, work or live upon a single spot of the Republic, nor to breathe its air.[229]

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227. Fed. R. Civ. P. 8(a). For a particularly niggardly view of pleadings in section 1981 civil rights cases, see Pettman v. United States Chess Federation, 675 F. Supp. 175 (S.D.N.Y. 1987).

> A substantial number of [civil rights] cases are frivolous or should be litigated in State courts; they all cause defendants—public officials, policemen and citizens alike—considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.

Id. at 177 (quoting Valley v. Maule, 297 F. Supp. 958, 960-61 (D. Conn. 1968)).

228. Saint Francis College v. Al-Khazraji, 107 S. Ct. at 2027 (citing CONG. GLOBE, 39th Cong., 1st Sess. 499, 523, 251, 542 (1866)).

229. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (emphasis added) *quoted in part in Saint Francis College*, 107 S. Ct. at 2027.

Moreover, it was partly because the 1866 Act covered "Chinese and Gypsies" that President Johnson vetoed the 1866 Act.[230] In overriding his veto, Congress stated:

> This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, *protect every citizen, including the millions of people of foreign birth who will flock to our shores* to become citizens and to find here a land of liberty and law.[231]

When Congress passed the Enforcement Act of 1870, which essentially reenacted the 1866 statute, the word "citizens" was changed to "all persons" in section 16 of the Act to insure that Chinese aliens and other immigrants would be covered by the protections now codified in section 1981.[232] Representative Bingham described this change as insuring "that the States shall not hereafter discriminate against the immigrant from China and in favor of the immigrant from Prussia, nor against the immigrant from France and in favor of the immigrant from Ireland."[233]

The legislative history thus supports an interpretation that places national origin discrimination within the purview of the 1866 Act. When this legislative history is coupled with the seemingly impossible task of extricating national origin discrimination from discrimination based on ancestry, ethnicity, or race, and when it is further considered that national origin discrimination represents the same type of bigotry and hatred that the Civil Rights statutes were designed to prevent, the conclusion is compelling that the "distinction" between discrimination based on plaintiff's country of birth as opposed to discrimination based on plaintiff's parents' country of birth is not worthy of legal significance.

III. ASSESSMENT OF THE IMPACT OF THE COURT'S DECISIONS

The decisions in *Saint Francis College* and *Shaare Tefila Congregation* assume added significance when the attributes of sections

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230. *Id.* at 1757.

231. *Id.* at 1833 (emphasis added).

232. CONG. GLOBE, 41st Cong., 2d Sess. 1536, 3658, 3808 (1870); Act of May 31, 1870, ch. 114, 16 Stat. 140, 140-46. Section 16 of the Enforcement Act of 1870 was revised and recodified in 1874, when section 1981 appeared in its current form. Section 1977 and 1978 of the Revised Statutes of 1874.

233. *Saint Francis College*, 107 S. Ct. at 2028 (citing CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870)).

1981 and 1982 claims are measured against the attributes of Title VII, Title VIII, and section 1983 claims.

A. Title VII of the Civil Rights Act of 1964

The holding in *Saint Francis College*, that discrimination based on ancestry or ethnicity is within the scope of section 1981, should be evaluated in light of several significant differences between the Title VII and section 1981 remedies.[234] To begin with, unlike Title VII, section 1981 is not limited to discrimination in employment but covers, as written, racial discrimination in the full range of contractual transactions.[235]

The Supreme Court has ruled that the Title VII remedy does not preempt other remedies available to combat employment discrimination.[236] "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."[237] Thus, Title VII and section 1981 are "overlapping remedies."[238]

There are various categories of employment which are excluded from the scope of Title VII: industries that do not affect interstate commerce, employers with fewer than fifteen employees, private membership clubs, religious associations, employees performing educational activities, and Indian tribes.[239] These exemptions do not appear in section 1981 and, while the Supreme Court has never definitively resolved the issue, it has indicated that they should not be read into section 1981.[240] Thus, in these instances, section 1981 will likely

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234. Title VII reaches discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-z(a)(1) (1982).

235. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (section 1981 applies to contracts with private schools). *See generally* 2 J. COOK & J. SOBIESKI, *supra* note 19, ¶ 5.04, at 5-30 (unlike Title VII, actions under section 1981 can encompass contracts other than employment contracts, or discrimination not involving contracts).

236. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975).

237. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974), *quoted in Johnson*, 421 U.S. at 459. The Supreme Court, however, has held that Title VII is the exclusive remedy for employment discrimination against federal employees. Brown v. General Servs. Admin., 425 U.S. 820 (1976).

238. *Alexander*, 415 U.S. at 47.

239. Title VII defines an employer as one "engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b) (1982). With respect to the other exceptions, see *id.* § 2000e(b)(1) (Indian tribes), *id.* § 2000e(b)(2), (private membership clubs), and *id.* § 2000e-1 (religious associations and educational institutions).

240. *Johnson*, 421 U.S. at 460 ("Section 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers."). The lower federal courts have disagreed on whether Title VII's private club exemption should be read into section 1981.

be the only federal remedy available to combat racial discrimination.[241]

Where both remedies are potentially available, section 1981 offers the employment discrimination claimant three advantages over the Title VII remedy. Perhaps most significantly, section 1981 provides immediate access to federal courts in contrast to the intricate series of procedural requirements which must be exhausted before a federal court suit may be filed under Title VII.[242] The Supreme Court has stated that resort to Title VII's administrative machinery is not a prerequisite to instituting suit under section 1981,[243] and the lower federal courts have consistently ruled that available state remedies need not be exhausted before suit is commenced under section 1981.[244] Section 1981 thus provides employment discrimination claimants with an important safeguard against the intricate "procedural pitfalls"[245] under Title VII.

Section 1981 also offers forms of remedial relief not available under Title VII. While section 1981 is silent regarding available relief, it has been interpreted as authorizing the full range of equitable and legal relief, including compensatory and punitive damages.[246] Like section 1981, Title VII offers a wide range of equitable relief, including reinstatement, promotion, and the setting of goals, timeta-

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Compare Baptiste v. Cavendish Club, Inc., 670 F. Supp. 108 (S.D.N.Y. 1987) (private club exemption does not apply to section 1981) *with* Cornelius v. Benevolent Protection Order, 382 F. Supp. 1182 (D. Conn. 1974) (reading Title II's private club exemption into section 1981).

241. A claim under section 1983 is not always an available alternative remedy because the fourteenth amendment state action requirement and section 1983's color of state law limitation mean that section 1983 claims normally may not be asserted against private parties. *See* M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES §§ 5.3, 5.7 (1986).

242. Under Title VII, the claimant must file a charge with the EEOC within either 180 or 300 days of the discriminatory act. 42 U.S.C. § 2000e-5(e) (1982). The time periods differ depending on whether or not there is a state or local fair employment practices agency authorized to hear the claim. *Id.* If such an agency exists, the claimant must first file with that agency which has sixty days to act. *Id.* § 2000e-5(c). The claimant then proceeds to the EEOC for investigation and possible conciliation. *Id.* § 2000e-5(f). A federal court action must be filed within ninety days of receipt of a right to sue letter from the EEOC. *Id.* § 2000e-5(e).

243. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460-61 (1975). Two commentators have opined that it would be ironic to apply Title VII's EEOC conciliation procedures to section 1981 because they have "been largely ineffectual." 2 J. COOK & J. SOBIESKI, *supra* note 19, ¶ 5.04, at 5-33. The EEOC is "largely unsuccessful in resolving disputes." *Id.* ¶ 5.04, at 5-34. While the EEOC has authority to investigate individual charges of discrimination, promote voluntary compliance with the requirements of Title VII, and institute civil actions, it has no direct enforcement powers. The EEOC has no authority to adjudicate claims or impose administrative sanctions. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

244. *See infra* notes 294-95.

245. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 668 (2d ed. 1983).

246. *Johnson*, 421 U.S. at 460.

bles, and quotas.[247] At this point the similarity ends. A Title VII claimant is limited to back pay for a maximum period of two years.[248] No such limitation applies under section 1981,[249] where the only time restraint is the applicable limitations period.[250] Compensatory and punitive damages are not available under Title VII[251] and the inability to obtain such relief is significant. The lack of authority to award compensatory damages deprives the court of the power to make the plaintiff "whole," while the inability to award punitive damages even in highly egregious cases prevents the courts from promoting the punishment and deterrence goals sought to be furthered by punitive damages.[252] Racial discrimination cases, because of the egregious nature of the wrong, are prime candidates for awards of punitive damages.[253] In addition, as the Supreme Court has recognized, there are some civil rights cases in which the claimants' "rights are maliciously violated but the victim cannot prove compensable injury."[254] In these cases, punitive damages may be the only significant relief available.[255]

The distinctions in the forms of relief available under the two statutes, in turn, result in another important difference which makes section 1981 the more attractive remedy to the employment discrimination claimant. While there is a right to trial by jury when legal relief

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247. *See* B. SCHLEI & P. GROSSMAN, *supra* note 245, at 696. Schlei and Grossman take the position that the remedies under Title VII and section 1981 are "in major part . . . similar." *Id.* As described in the body of the text, the authors of this article believe that there are some significant differences.

