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National Origin Discrimination Under Section 1981

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NATIONAL ORIGIN DISCRIMINATION  
UNDER SECTION 1981

INTRODUCTION

Section 1981 guarantees "[a]ll persons within the jurisdiction of the United States . . . the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens." The statute prohibits discrimination both by private parties and by state action. Enacted in the aftermath of the Civil War, section 1981 was primarily intended to eliminate the legal disabilities imposed on the recently freed slaves by the Southern states'
"Black Codes." Accordingly, the Supreme Court has frequently characterized section 1981 as proscribing discrimination based on race.8 The Court has, however, construed section 1981 to apply to race discrimination directed at groups other than blacks; the statute has been interpreted to protect whites9 and aliens10 as well. Still unanswered, however, is the question whether a national origin discrimination11 claims are cognizable under section 1981.12 This issue is the subject of disagreement among lower federal courts;13 they apply four distinct approaches in determining whether a national origin discrimination claim states a cause of action under the statute.14


11. While the meaning of national origin discrimination has not been defined by the courts in the context of § 1981, it has been generally defined as discrimination directed at an individual because of the "country where a person was born, or . . . the country from which his or her ancestors came." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973). In the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. IV 1980), national origin discrimination has been defined by the Equal Employment Opportunity Commission as discrimination directed at an individual "because of [his or her], or his or her ancestor’s place of origin; or because [he or she] has the physical, cultural or linguistic characteristics of a national origin group.” 29 C.F.R. § 1606.1 (1982).


One group of courts concludes that section 1981 applies only to race discrimination claims and does not provide a cause of action based on national origin discrimination. A second approach finds that claims of national origin discrimination are sufficient to survive a motion to dismiss, but requires plaintiffs to demonstrate that the alleged discrimination was based on race rather than national origin. A third, "pragmatic approach," construes section 1981 to protect only those national origin groups that are commonly perceived as "non-white" and have traditionally been the victims of group discrimination. The fourth category of cases rejects the racial standard altogether and holds that a plaintiff may state a valid claim under section 1981 based on either national origin or race.

Part I of this Note reviews the judicial interpretations of section 1981 by both the Supreme Court and lower courts. Part II exposes the inconsistencies resulting from the incorporation of a racial test that limits cognizable claims under section 1981 and examines the language and legislative history of section 1981. This Note suggests that the primary concern of Congress more than 100 years ago to protect blacks should not be dispositive for limiting the statute to race discrimination claims today. Finally, this Note concludes that because section 1981 has been construed broadly enough to protect both whites and aliens, it is inconsistent to construe the statute strictly so as to preclude claims by identifiable national origin groups. This conclusion is in keeping with the general policies of the fourteenth amendment, upon which section 1981 rests in part, which considers discrimination based on race and national origin equally egregious.

I. JUDICIAL INTERPRETATION OF SECTION 1981

A. The Supreme Court

Historically, section 1981 claims addressed by the Supreme Court have primarily been brought by black plaintiffs. However, in

McDonald v. Santa Fe Trail Transportation Co.,\textsuperscript{20} the Court held that the statute also protects whites from racial discrimination.\textsuperscript{21} The Court emphasized that “the statute explicitly applies to ‘all persons.’”\textsuperscript{22} Furthermore, the Court rejected a “mechanical reading” of the phrase “as is enjoyed by white citizens” that would limit the class of section 1981 plaintiffs to non-whites.\textsuperscript{23} It emphasized that the legislative history of the phrase\textsuperscript{24} demonstrates that the phrase was “viewed simply as a technical adjustment without substantive effect”\textsuperscript{25} and thus was simply meant “to emphasize the racial character of the rights being protected.”\textsuperscript{26}

Despite the Supreme Court’s characterization of the rights protected as racial, the Court has also interpreted section 1981 to apply to aliens.\textsuperscript{27} The decisions are unclear, however, whether aliens can state a claim of alienage-based discrimination or are limited to claims of racial discrimination.\textsuperscript{28} Thus, under the Supreme Court’s interpreta-

\begin{itemize}
\item20. 427 U.S. 273 (1976). In McDonald, three employees, one black and two whites, were charged with misappropriating company property, but only the white employees were discharged. Id. at 275-76.
\item21. Id. at 296; see B. Schlei & P. Grossman, Employment Discrimination Law 610 (1976) (“Unanswered was the question whether § 1981 would be applied to discrimination on a basis other than race, such as national origin . . . .”).
\item22. 427 U.S. at 287 (emphasis in original).
\item25. 427 U.S. at 291.
\item26. Id. at 293 (quoting Georgia v. Rachel, 384 U.S. 780, 791 (1966)).
\item28. E.g., Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 419-20 (1948) (“section [1981] and the Fourteenth Amendment on which it rests in part protect ‘all persons’ against state legislation bearing unequally upon them either because of alienage or color”); B. Schlei & P. Grossman, supra note 21, at 265; see Graham v. Richardson, 403 U.S. 365, 377 (1971); Developments in the Law, supra note 23, at 91-92. Most lower courts have interpreted the Supreme Court’s decisions as prohibiting discrimination merely based on a person’s status as an alien. Ramirez v. Sloss, 615 F.2d 163, 165 (5th Cir. 1980); Roberto v. Hartford Fire Ins. Co., 177 F.2d 811, 814 (7th Cir. 1949), cert. denied, 339 U.S. 920 (1950); Speiss v. C. Itoh & Co. (Am.) 408 F. Supp. 916, 928 n.17 (S.D. Tex. 1976), rev’d on other grounds, 643 F.2d 353 (5th Cir. 1981), vacated on other grounds and remanded, 102 S. Ct. 2951 (1982); Guerra v. Manchester Terminal Corp., 350 F. Supp. 529, 536 (S.D. Tex. 1973), aff’d in part, rev’d in part, 498 F.2d 641, 653-54 (5th Cir. 1974); see Jones v. United Gas Improve-
tion, blacks, whites and aliens are afforded protection under section 1981. The extent of the protection, however, is still unclear.

