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Redefining Race in Saint Francis College v. Al-Khazraji and Shaare Tefila Congregation v. Cobb: Using Dictionaries Instead of the Thirteenth Amendment

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Redefining Race in *Saint Francis College v. Al-Khazraji* and *Shaare Tefila Congregation v. Cobb*: Using Dictionaries Instead of the Thirteenth Amendment

I. INTRODUCTION

In 1987 the Supreme Court unanimously extended the protections of 42 U.S.C. sections 1981[1] and 1982[2] to ethnic groups,[3] citing *Runyon v. McCrary*.[4] *Runyon* reinterpreted the legislative history of section 1981 to create a cause of action for blacks against both public and private discrimination in the making and enforcement of contracts.[5] One year later a sharply divided Supreme Court ordered the parties in *Patterson v. McLean Credit Union*,[6] a case in which the Court already had heard argument, to brief the Court anew and make arguments on an issue that none of the parties had raised—whether to overrule *Runyon v. McCrary*.[7]

The Supreme Court's request reminded the legal community that the constitutional authority for *Runyon* is and always has been in dispute.[8] Yet Justice White, who with Justice Rehnquist wrote the vehement and widely cited dissent to *Runyon*, authored the unanimous opinions for the Court in *Saint Francis College v. Al-Khazraji*[9] and *Shaare Tefila Congregation v. Cobb*,[10] which permit ethnic groups to employ sections 1981 and 1982 in order to reach private acts of discrimination. The justices of the Supreme Court accomplished this expansion of *Runyon* without examining precedent or establishing a constitutional foundation. Rather, the Court defined the term "race" to include ethnic

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1. 42 U.S.C. § 1981 (1982). Section 1981 reads:

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

Id.

2. *Id.* § 1982. Section 1982 reads:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Id.

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

4. 427 U.S. 160 (1976).

5. *Id.*

6. 108 S. Ct. 1419 (1988), *appeal from* 805 F.2d 1143 (4th Cir. 1986).

7. *Patterson*, 108 S. Ct. at 1420. *See generally* N.Y. Times, Apr. 26, 1988, at A1, col. 6.

8. *See, e.g., Runyon*, 427 U.S. at 192; Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343, 1349 (5th Cir. 1987).

9. 107 S. Ct. at 2022.

10. 107 S. Ct. at 2019. In *Shaare Tefila Congregation* the Court transposed the reasoning of *Saint Francis College* to § 1981 based on its prior conclusion that §§ 1981 and 1982 derive from the same source. In doing so, the Court unpliedly reaffirmed Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), in which the Court recognized a cause of action for blacks against private discrimination in the purchase or sale of property.

minorities for the purposes of sections 1981 and 1982.[11]

The American media overwhelmingly endorsed the Supreme Court's decision,[12] believing it to be a significant expansion of civil rights[13]—a reflection of the modern belief that all ethnic minorities equally deserve freedom from discrimination. The *New York Times* declared that the decisions created an opportunity for many Americans[14] to fight ethnic discrimination.[15] If the decisions, however, are as significant an expansion of civil rights as the press perceived them to be, the Supreme Court should have based its analysis on the United States Constitution.

Part II of this Note traces the Supreme Court's purported sources of authority and finds that they either are inappropriate or taken out of context. Part III posits that any constitutional support must emanate from the thirteenth amendment, the source of the authority to reach private discrimination under sections 1981 and 1982. After tracing the evolution of sections 1981 and 1982 since the enactment of the thirteenth amendment and confronting the ambiguities of the legislative history, Part IV contends that the Supreme Court circumvented the potential consequences of enlarging the scope of the thirteenth amendment to reach private ethnic discrimination. Part V considers why the Court retreated from a constitutional analysis of the scope of the thirteenth amendment in 1987, when it appears ready to engage in this constitutional analysis in 1988. Part VI concludes that the Court may restrict the scope of sections 1981 and 1982 to reach only discrimination by the state consistent with a logical interpretation of the legislative

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11. *See Saint Francis College*, 107 S. Ct. at 2026 n.4. *Webster's New Twentieth Century Dictionary of the English Language* defines race as:

> [A]ny of the major biological divisions of mankind, distinguished by color and texture of hair, color of skin and eyes, stature, bodily proportions, etc.; many ethnologists now consider that there are only three primary divisions, the Caucasian (loosely, *white race*), Negroid (loosely, *black race*), and Mongoloid (loosely, *yellow race*), each with various subdivisions. . . .

J. McKechnie, Webster's New Twentieth Century Dictionary of the English Language 1484 (2d ed. 1964).

12. *See, e.g.*, Wash. Post, May 19, 1987, at 1, col. 1; N.Y. Times, May 19, 1987, at A1, col. 3.

13. *See, e.g.*, M. Schwartz & E. Kaufman, *Public Interest Litigation: 2 "Race" Cases Decided by U.S. Supreme Court*, N.Y.L.J., July 21, 1987, at 1, col. 1. One commentator stated:

> While the two decisions certainly carry tremendous symbolic weight, extending as they do the protection of nineteenth century civil rights laws to twentieth-century forms of discrimination, they offer much more than psychological comfort to victims of intentional discrimination. In several important respects the 1866 provisions provide coverage and remedies not found under modern civil rights provisions.

Id. at 5, col. 3; *see also id.* (providing a point by point comparison of the protections of Title VII of the Civil Rights Act of 1964 with the protections of §§ 1981 and 1982).

14. N.Y. Times, May 30, 1987, at A30, col. 1 (editorial page). The newspaper noted that "nearly all Americans belong to a national or ethnic group." *Id.*

15. *Id.*

history of the thirteenth amendment.

II. THE 1987 CASES

A. *The Supreme Court's Analysis*

1. *Saint Francis College v. Al-Khazraji*

In *Saint Francis College* a United States citizen born in Iraq brought suit against a private college that had denied him tenure.[16] Suing on the basis of 42 U.S.C. section 1981,[17] Al-Khazraji alleged that the college intentionally had discriminated against him because of his Arabian "race." The district court held that claims of discrimination based on ethnicity were not permissible under section 1981 and, therefore, granted summary judgment for the college.[18] The Third Circuit reversed and remanded, holding that section 1981 encompasses claims of racial discrimination made by ethnic groups.[19]

The Supreme Court began its analysis in *Saint Francis College* by referring to *Runyon*. This unobtrusive citation to *Runyon* was the sole reference to the controversial line of cases through which the Court had resurrected and reinterpreted section 1981 to forbid all intentional racial discrimination in the making of public and private contracts.[20]

Because of the "common popular understanding"[21] that Arabs as well as the students and faculty of the defendant college are members of the Caucasian race, the Supreme Court had to confront whether "racial" discrimination could encompass claims brought by one Caucasian against another Caucasian. The Court answered affirmatively by defining "race" to include ethnic groups[22]—a definition contrary to the modern concept of race.[23] The Court thus circumvented a substantive reevaluation of its prior interpretation of section 1981.

