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## Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts

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# CASE COMMENT

## Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts

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### I. INTRODUCTION

Congress enacted the Civil Rights Act of 1866<sup>1</sup> in response to the rampant racial discrimination existing in the South following the abolition of slavery.<sup>2</sup> Section 1 of the Act is now codified at 42 U.S.C. §§ 1981 and 1982.<sup>3</sup> Section 1981 guarantees to "all persons" the same general rights of contract and equal protection as "white citizens."<sup>4</sup> Section 1982 guarantees to "all citizens" the same property rights as

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1. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981-1982 (1982)).

2. See *infra* notes 23-26 and accompanying text.

3. 42 U.S.C. §§ 1981-1982 (1982). This Comment analyzes sections 1981 and 1982 (the modern versions of the Act) together because the courts generally construe them together. See *Runyon v. McCrary*, 427 U.S. 160, 171 (1976); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973).

4. Section 1981 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

"white citizens."<sup>5</sup> In the Reconstruction context, it is apparent that Congress's immediate goal was to provide protection to the newly freed blacks.<sup>6</sup> The Supreme Court of the United States has held that the statutes also protect white persons who have suffered discrimination because of their race.<sup>7</sup> The unsettled issue, however, is whether plaintiffs who cannot claim status as whites or blacks can seek protection under the statutes.

The federal courts have been remarkably inconsistent about the coverage of nonracially identified plaintiffs under sections 1981 and 1982.<sup>8</sup> The inconsistency is not surprising because the courts lack definitive guidelines necessary for decision-making. They simply cannot be certain which groups Congress intended to protect.<sup>9</sup> Both the terms of the statutes and the legislative history are broad, ambiguous, and contradictory.<sup>10</sup> The courts have attempted to define race in terms of the predominant dichotomies of white, black, and other color-defined groupings. But this effort is misguided because race is an inherently irrational and subjective concept.<sup>11</sup>

This Term, the Supreme Court will resolve the conflict among

subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1982).

5. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1982).

6. See *infra* notes 23-26 and accompanying text.

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

8. Cf. Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 84 MICH. L. REV. 88, 107 (1985) ("The class-based animus requirement of section 1985(3) has a long and torturous history. Broad language, a massive and meandering legislative history, and a lack of guidance from the Supreme Court have contributed to arbitrary decisions, uncertainty, and often unworkable or illogical standards.").

9. Although the passage of the Act was prompted by the existence of rampant discrimination against the newly freed blacks one hundred years ago, the Act does not explicitly mention blacks. See *infra* notes 23-30 and accompanying text.

10. See *infra* notes 23-63 and accompanying text. The sections begin with broad references to "all persons" (section 1981) and "all citizens" (section 1982), and end with ambiguous references to "white citizens." 42 U.S.C. §§ 1981-1982.

11. See *infra* notes 70-86 and accompanying text. Although the statutes are not expressly limited to racial discrimination, the Supreme Court of the United States has frequently indicated in dicta that they are so limited. See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976) (Section 1981 covers white plaintiffs because of "the racial character of the rights being protected."); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975) (Section 1981 covers employment discrimination "on the basis of race."); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (Section 1982 "deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin."); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) ("Congress intended to protect a limited category of rights, specifically defined in terms of racial equality."). The lower courts have therefore attempted to define race in order to determine whom the statutes protect.

the lower courts on the proper scope of the statutes.<sup>12</sup> In *Al-Khazraji v. Saint Francis College*,<sup>13</sup> the Court of Appeals for the Third Circuit held that an Arab could sue under section 1981 because the racial status of the plaintiff is a question of fact to be determined at trial. In *Shaare Tefila Congregation v. Cobb*,<sup>14</sup> the Court of Appeals for the Fourth Circuit held that Jews could not sue under section 1982, despite the defendants' *perception* that the plaintiffs belonged to a separate race, because, as a matter of law, Jews do not constitute a race.<sup>15</sup>

Considering the breadth of the statutory language, the ambiguity of the legislative history, and the disparate definitions of race, the Supreme Court can easily legitimize any decision it chooses to make. If the Court is to find a principled basis for its decision, however, it must look beyond an overly technical construction of legislative intent. This Comment proposes that the Court construe the statutes broadly in order to redress all racial discrimination. Because the federal government is the primary protector of civil rights,<sup>16</sup> the Court should read the 1866 Act broadly as a remedial statute<sup>17</sup> designed to address the entrenched but nonstatic problem of discrimination. In effect, the Court has already done so by construing the statutes to cover whites.<sup>18</sup> It would be both inconsistent and counterintuitive to hold that the statutes do not cover ethnic or minority groups who,

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12. The Court last addressed this issue in 1976 in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (allowing whites, as a "race," to sue under section 1981).

13. 784 F.2d 505 (3d Cir.), *cert. granted*, 107 S. Ct. 62 (1986).

14. 785 F.2d 523 (4th Cir.), *cert. granted*, 107 S. Ct. 62 (1986).

15. A claim of religious or national origin discrimination might have been brought under section 1983, which is not limited to *racial* discrimination. 42 U.S.C. § 1983 (1982). The Supreme Court has held, however, that a section 1983 action may be brought only if the defendant acted with state authority or under color of state law. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). The plaintiffs did not seek a remedy under section 1983 because the defendants were private actors without apparent state authority.

16. The passage of the fourteenth amendment and the civil rights acts radically altered the federal system. See *Mitchum v. Foster*, 407 U.S. 225 (1972); *Monroe v. Pape*, 365 U.S. 167 (1961) (partially overruled in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for its holding that municipalities are not subject to suit under § 1983). By failing to redress the massive inequities of private racial discrimination after the Civil War, the states had abdicated their essential role as the protectors of individual rights. *Id.* Congress therefore responded by enacting a remedial scheme that made the federal government the primary protector of civil rights. *Id.*

17. See K. LEWELLYN, *THE COMMON LAW TRADITION* 521-34 (1961); Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 523 (1986); Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886 (1930); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). When both the text and legislative history are ambiguous, the courts may consider the ultimate purpose of the legislation and apply the text accordingly. This is known as the "proliferation of purpose" principle. Foy, *supra*, at 523.

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

more often than majority whites, are subjected to racial discrimination because of societal conventions that treat race predominantly in color-defined terms. The Court should read the statutes to remedy the injury of racial discrimination, regardless of the victim's racial *status*.

The section that follows canvasses the legislative and judicial history of the 1866 Act and demonstrates the problematic nature of reliance on congressional intent. The next section discusses the courts' use of definitions of race to determine the scope of the statutes. The final section identifies factors that courts should consider in resolving questions of coverage under these statutes.

## II. DIVINING LEGISLATIVE INTENT

In the traditional model, a court simply applies the law to the facts of the case.<sup>19</sup> When a plaintiff invokes statutory protection, the court first examines the text of the statute to determine if the plaintiff falls within its coverage.<sup>20</sup> If the text does not expressly delineate the scope of coverage, the court resorts to the legislative history of the statute in an attempt to divine legislative intent.<sup>21</sup> In determining the scope of protection under sections 1981 and 1982, however, neither the text nor the legislative history has proven dispositive. The court thus can only decide the case by making normative judgments in the interpretive process.<sup>22</sup>

### A. *The Historical Context and the Language of the Act*

In 1864, Congress passed the thirteenth amendment, declaring that "[n]either slavery nor involuntary servitude . . . shall exist within the United States."<sup>23</sup> The badges and incidents of slavery continued

19. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 138 (1803); Foy, *supra* note 17, at 506-08.

20. Foy, *supra* note 17, at 519.

21. *Id.* at 520. Attempting to determine legislative intent to answer a question not specifically addressed in the text may prove to be futile because, as one commentator has stated, "[t]he silence of the text probably means that the legislature did not consider the issue." *Id.* For discussion of the problem of determining legislative intent, see R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 137-68 (1975); Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 *HOFSTRA L. REV.* 1125 (1983); Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Ventures"*, 64 *B.U.L. REV.* 737 (1984). Cf. Dworkin, *The Forum of Principle*, 56 *N.Y.U. L. REV.* 469, 477 (1981) ("[T]here is no such thing as the intention of the Framers waiting to be discovered, even in principle. There is only some such thing waiting to be invented.")

22. See Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1 (1979) (discussing the general ambiguity of constitutional provisions).

23. The thirteenth amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment

to exist in society, however, in the form of racial discrimination. Several Southern states enacted Black Codes defining the inferior status of blacks relative to other groups.<sup>24</sup> Blacks also encountered private discrimination in areas such as housing, employment, restaurants, and public accommodations.<sup>25</sup> Congress responded by enacting the Civil Rights Act of 1866.<sup>26</sup>

The Senate version of the bill declared that all citizens "of every race and color, without regard to any previous condition of slavery or involuntary servitude," have the same contract and property rights, and the same right to equal protection of the law.<sup>27</sup> The House amended the bill to indicate that the rights protected were the same as those "enjoyed by white citizens."<sup>28</sup> The legislative debates centered

for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

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

U.S. CONST. amend. XIII. In passing this amendment, Congress was responding in part to questions about the validity of the Emancipation Proclamation of 1863. Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 39 (1980).

24. See D. BELL, *RACE, RACISM AND AMERICAN LAW* 83-90 (2d ed. 1973). The Black Codes were state statutes segregating blacks and whites in public facilities and private facilities open to the public, including public carriers, railroad trains, travel facilities, local transportation facilities, streetcars, and horsecars.

Parks, hospitals, prisons, courthouses; all had segregated toilets, drinking fountains, seating arrangements, stairways, waiting rooms, entrances and exits—even telephone booths. Segregation of cemeteries was *de rigueur*, and New Orleans even deemed it in the public welfare to enact an ordinance separating Negro and white prostitutes.

*Id.* at 83.

25. See *id.* at 83-124. One commentator described the post-Civil War society as follows:

The law had created two worlds, so separate that communication between them was almost impossible. Separation bred suspicion and hatred, fostered rumors and misunderstanding, and created conditions that made extremely difficult any steps toward its reduction. Legal segregation was so complete that a southern white minister was moved to remark that it "made of our eating and drinking, our buying and selling, our labor and housing, our rents, our railroads, our orphanages and prisons, our recreations, our very institutions of religion, a problem of race as well as a problem of maintenance."