Although the Supreme Court has made frequent references to the racial character of the rights protected under section 1981, it has never defined the term "race." This may be explained in light of the nature of the litigants before the Court in those cases in which these references were made; the plaintiff was either black or white and had specifically alleged racial discrimination. The absence of a clear definition of the term "race" has resulted in inconsistent approaches by the lower federal courts for determining when a plaintiff has been subjected to "racial discrimination." Furthermore, courts disagree whether the Supreme Court's characterization of the racial discrimination prohibited should be interpreted as excluding other forms of discrimination, such as national origin discrimination.

32. See infra pt. I(B).
33. The lower courts have held that sex and age discrimination are not prohibited by § 1981. See Kodish v. United Airlines, 463 F. Supp. 1245, 1250 (D. Colo. 1979) (age discrimination), aff'd, 628 F.2d 1301 (10th Cir. 1980); Thomas v. Firestone Tire & Rubber Co., 392 F. Supp. 373, 375 (N.D. Tex. 1975) (sex discrimination); Olson v. Rembrandt Printing Co., 375 F. Supp. 413, 417 (E.D. Mo. 1974) (same), aff'd, 511 F.2d 1228 (8th Cir. 1975). The Supreme Court has summarily stated, in dictum, that § 1981 does not proscribe discrimination based on sex or religion. Runyon v. McCrary, 427 U.S. 160, 167 (1976) ("§ 1981 is in no way addressed to such categories of selectivity" as discrimination based on religion or sex). But see Marlowe v. General Motors Corp., 4 Fair Empl. Prac. Cas. (BNA) 1160, 1161 (E.D. Mich. 1972) (religious discrimination against Jews is tantamount to racial discrimination and thus prohibited under § 1981), vacated on other grounds and remanded, 489 F.2d 1057 (6th Cir. 1973). Whether "ethnic" plaintiffs should be able to recover under § 1981 on the further ground that they were discriminated against on the basis of their sex, age or religion is beyond the scope of this Note.
B. The Lower Courts

Most lower courts have interpreted section 1981 as proscribing only racial discrimination and accordingly have refused to allow claims based solely on national origin. Some justify this interpretation by reference to the historical framework in which the statute was passed. These courts emphasize that because section 1981 was originally enacted pursuant to the thirteenth amendment, it is directed solely at racial discrimination. Other courts interpret the phrase "as is enjoyed by white citizens" to limit the proper class of litigants under section 1981 to "non-whites." In addition, many courts rely upon Supreme Court characterizations of the "racial" rights protected by section 1981 to exclude national origin claims.

The most restrictive approach provides that a plaintiff who does not allege racial discrimination fails to state a claim under the statute.
and therefore refuses to recognize a claim based on national origin. Furthermore, even if a national origin plaintiff does allege "racial" discrimination, his claim is likely to be dismissed because many courts construe the term "race" narrowly. For example, East Indians, Mexican-Americans, Puerto Ricans and other Hispanic and Spanish-surnamed persons have tried to assert "race" discrimination claims, yet have been unsuccessful under this approach because technically they were Caucasian, and their discrimination claim was considered to be based solely on national origin. In particular, one court dismissed a claim by an East Indian because he failed to provide "factual support" for his assertion that he was "Black."

These same groups, however, have been protected by other courts under more expansive interpretations of the racial test. Some courts implicitly recognize that individuals of certain national origin groups