Attempting to justify its definition, the Supreme Court emphasized the transitory nature of the concept of race.[24] In a footnote, the Court noted that some modern scientists have attacked the twentieth century limitation of race to Caucasian, Mongoloid, and Negroid delineations.[25]

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16. 107 S. Ct. at 2024.
17. See *supra* note 2.
18. Al-Khazraji v. Saint Francis College, 523 F. Supp. 386 (W.D. Pa. 1986).
19. Al-Khazraji v. Saint Francis College, 784 F.2d 505, 517 (3rd Cir. 1986) (defining race as "genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*").
20. *See* Runyon v. McCrary, 427 U.S. 160 (1976).
21. *Saint Francis College*, 107 S. Ct. at 2026 n.4.
22. *Id.*
23. *See supra* note 11.
24. *Saint Francis College*, 107 S. Ct. at 2026 n.4.
25. *Id.*

These scientists argue that racial classification should be predominantly sociopolitical in nature rather than biologically based.[26] Recognizing the possibility that the concept of race may have different meanings at different times,[27] the Court declared its intention to use the nineteenth century concept of race to discern the types of groups that Congress had intended to protect under the original version of section 1981.[28]

The Supreme Court consulted dictionaries from the mid-nineteenth century.[29] For example, the Court cited the 1887 edition of Webster's *Dictionary of the English Language*,[30] which defined race as: " 'The descendants of a common ancestor; a family, tribe, people or nation, believed or presumed to belong to the same stock.' "[31] Other mid-nineteenth century dictionaries confirmed this definition.[32] The Court found the characterization of race as the stock of the individual analogous to the modern concept of an ethnic group.

The Supreme Court then searched nineteenth century encyclopedias for specific examples of various "races."[33] Sources such as the 1858 *Encyclopedia Americana* referred to Finns, Hebrews, Greeks, and Russians as "races."[34] Relying on these examples, the Court fragmented the unitary concept of the Caucasian race into countless ethnic subgroups.

Finally, the Court sought to imbue its analysis with an aura of legislative intent. The opinion isolated one-word excerpts from the voluminous legislative histories of the Civil Rights Act of 1866 and the Voting Rights Act of 1870[35] in which congressmen had referred to ethnic groups and nationalities as races. The Supreme Court reasoned that statements regarding "Chinese," "Mexican," "Jewish," and

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26. *Id.*

27. By rejecting the subjective test employed by some of the lower courts—that discrimination is racial in character if the person discriminating against another intends it to be so—the Court refused to recognize the logical extension of the sociopolitical concept of race—that *different people* may have different understandings at different times.

28. *Id.* at 2026-27. The Court in *Runyon* stated that the sources of § 1981 are § 1 of the Civil Rights Act of 1866 and § 16 of the Voting Rights Act of 1870. *Runyon*, 427 U.S. at 168 n.8.

29. *Saint Francis College*, 107 S. Ct. at 2027.

30. N. WEBSTER, DICTIONARY OF THE ENGLISH LANGUAGE (W. Wheeler ed. 1887).

31. *Saint Francis College*, 107 S. Ct. at 2027 (quoting N. WEBSTER, *supra* note 30).

32. *Id.* Other sources considered by the Court included N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 666 (N.Y. 1830), and J. DONALD, CHAMBER'S ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 415 (1871).

33. *Id.*

34. *Id.*

35. *Id.* at 2028 (quoting CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870)). For example, the Court quoted one congressman's statement that the Congress must not permit any state to "discriminate against the immigrant from China and in favor of the immigrant from Prussia, nor against the immigrant from France and in favor of the immigrant from Ireland." *Id.* What the Court failed to note is that the Voting Rights Act of 1870 is based upon the fourteenth amendment and, therefore under a constitutionally-based analysis, cannot be the basis for reaching private acts of discrimination, whether racial or ethnic. *See infra* notes 85-89 and accompanying text.

"Mongolian" races evidenced a legislative intent to protect ethnic groups from discrimination.[36]

The Court concluded that these three sources—dictionaries, encyclopedias, and out-of-context quotes—constituted the relevant "legislative history of section 1981."[37] Based on this conclusion, the Supreme Court decided that Congress in 1866 had intended to protect from intentional discrimination those classes of persons identifiable "solely because of their ancestry or ethnic characteristics."[38] By implicitly deeming the twentieth century concept of race irrelevant, the opinion made section 1981 available for use by any identifiable ethnic group against another ethnic group.[39]

2. *Shaare Tefila Congregation v. Cobb*

In *Shaare Tefila Congregation v. Cobb*[40] the Court transposed its definition of race developed in the context of section 1981 to section 1982.[41] In *Shaare Tefila Congregation* a Jewish congregation, individually and on behalf of its members, brought a section 1982 claim against the white, non-Jewish vandals who had spraypainted the congregation's synagogue with swastikas and anti-Semitic phrases and slogans.[42] Because the Court has held that section 1982 also derives from the Civil Rights Act of 1866,[43] the Court declared that the protections of section 1982 were available under the same test as the protections of section 1981: whether, at the time Congress enacted the section, the group alleging discrimination was of the type that Congress had intended to protect.[44] Applying this redefinition, the Court permitted the claim by the Jewish-Caucasian congregation against the Caucasian vandals.[45]

B. The Analytical Facade

The analysis in *Saint Francis College* appears to be logical and is easy to follow. The analysis, however, is superficial. The Court's use of

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

37. *Id.*

38. *Id.*

39. *Id.* at 2028-29. Justice Brennan concurred to point out that the line between claims based on ethnicity and claims based on national origin "is not a bright one." *Id.* at 2028 (Brennan, J., concurring). Brennan concluded that courts should permit plaintiffs to use § 1981 even if their claims were based in part upon national origin discrimination. At present courts may withhold the use of § 1981 only when plaintiffs base their claims solely upon national origin discrimination. *Id.*

40. 107 S. Ct. 2019 (1987).

41. *See supra* notes 1-2 and accompanying text.

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

43. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (holding that § 1982 derived from § 1 of the Civil Rights Act of 1866).