Franklin, *History of Racial Segregation in the United States*, in 34 ANNALS 1, 8 (1956), quoted in D. BELL, *supra* note 24, at 83-84.

26. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981-1982 (1982)). For a historical discussion of the role of Civil War and Reconstruction events on the Constitution, see H. HYMAN, *A MORE PERFECT UNION* (1973).

27. CONG. GLOBE, 39th Cong., 1st Sess. 211, 573 (1866).

28. *Id.* at 1366, 1413-16. The final text of section 1 of the Act provided:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary

around congressional authority to create substantive civil rights under the thirteenth amendment,<sup>29</sup> and the propriety of federal invasion into areas traditionally in the states' domain.<sup>30</sup> Opponents of the bill took the narrow view that the thirteenth amendment did no more than abolish slavery, and that the legislation violated principles of federalism.<sup>31</sup> Proponents of the bill, however, claimed that the enforcement clause of the amendment authorized Congress to enact all legislation necessary to eradicate the *vestiges* of slavery.<sup>32</sup>

Congress responded to this uncertainty surrounding the scope of congressional authority under the thirteenth amendment by passing the fourteenth amendment.<sup>33</sup> The ratification of the fourteenth

servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981-1982 (1982)). President Johnson vetoed the bill because he believed that Congress intended the Act to apply to Chinese, Indians, Gypsies, and blacks. CONG. GLOBE, *supra* note 27, at 1679. Johnson also maintained that the proposed legislation would infringe upon the state courts' power. *Id.* at 1679-81. Congress voted to override Johnson's veto. *Id.* at 1809, 1861.

29. The Supreme Court has since stated that the thirteenth amendment does in fact give Congress the power to create these rights. *See Runyon v. McCrary*, 427 U.S. 160, 170 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

30. *See Gressman, The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1324-25 (1952).

31. For example, Senator Saulsbury of Delaware described the effect of the amendment as follows:

[T]hat a person who heretofore was a slave of another shall be no longer his slave, and it operates no further. It bestows no rights further than to relieve him from the burdens of servitude and slavery. A man may be a free man and not possess the same civil rights as other men.

CONG. GLOBE, *supra* note 27, at 477.

32. Senator Howard of Michigan stated: "[I]t was in contemplation [of the drafters of the amendment] to give to Congress precisely the power over the subject of slavery and the freedmen which is proposed to be exercised by the bill now under consideration." *Id.* at 503. Senator Trumbull of Illinois, Chairman of the Judiciary Committee, stated:

This measure is intended to give effect to [the thirteenth amendment] and secure to all persons within the United States practical freedom. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations.

*Id.* at 474. He believed that the bill would "break down *all* discrimination between black men and white men." *Id.* at 599 (emphasis added).

33. The fourteenth amendment provides:

All persons born or naturalized in the United States, and subject to the

amendment removed any doubt as to the constitutionality of the Civil Rights Act of 1866,<sup>34</sup> and may have even incorporated the guaranties of the Civil Rights Act into the Constitution itself.<sup>35</sup> Once the amendment was passed, Congress reenacted the 1866 Act as an addendum to section 16 of the Enforcement Act of 1870.<sup>36</sup>

### B. *Judicial Interpretation of the Act*

Virtually no suits were brought under the Civil Rights Act of 1866 during the first hundred years after its enactment<sup>37</sup> because the Supreme Court initially applied the enforcement clause of the thirteenth amendment to state action only.<sup>38</sup> In the *Civil Rights Cases*,<sup>39</sup>

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jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

34. *Hurd v. Hodge*, 334 U.S. 24, 32-33 & n.14 (1948) ("aiding to remove all doubt upon this power of Congress") (quoting CONG. GLOBE, *supra* note 27, at 2961); see CONG. GLOBE, *supra* note 27, at 2461, 2498, 2506, 2511, 2896, 3035.

35. The *Hurd* Court remarked that the amendment "incorporate[d] the guaranties of the Civil Rights Act of 1866 in the organic law of the land." *Hurd v. Hodge*, 334 U.S. at 32. The Court quoted Congressman Thayer: "As I understand it, [the fourteenth amendment] is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law . . . in order . . . that that provision . . . so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States." *Id.* at 32 & n.13 (quoting CONG. GLOBE, *supra* note 27, at 2465); see also CONG. GLOBE, *supra* note 27, at 2459, 2462, 2961 (remarks of proponents); *id.* at 2467, 2538 (remarks of opponents); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 94-96 (1908).

36. Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 1408 (current version at 42 U.S.C. §§ 1981-1982 (1982)).

37. See Note, *Dead-End Street: Discrimination, The Thirteenth Amendment, and Section 1982*, 58 CHI.-KENT L. REV. 873 (1982). In 1961, only one half of one percent of all civil cases filed in federal court were civil rights cases. By contrast, in 1981, one sixth of all civil cases filed in federal court were civil rights cases. C. WRIGHT, THE LAW OF FEDERAL COURTS § 22A (4th ed. 1983) (citing table C2 of the 1961, and tables 20, 21, and 29 of the 1981, Annual Reporter of the Director of the Administrative Office of the U.S. Courts). This increase in litigation is also attributable to rulings of the Supreme Court applying provisions of the Bill of Rights to the states by incorporating the provisions into the fourteenth amendment, and to the Supreme Court ruling in *Monroe v. Pape*, 365 U.S. 167 (1961), authorizing section 1983 damages actions against persons acting "under color of state law" but outside actual state authorization. *Id.*

38. See Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 29, 57 (1972); cf. Note, *supra* note 8, at 89 (discussing 42 U.S.C. § 1985(3), another civil rights statute enacted pursuant to section 5 of the fourteenth amendment).

Despite its broad language, the statute was rendered largely impotent soon after its enactment by a series of hostile Supreme Court decisions. It languished in relative obscurity until 1971, when the Supreme Court, in *Griffin v. Breckenridge*,



the Court held that Congress had exceeded its authority under the thirteenth and fourteenth amendments in enacting the Civil Rights Act of 1875,<sup>40</sup> which prohibited discrimination in public accommodations. The Court's narrow construction of the thirteenth amendment effectively precluded the application of the enforcement clause through the civil rights acts to reach private racial discrimination.

The Supreme Court reaffirmed its restrictive reading of the thirteenth amendment two decades later in *Hodges v. United States*.<sup>41</sup> In *Hodges*, the Court reversed the convictions of three white men charged with conspiracy to oppress and discriminate against blacks to drive them from employment. The Court held that the thirteenth amendment was not intended to apply to private discrimination.<sup>42</sup> This construction implicitly compounded the narrow scope of the civil rights acts.

The Court finally faced the state action issue squarely in *Corrigan v. Buckley*.<sup>43</sup> In *Corrigan*, a white plaintiff brought an action to enforce a restrictive covenant that denied to blacks the ability to purchase certain properties. On the black defendant's motion to dismiss the action, the Court construed sections 1981 and 1982:

[I]t is obvious, upon their face, that while [the statutes] provide, *inter alia*, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property.<sup>44</sup>

The 1968 Supreme Court, however, eliminated the state action requirement in *Jones v. Alfred H. Mayer Co.*<sup>45</sup> In *Jones*, black prospective buyers sued private property owners under section 1982 challenging their business policy against selling houses to blacks. The Court ruled that Congress may provide a remedy for private discrimination under the thirteenth amendment. In this landmark decision,

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breathed new life into the statute by relaxing a formerly rigid state action requirement.

*Id.* (citing *Griffin v. Breckenridge*, 403 U.S. 88 (1971)).

39. 109 U.S. 3 (1883).

40. Civil Rights Act of 1875, ch. 137, 18 Stat. 470 (current version at 42 U.S.C. §§ 1981-1982 (1982)).

41. 203 U.S. 1 (1906).

42. The Court stated that the Act was not intended "to denounce every act done to an individual which was wrong if done to a free man and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation." *Hodges*, 203 U.S. at 19.

43. 271 U.S. 323 (1926).

44. *Id.* at 331.

45. 392 U.S. 409 (1968).

the Court held that “[s]ection 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.”<sup>46</sup>

The *Jones* case is perhaps the most important interpretation of the 1866 Act since its inception. The decision renewed the guaranty of equal rights under the law,<sup>47</sup> but, at the same time, left the potential reach of the statutes in a state of uncertainty. To support its broad construction, the Court relied almost exclusively on the broad language and ambiguous legislative history of the Act.<sup>48</sup> The Court declared that the language of the Act “[i]n plain and unambiguous terms,” granted to all citizens the right to hold and purchase property.<sup>49</sup> The Court concluded that the Act prohibited discrimination in the sale or rental of property, whether by private owners or public authorities.

The Court focused on statements from the legislative debates tending to indicate that Congress intended to reach private action.<sup>50</sup> In this manner, the Court managed to extract authority that supported an expansive reading of congressional intent. In contrast, Justice Harlan’s dissent focused on statements from the very same debates that supported his view that Congress did *not* intend to cover private discrimination. His view was that “those debates do not . . . overwhelmingly support the result reached by the Court, and in fact that a contrary conclusion may equally well be drawn.”<sup>51</sup> To support

46. *Id.* at 413. The Court stated:

And 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. . . . 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.

*Id.* at 442-43.

47. *See infra* note 55.

48. *See Jones*, 392 U.S. at 420-36. The Court did cite *Hurd v. Hodge* for the proposition that a black citizen who is denied the opportunity to purchase the home of his choice “[s]olely because of [his] race and color,” has suffered the kind of injury that section 1982 was designed to prevent. *Id.* at 419 (citing *Hurd v. Hodge*, 334 U.S. 24, 32 (1948)). But in relying on *Hurd* to support its contention that Congress intended the statute to apply to private actions, the Court neglected to address the statements the *Hurd* Court made on precisely this issue: “[T]he statute *does not invalidate private restrictive agreements* so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action.” *Hurd*, 334 U.S. at 31 (emphasis added).

49. *Jones*, 392 U.S. at 420.

50. *See id.* at 431-34.