42. Shah v. Mount Zion Hosp. & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981).

43. E.g., London v. Coopers & Lybrand, 644 F.2d 811, 818 n.4 (9th Cir. 1981) (Chinese, characterized as racial minority); Gonzalez v. Stanford Applied Eng'g, Inc., 597 F.2d 1298, 1300 (9th Cir. 1979) (per curiam) (Mexican-American, racial prejudice based upon skin color); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1159, 1160 (9th Cir. 1976) (East Indian, discrimination claim characterized as racial); Chicano Police Officer's Ass'n v. Stover, 526 F.2d 1011, 1011 (9th Cir. 1975) (Chicano, whether plaintiffs had "standing" on racial or national origin grounds not discussed), vacated on other grounds and remanded, 426 U.S. 944 (1976); Scott v. Eversole Mortuary, 522 F.2d 1110, 1111, 1112 (9th Cir. 1975) (American Indians, same); Naraine v. Western Elec. Co., 507 F.2d 590, 591, 593 (8th Cir. 1974) (per curiam) (East Indian Hindu, permitted to demonstrate racial discrimination but failed to do so); Alvarado v. El Paso Indep. School Dist., 445 F.2d 1011, 1011 (5th Cir. 1971) (en banc) (Mexican-Americans, discrimination claim both racial and "ethnie"); see Al-Khazraji v. Saint Francis College, 523 F. Supp. 386, 392 (W.D. Pa. 1981) (Arabian, born in Iraq); Khawaja v. Wyatt, 494 F. Supp. 302, 304 (W.D.N.Y. 1980) (Pakistani Muslim); Maldonado v. Broadcast Plaza, Inc., 10 Fair Empl. Prac. Cas. (BNA) 839, 839-40 (D. Conn. 1974) (Spanish-surnamed); Rios v. Enterprise Ass'n Steamfitters Local Union No. 638, 326 F. Supp. 198, 201 (S.D.N.Y. 1971) (Puerto Rican).
may suffer "racial" discrimination, and use a second approach under which a claim of national origin discrimination survives a motion to dismiss. However, because national origin discrimination is considered actionable only to the extent it is motivated by, or indistinguishable from, racial discrimination, these courts then require the plaintiff to demonstrate that the alleged discrimination was in fact based upon race. Under this approach, therefore, the plaintiff may be required to demonstrate "racial animus," described by one court as "discrimination based upon the perception by those who allegedly discriminated [that the plaintiff] is a member of an identifiable racial group different from white persons." Other courts require a plaintiff who may be technically "Caucasian" to demonstrate that he has objective racial characteristics—such as brown skin color. Thus, an allegation that Hispanics as a group are subject to racial discrimina-


tion would not be sufficient. A Hispanic plaintiff would be required to establish that as an individual he is considered "non-white" and was discriminated against on that basis.

A third, "pragmatic approach," extends protection under section 1981 to groups that are commonly perceived, "however inaccurately or stupidly," as racially distinct and which have traditionally been subject to group discrimination. The principal beneficiaries of this approach have been Hispanics because courts have concluded that although Hispanics as a group may be technically "Caucasian," "skin color, language, cultural differences and historical background are persuasive reasons for classifying them as distinct from 'white citizens' within the meaning of § 1981."

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54. 3 A. Larson & L. Larson, *supra* note 5, § 94.30; see Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Calif. L. Rev. 662, 703-31 (1975) (arguing that Mexican-Americans are commonly perceived as racially distinct, and should therefore come within § 1981's protection). As noted in Ortiz v. Bank of Am., 547 F. Supp. 550, 559 n.16 (E.D. Cal. 1982), the term Hispanic is only questionably descriptive. The courts, however, use the term to describe a number of national origin groups, including Mexican-Americans and Puerto Ricans, and therefore this Note uses this term to embrace the above groups.

In contrast to these approaches, which construe section 1981 as requiring some kind of racial test, a few courts reject this requirement and instead recognize claims based solely on national origin discrimination. These courts emphasize that section 1981 explicitly applies to "all persons" and they decline to equate the "as is enjoyed by white citizens" language of the statute with a racial classification. Rather, they construe the phrase as guaranteeing all persons the same rights as the most favored class—historically, "white citizens." Accordingly, a section 1981 cause of action will be stated if a plaintiff alleges discrimination on the basis of membership in a group composed of both men and women, the boundaries of which are not fixed by age or exclusively by religious faith, and which is of a character that it is or may be perceived as distinct when measured against the group which enjoys the broadest [civil] rights.

This standard avoids the myriad of problems inherent in the racial test invoked by other courts.

II. THE UNREASONABILITY OF THE RACIAL TEST

A. The Test's Ambiguity and Impracticality

Use of a racial test "in political or judicial functions is fraught with peril" and for purposes of section 1981 leads to confusion because no single judicial or scientific definition of "race" exists. Indeed, the...
Supreme Court has failed to outline the scope of the racial discrimination prohibited by section 1981, while in another context it has commented on the difficulty associated with assigning groups to "grand racial divisions" based on a scientific definition of the term "race." It stated that the word "white" was "to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood." Therefore, although the Court acknowledged that an Indian Hindu might be "racially" Caucasian, he was not considered "white" for purposes of a federal naturalization law.

