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JUSTICE WHITE MIXES MORE THAN JUST COLOR TO CREATE A NEW SHADE OF RACIAL PROTECTION*

In Saint Francis College v. Al-Khazraji1 and Shaare Tefila Congregation v. Cobb,2 a unanimous Supreme Court, in opinions authored by Justice White, extended civil rights protection under 42 U.S.C. sections 1981 and 1982 to ethnic origin groups. In Saint Francis, Justice White went beyond color distinctions and granted section 1981 protection to an American-Iraqi college professor who was denied tenure.3 Similarly, in Shaare Tefila the Court granted recovery under section 1982 to a Jewish community whose temple had been vandalized.4 These decisions should resolve much of the uncertainty that has plagued the lower courts.5

This Note will analyze the Supreme Court decisions in light of the pre-existing lower court decisions in this area.6 It will then examine the remedies available under sections 1981 and 1982 to emphasize the significance of the decisions.7 The Note will demonstrate that the United States Supreme Court, through Saint Francis and Shaare Tefila, has provided a broad, new avenue through which injured parties may seek justice. However, the decisions offer little guidance to lower courts that must apply their holdings to other cases. The purpose of this Note is to pose a hypothetical fact pattern as a means of suggesting the manner in which the holdings in Saint Francis and Shaare Tefila should be implemented by the lower courts.8 In its proposed resolution of this hypothetical the Note will reveal that these decisions impose a min-

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5. See infra notes 37-67 and accompanying text.
6. Id.
7. See infra notes 68-126 and accompanying text.
8. See infra notes 127-42 and accompanying text.
ute burden on potential plaintiffs. In light of this small burden, sections 1981 and 1982 are able to provide protection to a wide range of injured parties.\(^9\)

I. Saint Francis and Shaare Tefila

In the Spring of 1987, the United States Supreme Court was confronted with two cases in which the plaintiff sought recovery for ethnic origin discrimination under section 1981 and section 1982.\(^{10}\) Section 1981 states:

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 extractions of every kind, and to no other.

In attempting to apply the broad and ambiguous language of section 1981, the federal district and appellate courts have developed different approaches and consequently rendered inconsistent opinions.\(^{11}\) The courts have found the legislative history to be of little additional help in applying section 1981.\(^{12}\) Using equally ambiguous language, section 1982 states that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” In spite of the ambiguities in sections 1981 and 1982, these provisions have usually been interpreted concurrently with respect to the scope of their application.\(^{13}\)

A. Statement of the Cases

In Saint Francis College v. Al-Khazraji, the plaintiff was an associate professor at Saint Francis College who was denied tenure after teaching for five years. He was a member of the Muslim

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9. Id.
11. See infra notes 37-67 and accompanying text.
12. See infra notes 27-33, 37-67 and accompanying text.
13. Tillman v. Wheaton-Haven Recreation Assn., 410 U.S. 431, 440 (1973)(“In light of the historical interrelationship between section 1981 and section 1982, we see no reason to construe the sections differently . . . .”).
faith who had been born in Iraq and later became a United States citizen.\textsuperscript{14} Because Al-Khazraji was convinced his tenure rejection was due to his religion and ethnic origin, he brought suit against the college alleging that Saint Francis had violated its own tenure guidelines in denying him tenure and that the decision was motivated by bias, purpose, and discrimination. More specifically, Al-Khazraji's complaint and amended complaint alleged violations of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. sections 1981, 1983, 1985(3), 1986, and 2000e, as well as breach of contract and intentional infliction of emotional distress.\textsuperscript{15}

After several claims were dismissed for untimeliness, the crucial controversy centered on "whether a person of Arabian ancestry was protected from racial discrimination under section 1981."\textsuperscript{16} In a rather brief opinion, the Supreme Court affirmed the Third Circuit's opinion permitting the plaintiff to seek recovery under section 1981. The Court held that:

Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended section 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. . . . It is clear from our holding, however, that distinctive physiognomy is not essential to qualify for section 1981 protection.\textsuperscript{17}

In \textit{Shaare Tefila Congregation v. Cobb}, a Jewish community brought suit against several vandals who desecrated their synagogue.\textsuperscript{18} The defendants were accused of spray painting anti-Semitic slogans on the outer walls of the synagogue. Specifically, the words "Death to the Jude," "In, Take A Shower Jew," "Toten Kamf Raband," and "Dead Jew," along with swastikas, Ku Klux Klan symbols, and a skull and crossbones were painted with red and black paint on the outer walls.\textsuperscript{19} The plaintiffs filed their claims under 42 U.S.C. sections 1981, 1982, and 1985(3). They also filed trespass, nuisance, and intentional infliction of emotional

\textsuperscript{15} \textit{Id.} at 508.
\textsuperscript{17} \textit{Id.} at 2028.
\textsuperscript{19} \textit{Id.} at 525.
distress claims.\textsuperscript{20}

The Supreme Court applied the same analysis used in \textit{Saint Francis} and granted section 1982 coverage to the plaintiffs. The Court thereby reversed the Fourth Circuit decision that did not allow the plaintiffs to present their claims.\textsuperscript{21}

B. Persuasiveness of Decisions and Authority Relied Upon

Since the Supreme Court was rendering a decision on previously unsettled issues, it is not surprising that it cited only a small amount of precedent. Rather than relying on case law, Justice White focused primarily upon dictionary definitions\textsuperscript{22} and underlying notions of justice.\textsuperscript{23}

1. Scientific Support

Justice White first demonstrates that determining the precise definition of race with respect to sections 1981 and 1982 is impractical and probably impossible. He cites anthropological and biological authority to indicate that even scientists have abandoned racial classification.\textsuperscript{24}

2. Dictionary and Encyclopedia Definitions

In light of the impossibility of establishing a scientific definition of race, Justice White turned to definitions of race taken from late nineteenth and early twentieth century dictionaries and encyclopedias.\textsuperscript{25} He focused on these definitions in order to determine common notions of race during the time when the predecessor of Section 1981, the Civil Rights Act of 1866, was passed. After citing several definitions, the Court concluded that "[t]hese dictionary and encyclopedia sources are somewhat diverse, but it is clear that they do not support the claim that for purposes of section 1981, Arabs, Englishmen, Germans and certain other ethnic groups are to be considered a single race."\textsuperscript{26}

Through this brief analysis the Court not only demonstrated

\begin{footnotes}
\item[20.]	extit{Id.}
\item[22.]	extit{Saint Francis College v. Al-Khazraj, 107 S. Ct. 2022, 2026-27 (1987).}
\item[23.]	extit{Id. at 2028.}
\item[24.]	extit{Id. at 2026 (The Court stated that some authorities agree that "racial classifications are for the most part sociopolitical, rather than biological in nature.").}
\item[25.]	extit{Id. at 2026-27.}
\item[26.]	extit{Id. at 2027.}
\end{footnotes}
that a precise definition of race is impractical, but that race can be classified into more categories than just black, white, and oriental. Although the authority relied upon for this argument is considerably less than highly persuasive, it allowed the Court to effectively demonstrate the worthlessness of the imposition of rigid barriers between what is racial and what is non-racial, and consequently between who is protected and who is not.