248. 42 U.S.C. § 2000e-5(g) (1982).

249. *Johnson*, 421 U.S. at 460.

250. The governing limitation period under section 1981, like the governing period under section 1983, is the state law personal injury limitations period. Goodman v. Lukens Steel Co., 107 S. Ct. 2617 (1987). "[T]he limitation period for a § 1983 claim is . . . generally longer than the 180 day limitation period for a Title VII claim." Keller v. Prince George's County, 827 F.2d 952, 955 (4th Cir. 1987).

251. *Keller*, 827 F.2d at 955 ("Monetary relief available to a Title VII claimant is typically limited to an award of back pay."); 2 J. COOK & J. SOBIESKI, *supra* note 19, ¶ 5.04, at 5-35; B. SCHLEI & P. GROSSMAN, *supra* note 245, at 1452 ("Neither compensatory not punitive damages are recoverable under Title VII.").

252. "Punitive damages are sums awarded apart from any compensatory or nominal damages, usually as punishment or deterrent levied because of particularly aggravated misconduct on the part of the defendant." D. DOBBS, REMEDIES § 3.9, at 204 (1984).

253. *See, e.g.*, Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 206 (1st Cir. 1987) ("After all, can it really be disputed that intentionally discriminating against a black man on the basis of his skin color is worthy of some outrage?"); Heritage Homes v. Seekonk Water Dist., 648 F.2d 761 (1st Cir. 1981) (The "odious character of the discrimination" justified an award of punitive damages.).

254. Carlson v. Green, 446 U.S. 14, 22 n.9 (1980) (dicta).

255. *Id.*

is sought under section 1981,[256] there is no jury trial right under Title VII, because all of the available relief is regarded as equitable in nature.[257]

Title VII, however, offers one advantage over section 1981 that is so significant that in many cases it will overshadow the comparative benefits of section 1981. While section 1981 is limited to cases of intentional racial discrimination,[258] Title VII encompasses employment practices that have a disproportionate impact against a protected class and are not justified by business necessity.[259] This is an especially significant distinction in light of the difficulties inherent in proving intentional discrimination. "Today, although flagrant examples of intentional discrimination still exist, discrimination more often occurs 'on a more sophisticated . . . level' the effects of which are often as cruel and 'devastating as the most crude form of discrimination.' "[260] While an intent to discriminate may be shown by circumstantial evidence,[261] the claimant carries a very heavy burden, legally as well as pragmatically. A series of recent Supreme Court

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256. Edwards v. Boeing Vertrol, 717 F.2d 761, 763 (3d Cir. 1983) ("[A] party requesting compensatory damages under 42 U.S.C. § 1981, or other legal relief, has a right to a jury trial. This seventh amendment right applies even when legal claims are based upon the same facts which support equitable claims.") (citations omitted); *see also* B. SCHLEI & P. GROSSMAN, *supra* note 245, at 696.

257. B. SCHLEI & P. GROSSMAN, *supra* note 245, at 696-97 ("[W]hen a Title VII suit is joined with an action under § 1981 there is a right to jury trial on the § 1981 legal claims and all issues common to both claims.").

258. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389 (1982).

259. *See infra* note 304.

260. *General Bldg. Contractors Ass'n*, 458 U.S. at 412 (Marshall, J., dissenting) (quoting Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 469 F. Supp. 329, 337 (E.D. Pa. 1978) (Higginbotham, Cir. J., sitting by designation)).

261.

> A plaintiff may prove a claim under 48 [sic] U.S.C. § 1981 by direct evidence of intentional discrimination, which may be proven by statements made by the employer or its agents which evidence such intent . . . Alternatively, the plaintiff may prove discriminatory intent through circumstantial evidence which shows that the plaintiff was treated 'less favorably than others because of race.' . . . In the alternative method of proof, the *McDonnell Douglas Corp. v. Green* . . . test bears on the question.

Foster v. Tandy Corp., 828 F.2d 1052, 1056 (4th Cir. 1987) (citations omitted); *see also* Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir. 1987) (*McDonnell Douglas* standard applies under section 1981). Under *McDonnell Douglas*, a claimant makes out a prima facie case of racial discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The *McDonnell Douglas* Court stated that this standard is not inflexible as "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required . . . is not necessarily

equal protection clause decisions indicates a general reluctance by the Court to infer an intent to discriminate.[262] The Court has ruled that a showing of disproportionate impact, while a relevant piece of circumstantial evidence, is not sufficient to demonstrate intent, even if the disparity is great.[263] Moreover, clever officials may attempt to mask an intent to discriminate under the guise of an allegedly valid governmental interest.[264]

There are numerous other potential points of comparison between section 1981 and Title VII remedies. The relative advantages and disadvantages of section 1981 and Title VII must be evaluated in light of the particular facts and circumstances of a given case. In a case where discriminatory racial intent is clear, section 1981 offers several important advantages, but if the case is one where proof of intent is likely to be problematic, Title VII may well prove to be the preferable route. The following chart summarizes the more significant attributes of the two remedies.

	Section 1981	Title VII
ASSIGNED COUNSEL	Counsel may be assigned.[265]	Counsel may be assigned.[266]

applicable in every respect in differing factual situations." *Id.* at 802 n.13, *quoted in* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 n.6 (1981).

262. *See supra* note 107 and accompanying text.

263. *See* McClesky v. Kemp, 107 S. Ct. 1756 (1987); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

264. *See supra* note 105 and accompanying text.

265. 28 U.S.C. § 1915(d) (1982) gives the federal courts discretion to request an attorney to represent an indigent who is not able to obtain counsel. Under this statute, the courts should consider such factors as whether plaintiff has presented a colorable claim, the complexity of the case, and plaintiff's ability to present her case. *See, e.g.*, Merritt v. Faulkner, 697 F.2d 761 (7th Cir. 1983), *cert. denied*, 464 U.S. 986 (1983); Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981) (per curiam); *see also* Hodge v. Police Officers, 802 F.2d 58, 60 (2d Cir. 1986) (describing *Maclin* as the "leading case").

266. 42 U.S.C. § 2003-5(f)(1) (1982) provides in pertinent part that "the court may appoint an attorney for such complainant." Like 28 U.S.C. § 1915(d) (1982), the courts should consider such factors as plaintiff's ability to afford private counsel, her efforts to obtain an attorney, the merits of her case, her ability to gather and present the facts, and the complexity of the legal issues. Jenkins v. Chemical Bank, 721 F.2d 876 (2d Cir. 1983).

	Section 1981	Title VII
ATTORNEYS' FEES	Available.[267]	Available.[268]
CLASS ACTIONS	Available under Fed. R. Civ. P. 23.[269]	Available under Fed. R. Civ. P. 23.[270]
COVERAGE		
TYPES OF DISCRIMINATION		
RACE	Covered.[271]	Covered.[272]
RELIGION	Not covered.[273]	Covered.[274]
SEX	Not covered.[275]	Covered.[276]
NATIONAL ORIGIN	May not be[277] covered.	Covered.[278]
ANCESTRY	Covered.[279]	Covered.[280]
ETHNICITY	Covered.[281]	Covered.[282]

267. 42 U.S.C. § 1988 (1982) gives the courts discretion to award a "reasonable attorney's fee" to a "prevailing party." A prevailing plaintiff is entitled to fees unless "special circumstances" render an award unjust. *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). By contrast, a prevailing defendant is entitled to a fee award only when the "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Hughes v. Rowe, 449 U.S. 5, 14 (1980) (incorporating into section 1988 the Title VII standard enunciated in Christiansburg Garment Co. v. EEOC, 434 U.S. 418 (1978)).

268. 42 U.S.C. § 2000e-5(k) (1982). Congress intended that the same fee standards would apply under Title VII's fee provision and under section 1988 which applies, inter alia, to section 1981 claims. Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983).

269. *See* 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS § 21, at 36 (1980).

270. *See* General Tel. Co. v. Falcon, 457 U.S. 147 (1982) (Title VII class action suit must meet requirements of Fed. R. Civ. P. 23).

271. *See supra* text accompanying notes 175-82.

272. 42 U.S.C. § 2000e-2(a)(i) (1982).

273. *See* Runyon v. McCrary, 427 U.S. 160, 167 (1976) (dicta); Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979).

274. 42 U.S.C. § 2000e-2(a)(i) (1982).

275. *See* Runyon v. McCrary, 427 U.S. 160, 167 (1976) (dicta); Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979); *see also* B. SCHLEI & P. GROSSMAN, *supra* note 245, at 674.