51. *Id.* at 454.

his conclusion, Justice Harlan referred to remarks of the Chairman of the Judiciary Committee discussing the detrimental effects of the state-enacted Black Codes on southern blacks.<sup>52</sup> After citing numerous other statements that evidenced legislative intent to limit the breadth of the Act to state action,<sup>53</sup> Justice Harlan concluded that if any intent could be derived, it was the intent that the Act apply to state action only.<sup>54</sup>

The Court's reading of the legislative history generated intense controversy.<sup>55</sup> The Court decided *Jones* in 1968 at the peak of the civil rights movement, when society had come to regard private discrimination against blacks as intolerable.<sup>56</sup> When the opportunity arose for the Court to address the situation, it recognized society's disapproval of racial discrimination and responded by reading the underlying spirit of the statutes to provide a remedy.

In the years following *Jones*, the Court continued to expand the scope of the statutes.<sup>57</sup> In *Runyon v. McCrary*,<sup>58</sup> the Court held that a

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52. *Id.* at 458.

53. Justice Harlan quoted Senator Trumbull's statement which strongly indicated that the purpose of the bill was to abolish the discriminatory laws of state legislatures in several of the southern states:

[This bill] may be assailed as drawing to the Federal Government powers that properly belong to the "States"; but I apprehend, rightly considered, it is not obnoxious to that objection. It will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.

*Id.* at 459 (quoting CONG. GLOBE, *supra* note 27, at 476).

54. *Id.* at 473.

55. See, e.g., Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980); Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207 (1979); Note, *Constitutional Law—Civil Rights Act of 1866—New Strength for an Old Law*, 18 DE PAUL L. REV. 284 (1968); Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29 (1980).

56. See R. BLUMBERG, *CIVIL RIGHTS: THE 1960'S FREEDOM STRUGGLE* 99-117 (1984) (chronologizing the peak of the civil rights movement and its effect on the enactment of the 1964 Civil Rights Act).

57. Following the *Jones* decision, the statute regained force and was soon used to further expand protection against discrimination. The Court applied the "badge of slavery" concept in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), to strike down a corporation bylaw that restricted the assignability of membership shares in the corporation, and in *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973), to protect against the discriminatory practices of a private club. In *Johnson v. Railway Express Agency*, the Court held that the Act afforded a remedy against racial discrimination in private employment. 421 U.S. 454, 459-60 (1975). The Court further held that the remedy provided by section 1981 was "separate from and independent of" those remedies provided by the Civil Rights Act of 1964. *Id.* at 466. The notion that Congress has broad authority to determine the "badges of slavery,"

private school could not exclude qualified applicants under section 1981 based solely on their race.<sup>59</sup> Justice Stevens put it directly: “[E]ven if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today. . . . [M]y understanding of the mores of today [is such] that I think the Court is entirely correct in adhering to *Jones*.”<sup>60</sup>

The Court last considered the scope of the statutes in *McDonald v. Santa Fe Transportation Co.*<sup>61</sup> In *McDonald*, the Court held that section 1981 affords a remedy to white employees who suffer racially discriminatory treatment in private employment.<sup>62</sup> The Court based its expansive holding on the broad language and ambiguous history of the 1866 Act<sup>63</sup> and the underlying congressional objective to remedy racial discrimination.

Relying on the legislative history, the *McDonald* Court concluded that the amendment incorporating the “white citizens” clause does not limit the classes protected, but rather defines the nature of the rights protected.<sup>64</sup> Some Congressmen feared that without the amendment the Act might be construed to extend to females and minors.<sup>65</sup> Such a construction would not have been in keeping with Congress’s paramount goal of redressing racial discrimination. The Court has stated that “Congress intended to protect a limited category of rights, specifically defined in terms of racial equality.”<sup>66</sup> Congress added the “white citizens” clause “apparently to emphasize the

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and then to legislate accordingly to eliminate them was rejected in the Civil Rights Cases, 109 U.S. 3 (1883), and reborn in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

58. 427 U.S. 160 (1976).

59. *Id.* at 168-75. The majority held that section 1981 was a reenactment of both section 16 of the Civil Rights Act of 1870 and section 1 of the Civil Rights Act of 1866. *Id.* at 168 n.8. Justice White, in his dissenting opinion, claimed that section 1981 derived solely from section 16 of the 1870 Act and was therefore based on the fourteenth amendment, which required state action. *Id.* at 205-06.

60. *Id.* at 191-92 (Stevens, J., concurring).

61. 427 U.S. 273 (1976).

62. *Id.* at 278-85.

63. *See id.* at 287-96.

64. *Id.* at 291-93; *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). The Court’s holding that the “white citizens” language of the Act does not limit the classes of protected persons to nonwhites has generated some criticism. *See, e.g.,* Reiss, *Requiem for an “Independent Remedy”: The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S. CAL. L. REV. 961, 984 (1977); Note, *The Thirteenth Amendment and Private Affirmative Action*, 89 YALE L.J. 399 (1979).

65. After the amendment was adopted, the floor manager of the bill in the House explained that “it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors.” *McDonald*, 427 U.S. at 293 (quoting CONG. GLOBE, *supra* note 27, at 157 (remarks of Rep. Wilson)).

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

racial character of the rights being protected."<sup>67</sup> Congress viewed it "simply as a technical adjustment without substantive effect," and adopted it without objection or debate.<sup>68</sup> The amendment's sponsor himself urged passage of the bill as amended "to protect our citizens, from the highest to the lowest, *from the whitest to the blackest*, in the enjoyment of the great fundamental rights which belong to all men."<sup>69</sup>

### III. THE MEANING OF "RACE"

The text and legislative history of sections 1981 and 1982 do not delineate the scope of intended coverage.<sup>70</sup> The Supreme Court has only described the 1866 Act as one designed to redress "racial discrimination" without indicating the meaning of this term.<sup>71</sup> As a result, the lower courts have resorted to disparate definitions of race in an effort to determine the classes of persons protected under the statutes.

Modern physical anthropological studies, however, indicate that "race" can never be a precise way to categorize human beings.<sup>72</sup> Race is not a term that consistently permits objective application.<sup>73</sup> " 'Race' is not a fact; it is a concept, and one which by no means has the same meaning for every biologist today."<sup>74</sup> The concept of race is

67. *Id.*

68. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 291-92 (1976). Rep. Wilson of Iowa, Chairman of the Judiciary Committee and the bill's floor manager in the House, proposed the amendment as soon as the bill was introduced. His stated reason for the change was to "perfect" the bill technically. *Id.* at 291.

69. *Id.* at 293 n.23 (emphasis added) (quoting CONG. GLOBE, *supra* note 27, at 1118).

70. *See supra* notes 19-63 and accompanying text.

71. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). The races of the parties before the Court to date have been limited to blacks and whites, and for that reason the Court has not had to define the term "race" or "racial discrimination." In *Jones*, however, the Court did apply the statute in a sweeping manner: "[Section 1 of the Civil Rights Act of 1866] was meant to *prohibit all racially motivated* deprivations of the rights enumerated in the statute." 392 U.S. at 426 (emphasis added).

72. *E.g.*, C. LEVI-STRAUSS, *THE VIEW FROM AFAR* 3-10 (1985); Littlefield, Lieberman & Reynolds, *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 CURRENT ANTHROPOLOGY 641 (1982). *Contra* Lundsgaarde, *Racial and Ethnic Classifications: An Appraisal of the Role of Anthropology in the Lawmaking Process*, 10 Hous. L. REV. 641 (1973) (anthropological perspective arguing that the courts should incorporate scientific theories into decision-making).

73. S. MOLNAR, *RACES, TYPES, AND ETHNIC GROUPS* 13 (1975) ("Just what constitutes a race is a hard question to answer, since one's classification usually depends on the purpose of the classification . . ."); *cf.* C. LEVI-STRAUSS, *supra* note 72, at 10-11 (noting cultural relativity of all anthropological observations).

74. Hiernaux, *Problems of Race Definition*, 17 INT'L SOC. SCI. J. 115 (1965). For background discussion of the history of the race concept, see T. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* (1963); J. HALLER, *OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900* (1971); R. HORSMAN, *RACE*

found in two realms—science and society. In science, race was conceived as a taxonomical device, grouping people according to genetic or physical differentiating traits.<sup>75</sup> In society, race describes the grouping of people according to physical and cultural distinguishing traits. In both realms, the concept of race expresses subjective group comparisons.

#### A. *Race as a Taxonomical Construct*

Biologists subdivide people into groups whose members inherit distinguishing physical characteristics.<sup>76</sup> The three basic biological classifications are Negroid, Caucasian, and Mongoloid.<sup>77</sup> Within these three divisions, attempts at scientific racial classifications fail.<sup>78</sup> Indeed, since the 1970's, most physical anthropologists agree that race in general is not a valid taxonomical device.<sup>79</sup> The lines drawn between "racial" groups are necessarily subjective and arbitrary because they depend on which traits and combination of traits the classifier chooses to isolate to identify subgroups.<sup>80</sup> But there is no scientific consensus on meaningful determinative traits. In fact, there is no subgroup that is sufficiently isolated genetically to remain distinct.<sup>81</sup> Because of the intermixing of humanity's genetic stock and the resulting overlap of physical traits between groups, attempts at racial classification are entirely futile.<sup>82</sup> Hence, even those scientists who insist on formulating lists of "races" based on the sharing of some isolated traits emphasize that their "list of 30 'races' might have been ten or 50; the line of discrimination in many cases is arbitrary. . . . [R]ace is not a static thing at all . . . . History, in the biological as well as the cultural sense, is always in motion."<sup>83</sup>

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AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981); J. KOVEL, *WHITE RACISM: A PSYCHOHISTORY* (1970); W. STANTON, *THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815-59* (1960); A. THOMAS & S. SILLEN, *RACISM AND PSYCHIATRY* (1972); W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978).

75. *Ortiz v. Bank of Am.*, 547 F. Supp. 550 (E.D. Cal. 1982).

76. A. MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 4-5 (5th ed. 1974).

77. *Id.* at 6-7.

78. *Id.* at 5-11.