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

45. *Id.* at 2019.

nineteenth century dictionaries and encyclopedias is contrived because those definitions undoubtedly were rooted in nineteenth century bigotry and were not a product of twentieth century scientific thought.[46] Moreover, the Court's decision to integrate its literal "legislative history" into a prior interpretation of sections 1981 and 1982 rather than to re-evaluate the substantive basis of sections 1981 and 1982's authority to reach ethnic discrimination raises questions regarding the Court's motive.

Labelling the one-word excerpts from the *Congressional Globe* as "legislative history" without placing the quotations in context dilutes the Court's proposition that these groups are of the type that Congress intended to protect. When placed in context, the quotations do not support, and in fact undermine, the Court's contention.[47] Most of the references cited by the Court were extracted from blatant declarations of bigotry: "The domination of these colonists of the Spanish race . . . was lost only when the gangrene of miscegenation had wasted their energies, . . . then degeneracy, feebleness, and incompetency to rule came over them."[48] These excerpts merely reflect bigotry; they do not reflect the intention of Congress to protect ethnic groups.

C. Precedent

1. The Cited Precedent

In *Saint Francis College* the Supreme Court tersely cited *Runyon* as if the Court had decided already, in *Runyon* and other precedent, that sections 1981 and 1982 apply to all racial discrimination. Despite the universal language employed by the Court in cases such as *Runyon* and *Jones*, the Court before *Saint Francis College* never had faced a claim of racial discrimination that fell outside of the Civil War contours of the thirteenth amendment—the relationship between blacks and whites.

All of the cases in which the Supreme Court has stated that the thirteenth amendment authorizes Congress to legislate regarding all

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46. *See generally* S. GOULD, MISMEASURE OF MAN (1981).

47. For example, the Court quoted Representative Kasson making reference to the Latin race. *Saint Francis*, 107 S. Ct. at 2027. Representative Kasson actually referred to the Latin race as follows:

> [L]ook at those countries where mixed bloods have controlled the Government by universal suffrage. Look at Mexico and the South American republics where revolutions are as frequent almost as the revolutions of the seasons. Look at the Latin races of the world, and where have they ever succeeded in establishing a permanent and reliable republican Government controlled by the will of the people?

CONG. GLOBE, 39th Cong., 1st Sess. 238 (1866) (remarks of Rep. Kasson).

48. CONG. GLOBE, 39th Cong., 1st Sess. 251 (1866) (remarks of Sen. Davis).

races have implicated tensions between blacks and whites. *Jones* and *Runyon*, for example, involved claims by blacks against whites. In *McDonald v. Sante Fe Trail Transportation Co.*[49] the Court permitted a white man to bring a section 1981 claim against his white employer, charging that the employer had discriminated against him in favor of a black man—a claim also within the context of black versus white tensions.

2. The Precedent Not Cited

Saint Francis College and *Shaare Tefila Congregation* involved tensions between whites. In light of the Civil War context in which sections 1981 and 1982 arose, the Court's presumption that the authority for this claim exists is unwarranted. Prior case law does not necessarily provide authority for the presumption.

McDonald enunciates the Court's broadest interpretation of the reach of the civil rights statutes. The *McDonald* Court considered the applicability of section 1981 to racial discrimination in private employment against whites as a result of favoritism toward blacks.[50] The Court extended section 1981 to protect white claimants based on statutory reinterpretation, declaring that the phrase " 'as is enjoyed by white citizens' " within the text of section 1981 emphasized the racial character of the protected rights.[51] The Court relegated to a footnote, however, the authority of the thirteenth amendment to permit claims by whites.[52]

In that footnote the *McDonald* Court cited two law review articles[53] and then declared that the Court previously had "ratified" Congress' authority to legislate regarding all racial discrimination under the thirteenth amendment.[54] To support the purported "ratification," the Court cited *Hodges v. United States* and *Jones*.[55] *Hodges* does support

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49. 427 U.S. 273 (1976).

50. *Id.* at 287.

51. *Id.* (quoting Georgia v. Rachel, 384 U.S. 780, 791 (1966)).

52. *Id.* at 288 n.18.

53. *Id.* The first law review cited in the footnote was Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1 (1974) (a series of articles, one at the heginning of every hook in the volume). Buchanan argued that the Court should recoguize a hadge of slavery to be any act motivated by arbitrary class prejudice. *Id.* at 1072. He based his theory upon the fact that arbitrary class prejudice was exactly the sort of treatment blacks had been forced to endure. *Id.* at 1073. Buchanan additionally argued that these badges could be worn on the basis of race, color, religion, sex, national origin, or alienage, *id.*, a theory that the Supreme Court and other courts certainly have not adopted to date. The Court's footnote also cited Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

54. *McDonald*, 427 U.S. at 288 n.18.

55. *Id.* (citing Hodges v. United States, 203 U.S. 1, 16-17 (1906), and *Jones*, 392 U.S. at 441 n.78).

the Court's claim that the thirteenth amendment reaches all races, but only in a far more restrictive context. The *Hodges* Court stated that the thirteenth amendment protects all races from being entirely subject to the will of another.[56]

The *Hodges* Court relied on the *Slaughter-House Cases* in which an earlier Supreme Court had declared that Congress has the authority under the thirteenth amendment to stamp out any new form of slavery, involving any race of persons, that might arise, listing as examples Mexican peonage and the Chinese coolie labor system.[57] The *Hodges* Court's conception of the breadth of legislative power under the thirteenth amendment is far more restrictive than that of the *McDonald* Court. The *Hodges* Court limited the thirteenth amendment's scope to formal institutions similar to the American institution of slavery. This view that the thirteenth amendment protects all races in the institutional context of slavery does not compel the conclusion that the amendment authorizes Congress to legislate to prohibit all racial or ethnic discrimination. Moreover, *Jones* overruled *Hodges*.[58]

The *McDonald* Court additionally relied on a footnote in *Jones* to support the "ratification" theory.[59] The *Jones* Court in turn had relied on the *Civil Rights Cases* of 1883. In that footnote the *Jones* Court paraphrased the proposition conceded by the *Civil Rights Cases* Court that Congress could secure "to all citizens, of every race and color" certain property rights, to find that the enforcement clause of the thirteenth amendment authorizes legislation prohibiting private racial barriers to property rights.[60] The *Civil Rights Cases*, however, held that private refusals to accommodate blacks at inns, on public conveyances, or in public places of amusement do not create badges of servitude and consequently are not prohibited by the thirteenth amendment.[61]

Tracing the precedent allegedly supporting the Court's broad pronouncements in *McDonald* reveals the lack of substantive decisionmaking on which *Shaare Tefila Congregation* and *Saint Francis College* are based. The Court in *Saint Francis College* and *Shaare Tefila Congregation* should have addressed squarely whether the thirteenth amendment can reach private acts of discrimination based on ethnicity.