3. Legislative History

In an effort to add meaning to the term “race,” Justice White turned to the legislative history of the Civil Rights Act of 1866. The Civil Rights Act, the predecessor to section 1981, was passed during the Reconstruction Era in order to ensure, at least on paper, that newly-freed slaves would have a remedy for deprivations of basic freedoms. The statutory language indicates that the Act was intended to provide the rights “enjoyed by white citizens” to “all persons.”

Although the historical setting and statutory language of the Act seem to limit the statute’s applicability to blacks, Justice White is able to cite fairly convincing remarks by Congressmen that clearly indicate that the Act was intended to apply to groups that are no longer considered racially distinct. The most convincing of these citations are to remarks made by Senator Shellabarger and Representative Bingham that make direct references to ethnic groups as being protected under the Act. Conducting a thorough examination of the congressional debates, the Court noted that Congress specifically considered racially distinct classifications to include individuals whose ancestries were Chinese, Scandinavian, Spanish, English, Irish, Mexican, Mongolian, Prus-

29. Saint Francis, 107 S. Ct. at 2027.
30. Id. (The Court quoted Senator Shellabarger who stated, “[w]ho will say that Ohio can pass a law enacting that no man of the German race . . . shall ever own any property in Ohio, or shall ever make a contract in Ohio, or ever inherit property in Ohio, or ever come into Ohio to live, or even to work? If Ohio may pass such a law, and exclude a German citizen . . . because he is of the German nationality or race, then may every other State do so.”).
sian, French, or Jewish.\textsuperscript{31}

After clearly demonstrating that the late-nineteenth century congressional notions of race are quite different from those of today, the Court used those earlier notions as a basis for allowing individuals now considered racially homogeneous, yet ethnically identifiable, to sustain a section 1981 and 1982 claim.\textsuperscript{32} In other words, a plaintiff alleging ethnic origin discrimination under section 1981 and 1982 can no longer have his claims dismissed simply because he is not a member of a racially distinct group, provided that he is able to demonstrate that he is a member of an identifiable group that was considered racially distinct by the Congress which enacted the predecessor or those sections. In \textit{Shaare Tefila}, the Court stated that "[t]he question before us is not whether Jews are considered to be a separate race by today's standards, but whether, at the time section 1982 was adopted, Jews constituted a group of people that Congress intended to protect."\textsuperscript{33} Justice White's use of Congress' original intent in this manner enabled him to effectively legitimate his application of sections 1981 and 1982 to a broader base of potential claimants.

4. The Product

The outcome of these cases seems most appropriate when one realizes that civil rights remedies were mandated and that the Supreme Court merely responded by providing them. While the rule enunciated in \textit{Saint Francis} and applied in \textit{Shaare Tefila} follows logically from Justice White's reasoning, it also appears to contain some contradictions. The Court first stated that based upon the legislative history, Congress intended to protect "identifiable classes" from discrimination based solely on ancestry or ethnic characteristics and that such discrimination is \textit{racial}.\textsuperscript{34} The Court then stated that "[a] distinctive physiognomy is not essential to qualify for section 1981 protection."\textsuperscript{35} In other words, section 1981 applies to ethnic origin discrimination, but the plaintiff need not possess distinctive physical characteristics to prevail in such an ac-

\begin{itemize}
\item \textsuperscript{31} \textit{id.} at 2027-28.
\item \textsuperscript{32} \textit{id.} at 2028 (The Court stated that "[b]ased on the history of section 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics").
\item \textsuperscript{33} \textit{Shaare Tefila}, 107 S. Ct. at 2020.
\item \textsuperscript{34} \textit{Saint Francis}, 107 S. Ct. at 2028.
\item \textsuperscript{35} \textit{id.}
\end{itemize}
tion. It seems difficult to imagine how an individual could prove that another had discriminated against him based upon his ethnic background when the person discriminated against does not possess indicative physical characteristics. The defendant could easily argue that he was unaware of the plaintiff's ancestry. The plaintiff, however, may be able to demonstrate that the defendant based his actions on some personal knowledge of the plaintiff's ancestry or from conclusions drawn from the plaintiff's last name. The potential difficulties with respect to the application of the court's rule will be discussed more fully in the hypothetical section which follows.36

In spite of the aforementioned difficulties, the rule set forth in these cases clearly defines racial discrimination as including ethnic origin discrimination for the purposes of sections 1981 and 1982. In order to fully appreciate the somewhat radical avenue selected by the Court, an examination of previous lower court approaches and their inconsistent outcomes is necessary.

C. Analysis in Light of Precedent

When confronted with the issues presented in Saint Francis and Shaare Tefila the federal district courts and the circuit courts of appeal have utilized different approaches to arrive at different conclusions. This inconsistency is perhaps most clearly presented in the Third and Fourth Circuit cases from which these two cases originally arose.37

1. The Fourth Circuit Approach: Shaare Tefila Congregation v. Cobb

In Shaare Tefila, the plaintiffs, a Jewish Congregation, alleged that the defendant's desecration of their synagogue was racial in character and motivated by racial animus.38 The congrega-

36. See infra text accompanying notes 127-42.
37. See Kaufman, A Race By Any Other Name: The Interplay Between Ethnicity, National Origin and Race for Purposes of Section 1981, 28 ARIZ. L. REV. 259 (1986); Note, Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts, 41 U. MIAMI L. REV. 823 (1987)(These notes provide a thorough analysis and classification of the pertinent case law which preceded the Saint Francis and Shaare Tefila decisions.).
38. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 525 (4th Cir. 1986)(In their complaint, the plaintiffs stated that "[d]efendants' desecration of the synagogue . . . deprived plaintiffs of the full and equal benefit of laws for the security of persons and property. Defendants' desecration . . . was motivated by racial prejudice in that defendants
tion maintained, however, that "Jews are not members of a racially distinct group and do not wish to be so considered." The Fourth Circuit rejected the plaintiff's claim and denied protection under both section 1981 and section 1982 as a matter of law. The court held:

We . . . find nothing in the statute, its legislative history, or subsequent case law which would lead us to conclude that section 1982 was intended to apply to situations in which a plaintiff is not a member of a racially distinct group but is merely perceived to be so by defendants.

Because discrimination against Jews is not racial discrimination . . . we find that the district court properly dismissed the congregation's section 1982 claim.

The Fourth Circuit imposed its own definitions of race and denied section 1981 and 1982 protection as a matter of law because the plaintiffs did not fit into the court's definition of race.