79. See Littlefield, Lieberman & Reynolds, *supra* note 72, at 641.

80. See Brace, *On the Race Concept*, 5 *CURRENT ANTHROPOLOGY* 313 (1964).

81. See Montagu, *The Concept of Race*, in *THE CONCEPT OF RACE* 16-17 (A. Montagu ed. 1964).

82. See A. MONTAGU, *supra* note 76, at 7.

83. C. COON, S. GARN & J. BIRSELL, *RACES: A STUDY OF THE PROBLEMS OF RACE FORMATION IN MAN* 140 (1950).

### B. *Race as a Popular Construct*

"Race as a popular construct" refers to culturally defined groupings of humans according to differentiating physical and/or cultural traits. Historically, immigrants and other minorities were classified into "races" according to national origin and skin pigmentation,<sup>84</sup> neither of which are correct in biological or even cultural terms. Possible groupings of people are as numerous as the human mind can imagine.<sup>85</sup> Often, cultural differences alone are enough to cause society to group people into a separate "race."<sup>86</sup> Other times, ancestry of any degree is treated as a sufficient determinant.<sup>87</sup> Thus, the popular "race" construct varies according to the perceptions of the society in which it is based.

### C. *In the Lower Federal Courts—The Group-Based Rules*

Inasmuch as "race" defies definition,<sup>88</sup> the lower courts have defined race differently from each other, and inevitably have arrived at differing conclusions as to the scope of the statutes. One group of courts has devised a definition of "race" and applied this definition to exclude the plaintiff from coverage *as a matter of law*.<sup>89</sup> Another group of courts has recognized the problems of defining race, but believes race must be defined to identify those plaintiffs covered under the statutes.<sup>90</sup> These courts treat racial status as a *question of fact*, and place the burden on the plaintiff to prove that he or she falls

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84. See T. GOSSETT, *supra* note 74, at 4-8.

85. See Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303 (1986). This results from a basically normal psychic phenomenon or response. *Id.* at 306-07. People naturally identify themselves with cultural groups to achieve what Karst has termed a "path to belonging." *Id.* at 307-09. Once identified with a group, people acquire their "own acculturated views of the natural order of society." *Id.* at 309. Distrust of members of other cultural groups results because their different values and appearances are threatening. "Discrimination against the ethnic outsider is a form of exclusion . . ." *Id.* at 323. Therefore, the primary cultural group will either force the other group to assimilate or will relegate it to an inferior status in society. *Id.* at 311. Restricting definitions of the "races" to blacks, whites, and other color-defined groups ignores this phenomenon.

86. See *id.* at 309-11 (discussing distrust and fear among different cultural groups).

87. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896). In this infamous case, the Supreme Court held that a Louisiana statute providing for "equal, but separate" accommodations for whites and blacks in trains did not violate the thirteenth or fourteenth amendments. Plessy was "seven eighths Causasian and one eighth African blood," and "the mixture of colored blood was not discernible in him." *Id.* at 541. Nevertheless, he was convicted for refusing to move to the colored car. *Id.* at 541-42. The Court concluded that "the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person" is a question of state law. *Id.* at 552.

88. See *supra* notes 70-86 and accompanying text.

89. See *infra* notes 92-109 and accompanying text.

90. See *infra* notes 111-33 and accompanying text.

within a definition of race designed by the court. Within this group, a subgroup of courts has abandoned rigid definitional distinctions and created new classes protected under the statutes.<sup>91</sup>

### 1. MATTER OF LAW—*Shaare Tefila*

The Court of Appeals for the Third Circuit recently adopted the "matter of law" approach in *Shaare Tefila Congregation v. Cobb*.<sup>92</sup> In *Shaare Tefila*, a Jewish congregation brought a section 1982 action against eight individuals<sup>93</sup> for desecrating the plaintiffs' synagogue.<sup>94</sup> The plaintiffs argued that their claim satisfied the racial character requirement of the statute because the defendants' actions were motivated by racial animus and premised on a perception of Jews as racially distinct.<sup>95</sup> The court held, however, that the plaintiffs could not base their cause of action on the defendants' irrational perceptions.

91. See *infra* notes 120-28 and accompanying text.

92. 785 F.2d 523 (4th Cir.), cert. granted, 107 S. Ct. 62 (1986).

93. On March 16, 1984, the congregation filed suit against the eight defendants in the United States District Court of Maryland for violations of federal and state law. *Shaare Tefila Congregation v. Cobb*, 606 F. Supp. 1504 (D. Md. 1985), *aff'd*, 785 F.2d 523 (4th Cir.), cert. granted, 107 S. Ct. (1986). In its complaint, the congregation alleged violations of sections 1981, 1982, 1985(3), and claimed trespass, nuisance, and intentional infliction of emotional distress under Maryland common law. *Id.* at 1505. Upon a motion to dismiss the complaint under Federal Rules of Civil Procedure 12 (b)(1) and (6), the district court held that the Congregation's complaint failed to state federal causes of action because the section 1981 "full and equal benefit" claim did not involve the requisite state action. *Id.* at 1507. In addition, the section 1982 claim was not actionable because discrimination against Jews is not racial discrimination within the meaning of the statute. *Id.* at 1507-08. Finally, the 1985(3) charge was not viable because neither the federal constitutional right to interstate travel nor the various state rights the Congregation asserted would support a cause of action under the statute. *Id.* at 1509-10. Upon the dismissal of the complaint, the Congregation appealed to the Court of Appeals for the Fourth Circuit.

94. On November 2, 1982, the defendants spray-painted the plaintiffs' synagogue in Silver Spring, Maryland with anti-Semitic slogans such as "Death to the Jude," "In, Take a Shower Jew," "Toten Kamf Raband," "Dead Jew," and symbols such as swastikas and Ku Klux Klan signatures. *Id.* at 524-25. The racial nature of the defendants' acts in *Shaare Tefila* is not anomalous. The Anti-Defamation League of B'nai B'rith reported 638 incidents of anti-Semitic vandalism against Jewish homes, businesses, and institutions in 34 states and the District of Columbia in 1985. Brief for Petitioners at 32, *Shaare Tefila Congregation v. Cobb*, (No. 85-2156) (U.S. cert. granted Oct. 6, 1986) (citing ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, 1985 ANNUAL AUDIT OF ANTI-SEMITIC INCIDENTS 1, 5 (1986)). In Montgomery County, Maryland (the county where *Shaare Tefila Congregation* is located), the Human Relations Commission reported 195 "hate violence incidents (including harassment, vandalism, assault, arson and cross-burning)" in 1985; 68 of these were directed against Jews. *Id.* at 32-33 (citing MONTGOMERY COUNTY [MD] HUMAN RELATIONS COMMISSION, MONTGOMERY COUNTY GOVERNMENT HATE/VIOLENCE INCIDENTS FACT SHEET (Oct. 20, 1986)).

95. Brief for Petitioners at 14-15, 21-30, *Shaare Tefila Congregation v. Cobb*, (No. 85-2156) (U.S. cert. granted Oct. 6, 1986).



[Plaintiffs] cannot support a claim of racial discrimination solely on the basis of defendants' perception of Jews as being members of a racially distinct group. To allow otherwise would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants. Such perceptions are not what section 1982 was intended to protect against.<sup>96</sup>

The *Shaare Tefila* court implicitly defined race as a group in society that is commonly treated differently from whites.<sup>97</sup> The court indicated that if the plaintiffs were members of a group "commonly treated differently from Anglo-Americans," they would have a cause of action under the statute.<sup>98</sup> The court concluded, however, that Jews do not share the same position in society as Mexican-Americans or others commonly considered to be nonwhite.<sup>99</sup> Thus, although the court applied a definition of race similar to that applied in many of the recent cases decided under the statute,<sup>100</sup> it determined without factual inquiry that the plaintiffs did not fit within this definition as a matter of law. The court's ruling effectively precluded the plaintiffs from showing that they had suffered discrimination that was racial in nature, or even to prove that they were "commonly perceived" to be a distinct racial group.<sup>101</sup> In effect, the court took the case from the

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96. *Shaare Tefila*, 785 F.2d at 527. The court failed to support that sweeping statement. Other courts that have dismissed section 1981 suits without citation or discussion of authority have been criticized. See, e.g., *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 564 n.2 (E.D. Cal. 1982) (criticizing *Ponce de Leon v. Western Int'l Hotels*, 18 Fair Empl. Prac. Cas. (BNA) 1394 (N.D. Cal. 1978)).

97. *Shaare Tefila*, 785 F.2d at 526-27.

98. *Id.*

99. *Id.* at 527.

100. See *infra* notes 120-28 and accompanying text.

101. Although anti-Semitism initially stemmed from intolerance of the Jewish religion, since at least the fifteenth century, anti-Semitism has been predominantly racial in nature. See B. LEWIS, *SEMITES AND ANTI-SEMITES* 81 (1986); see also G. GILBERT, *NUREMBERG DIARY* (1947) (documenting the Nuremberg defendants' perceptions of Jews); T. GOSSETT, *supra* note 74. "Jew hatred was redefined, becoming at first partly, and then, at least in theory, wholly racial." B. LEWIS, *supra*, at 81. Historians have extensively documented that anti-Semitism is based on the view that Jews constitute a distinct race. E.g. G. GILBERT, *supra*, at 43; T. GOSSETT, *supra* note 74, at 9-12, 292-93, 371-72, 449. Anti-Semitism took its most outrageous form during World War II when Hitler orchestrated the killing of six million Jews. A fundamental precept of Nazism was that Jews were racially inferior and therefore had to be eliminated to protect the purity of the Aryan race. See G. GILBERT, *supra*. Commentators have described the racial nature of anti-Semitism:

[T]he Jewish people are a religious rather than a racial group in a strictly scientific sense. But the Nazi attitude and discrimination against the Jews was [sic] not founded upon their religious practices . . . [n]or was this discrimination based upon national origin . . . [Rather,] [t]he Nazi discrimination against the Jews was racial in that the Nazis defined the Jews as separate from their "Aryan" race and maintained that Jews were a physically distinct people.

Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of*

jury, and determined that a Jew can never state a claim under the statute.

The *Shaare Tefila* decision illustrates the problem associated with determining the scope of the statutes by attempting to define race. The court's approach is misguided because its definition of race has no basis in science, legal doctrine, or the statutes' legislative history. Indeed, the court failed to cite any cases to support its conclusion. As a result, its decision that the plaintiff fell outside the definition is highly questionable.