In contrast to this expansive definition, many lower courts construing section 1981 appear to apply a narrower, objective standard in determining whether the plaintiff has been discriminated against on the basis of his "race." Underlying this objective inquiry, however, are these courts' subjective perceptions of what constitutes racially distinct characteristics. A further problem with this objective standard is that scientists themselves widely disagree over the proper classifications of races. For example, depending on the authority consulted, the number of races ranges from three to thirty. Attempts at

Fair Empl. Prac. Cas. (BNA) 830, 830 (C.D. Cal. 1978) ("Because Mexican-Americans constitute a separate race, plaintiff . . . is protected by § 1981.").
63. Id. at 214-15.
64. Id. at 211. See generally Young, supra note 61, at 365 (explaining why both fair-skinned Scandinavians and brown-skinned Hindus are properly classified as Caucasian).
67. Young, supra note 61, at 349 & n.6; see, e.g., Shah v. Mount Zion Hosp. & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981) (plaintiff did not provide factual support for the assertion that he is "Black"); Trehan v. IBM Corp., 24 Fair Empl. Prac. Cas. (BNA) 443, 445 (S.D.N.Y. 1980) (plaintiff must demonstrate that he is not of the "white race"); Saad v. Burns Int'l Sec. Servs., Inc., 456 F. Supp. 33, 37 (D.D.C. 1978) (plaintiff may not merely allege that he is "non-Caucasian"); Vera v. Bethlehem Steel Corp., 448 F. Supp. 610, 613 (M.D. Pa. 1978) (although Hispanic peoples generally have been subject to discrimination similar to racial discrimination, this is not sufficient to constitute individual "racial" discrimination).
68. Ortiz v. Bank of Am., 547 F. Supp. 550, 560 (E.D. Cal. 1982) ("these cases . . . reflect only conclusions . . . based on faulty if unexpressed premises").
69. United States v. Thind, 261 U.S. 204, 212 (1923); see Ortiz v. Bank of Am., 547 F. Supp. 550, 555-66 (E.D. Cal. 1982); LaFore v. Emblem Tape & Label Co., 448 F. Supp. 824, 826 (D. Colo. 1978). But see Young, supra note 61, at 364-65 (suggesting that the term "race" is subject to scientific definition according to "anthropological norms" and proposing that courts use these norms so as to "lend certainty to the present state of the law").
70. See United States v. Thind, 261 U.S. 204, 212 (1923); Ortiz v. Bank of Am., 547 F. Supp. 550, 565-66 (E.D. Cal. 1982). See generally S. Molnar, Races, Types & Ethnic Groups 12-13 (1975) ("as few as three and as many as thirty-seven races have been described" and noting that "one's classification usually depends on the purpose
static classifications are also complicated by the fact that races evolve; "some vanish, some new ones emerge and all change."71 In addition, courts attempting to determine an individual's race based on scientific classifications are likely to find themselves beyond their expertise72 because their decisions will necessarily be based on complex anthropological data, including skull type, skin pigmentation, facial features and blood traits.73

Although courts that do not apply an objective racial test have avoided some of the pitfalls of this approach, they have encountered other difficulties. For example, courts that find a national origin claim sufficient to survive a motion to dismiss, but subsequently require proof of "racial animus," have been constrained to note that the line between race and national origin discrimination "may be so thin as to be indiscernible."74 One court in particular remarked that it is "ironic that these cases which place the burden on plaintiff to prove that the alleged discrimination was of a 'racial character' fail to attempt to define the term 'racial' or to distinguish . . . that term from 'national origin.'"75 Indeed, no court adopting this approach appears

of classification"); McBroom, Science on Race, in Human Variation: Readings on Anthropology 233 (1971) (because races overlap, "creating a continuum," any attempt at defining discrete categories of people is completely arbitrary).

71. LaFore v. Emblem Tape & Label Co., 448 F. Supp. 824, 826 (D. Colo. 1978); see United States v. Thind, 261 U.S. 204, 212 (1923) (racial types may have become "so changed by intermixture of blood as to justify an intermediate classification"); Ortiz v. Bank of Am., 547 F. Supp. 550, 567 (E.D. Cal. 1982) ("the notion of race is dynamic"); S. Molnar, supra note 70, at 4 ("Evolution is still proceeding . . . . The composition of racial groups, as we define them now, will undoubtedly change considerably."); Young, supra note 61, at 365 ("[R]ace is not static.").

72. See Ortiz v. Bank of Am., 547 F. Supp. 550, 562 n.19 (E.D. Cal. 1982); LaFore v. Emblem Tape & Label Co., 448 F. Supp. 824, 826 (D. Colo. 1978). For example, as noted in Ortiz, courts that have dismissed claims by Hispanics because it was assumed that they were not racially distinct in a scientific sense are "factually wrong." 547 F. Supp. at 561 n.18. One scientific racial classification, in fact, includes "Ladino," commonly known as Hispanics, as a distinct race. C.S. Coon, S. Garn & J. Birdsell, A Study of the Problems of Race Formation in Man 138 (1950).

73. Ortiz v. Bank of Am., 547 F. Supp. 550, 562 n.19 (E.D. Cal. 1982); LaFore v. Emblem Tape & Label Co., 448 F. Supp. 824, 826 (D. Colo. 1978). See generally S. Molnar, supra note 70, at 46-77 (discussing some of the physical characteristics that are used in classifying races: body size, head size and shape, brain size, face and nose form, skin color, and blood traits); Young, supra note 61, at 365 & n.91 (listing eight characteristics: skin pigmentation, stature, head form, facial structure, hair color and texture, eye color and presence of eye fold, form of nose and body build) (relying on L. Holmes, Anthropology: An Introduction 10 (1969)).


