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Section 1981 of the 1866 Civil rights act is not often discussed, or even thought of. I am familiar with it from an employment law context, and even there, it is seldom used and seldom understood by lawyers. Section 1981 was created to protect the right of African Americans in a postbellum United States. It states that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[1]

Over the century and a half since its passage, contractual rights have been found to include employment agreements.[2] In fact, in 1996, Congress amended 1981 to not only cover the creation of impotent agreement, but also anything relating to the status of an employee, such as lack of promotion, termination, failure to hire, or constructive discharge[3].

Section 1981 is one of the most important employment laws because it is also the most accessibility for race-based claims. Title VII of the 1964 Civil rights act only applies to employers with 15 or more employees.[4] While this may cover most employers- and the EEOC has ways to get to 15 employees- some employees would not be covered by title VII. Section 1981 also does not fall under the aegis of the EEOC[5]. While the EEOC does tremendous work in advancing the cause of employment justice, it has flaws. Firstly, the EEOC is beholden to

[1] 42 U.S.C.A. § 1981 (West)
[2] *Id.*
[3] Id.
[4] 42 U.S.C.A. § 2000e (West)
[5] Statutes and regulations (no date) US EEOC. Available at: https://www.eeoc.gov/federal-sector/statutes-and-regulations (Accessed: May 2, 2023).

political appointees. These appointees can determine what kind of cases are taken by the EEOC[6]. This has not historically affected race-based cases, but the threat remains that political appointees could stop race-based cases. Secondly, any title VII claim is required to be file with the EEOC and must undergo mediation.[7] Mediation extends the process and can lead to more expenses for the plaintiff. Since Section 1981 falls outside of Title VII, the claim can be taken straight into a litigation phase, and can move faster.

Since a section 1981 claim applies to smaller as well as larger employers, and it falls outside of the preview of title VII, it has a clear value. It is because of its usefulness and clear value that I think section 1981 is a candidate for disrupting the idea of whiteness. Before examining how Section 1981 can be used, it is important to examine the history of the creation of whiteness in the United States.

A history of Race in the United States

Whiteness is one of the most ill-defined concepts in American law. Where there does exist a definition of what whiteness is, whiteness is only defined as what it is not. To be white is to Not have any African American blood, under the one drop rule[8]. Being white is not being East Asian[9]. No where in the corpus of American jurisprudence is there a definitive source of what is whiteness. Each time whiteness is defined as what it is not, the group who is not white was

[6] The commission and the general counsel (no date) US EEOC. Available at: https://www.eeoc.gov/commission (Accessed: May 2, 2023).
[7] Equal Opportunity Employment Commission, Mediation US EEOC, https://www.eeoc.gov/mediation (last visited May 2, 2023).
[8] F. James Davis, Mixed race America - who is black? One nation's definition | Jefferson's blood | frontline PBS, https://www.pbs.org/wgbh/pages/frontline/shows/jefferson/mixed/onedrop.html (last visited May 2, 2023).

[9] *See Takao Ozawa v. U.S.*, 260 U.S. 178, 198 (1922) (finding that Japanese people are not considered Caucasian).

subjected to legal and societal discrimination. whiteness separated those who were able to enjoy the full benefits of American society, and those who are not[10].

The history of the United States is tied intimately with race and racial categorization. Early settlers drew lines for racial distinction between themselves and native Americans, and later between themselves and African slaves. Race was the justification used to exploit people. It was reasoned that African American and native Americans were of lesser stock. Race was also inescapably baked into United States immigration policy[11].

In 1790, congress passed the Nationality Act of 1790, the first such law in the fledgling United States[12]. the Nationality Act restricted citizenship to "free white persons" who had maintained residence in the United States for two years[13]. From nearly the moment of its creation, the United States tied citizenship to race. However, the drafters of the 1790 immigration act failed to create a definition for what whiteness included. At the time, Free white person was generally interpreted to mean those from England, Scotland, Wales, and perhaps Germany[14]. Although German settlement was widespread in the early United States, Benjamin Franklin laments that those of the "German Race" were not teaching their children English.[15] However, there was never a legal definition of races. Whiteness and blackness existed only as social constructs and were not given a legal definition. Because of the lack of legal definition, the definition of whiteness was free to expand with little or no influence on the law.