This judicially controlled approach has been used by other circuit courts. In *Anooya v. Hilton Hotels Corporation*, the First Circuit was confronted with section 1981 claims arising out of a wrongful discharge. The plaintiff alleged ethnic origin discrimination based on his Iraqi ancestry. Although racial discrimination was alleged in the plaintiff's complaint, the court denied application of section 1981. The court supported its holding by stating that "[t]he legislative history of the statute clearly indicates that Congress intended to protect a limited category of rights, specifically in terms of racial equality." This decision is obviously quite inconsistent with the approach the Supreme Court eventually adopted in *Saint Francis*.

An approach similar to that used in *Anooya* was employed in
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*Petrone v. City of Reading.* In *Petrone*, the court refused both section 1981 and section 1982 protection to a plaintiff claiming ethnic origin discrimination based upon his Italian heritage.

The federal courts have also used judicially-imposed definitions of race to extend the coverage of sections 1981 and 1982. In *Gonzalez v. Stanford Applied Engineering*, the plaintiff alleged that he was wrongfully discharged because he was brown-skinned and therefore obviously of Mexican origin. In reversing the lower court's dismissal of the plaintiff's section 1981 claim, the Ninth Circuit held that "prejudice towards those of Mexican descent having a skin color not characteristically Caucasian must be said to be racial prejudice under section 1981." Thus, judicially imposed definitions of race, which were based upon physical characteristics, permitted judges to dismiss or allow claims as a matter of law. Obviously, this method of adjudication will produce results which could vary from judge to judge and it has resulted in the inconsistencies which have developed in the lower courts' application of these statutes.

Another drawback of relying on physiognomy is the fact that it allows the judge to define "race." As the Supreme Court has implied, this is a nearly impossible task. Furthermore, courts adopting this approach have based their decisions on inaccurate readings of the legislative history. As the Supreme Court pointed out, there is ample legislative history to support the proposition that these statutes were intended to counter ethnic origin discrimination.

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43. 541 F. Supp. 735 (E.D. Pa. 1982). The plaintiff filed suit alleging that the City of Reading improperly imposed additional procedures upon him before issuing him an occupancy permit for his proposed pizza business. The plaintiff claimed that this disparate treatment was a result of ethnic origin discrimination on the part of the city. The court held that although section 1981 protections have been applied to Hispanics, the statute may only be applied to those who "may be perceived as non-white, even though such racial characterization may be unsound or debatable." *Id.* at 738 (quoting Madrigal v. Certaineed Corp., 508 F. Supp. 310 (W.D. Mo. 1981)). The court stated that "[s]ince plaintiff has asserted discrimination based only upon his heritage and there is no allegation that plaintiff is generally perceived as a non-white, we will grant defendant's motion to dismiss all section 1981 claims." *Id.* at 738.

44. 597 F.2d 1298 (9th Cir. 1979). The plaintiff filed suit alleging that he was discharged from his job by the defendant and otherwise discriminated against because he was of Mexican descent. The court noted that "a substantial portion of the Mexican population traces its roots to a mixture of the Caucasian (Spanish) and native American races." *Id.* at 1300. The court concluded that the discrimination suffered by the plaintiff was "directed at those Mexican-Americans having, by virtue of their descent, a brown rather than a white skin." *Id.*

45. *Id.* at 1300.

discrimination.

2. The Third Circuit Approach: *Saint Francis College v. Al-Khazraji*

As stated earlier, the *Saint Francis* case involved a well qualified college professor who alleged that he was discriminated against. The Third Circuit acknowledged that there was no precise definition of race and that the legislative history of section 1981 indicated that its protection was not intended to be limited to those who could demonstrate that they belonged to a particular group identified and described by anthropologists. In overruling the district court's summary judgment, the court held:

Discrimination based on race seems, *at a minimum*, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens. Accordingly, Al-Khazraji should be allowed to prove that the discrimination he alleges is racially motivated within the meaning of section 1981.

In other words, the Third Circuit allowed "ethnics" to prevail under section 1981 provided that they are able to prove to the jury that they belong to a physiognomically distinctive group and that they have been discriminated against because of such membership.

This approach was recently adopted by the Fifth Circuit in *Alizadeh v. Safeway Stores, Inc.* In *Alizadeh*, a white woman alleged that she was wrongfully discharged by her employer because her husband was Iranian. Applying the rule adopted by the Third Circuit in *Saint Francis*, the court vacated the district court's summary judgment and granted the plaintiff an opportunity to prove that her discharge was based upon the fact that her

47. *Id.* at 2027-28.

48. Al-Khazraji v. Saint Francis College, 784 F.2d 505, 515-16 (3d Cir. 1986), *aff’d, 107 S. Ct. 2022 (1987).* The plaintiff alleged that he, a United States citizen, was denied tenure at St. Francis College on account of his race, religion, and national origin. The Third Circuit Court of Appeals reversed the district court's order for summary judgment entered in favor of the defendants with respect to the plaintiff's section 1981 claim. *Id.*

49. *Id.* at 517-18 (emphasis added).

50. 802 F.2d 111 (5th Cir. 1986)(The plaintiff was dismissed by her employer following allegations that she had stolen money. In addition to suing her employer, the plaintiff filed suit against her union, claiming that it failed to perform its duty of fair representation in violation of section 301 of the Labor Management Relations Act of 1947. Because the plaintiff failed to show a basis for her husband's claims, or for her claims against the union, the dismissal as to those claims was upheld.).
husband belongs to a physiognomically distinct sub-grouping.\textsuperscript{51}

In clinging to the requirement that a plaintiff must be found to belong to a physiognomically distinct group, the courts which have adopted this approach are still likely to produce inconsistent results. Decisions could differ based upon the attitudes of the juries and the effectiveness of counsel.

3. The Racially Related Approach

The third approach adopted by the lower courts is illustrated by \textit{Cubas v. Rapid American Corp.}\textsuperscript{52} In \textit{Cubas}, the plaintiff filed suit under section 1981 alleging that she had been wrongfully discharged from her employment because she was Cuban and because she was trying to organize activities on behalf of a dissident faction within her union. In refusing to grant the defendant's motion to dismiss, the court held that "[n]ational origin discrimination is actionable only to the extent that it is motivated by or indistinguishable from racial discrimination."\textsuperscript{53} This approach has also been followed by other federal courts.\textsuperscript{54}

This "racially-related approach" allows plaintiffs, as ethnics, to allege acts of discrimination under section 1981 as long as the discrimination in question is racial in character. This approach also relies upon the jury to determine whether the acts qualify as racial in nature. Had the Fourth Circuit applied this approach in \textit{Shaare Tefila}, a different result may have been reached. Although Jews are considered to be Caucasian, the slogans painted on their temple walls were arguably racial in nature. Such acts could have

\textsuperscript{51} The court stated that "Mrs. Alizadeh's husband was allegedly considered by the defendant to be of a 'race other than white,' and we cannot say that he is any less ethnically and physiognomically distinctive, as compared to a 'white,' than was the Iraqi in \textit{Al-Khazraji}." \textit{Id.} at 115.