276. 42 U.S.C. § 2000e-2(a)(i) (1982).

277. *See supra* text accompanying notes 187-233.

278. 42 U.S.C. § 2000e-2(a)(i) (1982).

279. Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987); Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987).

280. Pejic v. Hughes Helicopters, 840 F.2d 667 (9th Cir. 1988); B. SCHLEI & P. GROSSMAN, *supra* note 245, at 305.

281. Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987); Shaare Tefila Congregations v. Cobb, 107 S. Ct. 2019 (1987).

282. B. SCHLEI & P. GROSSMAN, *supra* note 245, at 305.

	Section 1981	Title VII
ALIENAGE	Covered at least where state action is present.[283]	Not covered.[284]
TYPES OF TRANSACTIONS		
	All types of contracts, including all types of employment contracts.[285] Unresolved whether Title VII's private club exemption applies to section 1981.[286]	Employment contracts only. Excludes industries that do not affect interstate commerce, employers with fourteen or fewer employees,[287] private membership clubs,[288] religious associations,[289] employees performing educational functions for educational facilities,[290] and Indian tribes.[291]

283. *See infra* note 450.

284. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

285. Runyon v. McCrary, 427 U.S. 160 (1976) (applying section 1981 to contract with private school); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975) ("§ 1981 affords a federal remedy against discrimination in employment on the basis of race."); *see supra* text accompanying note 235.

286. *See supra* note 240.

287. Employer in Title VII is defined as one who is "engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b) (1982).

288. 42 U.S.C. § 2000e(b)(2) (1982).

289. 42 U.S.C. § 2000e-1 (1982).

290. *Id.*

291. 42 U.S.C. § 2000e(b)(1) (1982).

	Section 1981	Title VII
ELEVENTH AMENDMENT SOVEREIGN IMMUNITY	Bar to retrospective relief against the state.[292]	Not a bar to imposition of state liability because of involuntary congressional waiver.[293]
EXHAUSTION OF ADMINISTRATIVE REMEDIES	Neither EEOC[294] nor state remedies need be exhausted.[295]	Detailed exhaustion of administrative remedies requirement.[296]
GOVERNMENTAL ENFORCEMENT	Not available; private enforcement only.[297]	Governmental enforcement powers authorized.[298]
INDEPENDENT NATURE OF REMEDY	Independent, overlapping remedies allowed.[299]	Independent, overlapping remedies allowed.[300]

292. *See* Freeman v. Michigan, Dep't of State, 808 F.2d 1174 (6th Cir. 1987); Foulks v. Ohio Dep't of Rehabilitation and Correction, 713 F.2d 1229 (6th Cir. 1983); Aguirre-Molina v. New York State Div. of Alcoholism, 675 F. Supp. 53, 62 n.6 (N.D.N.Y. 1987); Parents for Quality Educ. v. Fort Wayne Community Schools Corp., 662 F. Supp. 1475, 1480 (N.D. Ind. 1987); Wilson v. University of Va., 663 F. Supp. 1089 (D.C. Va. 1987); Malone v. Schenk, 638 F. Supp. 423 (C.D. Ill. 1985); Daisernia v. New York, 582 F. Supp. 792 (N.D.N.Y. 1984); Wren v. Kansas, 561 F. Supp. 1216 (D. Kan. 1983); B. SCHLEI & P. GROSSMAN, *supra* note 245, at 674 and at 167 (1983-1985 Cumulative Supplement).

There is no evidence that in enacting section 1981, Congress intended to abrogate the eleventh amendment. *Foulks*, 713 F.2d at 1233; *Daisernia*, 582 F. Supp. at 800. The eleventh amendment would not bar a section 1981 claim against a state official in an individual capacity. *Foulks*, 713 F.2d at 1233.

293. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (in amending Title VII so as to bring the state as employer within its scope, Congress was acting under section 5 of the fourteenth amendment and intended to override the eleventh amendment).

294. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460-61 (1975); Doe v. St. Joseph's Hosp., 788 F.2d 411, 426 (7th Cir. 1986); Goss v. Revlon, 548 F.2d 405 (2d Cir. 1976), *cert. denied*, 434 U.S. 968 (1977); B. SCHLEI & P. GROSSMAN, *supra* note 245, at 693.

295. *See* Goss v. Revlon, 548 F.2d 405, 407 (2d Cir. 1976), *cert. denied*, 434 U.S. 968 (1977); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1162 (9th Cir. 1974); Tafoya v. Adams, 612 F. Supp. 1097 (D. Colo. 1985); B. SCHLEI & P. GROSSMAN, *supra* note 245, at 693.

296. 42 U.S.C. § 2000e-5 (1982); 29 C.F.R. § 1613 (1987).

297. *See Johnson*, 421 U.S. at 459-60.

298. *See id.* at 458; Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Under 42 U.S.C. § 2000e-5(f)(1) (1982), the EEOC may itself institute an enforcement action.

299. *Johnson*, 421 U.S. at 459; *see also Alexander*, 415 U.S. at 47 ("overlapping remedies").

300. *See Johnson*, 421 U.S. at 459.

	Section 1981	Title VII
FEDERAL EMPLOYEES	Not available because Title VII is exclusive remedy.[301]	Available.[302]
INTENT TO DISCRIMINATE	Required.[303]	Not required. Covers de facto discrimination.[304]
JURY TRIAL	Available when legal relief sought.[305]	Not available because only equitable relief authorized.[306]
RELIEF	Legal and equitable relief including compensatory and punitive damages. No time limit for back pay except statute of limitations.[307]	Equitable relief only, including reinstatement and back pay which is limited to two years.[308] No other compensatory or punitive damages.[309]

301. *See* Brown v. General Servs. Admin., 425 U.S. 820 (1976).

302. 42 U.S.C. § 2000e-16 (1982).

303. *See* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982).

304. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see also* Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988) (*Griggs* test applies to subjective employment practices).

305. *See* Williamson v. Handy Button Mach. Co., 817 F.2d 1290 (7th Cir. 1987); Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir.), *modified*, 657 F.2d 962 (en banc), *cert. denied*, 454 U.S. 1064 (1981); B. SCHLEI & P. GROSSMAN, *supra* note 245, at 696.

306. *See* Keller v. Prince George's County, 827 F.2d 952, 955 (4th Cir. 1987) (dicta); B. SCHLEI & P. GROSSMAN, *supra* note 245, at 696-97 ("The overwhelming weight of authority holds that Title VII remedies are equitable in nature and, hence, jury trials are unavailable."); *see also id.* at 1135-36.

307. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975); Stallworth v. Shuler, 777 F.2d 1431, 1435 (11th Cir. 1985) (compensatory damages, including lost wages, suffering and emotional distress, available under section 1981). The Supreme Court's decision in Smith v. Wade, 461 U.S. 30, 56 (1983), which establishes the standard of "reckless or callous indifference to the federally protected rights of others," for punitive damages in actions under 42 U.S.C. § 1983, is fully applicable to section 1981. *See* Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 205-06 (1st Cir. 1987); *see also* Miller v. Fairchild Indus., Inc., 797 F.2d 727 (9th Cir. 1986); Wilmington v. J. I. Case Co., 793 F.2d 909 (8th Cir. 1986).

308. 42 U.S.C. § 2000e-5(g) (1982); *see Keller*, 827 F.2d at 955 ("Title VII grants authority only for equitable relief.")

309. *See* B. SCHLEI & P. GROSSMAN, *supra* note 245, at 1452.

	Section 1981	Title VII
RES JUDICATA	Applicable.[310]	Applicable.[311]
ADMINISTRATIVE RES JUDICATA	May be applicable.[312]	Not applicable.[313]
ARBITRATION DECISIONS	Not given preclusive effect.[314]	Not given preclusive effect.[315]
RESPONDEAT SUPERIOR	Unsettled but weight of authority holds that it is available.[316]	Available, at least under some circumstances.[317]
STATUTE OF LIMITATIONS	State personal injury period (typically longer than Title VII period).[318] Limitations period not tolled during pendency of EEOC proceedings.[319]	Within 90 days of receipt of right to sue letter from the EEOC.[320]

310. *See* Kirkland v. City of Peekskill, 828 F.2d 104 (2d Cir. 1987); Carpenter v. Reed *ex rel.*, Dep't of Pub. Safety, 757 F.2d 218 (10th Cir. 1985); Davis v. United States Steel Supply, 688 F.2d 1983 (3d Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1014 (1983).

311. Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982).