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to have postulated an "authoritative and judicially manageable method for distinguishing between national origin discrimination and racial discrimination;" in many cases the distinction may be so blurred as to be meaningless.\(^7\)

Other courts, by allowing a plaintiff alleging national origin discrimination to demonstrate his individual racial characteristics seem to be assuming that certain national origin groups can be categorized and identifiably distinguished solely on the basis of physical characteristics.\(^7\) "This is precisely the kind of stereotyping which the civil rights statutes were designed to prevent."\(^7\)

Courts that adopt the "pragmatic approach" merely require that an individual be a member of a group that is commonly perceived as non-white and which has traditionally been the victim of discrimination.\(^60\) Implicit in the pragmatic approach, however, is the assumption that a common perception exists as to which groups are "non-white" or racially distinct from whites. This supposition is questionable because "race" is subject to great misuse and misunderstanding, and therefore, it is doubtful that a common perception of the term exists.\(^81\) As commonly understood, race may be erroneously thought to encompass "any more or less clearly defined group thought of as a unit [usually] because of a common or presumed common past."\(^82\) For example, the people included within what is commonly referred to as the "Aryan race" merely share a common language root, 

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76. Cubas v. Rapid Am. Corp., 420 F. Supp. 663, 666 n.2 (E.D. Pa. 1976). In addition, it has been pointed out that it is somewhat anomalous to rely on proof of the perceptions of the discriminators in order to determine what kind of discrimination is at work, especially because the discriminators may be "poor anthropologists." Khawaja v. Wyatt, 494 F. Supp. 302, 305 n.1 (W.D.N.Y. 1980) (quoting Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979)).

77. See Ortiz v. Bank of Am., 547 F. Supp. 550, 566 (E.D. Cal. 1982) (because "race" is partially defined on the basis of geographic distribution and culture—the principal concepts of national origin—"no meaningful distinction can be drawn between 'race' and 'national origin' ").

78. See supra note 73 and accompanying text (explaining physical characteristics used to identify a "race").


80. See supra notes 52-55 and accompanying text.

81. Ortiz v. Bank of Am., 547 F. Supp. 550, 566-67 (E.D. Cal. 1982) (relying on Webster's Third New International Dictionary 1870 (1976)); see Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979) (same); S. Molnar, supra note 70, at 12 ("Through overuse and vague application the term race has become . . . encumbered with contradictory and imprecise meanings . . . . Many people take for granted that they know what 'race' means and assume that scientific investigation has long ago proved the existence of significant human racial differences—yet, each time the term is applied, a definition must be provided so that the reader will know what concept it represents.").

rather than common physical characteristics, and consequently do not constitute a "racial" group at all.83

Even if it could be agreed that a group is commonly perceived as "racially" distinct, this perception may change over time.84 German and Irish immigrants to this country were once thought by some Americans to be "racially" inferior, as were Chinese, American Indians and Jews.85 Absurd as it seems now, the alleged superiority of Northern whites was even posited as the reason for the defeat of Southern whites in the Civil War.86 Nevertheless, despite its attendant ambiguities and impracticalities, the racial requirement has been perpetuated by courts as a result of a strict reading of the language and legislative history of section 1981.87

B. The Language and Legislative History of Section 1981

When section 1981 was enacted after the Civil War, Congress primarily intended to eliminate the disparate treatment of blacks in the South88 by undercutting the vitality of the "Black Codes."89 Consistent with both this purpose and its constitutional basis in the thirteenth amendment,90 the original version of section 198191 extended protection to citizens of "every race and color."92 Doubts over congressional authority under the thirteenth amendment's enforcement clause to afford substantive rights93 prompted the introduction and

85. Id.; see People v. Hall, 4 Cal. 399, 404-05 (1854) (the Chinese characterized as racially inferior and "incapable of progress or intellectual development beyond a certain point"). See generally T. Gossett, Race, The History of an Idea in America 287-309 (1963) (discussing the characterization of various immigrant groups as "racially" inferior based on their origin).
87. See supra notes 36-38 and accompanying text.
91. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.
passage of the fourteenth amendment,\textsuperscript{94} pursuant to which section 1981 was then reenacted.\textsuperscript{95}

Although blacks were clearly intended as the primary beneficiaries of section 1981, nothing in the legislative history or the statutory language suggests that Congress intended to exclude from coverage all other minority groups.\textsuperscript{96} In fact, the author of section 1981, Senator Trumbull, described it as designed "to protect all persons in the United States in their civil rights."\textsuperscript{97}

Despite the absence of any restrictive congressional intent, the lower courts disagree whether the phrase "as is enjoyed by white citizens"\textsuperscript{98} should be interpreted to limit the scope of section 1981 to racial discrimination claims. Some courts emphasize that the word "white" indicates that protection is limited to claims based on color or race.\textsuperscript{99} Others suggest that the phrase was included merely because white citizens enjoyed a numerical majority and superior legal protection in 1866, and thereby set the standard by which the civil rights of all persons were to be measured.\textsuperscript{100} These courts suggest therefore that today it should be interpreted as prohibiting the maintenance of any favored class rather than as limiting claims to racial discrimination.\textsuperscript{101}


\textsuperscript{96} Mexican Americans, supra note 31, at 895; cf. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 289 n.20, 291 (1976) (no demonstration that the legislative history contradicts "the plain language" of § 1981 which was deemed to encompass discrimination against whites).