\textsuperscript{52} 420 F. Supp. 663 (E.D. Pa. 1976).

\textsuperscript{53} \textit{Id.} at 665 (The court further stated that "[t]he right to equal treatment which is guaranteed by the statute, protects against discrimination based on race, or on alienage." \textit{Id.}).

\textsuperscript{54} \textit{See} Bullard v. Omi Georgia, Inc., 640 F.2d 632, 634 (5th Cir. 1981)(Plaintiffs were black and white employees who alleged discrimination upon being replaced by oriental employees. In overruling the district court's summary judgment in favor of the defendants, the court stated that "[t]he 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." \textit{Id.}); Enriquez v. Honeywell, Inc., 431 F. Supp. 901, 904 (W.D. Okla. 1977)(The court stated that "the line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernable; indeed, to state the matter more succinctly, there may in some instances be overlap." \textit{Id.}).
been considered racial and therefore covered by section 1981 under the *Cubas* test.

4. Absence of Physical Characteristics Permissible

The fourth approach is one which does not require the plaintiff to possess distinctive physical characteristics in order to qualify for the protection of section 1981. This approach was adopted by the Tenth Circuit Court of Appeals in *Manzanares v. Safeway Stores, Inc.*, in which an employee of Mexican ancestry was discharged for stealing and then reinstated without seniority or back-pay after being acquitted of the charges. The plaintiff was able to demonstrate that Anglo-Americans were accorded much more lenient treatment. In reversing the district court's dismissal, the Tenth Circuit held:

> It is sufficient for our purposes that as a matter of common knowledge, and as described in the opinions, a prejudice as alleged in the complaint does exist. It is directed against persons with Spanish surnames. It is a group whose rights can be measured against a standard group or control group referred to in section 1981.

In other words, any group allocated distinguishable rights or demonstrating a prejudice can obtain protection even though they are not able to demonstrate physiognomical distinctiveness.

In an effort to add meaning to the term "race," the court relied upon a literal interpretation of the terms used in the statute. The court held that the statute required that the rights and benefits rendered to various identifiable groups are to be measured against the white citizen standard. The court acknowledged that any effort to define race would be futile and simply chose to apply section 1981 based upon a comparison to the Anglo control group. The court explained:

> If "white citizens" means a race, which technically does not

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55. 593 F.2d 968, 969 (10th Cir. 1979) (The court stated that the issue on appeal was "whether the allegations in the complaint that plaintiff was discriminated against because he was of 'Mexican-American descent,' and the employees who were alleged to have received different treatment were 'Anglo,' were sufficient to permit plaintiff to seek relief under 42 U.S.C. section 1981.").

56. *Id.* at 972. Acts by the defendants "were perpetrated upon the plaintiff because of his race and/or national origin." *Id.* at 969.

57. *Id.* at 970 (Focusing upon the plain language of the statute, the court acknowledged that "section 1981 makes no mention of race, national origin, or alienage. The only reference is that 'all persons' shall have described rights and benefits of 'white citizens.' " ).
seem particularly clear, it would seem that a group which is discriminated against because they are somehow different as compared to "white citizens" is within the scope of section 1981. We cannot consider this as a "national origin" case and that alone. 58

The court limited the applicability of this comparison to cases involving racial discrimination. It cannot be used to consider prejudice based on gender or, interestingly enough, religion. 59 Additionally, the approach advocated by Manzanares does not hinge upon the notions of race held by the accused discriminator. 60

Manzanares has been consistently distinguished or rejected by other courts confronted with these issues. 61 Nonetheless, the expansive approach taken by Manzanares most closely resembles the approach recently adopted by the Supreme Court. The Supreme Court, however, was more direct in that it explicitly stated that a "distinctive physiognomy is not essential to qualify for section 1981 protection." 62

Saint Francis, 63 Shaare Tefila, 64 and Manzanares 65 essentially adhered to the principles previously established by the Supreme Court. 66 As discussed earlier, this approach, although broad and seemingly all-inclusive, is justifiable. Classifying plaintiffs into particular categories, either as a matter of law or on a

58. Id. at 971. The court recognized that "[p]rejudice 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.'" Id.

59. Id. at 972.

60. Id. The court stated that "[i]t would not seem to serve a useful purpose to analyze the reasons for the acts of prejudice, as that can be left to the sociologists." Id.

61. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 526-27 (4th Cir. 1986), revd, 107 S. Ct. 2019 (1987). In refusing to apply the reasoning of Manzanares, the court limited its holding and stated as follows: Manzanares did not hold that a defendant's mere perception of a plaintiff as racially distinct is sufficient to constitute racial discrimination in violation of section 1981. Instead, the Tenth Circuit emphasized that Mexican-Americans, as a group, are commonly treated differently from Anglo-Americans, as a group. We do not find the position of Jews in this society to be analogous to that of Mexican-Americans or others commonly considered to be non-whites.


63. See supra text accompanying notes 14-17.

64. See supra text accompanying notes 18-21.

65. See supra text accompanying notes 55-60.

case-by-case basis, is simply impractical. Such avenues lead to inconsistent results and rules which may not accurately reflect the needs of society. Furthermore, anthropologists and biologists have nearly abandoned efforts to categorize society into specific racial classifications. Perhaps the best approach is to simply abandon the requirement that plaintiffs possess a distinctive physiognomy and allow section 1981 to protect against ethnic origin discrimination.

The Supreme Court's opinions in *Saint Francis* and *Shaare Tefila* were logically sound and provided justifiable remedies to groups which were the target of discrimination. In light of the foregoing analysis, the Court has also apparently chosen the most practical approach to eliminating the inconsistencies which have plagued the lower courts.

II. AVAILABLE REMEDIES UNDER SECTION 1981 AND SECTION 1982

The *Saint Francis* and *Shaare Tefila* decisions have made the traditional remedies under sections 1981 and 1982 available to those who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. In order to fully appreciate the impact of these landmark decisions, an exploration of the scope of these two statutes is required.