312. The decision in University of Tenn. v. Elliott, 106 S. Ct. 3220 (1986), which by its terms makes administrative res judicata potentially applicable to section 1983 claims, applies equally to section 1981. *Id.* at 3226-27; *Kirkland*, 828 F.2d at 105; DeCintio v. Westchester County Medical Center, 821 F.2d 111 (2d Cir.), *cert. denied*, 108 S. Ct. 454 (1987); Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc., 820 F.2d 892 (7th Cir. 1987); Davis v. Spanish Coalition for Jobs, 676 F. Supp. 171 (N.D. Ill., 1988).

313. *See University of Tenn.*, 106 S. Ct. at 3224-25.

314. *Id.* McDonald v. City of West Branch, 466 U.S. 284 (1984), which denies preclusive effect to a section 1983 claim, is applicable to section 1981 claims. Wilmington v. J. I. Case Co., 793 F.2d 909 (8th Cir. 1986).

315. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1979).

316. *See* Springer v. Seaman, 821 F.2d 871, 880 n.10 (1st Cir. 1987) (list of authorities). *Contra* Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986).

317. Merritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2407-09 (1986).

318. Goodman v. Lukens Steel Co., 107 S. Ct. 2617 (1987) (applying the rule in 42 U.S.C. § 1983 actions established by Wilson v. Garcia, 471 U.S. 261 (1985)); *see* Keller v. Prince George's County, 827 F.2d 952, 955 (4th Cir. 1987) ("[T]he limitation period for a § 1983 claim is . . . generally longer than the 180-day limitation period for a Title VII claim."); *see, e.g.*, Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987) (plaintiff's Title VII claim was dismissed as untimely, yet plaintiff was able to litigate his claim of employment discrimination pursuant to section 1981).

319. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 464-66 (1975).

320. 42 U.S.C. § 2000e-5 (1982).

B. Title VIII of the Civil Rights Act of 1968

There are also "vast differences"[321] between section 1982 and the Federal Fair Housing Act, Title VIII of the Civil Rights Act of 1968[322] relating to the scope of coverage, enforcement mechanisms, and available remedies. The Supreme Court has held that Title VIII does not constitute an implied repeal of section 1982, and that the two statutes afford independent avenues for redressing discriminatory housing practices.[323] As independent grounds for relief, they can be distinguished

> between, . . . [as], on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.[324]

Title VIII is a detailed and comprehensive fair housing act designed to prohibit a wide range of discriminatory housing practices which prohibits discrimination not just in the sale or rental of property, but also in advertising, financing, and brokerage services relating to the sale or rental of property.[325] These ancillary services are not expressly referred to in section 1982 which grants to "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."[326] Thus, with respect to advertising, financing, and brokerage services, the scope of Title VIII may exceed the scope of section 1982.[327]

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321. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417 (1968).

322. Pub. L. No. 90-284, §§ 801-819, 82 Stat. 81, 81-89 (1968).

323. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969); *Jones*, 392 U.S. at 416-17 n.20.

324. *Jones*, 392 U.S. at 417.

325. 42 U.S.C. §§ 3604-3606 (1982). Section 3604(a) provides that it shall be unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." *Id.* § 3604. This provision has been construed very liberally "to effectuate the goals of the Act." Steptoe v. Beverly Area Planning Ass'n, 674 F. Supp. 1313, 1318 (N.D. Ill. 1987); *see also* Huertas v. East River Hous. Corp., 674 F. Supp. 440, 453 (S.D.N.Y. 1987). The "catchall" phrase that prohibits making any dwelling "unavailable" has been characterized to be "as broad as Congress could have made it." *Steptoe*, 674 F. Supp. at 1318 (quoting Zuch v. Hussey, 366 F. Supp. 553, 557 (E.D. Mich. 1973)).

326. 42 U.S.C. § 1982. Section 1981 may also encompass housing discrimination. *See, e.g.*, Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-40 (1973); *Jones*, 392 U.S. at 441-43 n.78.

327. In *Jones*, the Court specifically declined to comment on whether section 1982 encompassed these "ancillary services." *Jones*, 392 U.S. at 413 n.10. In subsequent decisions, how-

In other ways, however, Title VIII's scope of coverage is more constrained. Title VIII generally excludes from its coverage single family houses sold or rented by a private individual owner who does not own more than three single family houses, so long as the house is sold without the services of a real estate broker and without publication of a discriminatory notice or advertisement.[328] Title VIII also contains a "Mrs. Murphy exemption"[329] which usually excludes from coverage owner-occupied dwellings containing no more than four units,[330] and generally exempts religious organizations, associations, societies, and private clubs not normally open to the public.[331] Section 1982, on the other hand, contains no exemptions for single family homes or small dwelling units occupied by the owner or for religious organizations.[332] The issue of whether section 1982 prohibits discrimination by truly private clubs has not been decided by the Supreme Court.[333]

An additional difference is that while Title VIII prohibits discrimination on the basis of race, color, religion, sex, or national origin,[334] section 1982 prohibits only racial discrimination, now understood to

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ever, the Court has indicated that section 1982 should be interpreted to encompass some of these services. *See* City of Memphis v. Greene, 451 U.S. 100, 120 (1981) (Section 1982 was designed to "protect not merely the enforceability of property interests acquired by black citizens but also their right to acquire and use property on an equal basis with white citizens."). In what was described as a "case of first impression," the court in Evans v. First Fed. Sav. Bank, 669 F. Supp. 915, 918 (N.D. Ind. 1987), held that "the procurement of financing (in particular, a second mortgage) is a protected property interest for purposes of section 1982." *But see* Saunders v. General Serv. Corp., 659 F. Supp. 1042 (E.D. Va. 1987) (section 1982 does not protect discrimination in advertising practices); Spann v. Colonial Village, Inc., 662 F. Supp. 541, 547 (D.D.C. 1987) (neither sections 1981 nor 1982 covers discriminatory advertising); *Steptoe*, 674 F. Supp. at 1322-23 (section 1982 does not encompass a claim that plaintiffs have a property right to receive comprehensive housing information from a voluntary noncommercial organization).

328. 42 U.S.C. § 3603(b)(1) (1982); *See* R. SCHWEMM, HOUSING DISCRIMINATION LAW 201 (1983) (detailed description of the single family exception).

329. R. SCHWEMM, *supra* note 328, at 201.

330. 42 U.S.C. § 3606(b)(2) (1982).

331. *Id.* § 3607. The religious organization and private club exemptions have been construed very narrowly and thus have not resulted in a single reported decision where a Title VIII defendant has been afforded the protection of section 3607. *See* R. SCHWEMM, *supra* note 328, at 204; *see also* United States v. Hughes Memorial Home, 396 F. Supp. 544, 550 (W.D. Va. 1975).

332. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968).

333. Whenever the issue has arisen, the Court has found that the club in question was not truly private. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969); *see also* Durham v. Red Lake Fishing & Hunting Club, 666 F. Supp. 954 (W.D. Tex. 1987).

334. 42 U.S.C. § 3604 (1982). On Sept. 13, 1988, President Reagan signed into law an amendment to Title VIII which, inter alia, extends its coverage to the handicapped and to

include discrimination based on ethnicity and ancestry.[335] Thus, Title VIII is far more comprehensive in prohibiting discriminatory housing practices than section 1982 which is targeted specifically at racial discrimination only. Moreover, section 1982's protections are limited to citizens of the United States while Title VIII affords relief to resident aliens and other non-citizens.[336]

The two statutes may also differ in terms of standing. While section 1982, as interpreted, in effect confers standing on both black and white plaintiffs whose rights to acquire and hold property are interfered with on the basis of race[337] it also confers standing on white plaintiffs whose property rights are affected because they either live with blacks[338] or seek to sell or rent to blacks.[339] It is not clear, however, whether standing for purposes of section 1982 is as extensive as under Title VIII.[340] On at least one occasion, the Supreme Court has denied standing under section 1982 to white plaintiffs who asserted a right to live in an integrated community.[341] In contrast, the Court has found standing when a comparable claim was asserted under Title VIII and has repeatedly held that Title VIII standing should be defined "as broadly as is permitted by Article III of the Constitution."[342] The standing issue is particularly significant because housing discrimination cases often involve indirect injuries.[343]

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families with children. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620-1622 (1988).

335. Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987); Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987).

336. *See* R. SCHWEMM, *supra* note 328, at 305.

337. City of Memphis v. Greene, 451 U.S. 100, 122 (1981), confers standing on blacks. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), holds that section 1981 is applicable to white as well as black victims of racial discrimination. In general, the parameters of section 1981 and section 1982 are perceived to be the same.

338. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (although Jones was black, his wife was not).

339. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

340. *See* R. SCHWEMM, *supra* note 328, at 320, 322-23.

341. Warth v. Seldin, 422 U.S. 490 (1975).

342. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972) (quoting Hackett v. McGuire Bros., 445 F.2d 442, 446 (3d Cir. 1971)); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), *aff'd sub nom.* Coles v. Havens Realty Corp., 633 F.2d 384 (4th Cir. 1980) (testers and fair housing organizations have standing to assert a Title VIII violation); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (resident testers have standing to assert a Title VIII claim).