\textsuperscript{100} Spiess v. C. Itoh & Co. (Am.), 408 F. Supp. 916, 924 (S.D. Tex. 1976), rev'd on other grounds, 643 F.2d 353 (5th Cir. 1981), vacated on other grounds and remanded, 102 S. Ct. 2951 (1982); see, e.g., Manzanares v. Safeway Stores, Inc., 593 F.2d 988, 970 (10th Cir. 1979); Ortiz v. Bank of Am., 547 F. Supp. 550, 563-64 (E.D. Cal. 1982) (quoting Manzanares); LaFore v. Emblem Tape & Label Co., 448 F. Supp. 824, 826 (D. Colo. 1978); see also Buchanan, The Quest for Freedom; A Legal History of the Thirteenth Amendment, 12 Hous. L. Rev. 1, 16 (1974) (rights possessed by white citizens became the yardstick by which all citizens' rights were to be measured).

The legislative history of the phrase can be read consistently with both of these interpretations because members of the House and Senate apparently attributed varying degrees of significance to the phrase.\textsuperscript{102}

The phrase was introduced as an amendment in the House by Representative Wilson to "technically 'perfect' the bill."\textsuperscript{103} Wilson suggested that unless the qualifying phrase was incorporated, the rights might be extended to "all citizens, whether male or female, majors or minors."\textsuperscript{104} Accordingly, it has been suggested that Congress did not intend to include women or minors among "all persons."\textsuperscript{105} This evidence of restrictive intent in the legislative history has also been narrowly read as emphasizing "the racial character of the rights being protected."\textsuperscript{106} But as one court has noted, even if the legislative history is correctly interpreted as excluding age and sex discrimination claims, this conclusion does not necessarily imply that other forms of discrimination, such as national origin discrimination, are also excluded.\textsuperscript{107} In fact, upon section 1981's introduction in the House, Representative Wilson explained that the statute was intended to protect "every citizen" in the enjoyment of his civil rights and would ensure that "one class shall not be required to support alone the burdens which should rest on all classes alike."\textsuperscript{108}

By contrast, some members of the Senate and the Senate Judiciary Committee viewed the phrase as "superfluous."\textsuperscript{109} One Senator remarked: "[T]he idea is that the rights of all persons shall be equal; and . . . the [statute] leaving out [the phrase], would attain the object."\textsuperscript{110} In light of some Senators' interpretation of the phrase as superfluous,


\textsuperscript{104} Cong. Globe, 39th Cong., 1st Sess. 157 app. (1866) (statement of Rep. Wilson); see also id. at 1293 (remarks of Rep. Shellabarger) ("Your State may deprive women of the right to sue or contract or testify, and children from doing the same.").

\textsuperscript{105} Developments in the Law, supra note 23, at 99. In fact, the Supreme Court has summarily stated, in dictum, that "§ 1981 is in no way addressed to such categories of selectivity" as discrimination based on religion or sex. Runyon v. McCrory, 427 U.S. 160, 167 (1976). See supra note 33.


\textsuperscript{109} Id. at 1413 (exchange between Senators Van Winkle and Trumbull); id. (Sen. Trumbull citing Senate Judiciary Committee's view that the phrase was superfluous); see McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 294-95 (1976).

it seems anomalous to construe it as affirmatively limiting the statute to racial discrimination claims; courts should regard the phrase as an expression of the standard by which all citizens' rights are to be measured.111

Apart from this phrase, section 1981 by its terms broadly protects "all persons."112 It is therefore unlikely, based on the breadth of this language, that Congress intended the protection to apply exclusively to persons discriminated against on the basis of race.113 Even though the primary congressional purpose in 1866 was to protect blacks, the language that has endured suggests a broader scope.

C. Congressional Impetus

Courts and commentators alike have questioned the propriety of using "the immediate concerns of Congress over one hundred years ago" to limit the scope of section 1981 today.114 These authorities argue that section 1981 should be interpreted to effectuate those broad principles of equality in civil rights that motivated Congress in 1866 to come to the aid of blacks who, at that time, were the nation's most oppressed group.115 Thus, the statute should be construed to apply to

112. 42 U.S.C. § 1981 (1976). The language of § 1981 does not refer to race, alienage or national origin but broadly applies to "all persons." Generally, civil rights legislation is to be broadly construed to effectuate its remedial purpose. 3 C. Sands, A. Sutherland Statutes and Statutory Construction § 72.05, at 392 (4th ed. 1974). Accordingly, courts have stated that § 1981 is to be broadly construed. See, e.g., Spiess v. C. Itoh & Co. (Am.), 408 F. Supp. 916, 928 n.17 (S.D. Tex. 1976), rev'd on other grounds, 643 F.2d 353 (5th Cir. 1981), vacated on other grounds and remanded, 102 S. Ct. 2951 (1982); Miranda v. Clothing Workers, Local 208, 10 Fair Empl. Pract. Cas. (BNA) 557, 558 (D.N.J. 1974); 1 C. Antieau, supra note 3, § 20, at 35. But see Martinez v. Bethlehem Steel Corp., 78 F.R.D. 125, 129 (E.D. Pa. 1978) ("statutes in derogation of the Common Law, such as the Civil Rights statutes, must be narrowly construed"). See generally 3 C. Sands, supra, § 72.05, at 391 (explaining that among earlier decisions construing civil rights statutes, narrow interpretations were not unusual and the same view is still found in some modern cases).
115. Ortiz v. Bank of Am., 547 F. Supp. 550, 555 n.7 (E.D. Cal. 1982); see Harris v. Norfolk & W. Ry., 616 F.2d 377, 378 (8th Cir. 1980); Miranda v. Clothing
the varied forms that group discrimination may take in society today, even if they were not envisioned by the 1866 Congress.