[10] Sean P. Harvey, Ideas of Race in Early America (2016), https://doi.org/10.1093/acrefore/9780199329175.013.262 (last visited May 2, 2023).
[11] Sean P. Harvey, Ideas of Race in Early America (2016), https://doi.org/10.1093/acrefore/9780199329175.013.262 (last visited May 2, 2023).
[12] Pub. L. 1-3
[13] *Id.*
[14] Ben Franklin thought that Germans were "swarthy" and therefore not white.
[15] Sean P. Harvey, Ideas of Race in Early America (2016), https://doi.org/10.1093/acrefore/9780199329175.013.262 (last visited May 2, 2023).

When the first large waves of Catholic Irish arrived in the 1840s, American whiteness saw its first major addition. When they arrived in the 1840s, the Irish were roundly considered not white[16]. The Irish were frequently treated as less than white, and discriminated against by the same forces that persecuted free African Americans in the north. The Irish became white by assimilating into the United States culturally, serving the in Mexican American war, and becoming a part of power structures. A key product of that socialization and joining power structures was placing themselves in opposition to blackness. Whiteness offered citizenship, as well as acceptance into the white-dominated power structure. The pattern of assimilation through inclusion in white American power structures set by the Irish was followed by other groups[17].

Race in the early to mid-19th century existed on a binary axis: black and white. Either a group was black, and therefore ineligible for citizenship, or they were white, and eligible for all the social and political benefits thereof.

When Chinese workers were brought in to work in the railroad in the 1860's it was the Irish who pushed hardest against them. Irish Americans, afraid of losing their jobs, lobbied for laws such as the Chinese exclusion at which excluded Chinese immigrants from entering the United States[18]. Exclusion was later expanded to Japanese migrants and then to anyone from the continent of Asia. As a result of Chinese exclusion, there was a third axis on the racial chart.

[16]Noel Ignatiev, *How the Irish Became White*, https://www.proquest.com/docview/304094819 (last visited May 2, 2023).
[17] Kachin, Peter. "Whiteness Studies: The New History of Race in America." The Journal of American History 89, no. 1 (2002): 154–73. https://doi.org/10.2307/2700788.
[18] Kachin, Peter. "Whiteness Studies: The New History of Race in America." The Journal of American History 89, no. 1 (2002): 154–73. https://doi.org/10.2307/2700788.

Now, new immigrant groups needed to prove they were not black, and they were not Asian in order to get citizenship[1920].

In the late 19th and early 20th century, a wave of immigrants from Southern and Eastern Europe arrived, bringing in some communities which had previously either barely existed or not existed at all. These new groups each had to assimilate into the United States by aligning themselves as being white. Such groups include Italians, Greeks, Finns, Arabs, and Armenians[21]. Each group fought for, and eventually became, white socially and (in the latter two cases, legally)[2223]. In doing so, they used similar tactics. They attempted to connect to American values such as the Italians seizing on Columbus as a hero[24]. New immigrant groups also tried to assimilate socially by creating clubs and business. However, one of the biggest ways that these new immigrant groups assimilated was racial[25]. Italians and Slavs frequently engaged in discrimination against African Americans[2627]. The politically divided Finnish community, who were often called China swedes, united in arguing that they were not Asian and in fact were of a