343. Indirect injuries may result from practices including segregated site selection or blockbusting. In addition, practices that impact upon the right to live in an integrated community also cause indirect injuries.

An additional and potentially significant difference between the two statutes relates to issues of proof. While the Supreme Court has never resolved the issue, the circuit courts which have considered the question have held that under Title VIII a plaintiff can prevail if discriminatory effect is proven.[344] Although the Supreme Court has not explicitly decided whether such discriminatory effect will suffice under section 1982, its ruling in *General Building Contractors Association v. Pennsylvania*,[345] which held that claims asserted under section 1981 require discriminatory motive,[346] strongly suggests that the scope of section 1982 is similarly limited. As previously stressed,[347] this distinction carries tremendous import because of the difficulty in proving intentional discrimination.[348]

Perhaps the most significant difference between the two statutes relates to enforcement procedures and mechanisms. Section 1982 provides a federal court remedy for private parties victimized by racial discrimination. In sharp contrast, Title VIII provides a governmental "hierarchy of administrative machinery"[349] for combatting discriminatory housing practices. Under Title VIII, a variety of options exist. First, a victim of housing discrimination may file a complaint with the Secretary of Housing and Urban Development who is charged with investigating complaints and attempting to secure compliance with the Fair Housing Act through "informal methods of conference, conciliation, and persuasion."[350] The Secretary is also required to notify the relevant state agency whenever the state or local fair housing law provides substantially equivalent rights and remedies for combatting discriminatory housing practices.[351] If the Secretary is unsuccessful in obtaining voluntary compliance with the Fair Housing Act, the claimant can proceed to federal district court.[352] Alternatively, Title VIII permits a complainant to proceed directly

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344. *See* NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036-37 (2d Cir. 1979).

345. 458 U.S. 375 (1982).

346. *Id.* at 388-89.

347. *See supra* note 103 and accompanying text.

348. *See supra* notes 105-07 and accompanying text.

349. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969). On Sept. 13, 1988 President Reagan signed into law an amendment to Title VIII which, inter alia, enhances the government's enforcement powers. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 8, 102 Stat. 1625-1635 (1988).

350. 42 U.S.C. § 3610(a) (1982).

351. *Id.* § 3610(c).

352. *Id.* § 3610(d).

to federal or state court without first exhausting administrative remedies.[353] Finally, Title VIII provides for enforcement by the Attorney General when there is "reasonable cause to believe" there exists "a pattern or practice of resistance to the full enjoyment of any of the rights granted by . . . [Title VIII]" or when a "group . . . has been denied any of the rights granted by . . . [Title VIII] and such denial raises an issue of general public importance."[354] Under such circumstances, the Attorney General is empowered to commence an action in federal court against the person or persons responsible for denying the rights guaranteed by Title VIII.[355]

Not only are the enforcement mechanisms different, but the two statutes provide different remedies. Title VIII explicitly provides that when a private person seeks to enforce the rights granted by the Fair Housing Act, the federal district court may appoint an attorney to represent the plaintiff,[356] grant *in forma pauperis* status to the plaintiff,[357] grant permanent or temporary injunctions and temporary restraining orders,[358] award to plaintiff actual damages,[359] and punitive damages not exceeding $1,000,[360] and award court costs and attorneys' fees if the plaintiff prevails and cannot afford to pay attorneys' fees.[361]

Similarly, when enforcement of Title VIII is conducted by the Attorney General, the Fair Housing Act authorizes the Attorney General to seek a permanent or temporary injunction as well as any "other order against the person or persons responsible . . . as he deems necessary to insure the full enjoyment of the rights granted by . . . [Title VIII]."[362] The Fair Housing Act further provides for the imposition of fines and/or imprisonment of individuals who intimidate, injure, or interfere with another's exercise of the rights guaranteed by Title VIII.[363]

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353. *Id.* § 3612(a).
354. *Id.* § 3613.
355. *Id.*
356. *Id.* § 3612(b).
357. *Id.*
358. *Id.* § 3612(c).
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.* § 3631. This section provides for fines not exceeding $1,000 and/or imprisonment for not more than one year. However, if bodily injury results, fines may be assessed up to $10,000 coupled with imprisonment up to ten years. If death results, the imprisonment may be for any term of years or life.

While section 1982 does not on its face authorize any specific remedies or means of enforcement,[364] the Supreme Court has held that a federal court has the power to "fashion . . . an effective equitable remedy" under section 1982.[365] Thus, with respect to equitable relief, section 1982 and Title VIII are coextensive, authorizing identical relief.[366] In addition to injunctive relief, section 1982 has been interpreted to authorize the award of damages, both compensatory[367] and punitive.[368] Thus, section 1982 and Title VIII provide comparable relief with respect to awards of damages, with one very notable exception.[369] Title VIII limits punitive damages to $1,000 whereas section 1982 provides no similar cap.[370] There is also a significant difference between the two statutes with respect to attorneys' fees. A section 1982 prevailing party can recover fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976[371] without regard to his or her financial circumstances whereas Title VIII conditions an award of attorneys' fees on financial need.[372]

Further comparison lies in the statute of limitations applicable to the 1866 Act and the Fair Housing Act. Under Title VIII, a claimant has 180 days to file a complaint with the Secretary after the alleged discriminatory housing practice has occurred.[373] Similarly, a claimant seeking private enforcement of the Fair Housing Act must commence the action in federal district court within 180 days of the discriminatory housing practice.[374]

Title VIII contains a second exceedingly short statute of limitations that has generated considerable confusion. It states that "if within thirty days after a complaint is filed with the Secretary . . . the Secretary has been unable to obtain voluntary compliance with this subchapter, the person aggrieved may, within thirty days there-

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364. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414 n.13 (1968).

365. *Id.*

366. *See* R. SCHWEMM, *supra* note 328, at 326.

367. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238-40 (1969).

368. *See infra* note 423.

369. R. SCHWEMM, *supra* note 328, at 328.

370. Fountila v. Carter, 571 F.2d 487, 494 (9th Cir. 1978). With respect to the importance of punitive damages in civil rights cases, see *supra* notes 251-55 and accompanying text.

371. Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)).

372. *Compare* 42 U.S.C. § 1988 (1982) *with* 42 U.S.C. § 3612(c) (1982). If a plaintiff sues and prevails under both section 1982 and Title VIII, "the more liberal provisions for recovery [of attorneys' fees] available under section 1982 should apply." Oliver v. Foster, 524 F. Supp. 927, 931 (S.D. Tex. 1981) (citing Dillon v. AFBIC Dev. Corp., 597 F.2d 556, 563-64 (5th Cir. 1979)).

373. 42 U.S.C. § 3610(b) (1982).

374. *Id.* § 3612(a).

after, commence a civil action in any appropriate United States district court."[375] The obvious question that arises is when does the thirty day period begin to run? The courts are split between those that conclude that the thirty day period begins to run only when the plaintiff receives notice of the Secretary's inability to obtain compliance[376] and those that conclude that the thirty day period begins to run as soon as the Department of Housing and Urban Development receives the complaint.[377] Under this latter view, the Fair Housing Act imposes a sixty day limitation period from the time of filing the complaint with the Secretary to the time the complaint must be filed in federal court.

In contrast, the statute of limitations for filing a section 1982 action is considerably longer. While section 1982 does not provide its own statute of limitations, section 1988, which directs the federal courts to apply state law whenever federal law is deficient, has been employed to determine the appropriate statute of limitations in civil rights actions.[378] The Supreme Court has held that the appropriate state statute of limitations in section 1983 actions is the period governing personal injury actions.[379] In 1987, the Supreme Court similarly held that the state's personal injury limitations period constitutes the appropriate statute of limitations to be borrowed in section 1981 cases and that result has been applied to section 1982 as well.[380]

Section 1982 and Title VIII are thus markedly different in terms of their substantive coverage, their enforcement mechanisms, and the relief provided. As was true in the comparison of section 1981 and Title VII, the relative advantages and disadvantages must be determined on a case by case basis.

The following chart illustrates the major points of comparison between section 1982 and Title VIII.

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375. *Id.* § 3610(d).

376. Logan v. Richard E. Carmack & Assocs., 368 F. Supp. 121 (E.D. Tenn. 1973); Brown v. Ballas, 331 F. Supp. 1033 (N.D. Tex. 1971). This view is supported by HUD's own regulations. 24 C.F.R. §§ 105.16(a), 105.34 (1987).

377. Green v. Ten Eyck, 572 F.2d 1233 (8th Cir. 1978).

378. 42 U.S.C. § 1988 (1982).