Nevertheless, several other courts have taken a similar approach to the statutes. Typically, these courts have held that allegations under section 1981 or 1982 based primarily or exclusively on national origin are insufficient to maintain an action because the statutes cover only racial discrimination.<sup>102</sup> For example, in *Budinsky v. Corning*

1866, 63 CALIF. L. REV. 662, 677-78 (1975). Hitler documented these misconceptions in his own publications. He wrote: "The Jew has always been a people with definite racial characteristics and never a religion . . ." A. HITLER, *MEIN KAMPF* 306 (R. Manheim trans. 1943). He further stated:

The Jewish State was never spatially limited in itself, but universally unlimited as to space, though restricted in the sense of embracing but one race. . . . It is one of the most ingenious tricks that was ever devised, to make this state sail under the flag of "religion," thus assuring it of the tolerance which the Aryan is always ready to accord a religious creed. For actually the Mosaic religion is nothing other than a doctrine for the preservation of the Jewish race.

*Id.* at 150. Several groups in the United States have adopted the Nazi belief that Jews constitute a distinct race. These groups publicly advocate and practice racial violence against Jews. For example, one Neo-Nazi group, the National Socialist Party of America, declared: "The single serious enemy facing the White man is the Jew. The Jews are not a religion, they are an Asiatic race, locked in mortal conflict with Aryan man which has lasted for millenia, and which will continue until one of the two combat peoples is extinct." Covington, *10 Fundamentals of National Socialism*, THE NEW ORDER, Mar. 1979, at 3. Another organization, Aryan Nations, alarmed its readers: "Aryans Awake! Jews are the Race of Satan!" Brief for Petitioners at 31 (citing ARYAN NATIONS, No. 30 at 8 (R. Butler ed. 1983)).

102. See *National Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Supp. 1224 (D.D.C. 1976) (concluding that because the plaintiffs alleged discrimination based on national origin without an allegation of racial discrimination, they failed to state a claim under the statute). In *Schetter v. Heim*, the court noted:

The clear purpose of these sections [1981 and 1982] is to provide for equality between persons of different races. In order for a plaintiff to predicate an action on either of these sections, he must have been deprived of a right which, under similar circumstances, would have been accorded to a person of a different race. These sections are clearly limited to racial discrimination—they do not pertain to discrimination on grounds of religion or national origin.

300 F. Supp. 1070, 1073 (E.D. Wis. 1969) (citations omitted). The court then concluded that "[t]here being no allegations of racial discrimination in the record . . . §§ 1981 and 1982 fail to confer jurisdiction upon this court." *Id.*; see also *Gradillas v. Hughes Aircraft Co.*, 407 F. Supp. 865, 867 (D. Ariz. 1975) ("The plaintiff's allegations in the instant matter being based solely on a claim for discrimination based on national origin are not within the confines or scope of 42 United States Code, Section 1981, and therefore, this Court has no jurisdiction to consider any claims thereunder."). In *Vera v. Bethlehem Steel Corp.*, the court took a formal-

*Glass Works*,<sup>103</sup> the court denied section 1981 protection to a plaintiff of Slavic origin who alleged national origin discrimination. The court conceded that it could not define "race" scientifically. Nevertheless, it held that the plaintiff was not part of a group that has been commonly subject, "however inaccurately or stupidly," to racial identification as a nonwhite.<sup>104</sup>

The *Budinsky* court dismissed the plaintiff's plea for an expansive reading of section 1981 to account for changed times:

Thus, plaintiff submits, § 1981 should not stand alone among the post-war Civil Rights Acts as frozen by a wording and legislative history written before the great influx of white European immigrants to this country, but should be expanded to protect all groups of potential discriminatees who are identifiable as a "race" or "nationality," or by "national origin."<sup>105</sup>

The court found that it was more appropriate to expand the statute for groups such as Indians and Hispanics who "have been traditional victims of group discrimination."<sup>106</sup> The court stated that "[t]here is accordingly both a practical need and a logical reason to extend § 1981's proscription" against discrimination to these groups.<sup>107</sup> "The same cannot be said with regard to persons of Slavic or Italian

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istic approach to the plaintiff's national origin claim in dismissing it for failure to state a "racial" cause of action. 448 F. Supp. 610 (M.D. Pa. 1978). Although the court recognized that Puerto Rican-Americans, Cuban-Americans, and other Hispanic peoples have been subject to "discrimination like unto racial discrimination," the court nevertheless rejected the plaintiff's claim for relief under section 1981. *Id.* at 613. The court concluded, "[T]his court is not prepared to hold that Plaintiffs, being of Puerto Rican background, have stated a cause of action for racial discrimination as required under 42 U.S.C. § 1981." *Id.*

103. 425 F. Supp. 786, 788 (W.D. Pa. 1977).

104. *Id.* at 788. The court adopted this view of race even though, given the opportunity, the plaintiff might have been able to prove his way into the court's definitional boundary at trial. Although it is quite possible that the court chose a narrow definition of race because of a fear of opening the "floodgates of litigation," it is equally possible that the court felt it did not possess or was not comfortable exercising expansive powers in interpreting the statute. This attitude would reflect the court's belief that expansion of the statute is for Congress. In *Jones v. United Gas Improvement*, the court defined racial discrimination for purposes of section 1981 as requiring a showing that the plaintiff is a member of a group that is denied the rights enumerated in the statute "to the extent that such rights are enjoyed by white citizens of this nation." 68 F.R.D. 1, 15 (E.D. Pa. 1975). The court in *United Gas* drew a sharp distinction between national origin and racial discrimination, holding that, as a matter of law, alleged discrimination against Spanish-surnamed individuals must be categorized as discrimination based on national origin. *Id.* Finally, in *Hiduchenko v. Minneapolis Medical & Diagnostic Center*, the court held as a matter of law that a Ukrainian-born plaintiff could not maintain a cause of action under section 1981 against her white employers, because "Ukrainians are not considered a race separate from that of the caucasian race." 467 F. Supp. 103, 106 (D. Minn. 1979).

105. 425 F. Supp. 786, 788.

106. *Id.*

107. *Id.*

or Jewish origin. These groups are not so commonly identified as 'races' nor as frequently subject to 'racial' discrimination which is the specific and exclusive target of § 1981."<sup>108</sup>

The *Budinsky* court is also typical of other courts in maintaining that because the plaintiff could seek an alternative remedy, the court need not apply the statute to afford protection to the plaintiff. The court emphasized that its decision might have been different if the plaintiff had not invoked Title VII.<sup>109</sup> On the facts of this case, however, the court found "neither need nor justification for judicially legislating § 1981."<sup>110</sup>

## 2. QUESTION OF FACT—*Al-Khazraji*

The Court of Appeals for the Fourth Circuit recently adopted the "question of fact" approach. In *Al-Khazraji v. Saint Francis College*,<sup>111</sup> a college professor brought an action against his employers under section 1981 alleging that the college's decision to deny him tenure resulted from religious and national origin discrimination. The court made two separate determinations: races can be identified, and the issue of whether the plaintiff is part of a group that is commonly perceived to be a distinct race is a question of fact for the jury to decide.<sup>112</sup>

108. *Id.*

109. *Id.* at 788-89. Some courts deny recovery because they view Title VII as providing an alternative remedy. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982); see *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 129 (S.D.N.Y. 1975) (holding there was no "practical need [or] logical reason" to extend section 1981 to national origin discrimination as other courts had done "because Congress has provided protection for persons affected because of national origin in . . . Title VII"). Additionally, in *Vera v. Bethlehem Steel Corp.*, the limited application of section 1981 was due in large part to the court's belief that the plaintiff's remedy was more appropriately sought under Title VII. 448 F. Supp. 610, 613 (M.D. Pa. 1978). By contrast, the court in *Ortiz v. Bank of America* remarked: "While it is true that many persons alleging causes of action under section 1981 may also have a claim under Title VII it is difficult for this court to perceive how that fact has any relevancy to determining the appropriate scope of section 1981." 547 F. Supp. 550, 564 n.21 (E.D. Cal. 1982). The Supreme Court has directly addressed this issue: "Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII." *Johnson v. Railway Express Agency*, 421 U.S. 454, 466 (1975). Moreover, cases like *Shaare Tefila* indicate that Title VII is not an adequate substitute because racist actions are not limited to the employment context.

110. *Budinsky*, 425 F. Supp. at 789.

111. 784 F.2d 505 (3d Cir.), cert. granted, 107 S. Ct. 62 (1986).

112. *Id.* The court stated:

We are unwilling to assert that Arabs cannot be the victims of racial prejudice: "prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is a usage or image based on all the mistaken concepts of 'race.' "

*Id.* at 517 (quoting *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979)).

### a. Identifying Races

In making its first determination, that races can be identified, the court reviewed the legislative history of section 1981. The court expressed its view that Congress did not intend to restrict coverage only to those who are discriminated against as part of a group that scientists would identify as racially distinct.<sup>113</sup> Instead, the court contended, Congress intended to "ensure that all persons be treated equally, without regard to color or race."<sup>114</sup> The court expressly stated that race could not be precisely defined and that, for purposes of section 1981, distinctions between racial and other types of discrimination in some cases may be "obscure."<sup>115</sup>

The court argued that recognition of the problems associated with defining race do not preclude an attempt to distinguish between national origin and racial discrimination. The court defined racial discrimination as "discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*."<sup>116</sup>

The *Al-Khazraji* court relied on *Manzanares v. Safeway Stores, Inc.*<sup>117</sup> to include ethnic groups as protected parties under the statute.<sup>118</sup> The *Al-Khazraji* court did not, however, go as far as many other federal courts<sup>119</sup> that have read *Manzanares* more expansively,

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113. *Id.* at 516.

114. *Id.* at 517.

115. *Id.*

116. *Id.* Although the court's definition allows for expansion of the statute, it is too narrow because it fails to consider the full range of factors that may provide a basis for human differentiation. The definition requires a showing of physiognomic distinction, a factor that is not necessarily present in many cases of racial discrimination. See *supra* notes 70-86 and accompanying text. The court's definition, however, was broader than the definition of those courts that have held as a matter of law that racial discrimination involves differences in skin color only.

117. 593 F.2d 968 (10th Cir. 1979).