[19] Kachin, Peter. "Whiteness Studies: The New History of Race in America." The Journal of American History 89, no. 1 (2002): 154–73. https://doi.org/10.2307/2700788.
[20] In the aftermath of the Civil war, the immigration act was changed to allow for the granting of citizenship to those of African descent. However, the record is unclear of immigrants of African descent were eligible for citizenship, and even fi they were, immigrant for us in the 19th century still tried to be white.
[21] Roediger, David R., Working Towards Whiteness: How America's Immigrants Became White, 2nd ed. (New York City, New York: Basic Books, 2018), 91.
[22] *Dow v. U. S.*, 226 F. 145, 147 (4th Cir. 1915)
[23] *In re Palladian*, 174 F. 834 (C.C.D. Mass. 1909)
[24] Roediger, David R., Working Towards Whiteness: How America's Immigrants Became White, 2nd ed. (New York City, New York: Basic Books, 2018), 91.
[25] Greeks are a major exception to this. I have written about this at much greater length elsewhere, but in sum, Greeks as a community did not engage in systemic discursion against African Americans as a part of assimilation. In fact, Greek American association included defense of African Americans. There assimilation came about through organized groups such as AHEPA, which form its genesis was dedicated to fighting the Ku Klux Klan. *Midwestern Philotimo: Greek American Assimilation in the Upper Midwest and its Exceptionalism*. Isaac Hampton Verhelst, Albion College 2019.
[26] Roediger, David R., Working Towards Whiteness: How America's Immigrants Became White, 2nd ed. (New York City, New York: Basic Books, 2018), 91.
[27] Interestingly, the two most common slurs used against Italians, Guinea and Dago, both originated as anti-African American slurs.

superior white stock[28]. Armenians and Arabs not only distinguished themselves as white in the press, but they also fought for their whiteness in court. In *Palladian*, the Armenian community successfully won the ability to be considered white[29]. In Dow v. United States, an Arab man (referred to as Syrian) argued that he was white. In doing so, Dow and the Syrian American community made great effort to distinguish themselves form Asians and African Americans. In fact, Syrian newspapers referred to African Americans as Al-zanj (الزنج), a derogatory term in Arabic with connections for slavery and inferiority [30].

It was not until the mid-1960s civil rights movement that race was decoupled from immigration. Then, a new immigration law was passed which both got rid of race-based citizenship requirements and also did away with ethnic quotas. It was also during the vice rights era that title VII was passed. with this history in mind, it become apparent that the meaning of whiteness has changed radically since 1866. However, since we are to look at 1866 as our standard for whites, then that opens up opportunities.

The Changing Face Of 1981

The protected class that is identified by section 1981 is non white people. In years following its creation, this was been interpreted to mean that race and national origan are protected. Jurisprudence on section 1981 historically seemed to hold that who was considered

[28] Koivisto, Peter, and Johanna Leinonen. "Representing Race: Ongoing Uncertainties about Finnish American Racial Identity." Journal of American Ethnic History 31, no. 1 (2011): 11–33. https://doi.org/10.5406/jamerethnhist.31.1.0011.
[29] In re Palladian, 174 F. 834 (C.C.D. Mass. 1909)
[30] Gualtieri, Sarah. "Becoming 'White': Race, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States." *Journal of American Ethnic History* 20, no. 4 (2001): 29–58. http://www.jstor.org/stable/27502745.

nonwhite was based on perceptions at the time the judges were deciding the cases. However, this changed with *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

St. Francis radically changed how race under section 1981 was constructed[31]. In *St Francis,* the plaintiff was an associate professor at St. Francis college who had applied for tenure in 1978. He was denied, and after waiting and applying for tenure again, left St. Francis and field a complaint pro se with the EEOC and with the district court, alleging Title VII race discrimination and discrimination under section 1981[32]. Al-Khazraji's Title VII claim, which would have been based on national origin, was deemed time barred and dismissed. However, his 1981 complaint was later ruled to not be time barred under Pennsylvania law. Although St. Francis college argued that Arabs would be considered Caucasian, the Court found at Arab Americans can be found to be another race under section 1981[33]. The court held that the original drafters of the 1866 civil rights act had a different conception of race. Because many groups that would be considered suasion today, indulging arabas were not, the court concluded that the best way to apply section 1981 would be to apply it in cases where an individual is discriminated against based on being a part of "an ethnically and physiognomically distinctive sub-grouping of homo sapiens" and also in cases where someone is discriminated against simply for the fact that they belong to a distinct group[34].