The Supreme Court has adopted analogous reasoning in applying section 1981 to whites who have suffered "racial" discrimination. In analyzing congressional intent, the Court stated that "the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." The Court further stated that it would be unwarranted to limit this broad principle merely because discrimination against whites was unforeseeable 100 years ago. Thus, it appears inconsistent to interpret the legislative history expansively for purposes of protecting whites from discrimination, and yet use a restrictive interpretation to exclude protection of claims based on national origin.

D. Restrictive Interpretations of Section 1981's Companion Statute: Section 1982

In limiting section 1981's protection to racial discrimination, some courts emphasize that section 1982, a companion statute to section 1981, has been interpreted by the Supreme Court as restricted to racial discrimination and "does not address itself to discrimination on grounds of . . . national origin." Because the Court has stated that the two statutes are to be construed together, some courts hold that section 1981 likewise does not address national origin discrimination.
Because of several distinctions between section 1981 and section 1982, however, the two statutes have not been similarly construed for all purposes. For example, by its terms section 1982 protects only property rights while section 1981 protects a broad range of civil rights. In addition, section 1982 expressly applies solely to "citizens" and therefore does not proscribe discrimination against aliens. By contrast, section 1981 applies to "all persons" and has therefore been more broadly construed to protect aliens from discrimination. These distinctions between sections 1981 and 1982 suggest that there may be a basis for more readily allowing national origin discrimination claims under section 1981.

E. Section 1981 as Applied to Whites and Aliens

Some courts have held that groups asserting claims based upon any form of discrimination to which whites may be subject, such as religious, sex or national origin discrimination, are not protected by the statute. These courts interpret section 1981 as protecting a person's civil rights only "to the extent that such rights are enjoyed by white citizens." Accordingly, because whites may be subject to national origin discrimination, the statute is thought not to reach such discrimination. Yet as recognized in McDonald v. Santa Fe Trail Transpor-
whites may be subject to racial discrimination, and therefore carrying this argument to its logical extreme would produce an anomalous result: Racial discrimination would also not be protected by the statute.

Most lower federal courts have concluded that aliens who are discriminated against solely because of their non-citizenship status state a claim under the statute. It seems analytically inconsistent, however, to require citizens to allege racial discrimination under the statute and yet allow aliens to avoid categorizing the claim as racial. Furthermore, this inconsistency is compounded when one realizes that citizenship discrimination is often a mask for discrimination that is actually based on national origin. For example, an employer may refuse to hire both citizens and aliens of Mexican descent solely because of their Mexican origin. The Mexican-American plaintiff who cannot prove racial discrimination will have his suit dismissed, but the Mexican citizen will be allowed to proceed because of his alien status. It is therefore conceivable that resident aliens, but not their American-born children, would receive the protection of section 1981. This
anomaly can best be resolved by construing section 1981 to apply to a plaintiff who alleges discrimination on the basis of membership in a group, not defined by sex, age or religion, which is perceived as distinct when compared with the group which enjoys the broadest civil rights. This construction would include all claims of national origin discrimination, whether specifically asserted by citizens or implicitly providing the basis for an alienage-based discrimination claim.

F. Exclusivity of the Title VII Remedy

Some courts have also justified the limitation of section 1981 to racial discrimination claims by noting that victims of employment discrimination based on national origin have a thorough remedy under the express language of Title VII. Consequently, it is argued that there is neither need nor justification for "judicially legislating" section 1981 beyond the race discrimination at which it is supposedly directed. This argument may rest in part on a reluctance to allow plaintiffs to avoid certain procedural prerequisites to suit and limitations on relief under Title VII which have no counterparts under section 1981.