A. Section 1981

1. Basic Requirements

To successfully assert a section 1981 claim, the plaintiff must demonstrate that the discrimination was intentional. This normally requires proof that discriminatory purpose was a motivating factor behind the injurious action. In employment-related contexts, however, some courts have suggested that alternatives to proving intent exist. In *Ingram v. Madison Square Garden Center, Inc.*, the court held that if the criteria used by an em-

69. 482 F. Supp. 414, 425 (S.D.N.Y. 1979)(The plaintiffs were blacks and hispanics who had been or planned to be employed as cleaners. The court held that "[w]hile the plaintiffs have the initial burden to establish a prima facie case, that burden is satisfied by
ployer to determine job eligibility operates to exclude minorities, then a prima facie case of employment discrimination is satisfied without the necessity of proving intent. The court also stated that the prima facie case could be fulfilled by demonstrating the existence of a statistical disparity in light of surrounding circumstances.\(^{70}\)

The courts have also required actual discrimination before the plaintiff can prevail under section 1981. In *Gill v. Monroe County Department of Social Services*,\(^{71}\) the plaintiff filed suit against her employer for embarrassing her through preferential treatment. The court ruled that such an action could not prevail under section 1981.\(^{72}\)

Traditionally, the courts have required that the plaintiff be a member of a particular race.\(^{73}\) With respect to ethnic origin discrimination, however, this well-established requirement is no longer an obstacle to obtaining section 1981 protection in light of the recent Supreme Court decisions. Women and religious groups, however, are still unable to seek protection under this statute unless, of course, they are able to allege a "racial" claim.\(^{74}\)

2. Scope

Despite these often difficult to prove requirements, plaintiffs have successfully maintained section 1981 claims in a wide variety of areas. These claims have been based upon private as well as

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\(^{70}\) Id. at 424. The court explained that:

[I]f the criteria used by an employer or union to determine job eligibility "operate to exclude" minority members, then despite a lack of discriminatory intent, a prima facie case of employment discrimination is made out and the burden shifts to the employer or union to demonstrate a substantial relationship between the criteria and job performance.

\(^{71}\) 79 F.R.D. 316 (W.D.N.Y. 1978).

\(^{72}\) Id. at 324.

\(^{73}\) See Runyon v. McCrary, 427 U.S. 160, 168-72 (1976)(Two black children, through their parents, filed suit under section 1981, alleging that they had been wrongfully denied admission to a private school because of their race. The Court held that section 1981 was intended to prohibit racial discrimination in areas which include the making and enforcing of private contracts.); Schetter v. Heim, 300 F. Supp. 1070, 1073 (E.D. Wis. 1969)(In describing the scope of section 1981, the court held that "[t]hese sections are clearly limited to racial discrimination.").

\(^{74}\) Schetter, 300 F. Supp. at 1073 (The court noted that the applicability of section 1981 was limited to racial discrimination and did not apply to plaintiffs alleging discrimination on the grounds of religion or ethnic origin.).
public acts of discrimination. A large portion of litigation under section 1981 has arisen in employment related contexts. Plaintiffs have prevailed under this statute for acts of discrimination involving wrongful discharge, constructive discharge, unions, promotions, benefit and salary disparities, retaliation, and the use of unfair tests as a basis for hiring. Employers have sometimes been able to successfully assert incompetency, misconduct, and seniority as defenses to these allegations.

75. Runyon, 427 U.S. at 161. The Court held that “[s]ection 1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are [black].” Id. at 161, syllabus pt. 1.

76. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 274 (1976). The plaintiffs were white employees who were discharged for misappropriating cargo from one of the company’s shipments. Black employees, however, who committed the same offense were not discharged. The Court held that “section 1981 prohibits racial discrimination in private employment against white persons as well as non-whites, and this conclusion is supported both by the statute’s language, which explicitly applies to ‘all persons,’ and by its legislative history.” Id.

77. See, e.g., Brown v. Eckerd Drugs, Inc., 663 F.2d 1268 (4th Cir. 1981) (The plaintiffs charged discrimination in hiring, firing, promotion, job assignment, and geographical assignment under section 1981. The employer utilized a “word of mouth” system to notify employees of supervisory vacancies which resulted in an almost entirely white supervisory staff.).

78. See, e.g., General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982) (Although the petitioner was held not liable due to a lack of provable intent, the Court ruled that the union had discriminated against black employees through the exclusive hiring hall and apprenticeship programs it established.).

79. See, e.g., Young v. Edgcomb Steel Co., 363 F. Supp. 961 (M.D.N.C. 1973) (The plaintiff filed suit pursuant to section 1981 alleging that his employer’s promotion procedures were discriminatory. The court ruled in favor of the plaintiff and ordered that the employer utilize a different promotion procedure so that both blacks and whites would be notified of advancement opportunities.).

80. See, e.g., Browder v. Miller, 631 F.2d 433 (6th Cir. 1980) (The plaintiffs filed suit alleging that their employer refused to give black employees the same accumulated vacation pay as given to white employees. The court of appeals reversed the lower court’s dismissal.).

81. See, e.g., London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir. 1981) (The plaintiff charged her employer with racial discrimination in taking retaliatory action against her after she filed a claim with the Equal Employment Opportunity Commission.).

82. See, e.g., Harper v. Mayor of Baltimore, 359 F. Supp. 1187 (D. Md. 1973) (Baltimore’s Fire Department required all applicants to take a penmanship and multiple choice written test. These tests were allegedly used to discriminate against black employees.).

83. See, e.g., Grigsby v. North Mississippi Medical Center, 586 F.2d 457 (5th Cir. 1978) (The court of appeals held that the district court properly concluded that a black mental health worker was discharged for reasons totally unrelated to his race.).

84. See, e.g., Hagan v. Budd Co., 597 F. Supp. 89 (E.D. Pa. 1984) (The plaintiff was discharged after beating his supervisor. The court held that the plaintiff failed to prove that he was treated differently from white employees charged with beating supervisors and could not therefore prevail.).

Generally, however, the courts have ruled that employers can impose grooming standards upon their employees. Even though such requirements may seem to affect only certain groups of individuals, the courts have held that such requirements do not constitute a section 1981 violation. Thus, if Saint Francis College were to impose a requirement that none of its employees were to wear turbans or yarmulkes, Arabs and Jews would most likely fail to prevail in a section 1981 action.

Although plaintiffs in the field of education have occasionally been able to prevail on employment-related section 1981 claims, the defendant will usually prevail if he is able to justify the removal of a teacher on the grounds of incompetence or misconduct. Furthermore, the court in Hopkins v. Wasson ruled that a plaintiff who did not have tenure and whose contract had expired did not state a cause of action under section 1981. Therefore, although the recent Supreme Court decisions have expanded the number of potential plaintiffs, parties such as Al-Khazraji, the plaintiff in Saint Francis, will still find it difficult to prevail on section 1981 claims.

3. Significance of Expanded Coverage of Section 1981

The significance of these recent Supreme Court decisions should not be overlooked despite the potentially overlapping protection against ethnic origin discrimination provided by Title VII of the Civil Rights Act of 1964 and the equal protection clause of

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Geer, the court held that the records provided "no basis for finding that the seniority criterion was merely a ruse for race discrimination." Id.

86. See, e.g., Rogers v. American Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981)(The plaintiff was a black female who challenged a rule prohibiting employees from wearing an all-braided hairstyle. The court held that the rule did not discriminate against women or blacks.).

87. See, e.g., Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967)(The plaintiff was a black school teacher who filed suit alleging that she was wrongfully discharged. In reversing the lower court's dismissal, the Fourth Circuit held that minor infractions committed by a teacher with an excellent record over a 12-year period could not justify her termination.).

88. See, e.g., Alexander v. Warren School District, 464 F.2d 471 (8th Cir. 1972)(The court held that in light of extensive evidence of the plaintiff's incompetence, it could not be determined that the school board was motivated by racial prejudice when it failed to reemploy the plaintiff.).