118. The *Manzanares* court maintained: "Prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is usage or image based on all the mistaken concepts of 'race.'" 593 F.2d at 971. The court emphasized that "[t]he allegations demonstrate that the defendants may be poor anthropologists, but the prejudice is asserted to be directed against plaintiff in contrast to the Anglos. This in our view is sufficient." *Id.*

119. See, e.g., *Gonzalez v. Stanford Applied Eng'g, Inc.*, 597 F.2d 1298 (9th Cir. 1979) (plaintiff of Mexican descent with brown skin color); *Banker v. Time Chem., Inc.*, 579 F. Supp. 1183 (N.D. Ill. 1983) (East Indian plaintiff); *Pollard v. City of Hartford*, 539 F. Supp. 1156 (D. Conn. 1982) (Hispanic); *Baruah v. Young*, 536 F. Supp. 356 (D. Md. 1982) (nonwhite native of India); *Madrigal v. Certaineed Corp.*, 508 F. Supp. 310, 311 (W.D. Miss. 1981) (The court allowed a Mexican American to sue under section 1981, applying the following rule: "Section 1981 should be construed to offer protection to persons who are the objects of discrimination because prejudiced persons may perceive them to be nonwhite, even though such racial characterization may be unsound or debatable."); *Aponte v. National Steel Serv. Center*, 500

and that do not require a showing of physiognomical distinctiveness. For example, the *Al-Khazraji* court recognized the contrary decision in *Ortiz v. Bank of America*.<sup>120</sup> The *Ortiz* court found it impossible to distinguish between national origin and racial discrimination because race is a subjective concept that cannot be objectively conceived. "The notion of race is a taxonomic device and, as with all such constructs, it exists in the human mind [and] not as a division in the objective universe."<sup>121</sup> The court in *Manzanares* noted that "[t]he term 'race' in our language has evolved to encompass some non-racial but ethnic groups,"<sup>122</sup> and held that section 1981 "is not necessarily limited to the technical or restrictive meaning of 'race.'"<sup>123</sup> *Ortiz* expanded on this point:

This application is in keeping with Congress' intent of guaranteeing the same civil rights to all citizens. . . . Thus it extends section 1981's protections to those persons who today are members of groups that, like the then recently freed slaves, are in a position far from equal to that of the majority, historically "white citizens." Moreover, by hinging the "identifiable group" standard on the "common perception" of the group in question, the *Manzanares* approach employs the common law technique of the application of law to changes in the factual reality while limiting the scope of the statute in a way consistent with the apparent intent of its drafters.<sup>124</sup>

This expansive approach to the statutes entails eliminating arbitrary distinctions between the different forms of discrimination, and requiring that the plaintiff present sufficient evidence to prove that the discrimination was racial in nature.<sup>125</sup> For example, in *Cubas v.*

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F. Supp. 198 (N.D. Ill. 1980) (Hispanic); *Khawaja v. Wyatt*, 494 F. Supp. 302 (W.D.N.Y. 1980) (Pakistani-American); *Lopez v. Sears, Roebuck & Co.*, 493 F. Supp. 801 (D. Md. 1980) (nonwhite plaintiff with a spanish surname); *Ridgeway v. International Bd. of Elec. Workers*, 466 F. Supp. 595 (N.D. Ill. 1979) (Hispanic).

120. 547 F. Supp. 550 (E.D. Cal. 1982).

121. *Id.* at 565, cited in *Al-Khazraji*, 784 F.2d at 517. In *Ortiz*, the plaintiff alleged employment discrimination on the basis of her Puerto Rican ancestry. The court held that the plaintiff should have the opportunity to show at trial that she had been treated differently than the group enjoying the broadest rights. The *Ortiz* court stated: "Groups being so discriminated against vary in accordance with the historical context. Thus the appropriate means of definition involve inclusive but not exclusive criteria. Because the issue of racial classification is dynamic and not static no group is necessarily excluded." 547 F. Supp. at 567-68.

122. *Manzanares*, 593 F.2d at 970. The *Manzanares* court stated: "[W]e consider that Mexican American, Spanish American, Spanish-surnamed individuals, and Hispanos [sic] are equivalents, and it makes no difference whether these are terms of national origin, alienage, or whatever." *Id.* at 970.

123. *Id.* at 971.

124. *Ortiz*, 547 F. Supp. at 564.

125. See *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980) (Iranian

*Rapid American Corp.*,<sup>126</sup> the court determined that, in many cases, allegations of national origin discrimination may involve the element of racial animus.<sup>127</sup> The court therefore held that “[n]ational origin discrimination is actionable only to the extent that it is motivated by or indistinguishable from racial discrimination. . . . Hispanic Americans claiming that they have been discriminated against in violation of § 1981 are entitled to introduce evidence to prove that the alleged discrimination was racial in character.”<sup>128</sup> The *Cubas* decision reflects the direction in which the courts are moving with regard to determining protected parties under the statutes.

### b. Common Perception

The *Al-Khazraji* court concluded that the plaintiff might fall within its definition of race. It then determined that the plaintiff’s racial status was a question for the jury to decide.<sup>129</sup> This determination was consistent with recent lower court decisions. The court expressly refused to hold as a matter of law that Arabs cannot be subjected to discrimination that is racial in nature. The *Al-Khazraji*

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plaintiffs may state a cause of action under section 1981 notwithstanding allegations of national origin discrimination only.)

126. 420 F. Supp. 663 (E.D. Pa. 1976).

127. *Id.* at 666.

128. *Id.* at 665. This approach is reasonable because it recognizes that the phenomenon of racial discrimination is often linked to national origin. A federal remedy is therefore available for a plaintiff alleging discrimination based on national origin if he proves at trial that the discrimination was racial in nature. The potential for expansion under such a legal principle is extraordinary. The *Cubas* court exemplifies those courts that believe the function of the judiciary is to reinterpret the scope of the statute in light of changed circumstances in society. See also *Bullard v. Omi Georgia, Inc.*, 640 F.2d 632 (5th Cir. Unit B March 1981). In *Bullard*, the district court granted defendant’s summary judgment motion because it concluded that the action was based on national origin discrimination. *Id.* at 634-35. On appeal, the Fifth Circuit held that although national origin discrimination alone is not enough to bring the plaintiff under the Act, the court must still give the plaintiff a chance to prove at trial that he was discriminated against based on race. Not surprisingly, the court did not provide any guidance on how the plaintiff is to prove “racial” discrimination separate from national origin discrimination. The court hinted, however, that the plaintiff may be required to prove that he is a member of such an identifiable group that treatment afforded its members may be measured against that afforded Anglos. *Id.* at 634. The *Bullard* court concluded that the “[a]ppellants have stated and supported a case of racial discrimination. The line between national origin discrimination and racial discrimination is an extremely difficult one to trace. An attempt to make such a demarcation before both parties have had an opportunity to offer evidence at trial is inappropriate.” *Id.* at 634-35; see also *Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901 (W.D. Okla. 1977) (plaintiff alleged national origin discrimination as a Mexican-American). The *Enriquez* court stated: “The fact is the line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible; indeed, to state the matter more succinctly, there may in some instances be overlap.” *Id.* at 904.

129. *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518 (3d Cir.), cert. granted, 107 S. Ct. 62 (1986).

court concluded that "where a plaintiff comes into federal court and claims that he has been discriminated against because of his race, we will not force him first to prove his pedigree."<sup>130</sup>

There are several cases that support the *Al-Khazraji* court's determination although it did not cite them. These cases have held that when a plaintiff has insufficiently alleged racial violations of section 1981 or 1982, the plaintiff may replead and/or prove at trial that the discrimination was in fact racially motivated.<sup>131</sup> For example, in *Apodaca v. General Electric Co.*,<sup>132</sup> the court held that "[i]f a Spanish surnamed plaintiff alleges discrimination on the basis of race, the issues as to the defendant's perception and animus are factual and are not to be determined by the court from the pleadings."<sup>133</sup>

If the plaintiff's recovery hinges on his or her racial status, the *Al-Khazraji* approach is more just than the *Shaare Tefila* approach. The *Al-Khazraji* approach gives the plaintiff the opportunity to prove at trial that he or she meets the court's "racial" criteria. By comparison, the *Shaare Tefila* approach means that the protection afforded to victims of racially and ethnically motivated discrimination is entirely dependent on the judge's perceptions.

#### IV. COMMENT

The significance of *Shaare Tefila* and *Al-Khazraji* for the Supreme Court is more than a simple matter of statutory construction. These cases will be the first Supreme Court rulings on the scope of protection under sections 1981 and 1982 for ethnic and cultural groups. The language and the legislative history of the statutes do not direct the Court to a decision as to their scope.<sup>134</sup> Therefore, a decision based on these sources would be unpersuasive.<sup>135</sup>

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130. *Id.* at 517. The court made this statement despite its requirement that the plaintiff belong to an ethnically and physiognomically distinctive group, which would seem to require at least a visual type of verification.

131. See *Gonzalez v. Stanford Applied Eng'g, Inc.*, 597 F.2d 1298 (9th Cir. 1979). In *Gonzalez*, a Mexican-American plaintiff alleged discrimination based on national origin. In granting the plaintiff the opportunity at trial to prove the discrimination was, in fact, racially motivated, the court held:

We take note of the fact that a substantial portion of the Mexican population traces its roots to a mixture of the Caucasian (Spanish) and native American races. With this background prejudice towards those of Mexican descent having a skin color not characteristically Caucasian must be said to be racial prejudice under § 1981.

*Id.* at 1300.

132. 445 F. Supp. 821 (D.N.M. 1978).

133. *Id.* at 823.

134. See *supra* notes 23-30 and accompanying text.

135. In prior rulings on the statutes, the Court's reading of the legislative history has



The lower courts have turned to definitions of race to identify the persons protected under the statutes.<sup>136</sup> The *Shaare Tefila* test hinges recovery on the plaintiff's membership in a group that society "commonly perceives" as nonwhite.<sup>137</sup> The defendant is liable only if society shares his view that the plaintiff is a member of a distinct race. The *Al-Khazraji* test hinges recovery on the plaintiff's membership in a physiognomically and ethnologically distinct group.<sup>138</sup> The defendant is liable only if society shares his perceptions of the common characteristics of the group to which the plaintiff belongs. Both tests are therefore group-based and status-oriented.