140. Before a plaintiff may institute a lawsuit under Title VII, 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. IV 1980), he must file a timely charge of employment discrimination with the Equal Employment Opportunity Commission and receive and act upon the Commission's statutory notice of the right to sue. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). For a general overview of the procedural prerequisites to filing a charge with the Commission, see 2 C. Antieau, supra note 3, §§ 482-497. Claims under § 1981 are not subject to the filing requirements of Title VII. Furthermore, unlike the remedies available under Title VII, which are limited to equitable relief, 42 U.S.C. § 2000e-5(g) (1976), the remedies under § 1981 are both legal and equitable in nature. Carrillo v. Douglas Aircraft Co., 18 Fair Empl. Prac. Cas. (BNA) 830, 830 (C.D. Cal. 1978). Thus, Title VII has been construed as not authorizing either compensatory or punitive damages. 2 C. Antieau, supra note 3, § 520, at 222. By contrast, such damages are recoverable under § 1981, see id., and because such damages are legal in nature, a plaintiff is entitled to a jury trial under § 1981, which is not available under Title VII. Carrillo v. Douglas Aircraft Co., 18 Fair Empl. Prac. Cas. (BNA) 830, 830 (C.D. Cal. 1978); see 2 C. Antieau, supra note 3, § 513. A plaintiff alleging employment discrimination under
However, Title VII does not, in fact, provide a thorough remedy for all the instances in which national origin discrimination may arise. First, by its terms Title VII is inapplicable to certain employers. Furthermore, while Title VII is exclusively concerned with employment discrimination, section 1981’s protection of the right “to make and enforce contracts” has application beyond the employment context. For example, other contractual relationships have been the subject of litigation under section 1981 in the following contexts: admissions to hospitals, labor unions and private educational institutions; consumer transactions; and the operation of private and public parks.

It is also argued that when Title VII was passed, if Congress had wanted to redress the problem of national origin discrimination in non-employment contexts, it could have easily amended section 1981 to expressly apply to national origin discrimination. The legislative history of Title VII, however, demonstrates that it was intended to augment, and be co-extensive with, an individual’s remedy under section 1981. Thus, it was unnecessary for Congress to amend section 1981. Accordingly, a plaintiff should not be foreclosed from relief under section 1981 merely because he may have alternate relief under Title VII.

G. National Origin Discrimination under the Fourteenth Amendment

Section 1981 rests in part upon the fourteenth amendment because it was re-enacted pursuant to that constitutional provision. Accord-
National Origin Discrimination

Nationally, included within section 1981's protective reach is discrimination as a result of state action. The Supreme Court has historically recognized that section 1981 and the fourteenth amendment are "closely related both in inception and in the objectives which Congress sought to achieve" and further that section 1981 "puts in the form of a statute what had been substantially ordained by the [fourteenth] amendment."

Under the equal protection clause of the fourteenth amendment, arbitrary state classifications based on either race or national origin are considered "suspect," and are therefore subject to the highest degree of judicial scrutiny. Thus, because distinctions based on race and national origin are considered equally egregious for purposes of the equal protection clause, it seems inconsistent to construe the fourteenth amendment to proscribe national origin discrimination in all but compelling circumstances, and at the same time read this prohibition out of a statute that was adopted pursuant to its authority and which was to give effect to its provisions.

Conclusion

The use of section 1981 as an effective means of redressing the denial of civil rights has been hindered by the incorporation of the

151. The Civil Rights Cases, 109 U.S. 3, 17 (1883); 3 A. Larson & L. Larson, supra note 5, § 88.10, at 18-5 to 18-6; see Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419-20 (1948); 1 C. Antieau, supra note 3, § 19, at 34; cf. Hurd v. Hodge, 334 U.S. 24, 30-31 (1948) (§ 1982 is directed at governmental action).

152. Hurd v. Hodge, 334 U.S. 24, 32 (1948) (discussing the Civil Rights Act of 1866 as a whole); see Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (the fourteenth amendment applies universally, without regard to race, color or nationality and § 1981 was accordingly enacted); Kentucky v. Powers, 139 F. 452, 495 (C.C.E.D. Ky. 1905) ("Section [1981] is as broad as the fourteenth amendment as to the persons affected by it."); rev'd on other grounds, 201 U.S. 1 (1906); see also Fraser v. McConway & Torley Co., 82 F. 257, 259 (C.C.D. Pa. 1897) (construing the fourteenth amendment to bar alienage-based discrimination by reference to § 1981, which was enacted to enforce the amendment, thus embracing not merely citizens but "all persons"); In re Parrott, 1 F. 481, 508-09 (C.C.D. Cal. 1880) (construing the fourteenth amendment to apply to every person whether "Christian or heathen, civilized or barbarous, Caucasian or Mongolian" in light of § 1981, which was enacted in "consonance" with the amendment).

153. Strauder v. West Virginia, 100 U.S. 303, 312 (1880).


157. See C. Sands, supra note 112, § 72.05, at 393 (noting that § 1981 and the fourteenth amendment have been interpreted in light of one another).
“racial” test. Reference to section 1981’s legislative history neither compels the conclusion that a restriction on cognizable claims was intended nor demonstrates that all groups other than racial groups were to be excluded from protection. Because the term “race” is susceptible to varying interpretations, the “racial” test, whether narrowly or liberally construed, is unworkable and produces anomalous results.

A statute that is broad in language should be broadly construed. Section 1981’s scope should not be determined on the basis of conditions existing at the time of its passage in 1866, but rather, in light of the varied forms that group discrimination takes today. To interpret the statute otherwise leads to an unjust result: Whites and aliens may maintain suits, but the national origin plaintiff is denied relief. Section 1981 should be interpreted in light of its nexus to the fourteenth amendment as treating discrimination on the basis of race or national origin as equally egregious.

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