89. See, e.g., Duke v. North Texas State University, 469 F.2d 829 (5th Cir. 1972)(The plaintiff was discharged for making speeches using profane language and criticizing the university administration. The Fifth Circuit ruled in favor of the defendants.).

the United States Constitution. Both Title VII and the equal protection clause provide a basis upon which parties can litigate ethnic origin discrimination claims. Nonetheless, section 1981 possesses both substantive and procedural differences which make the expansion of its protection highly significant. It is not the purpose of this Note to focus upon the distinctions between these avenues of protection. Instead, this Note seeks to merely highlight a few of the distinctions so that a proper understanding of the recent Supreme Court decisions can be obtained.

With respect to the equal protection clause, the obvious distinction between it and section 1981 is that the equal protection clause does not apply to private acts of discrimination. In other words, discrimination on the part of a governmental body or one of its agents is necessary for the plaintiff to bring an ethnic origin discrimination claim under the equal protection clause. Thus, both Al-Khazraji and the Shaare Tefila Congregation would be unable to sustain a cause of action on equal protection grounds because they could not show any state action. Most of the section 1981 claims discussed above would likewise be precluded.

An examination of Title VII of the Civil Rights Act of 1964 reveals that similar distinctions exist between that Act and section 1981. Procedurally, a claimant under Title VII is first required to exhaust all administrative remedies before filing suit in the courts. These procedures almost always require potential plaintiffs to file a charge of discrimination with the Equal Employment

91. 42 U.S.C. § 2000e-2(a)(1) (1986)(The Civil Rights Act of 1964 prohibits an employer from denying an individual a position on the basis of that individual's "race, color, religion, sex or national origin."). Similarly, the equal protection clause of the fourteenth amendment has been repeatedly used to allow parties to assert ethnic origin discrimination claims. Traux v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

92. For a more detailed analysis of these distinctions, see Kaufman, supra note 37.

93. The fourteenth amendment states in relevant part that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

94. See Kaufman, supra note 37, at 267.


[A]ny claim predicated on Title VII of the Civil Rights Act of 1964 cannot succeed for failure of plaintiffs to initially pursue federal administrative relief. However, by contrast, section 1981 was designed to afford a federal remedy for acts of discrimination separate and distinct from any relief available under Title VII; consequently, exhaustion is not required.

Id.
Opportunity Commission. After conducting an investigation, the Commission will decide whether the plaintiff's claim is factually meritorious and, based upon its decision, it will grant or deny the claimant the opportunity to file suit in court. This filtering process is not required under section 1981. Rather, plaintiffs may file their section 1981 actions directly in the federal courts.

Another distinction between these provisions is that parties asserting claims under Title VII are subject to a host of procedural time constraints which are not present under section 1981. One can easily imagine how this limitation alone serves to bar many claims.

A great disparity also exists with respect to the remedies available under section 1981 and Title VII. Unlike Title VII, section 1981 seeks not only to eradicate discrimination but also attempts to make plaintiffs "whole." Section 1981 achieves this goal by providing damages for mental humiliation, compensatory damages for physical and emotional harm, and punitive damages. Recovery under Title VII is much more limited. For example, recovery of back-pay is limited to only two years.

Furthermore, unlike Title VII, section 1981 permits parties to try their cases before a jury. Allowing plaintiffs to take their cases to sympathetic juries may result in larger judgments for victims of ethnic origin discrimination.

100. Compensatory damages are available under 42 U.S.C. § 1981, but are unavailable to parties seeking relief under Title VII. See Easley v. Anheuser-Busch, Inc., 758 F.2d 251 (8th Cir. 1985).
101. Musikiwamba v. ESSI, Inc., 760 F.2d 740, 748 (7th Cir. 1985). The court stated:

Section 1981 . . . is aimed at rectifying individual acts of discrimination against racial and ethnic minorities in a myriad of situations, and it clearly lacks a 'make-whole' purpose. Section 1981's emphasis on eradicating direct personal discrimination and on making victims of such discrimination more than 'whole' is mirrored by the fact that, in order to recover, a plaintiff must always prove that the defendant intentionally discriminated against him and by the remedies available to an injured plaintiff, i.e., punitive damages and compensatory damages for physical and emotional harm.

Id.
Substantively, section 1981 offers no greater protection than Title VII. However, these two statutes provide separate and distinct causes of action. In construing the conditions for recovery under Title VII, the courts have not emphasized the intent requirement to the extent that it has been emphasized in section 1981 cases. In fact, some courts have held that proof of intentional discrimination is not an essential element of a Title VII claim. Similarly, the standards of discrimination under section 1981 are considered to be more stringent than those of Title VII.

As the foregoing comparison reveals, section 1981 has more stringent substantive requirements yet far less procedural obstacles than Title VII. Section 1981 allows more claims to have access to the courts but places higher substantive requirements to ensure that only valid claims will be entitled to recovery. This broad access allows plaintiffs with valid claims, such as those brought in Saint Francis and Shaare Tefila, to obtain judgments they could not have otherwise obtained. Therefore, the fact that the Supreme Court expanded the protection provided by section 1981, as opposed to other protective mechanisms, is highly significant.

B. Section 1982

In Shaare Tefila, the United States Supreme Court discussed and applied section 1982 as though it were identical to section 1981. In light of precedent, such treatment is perfectly legitimate. Both statutes have their origin in the Civil Rights Act of

104. New York Transit Authority v. Beazer, 440 U.S. 568, 584 (1979). The Court stated that “[a]lthough the exact applicability of [section 1981] has not been decided by this Court, it seems clear that it affords no greater substantive protection than Title VII.” Id.


106. Scott v. City of Anniston, 597 F.2d 897, 898 (5th Cir. 1979)(holding that “proof of intentional discrimination is not essential to recovery in a Title VII action even when the employer is a governmental agency”).

107. Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1349 (9th Cir. 1984). The court noted that “[t]he standards under § 1981 are more stringent than those of Title VII. Hence when a plaintiff fails to meet its burden of proof under Title VII, it also fails to establish a claim under § 1981.” Id.