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56. *Hodges*, 203 U.S. at 17.

57. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The Court stated that "[i]f Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, th[e thirteenth] amendment may safely be trusted to make it void." *Id.* at 72.

58. *Jones*, 392 U.S. at 441 n.78.

59. *McDonald*, 427 U.S. at 288 n.18 (citing *Jones*, 392 U.S. at 441 n.78).

60. *Jones*, 392 U.S. at 441 n.78 (citing The Civil Rights Cases, 109 U.S. 1 (1883)).

61. *Civil Rights Cases*, 109 U.S. at 1.

III. Constitutional and Statutory Support for Sections 1981 and 1982

A. The Thirteenth Amendment

Because the Supreme Court in *Saint Francis College* purported to rely on legislative intent, and because the line of cases under which the Court extended the protections of sections 1981 and 1982 rests upon the Court's interpretation of the legislative history of the thirteenth amendment and the Civil Rights Act of 1866, investigation of the Court's lack of analysis must begin with the substance of the legislative history—the debates surrounding the adoption of the thirteenth amendment and the passage of the 1866 Act. The congressional debates reveal a complexity of motive and intent not apparent in the majority's analysis.

Many congressmen voted for the thirteenth amendment for reasons far removed from any concern for the welfare of blacks. The preservation of the Union was a primary reason for supporting the amendment.[62] The war was over; the institution of slavery had been defeated,[63] and the thirteenth amendment was nothing more than a formal interment of the institution. Northerners and Southerners abhorred the institution, not for its effect on blacks, but rather for the destruction slavery had inflicted upon whites, including a devastating war, the death of loved ones, and the loss of free speech.[64]

Other congressmen sought to ensure civil rights for all men who had been subject to the bonds of slavery. The legislative debates indicate that these congressmen intended to protect former slaves, Northern freedmen,[65] Northern whites who had been treated unfairly in the South while campaigning against the institution of slavery,[66] persons who in the future might be subject to servitude analogous to slavery,[67] and loyal Southern whites who had been mistreated within the South.[68]

Some congressmen, including Senator Trumbull, the leading spokesman for the thirteenth amendment,[69] sought to ensure that all

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62. *See, e.g.*, Cong. Globe, 38th Cong., 2d Sess. 258 (1865) (remarks of Sen. Rollins of Missouri).

63. *See* tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 Calif. L. Rev. 171, 177 (1951).

64. *See, e.g.*, Cong. Globe, 38th Cong., 2d Sess. 237 (1865) (remarks of Sen. Smith of Kentucky).

65. *See* Buchanan, *supra* note 53, at 11; tenBroek, *supra* note 63, at 179.

66. tenBroek, *supra* note 63, at 177.

67. *See Slaughter-House Cases*, 83 U.S. at 72.

68. *See* Cong. Globe, 39th Cong., 1st Sess. 438 (1866). Southerners were "reduced from men almost to chattels because of their fidelity to our flag, to our Constitution, and to this country." *Id.* (remarks of Sen. Howe).

69. *See* tenBroek, *supra* note 63, at 190.

men in the United States would be entitled to equal civil rights. Reacting against the institution of slavery, these men responded by universalizing their beliefs.[70]

Each of the motivations holds different ramifications for the historical interpretation of the scope of the thirteenth amendment. The first view, that the amendment abolished the institution of slavery and its immediate incidents, suggests that Congress could legislate under the thirteenth amendment only to protect blacks and other persons immediately affected by public or private acts of enslavement. The second view, only slightly broader than the first view, would permit Congress to protect any person, regardless of color, from the closely related incidents of the formal institution of slavery, either public or private.[71] The third, expansive view of the thirteenth amendment apparently would enable Congress to make the amendment's protections available to any man, of any color, who had been denied statutorily granted civil rights. The modern Court has employed this third motivation as the thirteenth amendment's authorization to reach private discrimination. Having taken this step, the Court could have interpreted the references to "all men" as the basis for reaching ethnic discrimination. Even under this broad view, however, the legislative history is ambiguous regarding whether the protections of the thirteenth amendment extend both to private and to state violations.[72]

B. The Civil Rights Act of 1866

In 1866 Congress passed the Civil Rights Act[73] pursuant to the enabling clause of the thirteenth amendment. The Act gave a range of enumerated rights to citizens of every race and color and then distributed enforcement powers to the branches of the federal government.[74] Section one of the 1866 Act[75] creates the right to make and enforce con-

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70. *See* CONG. GLOBE, 38th Cong., 2d Sess. 154 (1865) (remarks of Sen. Davis of New York) (stating that "[n]ature made all men free, and entitled them to equal rights before the law").

71. This view was the one adopted by the Supreme Court in the cases it considered in the years immediately subsequent to the adoption of the thirteenth amendment. *See* Hodges v. United States, 203 U.S. 1 (1906), *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 n.78 (1968); The Civil Rights Cases, 109 U.S. 1, 3 (1883); *Slaughter-House Cases*, 83 U.S. at 72.

72. How to interpret this ambiguity has been a question that has divided the Supreme Court in its modern opinions.

73. Act of April 9, 1866, ch. 31, 14 Stat. 27 (the Civil Rights Act).

74. *Id.*

75. *Id.* § 1, 14 Stat. at 27. Section 1 of the Act reads:

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 bereby 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 servitude, except as a punishment for crime whereof the party shall

tracts, as well as the right "to inherit, purchase, lease, sell, hold, and convey real and personal property."[76] Section two of the Act[77] mandates criminal penalties for infringements on the rights granted under section one by any persons acting "under color of any law, statute, ordinance, regulation, or custom." All citizens were to enjoy these enumerated rights to the same extent permitted to white citizens.[78]

Congress passed the 1866 Act in order to implement the protections of the thirteenth amendment.[79] The immediate need for legislation apparently arose in response to specific deprivations of the civil rights of the freed black men and the failure of the Freedman's Bureau to provide comprehensive relief.[80] Congress, however, expressly cast the statute in universal terms—including language such as "all persons born in the United States" and "of every race and color"—to encompass all citizens, not simply blacks. Consequently, the debate that had surrounded the adoption of the thirteenth amendment resurfaced and intensified, focusing on the ability of the thirteenth amendment to support such expansive legislation.

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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, ordinance, regulation, or custom, to the contrary notwithstanding.

Id.

76. *Id.*

77. *Id.* § 2, 14 Stat. at 27. Section 2 of the Act reads:

And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Id.

78. *Id.* § 1, 14 Stat. at 27.

79. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 387 (1982) (quoting the leading spokesman for the bill, Sen. Trumbull. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866)). Senator Trumbull summarized the paramount aims of his bill in his statement that:

Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. 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, and to carry into effect the [thirteenth] amendment.

Id.

80. *See* tenBroek, *supra* note 63, at 184-85.

C. *The Adoption of the Fourteenth Amendment*

The explicit language of the 1866 Act did not end the debate. Many congressmen continued to protest that the protections of the 1866 Act exceeded the scope of protection under the thirteenth amendment. They argued that only a constitutional amendment could authorize the broad protections set forth in the 1866 Act.[81] The fourteenth amendment was enacted in part because of the persistence of this debate.[82]

The themes of the debate remained unchanged while the doubts regarding the ability of the thirteenth amendment to support such legislation grew. The congressmen who had voted for the thirteenth amendment in order to end the devastations of the Civil War again argued that the thirteenth amendment merely had authorized Congress to abolish the formal institution of slavery.[83] Under this pressure, even those congressmen who, in principle, might have supported the grant of civil rights under the 1866 Act began to doubt the constitutional authority of the thirteenth amendment to provide for the Act's broad protections.

Other congressmen, despite their undisturbed belief that the thirteenth amendment was sufficiently universal in scope to authorize such legislation, recognized the vulnerability of the legislation to a more literal construction. These congressmen sought the adoption of the fourteenth amendment in order to incorporate the protections of the 1866 Act into the Constitution.[84] Because these congressmen perceived the thirteenth amendment to be capable of supporting such legislation, they believed that the fourteenth amendment's focus on state violations would not limit the scope of the 1866 Act to protections against public discrimination.

Because the fourteenth amendment expressly limits its protections to violations by the State, the legislative history surrounding the adoption of the fourteenth amendment is relevant to acts of private discrimination only to the extent that it sheds light on the sufficiency of the thirteenth amendment to support legislation such as the Civil Rights Act of 1866. Thus, in order to prohibit private ethnic discrimination using legislative intent, the Court must find support in the terms of the 1866 Act, interpreted with regard to the scope of its sole authority—the thirteenth amendment.

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81. *See* Bickel, *supra* note 53, at 11-29.

82. *See id.*

83. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 113, 318, 476, 499, 507, 576, 600-01 (1866).

84. *See* Hurd v. Hodge, 334 U.S. 24, 32-33 (1948) *quoted in General Bldg. Contractors*, 458 U.S. at 384-85.

D. *The Voting Rights Act of 1870*

After the adoption of the fourteenth amendment, Congress passed the Voting Rights Act of 1870.[85] The 1870 Act primarily established voting rights for all citizens, but it also appended three sections unrelated to voting rights. Section sixteen,[86] in part, provided all persons in the United States with the right to make and enforce contracts. Section seventeen[87] declared that violations of section sixteen made under the color of law were criminal. Finally, section eighteen[88] re-enacted the Civil Rights Act of 1866, apparently in response to the debate over the constitutionality of its provisions, and, thus, made sections sixteen and seventeen of the 1870 Act enforceable according to the provisions of the 1866 Act.

According to its legislative history, Congress intended that sections sixteen and seventeen of the 1870 Act provide the same protections for aliens, with the exception of property rights, as Congress had provided for citizens in 1866.[89] As a product of the fourteenth amendment, the

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85. Act of May 31, 1870, ch. 114, 16 Stat. 140 (the Voting Rights Act).

86. *Id.* § 16, 16 Stat. at 144. Section 16 of the 1870 Act reads:

And be it further enacted, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States 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 person 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 none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

Id.

87. *Id.* § 17, 16 Stat. at 144. Section 17 of tbe 1870 Act reads:

And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Id.

88. *Id.* § 18, 16 Stat. at 144. Section 18 of the 1870 Act reads:

And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen bereof sball be enforced according to tbe provisions of said act.

Id.

89. *See* Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1091 (5th Cir.) (*Bhandari I*) (quoting Sen. Stewart of Nevada, the bill's sponsor from CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870)), *rev'd*, 829 F.2d 1343 (5th Cir. 1987) (en banc) (*Bhandari II*). The panel in *Bhandari I* developed its analysis as if it were going to reverse the prior Fifth Circuit precedent, but, in the

protections of the 1870 Act expressly reached only state infringements.

The purpose of the re-enactment of the 1866 Act in section eighteen is distinct from the purpose behind the protections accorded aliens under sections sixteen and seventeen. The re-enactment appears to be a response to the debates over the constitutionality of the 1866 Act. The legislative history is ambiguous, however, regarding whether Congress intended through re-enactment to base the authority for the 1866 Act solely on the fourteenth amendment, or whether Congress intended for the re-enactment merely to be a reaffirmation, thereby leaving it based on the authority of the thirteenth amendment. Basing the 1866 Act solely upon the fourteenth amendment would necessarily limit its protections to incidences of discrimination by the State.

E. Consolidation and Codification

The final point of confusion regarding the statutory histories of sections 1981 and 1982 is their allegedly routine codification in 1874. Faced with an abundance of redundant and disorganized legislation, a late-nineteenth century Congress decided to clean house. Congress authorized three appointed commissioners to consolidate, revise, arrange, and simplify all of the statutes, in whole or in part.[90] As a result of this process, the 1866 Act and sections sixteen, seventeen, and eighteen of the 1870 Act somehow became 42 U.S.C. sections 1981[91] and 1982.[92] Because nothing in the 1870 Act authorized the rights of property, section 1982 necessarily derives from section one of the 1866 Act. Whether deliberately or in error,[93] the commissioners labelled section 1981 "Equal Rights Under the Law," and appended an historical note which stated that the section derived entirely from section sixteen of the 1870 Act. This apparent consolidation of the contractual rights provisions of section one of the 1866 Act with the contractual rights provisions of section sixteen of the 1870 Act would have been a logical decision on the part of the commissioners only if they had interpreted both sections as

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end, the court reluctantly believed itself to be constrained by stare decisis. *Bhandari I*, 808 F.2d at 1105. The opinion in *Bhandari II* relied heavily on the panel's analysis in reversing the circuit's precedent. *Bhandari II*, 829 F.2d at 1345. Consequently, the analysis in the initial opinion is valid and influential. Senator Stewart stated: "the original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens . . . . It extends the operation of the civil rights bill . . . to all persons within the jurisdiction of the United States." *Id.*

90. Act of June 27, 1866, ch. 140, 14 Stat. 74, *amended by* Act of May 4, 1870, ch. 72, 16 Stat. 96.

91. Section 1981 apparently was a consolidation of § 16 of the 1870 Act and § 1 of the 1866 Act.

92. Section 1982 was based § 1 of the 1866 Act.

93. The modern Supreme Court made this observation in *Runyon*, 427 U.S. at 168 n.8.

reaching only state action. In other words, the relevant portion of section one would be subsumed into section sixteen, "all persons" from section sixteen being a larger category than "all citizens" from section one.