379. Wilson v. Garcia, 471 U.S. 261 (1985).

380. Goodman v. Lukens Steel Co., 107 S. Ct. 2617 (1987) (applying the state's personal injury limitations in a section 1981 case). Robinson v. Kelly, 1986 WL 15031 (E.D. Pa. Dec. 31, 1986) (Westlaw, Allfed Library) (applying the personal injury limitations period to all the Reconstruction era civil rights acts including section 1982).

	Section 1982	Title VIII
ASSIGNED COUNSEL	Counsel may be assigned.[381]	Counsel may be assigned.[382]
ATTORNEYS' FEES	Available to the prevailing party.[383]	Available but conditioned on financial need.[384]
CLASS ACTIONS	Available under Fed. R. Civ. P. 23.[385]	Available under Fed. R. Civ. P. 23.[386]
COVERAGE		
TYPES OF DISCRIMINATION		
RACE	Covered.[387]	Covered.[388]
RELIGION	Not covered.[389]	Covered.[390]
SEX	Not covered.[391]	Covered.[392]
NATIONAL ORIGIN	May not be covered.[393]	Covered.[394]
ANCESTRY	Covered.[395]	Covered.[396]

381. *See supra* note 265.

382. 42 U.S.C. § 3612(b) (1987) specifically provides:

> Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security.

Id.

383. 42 U.S.C. § 1988 (1982); *see supra* note 267.

384. 42 U.S.C. § 3612(c) (1982) provides, in pertinent part: "The court . . . may award to the plaintiff . . . reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." *Id.* (emphasis in original).

385. *See* C. ANTIEAU, *supra* note 269.

386. *See* R. SCHWEMM, *supra* note 328, at 394.

387. *See supra* text accompanying notes 175-82.

388. 42 U.S.C. §§ 3604-3606 (1982).

389. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (dicta); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803, 815-16 (S.D.N.Y. 1979); Schetter v. Heim, 300 F. Supp. 1070, 1073 (E.D. Wis. 1969).

390. 42 U.S.C. §§ 3604-3606 (1982).

391. *See* R. SCHWEMM, *supra* note 328, at 373.

392. 42 U.S.C. §§ 3604-3606 (1982).

393. *See supra* text accompanying notes 187-233.

394. 42 U.S.C. §§ 3604-3606 (1982).

395. Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022, 2028 (1987); Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019, 2022 (1987).

396. *See* Patel v. Holley House Motels, 483 F. Supp. 374, 384 (S.D. Ala. 1979).

	Section 1982	Title VIII
ETHNICITY	Covered.[397]	Covered.[398]
ALIENAGE	Not covered.[399]	Not covered.[400]
TYPES OF TRANSACTIONS	Sale or rental of property,[401] the terms and conditions,[402] services and facilities related to housing.[403]	Sale or rental of property, advertising, financing, and brokerage services relating to the sale or rental of property.[404]
TYPES OF HOUSING	All types of housing.[405]	Partially excludes single family houses,[406] owner-occupied dwellings,[407] religious organizations, associations, and private clubs.[408]
ELEVENTH AMENDMENT SOVEREIGN IMMUNITY	Bar to retrospective relief against the state.[409]	Unresolved.[410]

397. *Saint Francis College*, 107 S. Ct. at 2028; *Shaare Tefila Congregation*, 107 S. Ct. at 2022.

398. *See Patel*, 483 F. Supp. at 384.

399. The statute, on its face, applies only to "citizens." 42 U.S.C. § 1982 (1982).

400. Espinoza v. Hillwood Square Mut. Ass'n, 522 F. Supp. 559, 567-68 (E.D. Va. 1981).

401. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

402. *Id.*

403. City of Memphis v. Greene, 451 U.S. 100, 123 (1981).

404. 42 U.S.C. §§ 3604-3606 (1982).

405. *See Jones*, 392 U.S. at 437. The issue of whether or not section 1982 reaches truly private clubs has not been decided by the Supreme Court. *See infra* note 429.

406. 42 U.S.C. § 3603(b)(1) (1982).

407. *Id.* § 3606(b)(2).

408. *Id.* § 3607.

409. *See* Lowe v. Carter, 554 F. Supp. 831 (E.D. Mich. 1982) where the court applied the eleventh amendment in a section 1982 case with no analysis of the abrogation issue. The eleventh amendment has been held to be a bar to retrospective relief against the state in section 1981 cases. There is no reason to expect a different outcome under section 1982. *See also supra* note 292.

410. *See* R. SCHWEMM, *supra* note 328, at 91 and at 21 (1986 Supp.). *Compare* Quern v. Jordan, 440 U.S. 332 (1979) (section 1983 does not amount to a waiver of the state's sovereign immunity) *with* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Title VII constitutes a waiver of the state's sovereign immunity).

	Section 1982	Title VIII
EXHAUSTION OF ADMINISTRATIVE REMEDIES	Not required.[411]	Not required for private enforcement.[412]
GOVERNMENTAL ENFORCEMENT	Not available; private enforcement only.[413]	Enforcement power authorized.[414]
INDEPENDENT NATURE OF REMEDY	Independent remedy.[415]	Independent remedy.[416]
FEDERAL EMPLOYEES	Available.[417]	Available.[418]
INTENT TO DISCRIMINATE	Probably required.[419]	Not required; covers discriminatory effect.[420]
JURY TRIAL	Available if legal relief sought.[421]	Available.[422]

411. *See* Oliver v. Foster, 524 F. Supp. 927, 929 (S.D. Tex. 1981).

412. 42 U.S.C. § 3612 (1982); *see* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 104-06 (1979).

413. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413-14 (1968).

414. 42 U.S.C. §§ 3610(a), 3613 (1982).

415. *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969); *Jones*, 392 U.S. at 409.

416. *See Jones*, 392 U.S. at 417.

417. *See* J. KUSHNER, FAIR HOUSING 451-52 (1983).

418. *See* R. SCHWEMM, *supra* note 328, at 91.

419. *See supra* note 103.

420. *See* NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); Huertas v. East River Hous. Corp., 674 F. Supp. 440, 454 (S.D.N.Y. 1987). In addition, a Title VIII claimant can prevail even if the unlawful discrimination was only one of a number of reasons motivating the defendant's conduct. *See* Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1043 (2d Cir. 1979); Payne v. Bracher, 582 F.2d 17, 18 (5th Cir. 1978); *cf.* Mounty Healthy City School Dist. v. Doyle, 429 U.S. 274, 284-87 (1977) (Court rejected a mixed motive standard and adopted a "but for" rule in constitutionally based claims).

421. Headley v. Bacon, 828 F.2d 1272, 1277 (8th Cir. 1987).

422. A jury trial is available in a private enforcement action pursuant to section 3612 where the plaintiff is seeking damages as well as equitable relief, see Curtis v. Loether, 415 U.S. 189 (1974), but not when the Attorney General brings the action pursuant to section 3613 because there only equitable relief is authorized. 42 U.S.C. § 3613 (1982); *see also* J. KUSHNER, *supra* note 417, at 493 n.736; R. SCHWEMM, *supra* note 328, at 397 n.85.

	Section 1982	Title VIII
RELIEF	Compensatory and punitive damages[423] as well as equitable relief.[424]	Compensatory damages, punitive damages not exceeding $1,000[425] and equitable relief.[426]
RES JUDICATA	Applicable.[427]	Applicable.[428]
ADMINISTRATIVE RES JUDICATA	Applicable.[429]	Not applicable.[430]
ARBITRATION DECISIONS	Not given preclusive effect.[431]	Probably not given preclusive effect.[432]
RESPONDEAT SUPERIOR	Available.[433]	Available.[434]
STATUTE OF LIMITATIONS	State personal injury period (typically longer than Title VIII period).[435]	Private enforcement: 180 days after the alleged discriminatory housing practice occurred.[436] Sixty days after filing complaint with Secretary.[437]

423. Punitive damages may be awarded without limit. *See* Oliver v. Foster, 524 F. Supp. 927, 931 (S.D. Tex. 1981).

424. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

425. 42 U.S.C. § 3612(c) (1982).

426. *Id.*

427. Snell v. Mayor, 837 F.2d 173 (4th Cir. 1988); Torres v. Rebarchak, 814 F.2d 1219 (7th Cir. 1987). *See generally* 2 J. COOK & J. SOBIESKI, *supra* note 19, ¶¶ 3-204, 3-213, 3-214.

428. *Torres*, 814 F.2d 1219.

429. The rationale of the holding in University of Tenn. v. Elliott, 106 S. Ct. 3230 (1986) with respect to claims under 42 U.S.C. section 1983 logically extends to section 1982 claims. *See supra* note 312.

430. *See* R. SCHWEMM, *supra* note 328, at 240 ("[A]n adverse agency decision in a § 3610(a) case does not bar a subsequent § 3612 action.") (citing Miller v. Poretsky, 409 F. Supp. 837 (D.D.C. 1976).