#### A. *Learning from the Lower Courts—Problems with the Group-Based Rules*

The lower courts' treatment of the issue on a case by case basis can provide a starting point for the Supreme Court's analysis.<sup>139</sup> The lower courts have begun to recognize the problems associated with defining race.<sup>140</sup> The main difficulty is that the courts lack judicially manageable standards for defining race. Race is an inherently indefinable concept; it has no fixed meaning over time.<sup>141</sup> Because racial discrimination is always the product of subjective perceptions, it is irrational to require a rational basis for the defendant's perceptions.

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created controversy both inside and outside the Court. *See supra* note 46 and accompanying text. Critics claim that the Court has misread the history, or that the history could support a decision either way. For example, one historian stated:

In *Jones v. Mayer* the Court appears to have had no feeling for the truth of history, but only to have read it through the glass of the Court's own purpose. It allowed itself to believe impossible things—as though the dawning enlightenment of 1968 could be ascribed to the Congress of a century ago.

6 C. FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88*, at 1258 (1971) (comparing the Court's reading of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), to illusions in L. CARROLL, *THROUGH THE LOOKING GLASS* (Oxford 1982)). The Court must guard against the perception that it is manipulating the legislative sources to reach the outcome it desires. "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction." *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

136. *See supra* notes 88-133 and accompanying text.

137. In *Shaare Tefila*, the court treated the determination of race as a question of law. *See supra* notes 92-100 and accompanying text.

138. The *Al-Khazraji* court treated the determination of race as a question of fact. *See supra* notes 111-30 and accompanying text.

139. In drawing from the lower court decisions, the Supreme Court can benefit from the common law method of the lower courts without the restrictions of binding precedent. *Cf. Ortiz v. Bank of Am.*, 547 F. Supp. 550, 564 (E.D. Cal. 1982) (praising "the common law technique of the application of law to changes in the factual reality while limiting the scope of the statute in a way consistent with the apparent intent of its drafters").

140. *See supra* notes 88-133 and accompanying text.

141. *See supra* notes 70-86 and accompanying text.

Even if the Court finds it necessary to identify race as society perceives it, several hurdles to a fair and workable rule remain. To define race without the assistance of expert testimony would be imprudent because it would effectively establish the Court as the official mouthpiece of societal perceptions. Further, in devising a rule, the Court would have to decide between a national and a regional standard. A national test for identifying groups perceived as races would lead to anomalous results because of the ethnic differences in communities. Alternatively, the Court could devise a locality rule in which it would incorporate local or regional perceptions of race.<sup>142</sup> This rule would account for the different perceptions that arise in communities with different ethnic makeups, but would still condition the plaintiff's recovery on group status.

By hinging the plaintiff's recovery on his or her membership in a racial group, proponents of a group-based rule effectively ask the courts to withhold a remedy until widespread discrimination against a particular group exists. The Supreme Court should not require that the extent of racial discrimination against particular groups reach some level of discrimination such as that directed against blacks in 1866 before affording a federal remedy. To do so would implicitly grant judicial approval to racial discrimination below that level and unnecessarily afford judicial tolerance to discrimination. The *Shaare Tefila* court did not even delineate the proportion of society that would constitute a common perception that Jews are a racially distinct group.

Limiting recovery on a group basis is misguided because it bases the rule on commonality of injury. Because the plaintiff's recovery under this rule depends on the existence of an injured *group* in society, the rule operates to preclude relief in otherwise valid individual cases.

It is ironic that a court allows a defendant to use a group-based test to insulate discriminatory behavior from federal censure merely because these discriminatory beliefs are not widely shared in society. The perpetrator of the offense should not be absolved merely because others do not share his or her prejudice. Thus, the Court should not furnish the offender with the defense that his or her prejudice was not shared by some judicially cognizable sector of society. The *Shaare Tefila* court has justified a group-based rule with the claim that granting a federal remedy in the absence of a scientific or societal basis for the defendant's prejudices makes federal jurisdiction turn on the irra-

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142. Cf. *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979) (Prejudice "is thus a matter of practice or attitude in the *community*, it is usage or image based on all the mistaken concepts of 'race.' ") (emphasis added).

tional perceptions of the defendant.<sup>143</sup> This overlooks the fact that in a discrimination case, the cause of action (and hence jurisdiction) always turns on the defendant's perceptions, rational or irrational.<sup>144</sup>

### B. *Beyond the Lower Courts—The Case for a Racial Content Analysis*

Because the courts cannot define the scope of the statutes by identifying "races," they must focus on the essence of racial discrimination. The latter approach is consistent with the underlying purpose of the 1866 Act<sup>145</sup>—to provide a remedy for racial discrimination in society. Racial discrimination is invidious in nature and therefore has received special attention in Congress and the courts. Racial discrimination originates from a belief that the human race is hierarchically structured. This belief in an existing "caste system" assumes that some groups are inferior.<sup>146</sup> Discriminatory acts injure the plaintiff by excluding him or her from the favored group.<sup>147</sup> In most discrimination cases, the defendant is favoring a person from one type of group

143. *Shaare Tefila*, 785 F.2d at 527.

144. Taking the *Shaare Tefila* approach to its logical extreme illustrates the fundamental illogic of the group-based rule. Consider the following examples: (1) *A* is Caucasian, *B* is Mexican-American. *A* correctly perceives *B* as a Mexican-American and discriminates against him on this basis. Society commonly perceives Mexican-Americans to be a race. (2) *C* is Caucasian and *D*, from Naples, Italy. *C* calls *D* a "dirty, greasy wop," and makes a comment about protecting America. Society no longer perceives Italians to be a racial group.

Under the group-based rule of the *Shaare Tefila* court, plaintiff *B* is entitled to sue under section 1981 or 1982 because the defendant's perceptions had a rational basis in society. Plaintiff *D* would not be able to sue under the statutes, although skin color and prejudicial assumptions were motivating factors. The central arbitrariness of this approach is that *B* and *D* have suffered the same *injury*, and yet the courts only afford a remedy to *B*.

The group-based rule also assumes that each individual has a single racial identity. Because society is racially and culturally heterogeneous, however, its members sometimes identify one individual with different racial groups. The following story illustrates this phenomenon. In 1983, Theresa Mulqueen Skeeter unsuccessfully sued Suffolk, VA officials, claiming that they discriminated against her because she was black. *Miami Herald*, Apr. 8, 1987, at 10B, col. 1. In rejecting Skeeter's claim, the judge stated, "I see your mother and I see your father . . . I can't find where you would have any basis for calling yourself black." *Id.* Skeeter filed a separate suit four years later against Norfolk officials, now claiming that she was discriminated against because she was *white*. *Id.* Skeeter alleged that blacks were promoted ahead of her, and that after she was transferred to a black neighborhood, a supervisor told her that she would "get nowhere because she was a white woman." Answering the complaint, Norfolk officials disclosed that Skeeter's birth certificate lists her race and her parents' race as "colored." *Id.* The case was still pending as of this writing.

145. See Foy, *supra* note 19, at 520. Judge Learned Hand termed this the "proliferation of purpose" principle. *Id.*; cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 138, 163 (1803) ("Where there is a legal right there is also a legal remedy by suit, or action at law, whenever that right is invaded. . . . The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury.").

146. See Karst, *supra* note 85, at 321 & n.112.

147. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the*

over a person from another. These groups are often readily identifiable.<sup>148</sup> In racial discrimination cases, however, the problem of identification hinders objective categorization of people into racial types or groups.<sup>149</sup> The subjectivity of race and ethnicity requires a shift away from the racial status of the plaintiff to the defendant's acts. Because courts cannot always recognize discrimination as racial by determining the plaintiff's status, some other means of identification must be applied. This Comment proposes that a plaintiff be able to invoke statutory protection if the defendant's discriminatory acts have racial content. The content is racial if the acts communicate that the plaintiff is a member of a group that shares a genetic makeup distinct from some comparative group.<sup>150</sup>

The content analysis test allows a court to weigh evidence objectively without relying on its own perceptions. A court may analyze the totality of the circumstances and consider discovery evidence, documentary evidence, and expert testimony by ethnologists and sociologists to determine whether the discrimination was racial in nature.<sup>151</sup> For example, in *Shaare Tefila*, the symbols and slogans that the defendants used were Nazi-inspired and anti-Semitic; they invoked a racist ideology. A detailed factual inquiry is consistent with the fact-sensitive nature of all racial discrimination claims.<sup>152</sup>

The defendant's expression of the plaintiff's separate racial iden-

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*Law's Response to Racism*, 42 U. MIAMI L. REV. — (1987); see *supra* note 85 and accompanying text.

148. For example, plaintiffs in sex discrimination claims fortuitously benefit from the ease of classifying people into the gender-based groups of men and women.

149. See *supra* notes 72-87 and accompanying text. Justice Marshall illustrated this point during oral arguments for *Shaare Tefila*. The respondent claimed that races might be identified by immutable traits such as skin color. Justice Marshall responded that his father was fair-skinned and could not be racially identified by skin color although he was "a Negro." Oral argument before the Supreme Court of the United States, *Shaare Tefila* (No. 85-2156) (oral argument held Feb. 25, 1987). The plaintiff in *Plessy v. Ferguson* also had fair skin yet was made to sit in the black railway coach because he was one-eighth African. 163 U.S. 537 (1896).

150. This has not been communicated if there is no link between the racial nature of the act and the plaintiff. For example, a defendant who directs anti-Semitic discrimination against Christians has not inflicted the injury of racial discrimination.

151. Admissions, previous racist acts of the defendant, the defendant's associations with racist groups, and racial stereotypes should all be relevant. The court could also apply techniques from analogous causes of action such as Title VII and equal protection claims that assist courts in making evidentiary findings: inferences, disparate impact, and shifting burdens of proof.