If section 1981 is based solely on section sixteen of the 1870 Act, as the contemporary commissioners asserted, and because section sixteen is based solely upon the fourteenth amendment, then section 1981 provides no authority to reach private acts of discrimination. Consequently, in order to employ section 1981 to provide protection against private discrimination, the Supreme Court simply stated that the commissioners erred and that they must have mistakenly assumed that the relevant language in section one of the 1866 Act was redundant in light of the closely parallel language contained in section sixteen of the 1870 Act.[94]

IV. The Supreme Court's Evaluation of the Preceding Legislative and Statutory History

A. *The Majority*

Beginning with *Jones* in 1968, the Supreme Court has interpreted the thirteenth amendment and its legislative history as authorizing Congress to prohibit private racial discrimination. The Court also has stated that Congress affirmatively legislated to prohibit private racial discrimination in the 1866 Act.[95] Other than in dicta, however, the Court has never interpreted the thirteenth amendment, or its legislative history, as granting authority to reach private ethnic discrimination. Neither did the 1987 cases do so; instead, they were based upon historical extrapolation. Evaluating both the majority and dissenting interpretations of the legislative history of sections 1981 and 1982, however, highlights the issues that ought to have been before the Court in 1987. These issues are the ones that will face the Court in 1988.

The Supreme Court's analysis in *Jones*, which revived section 1982 after long years of disuse, forms the analytical core of the Court's subsequent opinions concerning the scope of sections 1981 and 1982. In *Jones* the Court advanced three arguments. First, because the right to purchase, hold, sell, inherit, or lease property can be impaired as easily by private action as it can be by state action, the majority reasoned that the purpose behind the plain and unambiguous language of the statute would not be effectuated if it did not reach private action.[96] Second, the majority declared that section two of the 1866 Act, which provides

94. *Id.*
95. *Jones*, 392 U.S. at 409; *see Runyon*, 427 U.S. at 160.
96. *Jones*, 392 U.S. at 420-22.

criminal sanctions for violations of section one committed under the color of law, would have become superfluous if the Court had interpreted the entire statute to prohibit only state discrimination.[97] Finally, and in the greatest detail, the Court argued that the legislative history of the 1866 Act proved that Congress was concerned with racial discrimination by private parties when it passed the 1866 Act.[98] The majority cited numerous references to instances of private acts of discrimination brought to the attention of the 1866 Congress.[99] For all three of these reasons, the Court determined that Congress must have intended for the statute to reach private acts of discrimination.

Finally, the majority evaluated the language of the thirteenth amendment in order to create a construct under which Congress would have had the constitutional authority to prohibit private racial discrimination.[100] Because the language of the thirteenth amendment so closely reflects its Civil War heritage and, therefore, is potentially restrictive in meaning and scope, the majority equated "badges and incidents of slavery" with modern "burdens and disabilities."[101] The *Runyon* majority used the construct created in *Jones* in order to extend the protections of section 1981 to reach private racial discrimination.[102]

B. The Dissents

Justice Harlan's dissent in *Jones*, and Justices White and Rehnquist's dissent in *Runyon*,[103] argued that Congress had not intended for either section 1981 or section 1982 to reach private racial discrimination.[104] These opinions rebutted the majority's conclusions using the same analytical framework that the majority had used, considering first the literal meaning of the language, then the implications of the structure of the 1866 Act, and finally the legislative history of the thirteenth amendment.

Justices Harlan and White began their analyses by arguing that the

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97. *Id.* at 424-26. The Court argued that Congress would not have legislated a provision that was ineffective when it is read in conjunction with the rest of the statute. *Id.* at 425-26.

98. *Id.* at 427-37.

99. *See id.* at 427-28.

100. *Id.* at 437-43.

101. *Id.* at 441.

102. *Runyon*, 427 U.S. at 179.

103. The majority opinion in the 1987 Fifth Circuit case of Bhandari v. First National Bank of Commerce, 808 F.2d 1082 (5th Cir. 1987) (*Bhandari I*), revived the dissenting arguments in *Jones* and *Runyon*.

104. Justice White in his dissenting opinion in *Runyon*, 427 U.S. at 192, argued that § 1981 was distinguishable from § 1982 in that it was derived from § 16 of the 1870 Act. He did not reargue that the thirteenth amendment did not authorize Congress to legislate to reach private acts of discrimination because he believed that he was constrained by the *Jones* precedent. *See id.* at 193-95 (White, J., dissenting).

majority was misguided in basing their decision on ambiguous language. Justice Harlan declared that the "right" recognized in the 1866 Act need not allude to an absolute right, enforceable against all men, but rather may refer to a right of equal status under the law.[105] Justice White contended that the phrase "as is enjoyed by white citizens" not only makes the protections of the statute racial in character, as the majority had asserted, but also presupposes an external measure of the rights of white citizens.[106] This external measure requires an evaluation of the rights that a white man holds outside the context of the statute in order to determine the rights that all others hold within the terms of the statute.[107] Justice White recoguized that no law requires white men to enter into contracts against their will. Thus, because the external standard against which the rights of all others are measured is private in nature, Justice White concluded that Congress could have intended that the language of the 1866 Act solely protect against state violations.[108]

Justice Harlan's dissent in *Jones* also challenged the majority's conclusion that section two of the 1866 Act, which imposed criminal sanctions for state violations of section one, would become redundant if the Supreme Court were to interpret section one as reaching only state action. Instead, Justice Harlan reasoned that section two was simply an enforcement clause, drafted to provide incentives to comply with the provisions of section one.[109] Interpreted in this way, section two is not redundant, thus refuting the majority's reliance on the structure of the 1866 Act as evidence of the scope of the Act.

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105. *Jones*, 392 U.S. at 453 (Harlan, J., dissenting).

106. *Runyon*, 427 U.S. at 193-95 (White, J., dissenting).

107. *Id.* This same argument was made by the Fifth Circuit in *Bhandari I*. *See Bhandari I*, 808 F.2d at 1092-93.

108. *Runyon*, 427 U.S. at 194 (White, J., dissenting). The majority in *Bhandari I* also advanced this argument. *See Bhandari I*, 808 F.2d at 1092.