By tying race under section 1981 to distinctive groups, the Court created an opening to use 1981 to at the very least challenge the concept of racial classification in the United States, if not demolish it altogether. By saying that Arab Americans are considered nonwhite under 1981,

[31] St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987)
[32] *Id.* at 606
[33] *Id.* at 613
[34] *Id. at 613*

the court has implied that any group not considered white in 1866 is to be considered nonwhite. Additionally, the court also said that one of the two groups who had their witness affirmed in a court of law was to be considered nonwhite. At the very least, a group which has a distinctive genetic heritage and physical characteristics can be found to be a separate race under section 1981.

The court in *St. Francis* gave lawyers the blueprint for a racial test case, and no one seems to have taken advantage of it.[35] Should such a test case be attempted, I believe I could at the very least lead to a debate about what whiteness really is. In an ideal world, it would shake the very foundations of what whiteness is.

By making the test for race under section 1981 based on a group physical distinctiveness, whether they would have been seen as a separate race in 1866, and whether they would be discriminated against for being in that group, The *St. Francis* court has set up the perfect recipe to disassemble whiteness. Already, this analysis has been used to argue that, under section 1981, Jews can be seen as nonwhite[36]. If part of the basis for the test is distinctiveness and historical views of race, then much of white America no longer is white. Italian Americans, Greek Americans, Slavic Americans, Finnish Americans, Arab Americans, and Armenian Americans, all would be nonwhite Americans under section 1981. All of these groups and more were not considered white under section 1981.

Many new immigrant groups (such as Greeks, Italians, Finns, and Arabs) have distinctive physical characteristics. Greeks and Italians often have olive skin and darker hair. Arab men have more body hair than the average European American male. Finns often have light to dark

[35] *Id.*
[36] *Lubavitch-Chabad of Illinois, Inc. v. N.W. U.*, 772 F.3d 443, 445 (7th Cir. 2014)

brown hair, blue almond shaped eyes, and distinctively shaped noses. All four groups also have an identity that persists to this day through community organizations that foster community and advocate for issues that community members care about.

Before discussing an ideal test case, I am not intending to do away with section 1981. For all the reasons I have mentioned previously, I think that section 1981 is an important law that serves a very valuable purpose in employment law. If anything, I want section 1981 to be utilized more often. To me, section 1981 is not an archaic law that must be dispatched. Rather, it is an old tool that, by the very nature of its relative irrelevance and lack of definition for what white is, is a tool to shake the foundation of whiteness.

The most ideal test case is one where an individual of a questionably white group finds themselves discriminated against for being a member of that questionably white group. Specifically, a case like that of Gayane Barsegyon would do perfectly. Ms. Barsegyan was fired from her position at Cedar-Sinai in Los Angeles, allegedly as a result of her Armenian heritage and her ability to speak Russian. Ms. Barsegyon has filed a suit against the hospital, and it appears she is claiming racial discrimination. If she is not, she certainly could.

The question will be asked, why take this effort on. In a word, disruption. I want to create a situation where otherwise white people find themselves nonwhite. In doing so, this can at the very least foster debate on why they want to be white in the first place. I want my fellow Finnish Americans to write angry letters and emails asking why I argued for this. I want marginally white America to be afraid of not being white. I want to see pundits enraged about having their whiteness questioned. When the pundits are engaged, and millions of Americans finds themselves having their whiteness questioned, I want them to be angry. I want these 40,000,000 questionably white people to see that they can be scatted against for being Italian, or Slavic or

Finnish, or any other non-white-by-1866-standards group. I want all this because then this happens, there is an opportunity to discuss whiteness.

I do not expect that the expansion of 1981 would single highhandedly solve the deep systemic injustices inherent to the American system. Not by a long shot. However, Section 1981 offers an opportunity to shake the foundation of whiteness. By shaking the foundation of whiteness, it is my hope and belief that forces within the newly less white America will take efforts to dismantle the systems for opposition that have been here for centuries. It may not cause the end of racism, or dismantle all the systems of oppression. But it could be a start. And wouldn't it be fun to use an obscure law to challenge the very notions of whiteness? I certainly think so.