109. Tillman v. Wheaton-Haven Recreation Assn., 410 U.S. 431, 439 (1973). The Court stated that “[t]he operative language of both section 1981 and section 1982 is traceable to the Act of April 9, 1866 . . . . In light of the historical interrelationship between section 1981 and section 1982, we see no reason to construe these sections differently when
1866, and have consequently been interpreted as having the same legislative purpose behind their respective protections.\textsuperscript{110}

Plaintiffs bringing section 1982 claims must meet many of the same requirements as plaintiffs bringing section 1981 claims. For example, plaintiffs must prove that the alleged discrimination was racially motivated and intentional.\textsuperscript{111} As mentioned previously, this requirement is difficult to prove and therefore greatly reduces the likelihood of a plaintiff's success.\textsuperscript{112}

Not surprisingly, section 1982 was traditionally construed as applying only to those plaintiffs customarily considered to be of another race.\textsuperscript{113} Thus, plaintiffs claiming ethnic origin discrimination were formerly unable to maintain a section 1982 claim. In granting the defendant's summary judgment, the court in \textit{Patel v. Holly House Motels}\textsuperscript{114} held that "a refusal to sell based solely upon the country of an individual's ancestry, or upon the cultural and linguistic characteristics common to an ethnic or national origin group, will not support a claim under section 1982."\textsuperscript{115} As discussed earlier, the United States Supreme Court's recent decisions have created an entirely new avenue through which such discrimination can be fought. As is the case with section 1981 actions, gender based discrimination has not been considered within the scope of section 1982,\textsuperscript{116} and white plaintiffs have been permitted to file section 1982 claims.\textsuperscript{117}

The significance of \textit{Saint Francis} and \textit{Shaare Tefila} is clearly demonstrated when section 1982 is compared with other statutes
providing similar protection. One such statute is the Fair Housing Act of 1968 which, although similar to section 1982, allows a plaintiff to state a cause of action entirely separate from actions brought under section 1982.\textsuperscript{118} The Fair Housing Act contains several procedural limitations not found in section 1982.\textsuperscript{119} For example, actions brought under section 1982 are not barred by a 180-day statute of limitations.\textsuperscript{120} Also, section 1982 permits actions against defendants that own or rent a less than four-unit dwelling structure, who would not be subject to an action brought under the Fair Housing Act.\textsuperscript{121}

Section 1982 is also considered substantially broader in its protection than the Fair Housing Act of 1968.\textsuperscript{122} Plaintiffs have used section 1982 to successfully maintain claims of property-related discrimination concerning the use of recreational facilities\textsuperscript{123} and the implementation of zoning laws.\textsuperscript{124} Plaintiffs have also successfully asserted claims involving discriminatory property purchasing\textsuperscript{125} and leasing.\textsuperscript{126} Therefore, the recent expansion of the scope of section 1982 appears to have provided significant new protections.

\textsuperscript{118} United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971)(The court stated that "[a]n action under the Fair Housing Act does not necessarily encompass a suit under the Act of 1866, and vice versa.").

\textsuperscript{119} Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975)(The plaintiffs, who were black, brought an action against a Nebraska realtor and homeowner alleging discrimination. The case was dismissed because it was barred by the 180-day statute of limitations of the Fair Housing Act.).

\textsuperscript{120} \textit{Id.} at 732.

\textsuperscript{121} Johnson v. Zaremba, 381 F. Supp. 165 (N.D. Ill. 1973)(The court concluded that even though the defendant brought himself within an exception to the scope of the Fair Housing Act by showing that he maintained rooms occupied by no more than four families, he did not thereby show any defense to the plaintiff's section 1982 claims.).

\textsuperscript{122} Warner v. Perrino, 585 F.2d 171, 173 (6th Cir. 1978)(holding that section 1981 "encompasses a much broader scope of activity than the 1968 Fair Housing Act").

\textsuperscript{123} Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969)(The plaintiffs brought suit alleging racial discrimination pursuant to section 1982 when they were denied access to a private playground and park.).

\textsuperscript{124} Hope, Inc. v. DuPage County, 717 F.2d 1061 (7th Cir. 1983)(The court concluded that the county engaged in intentional discrimination by establishing a zoning ordinance and then granting or denying variations dependent upon race and economic strata.).

\textsuperscript{125} Williams v. The Matthews Co., 499 F.2d 819 (8th. Cir. 1974)(The plaintiffs alleged racial discrimination against developers who sold lots in a subdivision only to approved builders, which operated to exclude black persons.).

\textsuperscript{126} Fred v. Kokinokos, 347 F. Supp. 942 (E.D.N.Y. 1972)(The plaintiffs brought suit for racial discrimination pursuant to section 1982 when an owner of a two-family home refused to lease them an apartment.).
III. SUGGESTED GUIDELINES FOR THE APPLICATION OF SAINT FRANCIS AND SHAARE TEFILA

Saint Francis and Shaare Tefila are well-reasoned opinions that undoubtedly resolve many of the inconsistencies that have plagued the lower courts. However, the Supreme Court has failed to provide the lower courts with a definite set of guidelines which would dictate how these decisions are to be applied in the future. Through the use of a hypothetical fact pattern, this Note will raise various uncertainties as to the application of these cases and offer suggestions for their resolution.

A. Legal Framework

In Saint Francis College v. Al-Khazraji, the United States Supreme Court determined that Congress intended section 1981 to protect "identifiable classes" from intentional discrimination. Unfortunately, the Court failed to provide a precise definition of that phrase. The Court did, however, note that a distinctive physiognomy was not essential for plaintiffs to qualify for section 1981 protection.

The requirements for such an action were set forth in Shaare Tefila Congregation v. Cobb, in which the Court held that a charge of racial discrimination under section 1982 could only be established by alleging that the defendants were motivated by a racial animus and that the defendants' animus was directed toward the kind of group that Congress intended to protect when it passed the statute. In Saint Francis, the Court cited several ethnic groups which the enacting Congress considered to be racially distinctive.

Eventually, the Court determined that Arabs and Jews, as identifiable groups, met the criteria and were permitted to have their claims stand for judgment. In refusing to dismiss the plaintiff's claims, the Court in Saint Francis stated, "[i]f respondent on remand can prove that he was subject to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will

128. Id.
130. Id.
have made out a case under section 1981.”

B. Hypothetical Facts

Let us suppose that an employer is suddenly faced with a small degree of unexpected financial hardship, requiring him to lay off an employee. For some unknown reason, the employer despises individuals of Armenian ancestry. As the employer examines a list of employees, he notices the name Armeniano and automatically concludes that the employee is of Armenian ancestry. In the presence of several witnesses, he declares that he hates all Armenians and states that he feels they are all dishonest and linked to organized crime. Without reviewing any employee work evaluation reports, or discussing the matter with any supervisors, the employer terminates Armeniano’s employment even though Armeniano has more seniority than several other employees. Armeniano can also demonstrate that he has an unblemished work record and has been praised by his supervisors for his superior work product.

After learning of his employer’s remarks, Armeniano files suit against his former employer alleging racial discrimination pursuant to section 1981. Interestingly, the plaintiff does not possess the physical characteristics prevalent among Armenians. Unlike most descendants of Indo-European immigrants, Armeniano has fair hair, a fair complexion, and blue eyes.

C. Proposed Application

In light of the approach recently adopted by the United States Supreme Court, Armeniano’s claims may not be dismissed. Under this approach, Armeniano must first meet the threshold requirement that he belong to an identifiable group. This requirement should not be applied stringently to exclude potential plaintiffs. The entire purpose of the Saint Francis and Shaare Tefila opinions was to remove barriers posed by vague terms such as “race.” Thus, in applying this threshold requirement, the lower courts should not attempt to define the words “identifiable,” “ethnic,” or “ancestry.” Rather, if a plaintiff identifies himself as within an ethnic classification, he should be held to have fulfilled this requirement. This ethnic classification will usually, but not

132. *Id.* at 2028.
133. *See supra* note 17 and accompanying text.
always, be based upon identification with a foreign country, region, or historical classification.