431. The rationale of McDonald v. City of West Branch, 466 U.S. 284 (1984), which deals with section 1983, logically extends to section 1982 claims. *See supra* note 314.

432. While no cases have been located, there is no reason why the Title VII analysis in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1979) should not apply to Title VIII.

433. *See* J. KUSHNER, *supra* note 417, at 256-57 n.468.

434. *See id.* at 255-56 n.458 and at 109 n.458 (Supp. 1986); R. SCHWEMM, *supra* note 328, at 80-81 nn.123-27.

435. Robinson v. Kelly, 1986 WL 15031 (E.D. Pa. Dec. 31, 1986) (Westlaw, Allfed Library).

436. 42 U.S.C. § 3612 (1982).

437. *Id.* § 3610; *see supra* text accompanying notes 375-77.

C. Section 1983 of the Civil Rights Act of 1871 and the Fourteenth Amendment

The interpretation of sections 1981 and 1982 is particularly significant when those statutes are contrasted to the remedies available under section 1983. Section 1983, derived from the Civil Rights Act of 1871,[438] constitutes the congressional machinery designed to enforce the fourteenth amendment.[439] The fourteenth amendment reaches only state action and thus stands in sharp contrast to sections 1981 and 1982, which apply to both public and private defendants.[440] As has already been noted, at the very time that the Supreme Court has extended the reach of sections 1981 and 1982, it has sharply restricted the Warren Court's state action rulings and principles.

In its most recent endeavor in this regard, just five weeks after the decisions in *Saint Francis College* and *Shaare Tefila Congregation*, the Court in *San Francisco Arts and Athletics v. United States Olympic Committee*[441] ruled that the United States Olympic Committee's refusal to allow a nonprofit group to use the word "Olympic" to sponsor the "Gay Olympic Games" did not constitute government action within the meaning of the fifth amendment's due process clause.[442] The Court reached this result even though the Olympic Committee was awarded exclusive control over the use of the word "Olympic" by Congress, was regulated by the government, carried out an important representational function in the international arena, and received other governmental benefits. In short, the Olympic Committee is a de facto governmental entity and yet, under the Court's decision it is not obligated to comply with the Constitution's equal protection principles even if it engages in the most egregious discrimination.[443] However, it may be subject to liability under

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438. 42 U.S.C. § 1983 (derived from Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13).

439. *See* District of Columbia v. Carter, 409 U.S. 418, 423 (1973).

440. *See supra* text accompanying notes 20-45. The Supreme Court has requested argument on the issue of whether the holding in Runyon v. McCrary, 427 U.S. 160 (1976), that section 1981 applies to private defendants, should be reconsidered. Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988).

441. 107 S. Ct. 2971 (1987). While the decision addressed the issue of federal governmental action under the fifth amendment, the Court employed the same principles utilized to determine state action under the fourteenth amendment. *Id.* at 2984 n.21.

442. *Id.* at 2984-86

443. "It would certainly be irony amounting to grave injustice if, to finance the team that is to represent the virtues of our political system, the USOC were free to employ government-created economic leverage to prohibit political speech." *San Francisco Arts and Athletics, Inc.*, 107 S. Ct. at 2992 (Brennan, J., dissenting) (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961)).

sections 1981 and 1982, if it engages in discriminatory conduct within the scope of these provisions.

The Warren Court's broad expansion of state action was part of its effort to eradicate governmental and societal racial discrimination. The Court found state action in a series of cases involving privately owned places of public accommodations because they were engaged in racial discrimination pursuant to state directives, customs, or assistance,[444] received significant state encouragement,[445] were carrying out a public function,[446] or had a "symbiotic relationship,"[447] with an arm of government pursuant to *Burton v. Wilmington Parking Authority*.[448] By employing these principles, the Court was able to reach various forms of racial discrimination carried out by the ostensibly "private" sector.

The post-Warren Court state action cases have not been limited to claims of racial discrimination but have included a variety of procedural due process and first amendment claims. The Court, however, has applied the same state action principles regardless of the nature of the constitutional claim, thereby implicitly rejecting Judge Friendly's position that "racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts."[449]

The Burger Court reversed the trend of the Warren Court state action rulings so severely that as early as 1979 one commentator concluded that state action is "the clearest area of conservatism on the part of the Burger Court and the most unqualified reversal of

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444. *See* Robinson v. Florida, 378 U.S. 153 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963).

445. Reitman v. Mulkey, 387 U.S. 369 (1967).

446. Evans v. Newton, 382 U.S. 296 (1966). In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), Justice Rehnquist indicated that *Evans* stood for the proposition that the operation of a municipal park involved the carrying out of a public function. *See id.* at 352. In Flagg Brothers v. Brooks, 436 U.S. 149 (1978), he seems to have had second thoughts about this reading of *Evans*. *See id.* at 159 n.8. Pre-Warren Court decisions employed the public function doctrine to find state action in the so-called white primary cases. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

447. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

448. 365 U.S. 715 (1961); *see generally* M. SCHWARTZ & J. KIRKLIN, *supra* note 241, § 5.10 (discussion of *Burton*).

449. Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring); *accord* Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

position from that adhered to by the Burger Court's predecessor."[450] The Court's subsequent no-state action holdings in *Rendell-Baker v. Kohn*[451] and *Blum v. Yaretsky*[452] provide further evidence of the present Court's highly restrictive approach to state action.

The post-Warren Court decisions found no state action in the case of a private club's refusal to admit blacks as guests,[453] a utility company's termination of service,[454] a shopping mall's refusal to permit expressive conduct,[455] a warehouseman's threat to sell another's property,[456] a private school for maladjusted children's termination of employees,[457] and a nursing home's discharge and transfer of patients.[458] These decisions were based upon the view that, either in isolation or combination, state regulation, even if extensive, the conferral of governmental assistance, even if substantial, the carrying out of an important function, even one that government would otherwise have to perform, and state authorization of the contested conduct, are insufficient bases for finding state action.[459]

The decision in *Rendell-Baker v. Kohn*[460] provides an instructive example of how the present Court approaches state action issues. The Court, by a seven-to-two vote, ruled that the discharge of teachers and other employees of a privately operated school for maladjusted children did not constitute state action, even though the school was heavily regulated by the state, received extensive state funding (in one year 99% of the school's operating budget), and performed an important public function. While the Warren Court's symbiotic relationship state action finding in *Burton v. Wilmington Parking Authority* was distinguished as a case in which the state profited from the discrimination, this was actually a minor part of the basis

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450. Choper, *State Action*, in THE SUPREME COURT: TRENDS AND DEVELOPMENT 1978-1979 265 (National Practice Institute 1979). This conclusion was based upon the Supreme Court's decisions in Flagg Bros. v. Brooks, 436 U.S. 149 (1978), Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), and Hudgens v. NLRB, 424 U.S. 507 (1967).

451. 457 U.S. 830 (1982).

452. 457 U.S. 991 (1982).

453. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

454. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

455. Hudgens v. NLRB, 424 U.S. 507 (1976).

456. Flagg Bros. v. Brooks, 436 U.S. 149 (1978). Author Martin Schwartz was counsel for the plaintiffs in *Flagg Brothers*.

457. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

458. Blum v. Yaretsky, 457 U.S. 991 (1982).

459. *See id.*; *Rendell-Baker*, 457 U.S. 830; Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 167 (1972).

460. 457 U.S. 830 (1982).

for the state action finding in *Burton*.[461] In *Rendell-Baker*, the Court gave short shrift to plaintiffs' public function argument, concluding that the education of maladjusted children has not been the "exclusive prerogative of the State."[462]

Through decisions like *Rendell-Baker*, the present Court has rendered the Warren Court state action decisions virtually useless relics without actually overruling them. The symbiotic relationship doctrine has been rejected in every post-Warren Court decision in which it has been asserted,[463] and has been given such a niggardly interpretation that one wonders whether it would be applied by the present Court even if a black individual named Burton was denied service because of his race by the Eagle Restaurant located in a garage operated by the Wilmington Parking Authority. Similarly, the present Court's restriction of the public function doctrine to "exclusive" state functions renders it virtually useless; it is impossible to satisfy its literal requirement, because the mere existence of the "private defendant" shows that the function is not exclusively public. Even if this is not what the Court means, the post-Warren Court decisions show the extreme difficulty in satisfying the test. Like the symbiotic relationship test, the public function doctrine has been rejected by the present Court every time it has been asserted.[464] As if all this were not enough, the Court has insisted upon a showing of government compulsion or significant encouragement in order to provide a sufficiently close nexus between the public and private sectors.[465]

Given the development of these principles it is hardly surprising that, with the exception of one relatively insignificant part of the

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461. Almost as an afterthought, at the end of a paragraph, the Court in *Burton* stated: "Neither can it be ignored . . . that profits earned by discrimination not only contribute to, but are indispensable elements in, the financial success of a government agency." Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961). A more realistic reading of *Burton* is that it was based on the fact that the public and private sectors were in "a position of interdependence," *id.* at 725, involving a "variety of mutual benefits." *Id.* at 724.