152. Because findings of fact can only be overturned if clearly erroneous, they are often insulated from review and effectively depend on the receptiveness of the trial court or jury. See, e.g., Comment, *McCleskey v. Kemp: Constitutional Tolerance for Racially Disparate Capital Sentencing*, 41 U. MIAMI L. REV. 295 (1986) (discussing problems associated with the use of statistics to prove racial discrimination in capital sentencing).

tity need not have a scientific basis, and society need not accept the view as valid. A court therefore should not inquire whether society commonly perceives the plaintiff to belong to a separate race.<sup>153</sup> Nor need the defendant actually believe that the plaintiff is racially distinct, although usually he or she will so believe. A court would look to society only to determine whether the defendant's discriminatory acts invoked a racist ideology. Society therefore acts as the rational identifier of what constitutes racial discrimination. A court should also not require a direct showing of racial animus.<sup>154</sup> In the majority of cases, if the acts were racial in nature, the defendant would have been acting out of racial animus. Rarely does a person invoke an ideology without personally subscribing to its underlying tenets. Because racial discrimination is emotional, however, racist beliefs can override conflicting rational knowledge. As Justice Scalia has suggested, a sophisticated defendant may therefore direct racial acts at a

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153. The appellant illustrated this point during oral arguments. When the respondent argued that the defendant's perceptions must be commonly shared, the appellant asked: "What are we going to do, take a Gallup poll?" Oral argument before the Supreme Court of the United States, *Shaare Tefila* (No. 85-2156) (oral argument held Feb. 25, 1987).

154. The Court has already indicated that intent may be a necessary element of a section 1981 or 1982 claim. In *General Building Contractors Association v. Pennsylvania*, the Supreme Court held that contractors and their trade association could not be held liable under section 1981 for the intentional racial discrimination of the local union and the joint apprenticeship training committee. 458 U.S. 375 (1982). The Court refused to find that section 1981 imposes a "nondelegable duty" to ensure that discrimination does not occur in the selection of the work force. *Id.* at 395-97. In doing so, the Court imposed the intent element of the equal protection clause from *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977), onto the Civil Rights Act of 1866. The Court dismissed the thirteenth amendment origins of the Act, finding "no convincing evidence" that Congress intended this amendment to reach further than the fourteenth amendment. *General Bldg. Contractors Ass'n*, 458 U.S. at 391. The Court further found that the elements of vicarious liability were lacking. *Id.* at 391-95.

Judicial imposition of a discriminatory intent element in equal protection and statutory areas has provoked widespread criticism. *See, e.g.*, Comment, *supra* note 152 (criticizing the imposition of an intent requirement in eighth amendment and equal protection challenges to capital sentencing alleging discrimination based on the race of the victim); *cf.* Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983) (comparing intent requirement in equal protection and criminal contexts and concluding that it should be relaxed in the equal protection context); *see also* UNITED STATES COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980'S: DISMANTLING THE PROCESS OF DISCRIMINATION 8 (1981) ("Although open and intentional prejudice persists, individual discriminatory conduct is often hidden and sometimes unintentional."); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 266 (1971) (An "admission is, of course, unlikely, especially where social mores disapprove of the conduct prohibited by the law."); Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. REV. 31 (1982) (The Supreme Court needs to recognize the unconstitutionality of both discriminatory means and discriminatory goals.); Note, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334 (1986) (The goal of equal protection, to protect against official discrimination, is hindered by requiring proof of overt discriminatory purpose; the impact/inference standard better meets this goal.).

plaintiff without intellectually espousing racist views.<sup>155</sup> For example, an ethnologist, who has professional knowledge that Jews are not a race, may nonetheless engage in anti-Semitic acts, thereby inflicting the same injury on the Jewish plaintiff. A court should therefore not require proof that the defendant viewed the plaintiff as a member of a distinct race.<sup>156</sup>

A court should not preclude recovery merely because the plaintiff belongs to a group that may be identified by nonracial traits such as religion or national origin when the discrimination is racial in nature. For example, the fact that the racial discrimination was also, simultaneously, religious discrimination in its operation should not preclude relief, if the acts had racial content. Thus, a Jew, an Italian, and a black who suffer the same injury of racial discrimination should all fall within the scope of the statutes. The test should focus on the nature of the plaintiff's injury, not on the plaintiff's status.

It may be argued that the Supreme Court should not adopt a test that is based on the racial content of the defendant's discriminatory acts because this might open the "floodgates of litigation." Yet, it is the Court's duty to decide the case before it.<sup>157</sup> The Court should not abdicate this duty merely because the dockets are overburdened. Indeed, as Justice Tobriner once stated, "The existence of a multitude of claims merely shows society's pressing need for legal redress."<sup>158</sup> One could also make the argument that redressing claims before discrimination against a particular group becomes rooted in society will *deter* future discrimination, and consequently *prevent* lawsuits.

Judicial resources . . . are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in

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155. Oral argument before the Supreme Court of the United States, *Shaare Tefila* (No. 85-2156) (oral argument held Feb. 25, 1987).

156. *See id.*; *Bob Jones Univ. v. United States*, 461 U.S. 574, 622 n.4 (1983) (Powell, J., concurring). The Court should also not require direct proof of intent, because motive is too difficult to prove; the defendant's subconscious is inaccessible. An intent requirement effectively insulates acts that perpetuate racist ideologies. *See, e.g.*, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

157. *Cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 138, 178 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (L. Hand, J.) ("Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.").

158. *Dillon v. Legg*, 68 Cal. 2d 728, 735 n.3, 69 Cal. Rptr. 72, 77 n.3, 441 P.2d 912, 917 n.3 (1968).

the way of the recognition of otherwise sound constitutional principles.<sup>159</sup>

Whichever way it rules, the Court will inevitably encounter charges of judicial legislation. The Court cannot know whom the Reconstruction Congress intended to protect when it passed the 1866 Act. The dilemma the Court faces is only a more pronounced version of the problem it faces in every case requiring statutory construction because this task inherently involves separation of powers concerns.<sup>160</sup> Congress cannot precisely delineate or legislate for every set of facts that a plaintiff may present to a court. Thus, a court almost always must read meaning into the text of a statute in order to apply it to the specific case. The Supreme Court cannot escape this dilemma by denying relief and maintaining the status quo scope of the statutes.<sup>161</sup> A narrow statutory construction could be viewed as judicial legislation because the Court would be *subtracting* from the text and thereby frustrating legislative intent. Congress may have intended the Act to protect *all* victims of racial discrimination. If so, the Court would be frustrating legislative intent by denying relief. To construe the statutes narrowly would also give effect to views that are repugnant to the guaranties of civil liberty and equal protection of the laws.<sup>162</sup> One Reconstruction senator expressed such unacceptable views in the debates over the Act: "A man may be a free man and not possess the same civil rights as other men."<sup>163</sup> Today's society does not and cannot accept that sentiment because it is in conflict with our basic constitutional ideals.

The Court has demonstrated that it is not afraid to read the legislative history and text of the statutes broadly to provide a remedy when state remedial schemes fail.<sup>164</sup> Nor has it hesitated to respond

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159. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

160. *Cf. id.* at 411-30 (Burger, C.J., Black & Blackmun, JJ., dissenting) (claims of judicial activism in the implication of a private right of action under the fourth amendment of the Constitution).

161. *Cf. Bell v. Hood*, 327 U.S. 678 (1946) (establishing a principle of statutory interpretation in favor of federal remedial power to protect federal rights).

162.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

163. CONG. GLOBE, *supra* note 27, at 477 (remarks of Sen. Saulsbury).

164. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Arguably, 120-year-old legislative history should not be outcome-determinative in the courtroom today. *See, e.g., Levinson, New Perspectives on the Reconstruction Court*, 26 STAN. L. REV. 461, 481-83 (1974)

to society's increasing disapproval of racial and ethnic discrimination.<sup>165</sup> The Court has also pointed to congressional remarks indicating that the fourteenth amendment was designed to incorporate the guaranties of the Civil Rights Act into the Constitution.<sup>166</sup> If this assessment is accurate, then the Act would have a quasi-constitutional status. This would warrant a broad reading of the language of the statutes in much the same manner as construction of constitutional provisions.

The racial content test would not suffer from the drawbacks of the group-based rules. It does not require the defendant's perceptions to be objectively based in science or commonly shared in society, and therefore would not present a court with the judicially unmanageable task of defining race. This, in turn, would protect the integrity of the judicial system because the courts would not have to become involved with the question of certifying races or "pedigrees." The test would not arbitrarily restrict remedies, but rather would provide the same remedy to all who have suffered the same injury. In this manner, the statutes would provide a federal remedy for all victims of racial discrimination.

## V. CONCLUSION

Racial discrimination is a complex phenomenon. As the ethnic makeup of society changes, racial perceptions change accordingly. Consequently, society tends to categorize people into new racial groups. For this reason, rigid definitions of race are no longer effective tools for determining the scope of coverage under sections 1981

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(reviewing 6 C. FAIRMAN, RECONSTRUCTION & REUNION, 1864-88 (1971)); Comment, *supra* note 23, at 48-49, 68-69; see also *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 556 n.7 (E.D. Cal. 1982) ("[T]he courts have no choice . . . the notion of 'race' is a dynamic concept which compels addressing the question in terms of the reality of present day group-to-group relations.").

165. For example, in *Bob Jones University v. United States*, the Supreme Court upheld the Internal Revenue Service's denial of tax-exempt status to a private nonprofit university because of its racially discriminatory admissions policy even though Congress had not spoken to this issue in the Code. 461 U.S. 574 (1983). The Court based this holding on its view that "racial discrimination in education violates deeply and widely accepted views of elementary justice." *Id.* at 592; see also *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) ("For even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.").

166. See *supra* note 35. In *Hurd v. Hodges*, the Court noted:

The 1866 Act represented Congress' first attempt to ensure equal rights for the freedmen following the formal abolition of slavery effected by the Thirteenth Amendment. As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of "incorporat[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land."

334 U.S. 24, 32 (1948).



and 1982. At least one Reconstruction congressman envisioned the future waves of immigration to the United States and expressed his view that the Civil Rights Act of 1866 would "protect every citizen, including the millions of people of foreign birth who will flock to our shores."<sup>167</sup> Recognizing that this congressman's vision has become reality, many of the lower courts have rejected the definitional approach to determining statutory protection. In many cases, however, the rules favored by these courts have conflicted with each other in their application. Because victims of racial discrimination are equally entitled to a federal remedy, the Supreme Court should shift the focus from the plaintiff's racial status to the racial content of the defendant's actions. Applying such a rule, the Court can resolve the conflict of the lower courts and, at the same time, establish a principle that affords a remedy for *all* victims of racial discrimination.

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167. CONG. GLOBE, *supra* note 27, at 1833 (remarks of Rep. Wilson).

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