In the hypothetical, Armeniano can easily fulfill this requirement. Through his self-classification, he has associated himself with an "identifiable group." His identifiable class is composed of those Americans whose ancestors immigrated from Armenia to America. For the purposes of a section 1981 or section 1982 claim, such a classification is sufficient.\(^\text{134}\)

Unlike most Americans of Armenian descent, Armeniano does not possess typical Indo-European physical characteristics. Under the recent Supreme Court holdings, however, a plaintiff's possession of physically identifiable characteristics, or a lack thereof, is irrelevant.\(^\text{135}\) Therefore, although the plaintiff does not possess physical characteristics which clearly manifest his Armenian ancestry, he cannot be denied an opportunity to present his claims.

Another essential requirement to the pleading of a sustainable section 1981 claim is that the plaintiff must allege that the defendant's animus was directed toward a group that Congress intended to protect when it passed the statute.\(^\text{136}\) This requirement raises the question as to whether Congress must have specifically mentioned the group of which the plaintiff is a member as protected when it passed the statute. The answer to this question is obviously no. Armeniano should be protected under section 1981 even though he is a member of an identifiable group which was not mentioned in the legislative history cited by the Court.\(^\text{137}\) Obviously, the late nineteenth century legislatures could not have possibly listed each and every group that they considered to be distinctively racial. Congress did, however, specifically mention many different ethnic groups.\(^\text{138}\) The groups listed should be considered as a list of examples, rather than an exhaustive list. Thus, one could argue by analogy that since Congress considered Prussians to be racially distinctive, it would have considered those from the neighboring country of Armenia to be equally distinctive.

\(^\text{134}\). See supra notes 127-28 and accompanying text.
\(^\text{135}\). See supra note 35 and accompanying text.
\(^\text{137}\). Saint Francis, 107 S. Ct. at 2027.
\(^\text{138}\). Id. The Court noted that the legislative history of section 1981 had its source in both the Civil Rights Act of 1866 and the Voting Rights Act of 1870. The debates regarding these Acts specifically referred to Scandinavian, Chinese, Latin, Spanish, Anglo-Saxon, Jewish, Black, Mongolian, and Gypsy races. Id.
Alternatively, a plaintiff could argue that congressional allusion to his specific classification is not essential. This argument is supported by the result in *Saint Francis* in which the Court held that an Arab-American satisfied the test even though a specific citation to such a classification could not be found in the legislative history.\(^{139}\)

Finally, plaintiffs must allege that the defendants were "motivated by a racial animus."\(^{140}\) This requirement ties into the general section 1981 requirement that the plaintiff must prove the defendant's intent to discriminate.\(^{141}\) The inquiry into intent will require the court to probe into the defendant's mind. However, the defendant's personal definition of race is irrelevant. Rather, definitions of the term race are to be derived only from the notions expressed by the enacting Congress.\(^{142}\) This understanding is clearly supported by the Court's strict adherence to legislative history.

Once the plaintiff has met the requirements set forth in *Saint Francis* and *Shaare Tefila*, he should be entitled to have his claim adjudicated before an appropriate court. If Armeniano can prove that he was subjected to intentional discrimination based on the fact that he was born an Armenian, he should be entitled to recovery. He is clearly able to classify himself within an identifiable group which the enacting Congress sought to protect. Further, the plaintiff's lack of Armenian characteristics should not preclude him from recovery. Based upon the statements made by his employer, he should be able to easily prove that the employer's actions were motivated by a racial animus.

Applying the legal framework provided in *Saint Francis* and *Shaare Tefila* to a hypothetical fact pattern, this Note identified and dismissed potential problems which may have been encountered by the lower courts. The analysis encourages courts to apply the identifiable group and the legislative intent requirements loosely. Additionally, the analysis suggests that the racial animus requirement should be viewed objectively in light of the appropriate legislative history.

\(^{139}\) *See supra* notes 16-17 and accompanying text.

\(^{140}\) *Shaare Tefila*, 107 S. Ct. at 2021.

\(^{141}\) *See supra* note 68 and accompanying text.

\(^{142}\) *See supra* notes 27-33 and accompanying text.
Conclusion

In St. Francis College v. Al-Khazraji and Shaare Tefila Congregation v. Cobb, the Supreme Court has finally laid to rest a great deal of confusion that has plagued the lower federal courts for some time. A careful examination of these decisions has revealed that they are not only just, but that they are also well-reasoned and logical in their interpretation of the rights protected by sections 1981 and 1982.

In an effort to add a clear meaning to the term “race,” the Court turned to the notions expressed by Congress when the statutes’ precursor was enacted. Through its reliance upon legislative history, the Court legitimized its decision to incorporate individuals who are victims of ethnic origin discrimination within the reach of sections 1981 and 1982. In doing so, the Court ended the debate as to the source of the meaning of “race.”

The Court did not completely end the debate, however, in that it did not provide a precise set of guidelines for the application of its rule. Although the Court eliminated the dispute as to the source of the meaning of “race,” it arguably replaced one vague term with a series of equally vague phrases, namely “identifiable classes,” “racial animus,” and “ethnic origin.” In this author’s view, these phrases should not result in the same type of confusion that previously confronted the lower courts. Rather, these terms should impose a very low burden upon potential plaintiffs. Thus, the lower courts should not attempt to precisely define these terms in a manner which places any significant burden upon plaintiffs.

Additionally, a showing of a racial animus need not hinge on the defendant’s particular subjective notions of race. Rather, whether an animus was racial or not depends upon whether it was directed toward a group the enacting Congress intended to protect. Whether the enacting Congress intended to protect a group should not be limited by those ethnic groups actually mentioned in the legislative history. The groups Congress specifically mentioned are not to be construed as an exhaustive list but rather as a list of examples to which a plaintiff may analogize.

Viewed in light of this proposed application, the decisions rendered in Saint Francis and Shaare Tefila have created a wide

144. See supra notes 127-42 and accompanying text.
range of potential plaintiffs who were previously unable to obtain access to judicial adjudication. The expansions under these particular statutes are highly significant when compared to the limits of the pre-existing statutory protections. Nevertheless, plaintiffs will still encounter the inherent limitation of proving intent in their battle to seek redress for injuries resulting from bigotry.

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145. See supra notes 68-126 and accompanying text.
146. The traditional scope of § 1981's protection has been significantly limited by Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), which was issued after this Note went to press. Under Patterson, the only discriminatory conduct that is actionable under § 1981 is conduct at the initial formation of the contract and conduct that impairs the right to enforce contractual obligations through legal process.