462. *Rendell-Baker*, 457 U.S. at 842 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).

463. *Id.*; Blum v. Yaretsky, 457 U.S. 991 (1982); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

464. *See* San Francisco Arts and Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2971, 2986 (1987); *Blum*, 457 U.S. at 1004; *Rendell-Baker*, 457 U.S. at 840; *Flagg Bros.*, 436 U.S. at 166; *Jackson*, 419 U.S. at 357.

465. *See San Francisco Arts and Athletics, Inc.*, 107 S. Ct. at 2986 (citing *Blum*, 457 U.S. at 1004; *Rendell-Baker*, 457 U.S. at 840; *Flagg Bros.*, 436 U.S. at 166; *Jackson*, 419 U.S. at 357; Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Adickes v. S.H. Kress, 398 U.S. 144, 170 (1970)).

decision in *Moose Lodge No. 107 v. Irvis*,[466] the post-Warren Court decisions failed to find state action in any case presenting a pure state action issue, i.e., one not involving the conduct of public officials.[467] In the one post-Warren Court case in which state action was found, it was based upon the joint conduct of a private creditor and public officials, and even under those circumstances, state action was found by a five-to-four vote.[468] The Court's recent decision in *San Francisco Arts and Athletics v. United States Olympic Committee*[469] demonstrates that the Rehnquist Court is simply picking up where the Burger Court left off.

The present Court's restrictive approach to state action clearly emphasizes the importance of the Court's recent expansive interpretation of sections 1981 and 1982. Since section 1983 and the fourteenth amendment may be unavailable to redress discrimination due to an inability to demonstrate state action, victims of discrimination may turn increasingly to sections 1981 and 1982 for relief. This means of redressing discrimination will be foreclosed should the Supreme Court reverse *Runyon v. McCrary*.[470]

D. Unresolved Questions Arising Under Sections 1981 and 1982

The significance of the Supreme Court's decisions in *Saint Francis College* and *Shaare Tefila Congregation* will depend in part upon how the Supreme Court resolves several of the as yet unanswered questions concerning section 1981 and section 1982 liability. For example, shortly after the decision in *Saint Francis College* and *Shaare Tefila Congregation*, the Court granted certiorari in the *Patterson* case which raised the issue whether racial harassment is cog-

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466. While the Court in *Moose Lodge* ruled that the club's refusal to admit blacks did not constitute state action, in one part of the Court's opinion it determined that a state law which had the effect of compelling the club to comply with a discriminatory bylaw constituted state action. *Moose Lodge*, 407 U.S. at 177-79.

467. In fact, in one case involving a public official, the Court ruled that a public defender, in carrying out her representation function, does not act under color of state law within the meaning of 42 U.S.C. section 1983. Polk County v. Dodson, 454 U.S. 312 (1981). *But cf.* West v. Atkins, 108 S. Ct. 2250 (1988)(physician who provides services to prison inmates pursuant to contract with the state is engaged in state action). An analysis of recent Supreme Court state action precedents led the Sixth Circuit to conclude that they "clearly make it very difficult for a private party to be engaged in state action." Smith v. Detroit Fed'n of Teachers, Local 231, 829 F.2d 1370, 1377 (6th Cir. 1987).

468. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

469. 107 S. Ct. 2971 (1987) (*see supra* text accompanying notes 441-43 for discussion of same).

470. 427 U.S. 160 (1976). *See supra* note 440.

nizable under section 1981.[471] Other important unresolved issues under sections 1981 and 1982 include the applicability of the eleventh amendment to claims under section 1981,[472] the availability of respondeat superior,[473] whether punitive damages may be awarded against a municipality,[474] whether section 1981 prohibits private dis-

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471. Patterson v. McLean Credit Union, 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987), *restored for reargument*, 108 S. Ct. 1419 (1988) (parties requested to argue whether the Court's holding in Runyon v. McCrary, 427 U.S. 160 (1976) should be reconsidered). In *Patterson*, the Fourth Circuit ruled that unlike the broader language of Title VII which encompasses the terms, conditions, or privileges of employment, section 1981's narrower language, which refers to the making and enforcing of contracts, does not cover claims of "racial harassment." *Id.* at 1145; *accord* Guy v. City of Phoenix, 668 F. Supp. 1342, 1351 (D. Ariz. 1987); *see also* Nieto v. United Auto Workers Local 598, 672 F. Supp. 987, 991 (E.D. Mich. 1987) (A single incident of harassment "does not rise to the level of poisoning the entire working environment so as to violate 42 U.S.C. § 1981."). *But see* Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1189 (2d Cir. 1987) ("The cause of action for a hostile working environment has also been recognized under § 1981.") (referring to Erebia v. Chrysler Plastic Prods., Corp., 772 F.2d 1250, 1253-54 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986)).

472. The lower federal courts, finding that the congressional enactment of section 1981 does not express an intent to override the eleventh amendment, have ruled that the eleventh amendment applies to section 1981 claims. *See supra* note 292.

473. The issue was left open in General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982). Most lower federal courts have taken the position that the Court's decision in Monell v. Department of Social Servs., 436 U.S. 658 (1978), which found respondeat superior inapplicable under 42 U.S.C. § 1983, does not apply under section 1981 because of its different legislative history. *See* Springer v. Seaman, 821 F.2d 871, 880-81 (1st Cir. 1987) and cases cited therein at 880 n.10. *But see* Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986) (liability may not be imposed under section 1981 solely on the basis of respondeat superior). In *Jett*, the court distinguished between private and municipal liability, finding that while respondeat superior may not be the basis of municipal liability, it may be the basis of private employer liability. *Jett*, 798 F.2d at 762-63. Since the decision in *Monell*, courts may be reluctant to hold cities liable under section 1981. T. EISENBERG, *supra* note 81, at 581. On the question of the liability of a successor corporation under section 1981, see Musikiwamba v. Essi, Inc., 760 F.2d 740 (7th Cir. 1985).

474. Most lower federal courts have taken the position that the Court's decision in City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981), which immunizes municipal entities from punitive damages under 42 U.S.C. section 1983, applies to 42 U.S.C. section 1981 as well. *See, e.g.*, Walters v. City of Atlanta, 803 F.2d 1135, 1148 (11th Cir. 1986); Bell v. City of Milwaukee, 746 F.2d 1205, 1270 (7th Cir. 1984); Poolaw v. City of Anadarko, Okla., 738 F.2d 364, 366 (10th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); Heritage Homes, Inc. v. Seekonk Water Dist., 670 F.2d 1, 3 (1st Cir.), *cert. denied*, 457 U.S. 1120 (1982); Zewde v. Elgin Community College, 601 F. Supp. 1237, 1248 (N.D. Ill. 1984); Lee v. Wyandotte County, Kan., 586 F. Supp. 236, 240 (D. Kan. 1984). *Contra* Boyd v. Shawnee Mission Pub. Schools, Unified School Dist. No. 512, 522 F. Supp. 1115, 1119 (D. Kan. 1981).

crimination against aliens,[475] and whether the private club exemption of Title II should be read into sections 1981 and 1982.[476]

CONCLUSION

The decisions in *Saint Francis College* and *Shaare Tefila Congregation* represent an important expansion of federal civil rights protection available to victims of discrimination. Hopefully, the Court's ill advised dicta concerning national origin discrimination will not be followed by the Court. Claims of discrimination based on national origin cannot be distinguished meaningfully from discrimination claims based upon ancestry and ethnicity. Moreover, the distinction will create, indeed has already created, protracted, hairsplitting litigation that is frequently too costly for improverished or even middle class claimants to bear. Of course, the gains achieved by civil rights claimants in *Saint Francis College* and *Shaare Tefila Congregation* will be largely lost should the Court overrule its decision in *Runyon v. McCrary*[477] applying section 1981 to private defendants.[478]

475. *See* Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343, 1351 (5th Cir. 1987) (en banc) (overruling Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974) by holding that section 1981 does not cover private acts of discrimination against aliens), *petition for cert. filed*, 56 U.S.L.W. 3542 (U.S. Feb. 2, 1988) (No. 87-1293).

476. *See* Durham v. Red Lake Fishing & Hunting Club, 666 F. Supp. 954, 959 (W.D. Tex. 1987) ("This Court would decide that § 1981 and § 1982 are subject to the exemption were the Court not to find that the Red Lake Hunting & Fishing Club [sic] is not a truly private club."); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974) (private club exemption of Title II is applicable to a section 1981 claim).

477. 427 U.S. 160 (1976).

478. *See* Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988). "Over 100 lower court opinions cite the relevant portions of *Runyon* and its progeny." *Id.* at 1422 (Blackmun, J., dissenting).