109. *Jones*, 392 U.S. at 454 (Harlan, J., dissenting). This argument also was made by the *Bhandari I* majority. *See Bhandari I*, 808 F.2d at 1093. The Fifth Circuit in *Bhandari I* additionally argued that even if § 2, in requiring state action, was narrower in scope than § 1, this conclusion did not mandate the further conclusion tbat § 1 reaches all private conduct. *Id.* at 1094. Instead, the court proposed that Congress may have intended § 1 to reach private violations of state law. *See id.* The court cited in support § 2 of the Civil Rights Act of 1871, now 42 U.S.C. § 1985(3) (1982). *See* 808 F.2d at 1094. In Griffin v. Breckenridge, 403 U.S. 88 (1971) (*quoted in Bhandari I*, 808 F.2d at 1094), the Supreme Court held that Congress intended in § 2 to "provide[] a remedy for deprivations by private conspiracies of equal protection of the laws." *Bhandari I*, 808 F.2d at 1094 (summarizing holding of *Breckenridge*, 403 U.S. at 97). Additionally, the Fifth Circuit quoted the Chairman of the Judiciary Committee who declared in referring to the 1866 Act that the supporters of the bill did not wish to make a general criminal code for the states, which is what would happen if the Act made private violations of state law a criminal offense. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866) (remarks of Mr. Wilson of Iowa, Chairman of the Judiciary Committee)).

Finally, the dissenters addressed the majority's contention that the legislative history of the 1866 Act clearly evidenced Congress' intent to prohibit private discrimination. Just as the majority in *Jones* had cited quotations from the legislative history of the Act to prove that Congress had intended to reach private discrimination, so did Justice Harlan cite numerous quotations to prove that Congress had intended to limit the Act's protections to state action.[110] In addition, Justice Harlan examined the contexts from which the majority's quotations had come and discovered that the quotes were not only ambiguous in meaning, but also equally consistent with his premise that section one reaches only state action.[111]

To avoid conflict with the *Jones* precedent, Justice White attacked the majority's interpretation from another angle. He declared that section 1981 was based solely upon section sixteen of the 1870 Act. Under this interpretation, section 1981 necessarily is based upon the fourteenth amendment and thereby reaches only state action.[112] Citing the reviser's unambiguous note that the basis of section 1981 was section sixteen of the 1870 Act, as well as a confirmatory sidenote labelling the statute "Equal Rights Under the Law," Justice White refused to accept the majority's contention that section 1981 was based upon both section sixteen of the 1870 Act and section one of the 1866 Act.[113]

In addition, Justice White argued that the majority's finding that the basis of section 1981 was both section sixteen of the 1870 Act and section one of the 1866 Act forced a dichotomy upon the statute clearly not within its terms and not intended by Congress.[114] By its terms, section 1981 applies to all persons; the 1866 Act protects only citizens. Consequently, noncitizens could not enjoy the protections of the 1866 Act, but rather would be forced to rely on the 1870 Act which only protects against state action. Basing section 1981 on both section sixteen and section one forces the judicial enforcers of the statute to draw a distinction that the plain language of the statute does not draw.[115] Lower courts have wrestled with this dichotomy, but the Supreme Court has not resolved the issue.[116] Justice White's argument, however, is persuasive; both commentators and courts have commented on the weakness of the majority's analysis in grounding section 1981 on both

110. Specifically, Justice Harlan quoted Senator Trumbull, the bill's leading spokesman. For the full quotes, see *Jones*, 392 U.S. at 459-62 (Harlan, J., dissenting).

111. *Id.* at 461-62.

112. *Runyon*, 427 U.S. at 202 (White, J., dissenting).

113. *See id.* at 205-06.

114. *Id.*

115. *Id.* at 206.

116. *See, e.g., Bhandari I*, 808 F.2d at 1098.

the 1866 and 1870 Acts.[117]

V. Potential Consequences of Addressing Squarely Whether to Expand the Scope of the Thirteenth Amendment

The authorization for the extension of sections 1981 and 1982 to reach ethnic discrimination was one of a number of potential extensions confronting the lower federal courts.[118] By redefining race, rather than attempting to find legislative support for the Court's analysis in *Saint Francis College* and *Shaare Tefila Congregation*, the Supreme Court effectively divorced the issue of ethnic discrimination from other potential extensions of sections 1981 and 1982. The Court's decision in the 1987 cases appears to be a compromise; the decision appeased those justices who did not want to extend the protections of sections 1981 and 1982 further by limiting the interpretive scope of the decisions, but yet pleased those justices who sought to make the provisions of sections 1981 and 1982 equally available to all victims of discrimination by extending the protections of the provisions to include ethnic groups. Concealing the constitutional issues beneath the mound of dictionaries and encyclopedias enabled the Court to avoid sending the signal that it was willing to extend the scope of the thirteenth amendment in the form of sections 1981 and 1982.

The continuing lower court debate over whether section 1981 encompasses claims by resident aliens of private discrimination[119] exemplifies the unresolved issues.[120] In 1974, prior to Justice White's dissent in *Runyon*, the Fifth Circuit held that because section one and section sixteen were coextensive, such claims were cognizable.[121] In 1987, however, the Fifth Circuit en banc reversed itself.[122] Relying on the panel's careful and exhaustive examination of the statutory and legislative history of section 1981, the en banc court declared that because the Supreme Court had erred in creating a cause of action for private discrimination under *Jones* and *Runyon*, it was not obligated to extend

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117. The Fifth Circuit en banc in *Bhandari II* confidently declared that the reasoning of *Jones* and *Runyon* cannot stand of its own force. Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343, 1349 (5th Cir. 1987) (en banc).

118. *See infra* notes 120-30. Other potential extensions of §§ 1981 and 1982 are prohibitions against discrimination on the basis of sex or religion. *See* Buchanan, *supra* note 53, at 1073.

119. The Supreme Court deliberately left the question open in Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 96 n.9 (1973).

120. *See, e.g.*, Espinoza v. Hillwood Square Mut. Assoc., 522 F. Supp. 559, 564 (E.D. Va. 1981) (holding that § 16 is coextensive with § 1 because the 1870 Act extended the operation of the 1860 Act); De Malherbe v. International Union of Elevator Constr., 438 F. Supp. 1121, 1140 (N.D. Cal. 1977) (holding that the legislative history of § 16 is undisputable, that it applies only to state action; the "merger" of the provision into § 1981 cannot change this result).

121. Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974).

122. *Bhandari*, 829 F.2d at 1343.

this flawed reasoning to a new domain.[123] In reaching this conclusion, the Fifth Circuit was forced to analyze the scope of the thirteenth amendment, an analysis that the Supreme Court should have made in *Saint Francis College* and *Shaare Tefila Congregation*.[124]

In fact, the Court in *Saint Francis College* stated, in dicta, that persons with claims of discrimination based on national origin were not within the type of groups that Congress had intended to protect.[125] The Supreme Court apparently drew this distinction between alienage and ethnicity because Congress had passed the 1870 Act specifically in response to discrimination against resident aliens, under the auspices of the fourteenth amendment. Undisputed legislative history forced the Court to maintain this distinction, thus making the availability of sections 1981 and 1982 turn upon the plaintiff's label for his claim. The distinction has become a matter of semantics; for example, a plaintiff can claim that he was discriminated against because he is Arabic rather than because he is from Iran. Focusing on the reason for the difference in semantics highlights the difficulties that the Court would have faced in dealing with the issues comprehensively.

The case presently before the Supreme Court, *Patterson v. McLean Credit Union*,[126] illustrates another unresolved issue—whether a charge of racial harrassment, as opposed to racial discrimination, creates a cognizable claim under section 1981. In *Patterson* the plaintiff charged racial harassment per se and sought to bring her claim under section 1981.[127] The district court, in refusing to submit the claim to the jury,[128] stated that her claim was not cognizable under section 1981. The Fourth Circuit affirmed.[129] The Fourth Circuit reasoned that the contract language of section 1981 cannot support the claim because harrassment, as opposed to discrimination, does not affect the existence of the employment contract directly, but instead merely implicates the terms and conditions of the contract.[130] Although the extension of section 1981 raised in *Patterson* is distinct from the extension of sections 1981 and 1982 accomplished in *Saint Francis College* and *Shaare*

123. *Id.* at 1351-52.

124. Interestingly, while the original panel in *Bhandari I* mentioned that *Saint Francis College* and *Shaare Tefila Congregation* were pending before the Court, *Bhandari I*, 808 F.2d at 1087 n.6, the en banc decision, published four months after the 1987 cases, made absolutely no mention of the cases. *Bhandari II*, 829 F.2d at 1343. Because the lack of substantive analysis in *Saint Francis College* made the cases extremely restrictive, this later omission in *Bhandari II* is not surprising.

125. *See Saint Francis College*, 107 S. Ct. at 2026-28.

126. 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987).

127. *Id.* at 1145.

128. *Id.*

129. *Id.*

130. *Id.*

Tefila Congregation, substantive evaluation of the constitutional basis for the 1987 cases necessarily would have revived the issue now before the Court in its request to consider overruling *Runyon*—whether the authority of section 1981 to reach private discrimination is constitutionally based.

Additionally, claims of private discrimination on the basis of religion and sex have been attempted, and for the most part, have failed in the lower courts.[131] Guidance from the Court concerning its willingness to legitimize further extensions of sections 1981 and 1982 would answer some of the questions that these lower court cases have raised.

VI. CONCLUSION

While purporting to rely on legislative history, the Supreme Court defined race according to nineteenth-century bigotry. If the Supreme Court in fact had employed legislative history in *Saint Francis College* and *Shaare Tefila Congregation*, it would have had to confront the same constitutional issues that it has summoned in *Patterson*.

The nature of the Court's request to the parties in *Patterson* suggests that the Court may re-examine the constitutional basis of section 1981 by relying on legislative intent. In order to remain consistent with the legislative history, the Court is faced with three choices. First, the Court could reject its prior analysis of the derivation of section 1981, and adopt Justice White's determination that this section derives solely from section sixteen of the 1870 Act. Second, based on the strains within the legislative history that restrict the scope of the thirteenth amendment to its Civil War contours, the Court could determine that neither section 1981 nor section 1982 reaches private acts of discrimination. Finally, by adopting the strain of the legislative history that universalizes the thirteenth amendment, the Court could reaffirm that both section 1981 and section 1982 reach private discrimination. Because of the complexity of motive and intent that lay behind the adoption of the thirteenth amendment and the passage of the 1866 Act, the Court's choice of any one of the three interpretations would be reasonably consistent with the legislative history. Yet, the Court must be willing to face the consequences of its choice.

Although a decision to accept the revisers' notation that section 1981 derives solely from section sixteen of the 1870 Act would eliminate the dichotomy between its application to citizens and its application to noncitizens, the decision would create other problems. The choice would create an external dichotomy between the protections afforded

131. For a collection of these cases, see 2 J. COOK & J. SOBIESKI, CIVIL RIGHTS ACTIONS § 5.08 (1983).

the right to contract and the protections afforded the rights of property. Section 1981 only would protect against discrimination by the state, while section 1982 would continue to reach private discrimination. The illogic of this dichotomy would re-emphasize the question whether the revisers in fact had considered section sixteen of the 1870 Act to be co-extensive with section one of the 1866 Act merely because they did not perceive the 1866 Act as capable of reaching private discrimination.

A decision to adopt the interpretation of the legislative history consistent with the language of the thirteenth amendment and its Civil War contours would require the Supreme Court to reject outright the analysis of *Runyon* and *Jones*. This decision would create a consistent, but restrictive, thirteenth amendment analysis. Under this analysis, neither section 1981 nor section 1982 could be used against private discrimination.

A decision to reaffirm the authority of sections 1981 and 1982 to reach private discrimination by relying expressly on the strain in the legislative history universal in conception would carry with it broad implications. Language such as "[n]ature made all men free"[132] could encompass the prohibition of private ethnic discrimination. The breadth of this strain of legislative history, however, does not end with the prohibition of private ethnic discrimination. Adopting natural rights as the underlying premise for sections 1981 and 1982 would open the possibility of further extensions, both of the types of groups that Congress intended to protect and of the types of discrimination against which Congress intended to protect.

Although *Saint Francis College* and *Shaare Tefila Congregation* further extended the protections of sections 1981 and 1982, the manner in which the Supreme Court did so evidences an intent to contain future extensions. It is unlikely, therefore, that the Court in 1988 will choose to adopt the natural rights strain of the legislative history. In addition, adoption of the view that section 1981 derives solely from section sixteen of the 1870 Act is both shortsighted and illogical because of the external dichotomy that it creates. The remaining choice, to recognize the Civil War contours of the thirteenth amendment and, therefore, restrict the broad application of sections 1981 and 1982 to discrimination by the state, would permit the Court to create a logical, consistent analysis, grounded in a reasonable interpretation of the legislative history.

Jennifer Grace Redmond

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132. CONG. GLOBE, 38th Cong., 2d Sess. 154 (1865) (remarks of Sen. Davis of New York).