CIVIL RIGHTS—RACIAL CHARACTER OF SECTION 1981 SHOULD BE SUBJECT TO DYNAMIC INTERPRETATION TO AFFORD PROTECTION AGAINST GROUP DISCRIMINATION—*Ortiz v. Bank of America*, 547 F. Supp. 550 (E.D. Cal. 1982).

The first guarantee of racial equality was authorized in 1865 by the thirteenth amendment to the United States Constitution.[1] 42 U.S.C. § 1981,[2] in its original form,[3] was conceived pursuant to this landmark amendment[4] in order to ensure the freedom of the then recently emancipated black man.[5] This statute provides that all persons must have "full and equal benefit[s] [of all laws] . . . as is enjoyed by white citizens."[6] Although the Supreme Court has held the statute to be racial in character,[7] the precise boundaries of section 1981, particularly with respect to the meaning of race, have been in controversy since the statute's conception.[8]

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[1] U.S. CONST. amend. XIII, § 1 provides: "Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

[2] 42 U.S.C. § 1981 (1976).

[3] Section 1981 was originally part of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (enacted Apr. 9, 1866); *see Ex parte* Virginia, 100 U.S. 339, 344 (1879). The wave of doubt concerning the constitutionality of the Act which ensued soon after its enactment led, in part, to the passage of the fourteenth amendment in 1868. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1328 n.19, 1329 (1952). The Civil Rights Act was then reenacted in 1870 pursuant to the Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144. It appeared in its present form in the 1874 codification of federal law. Although many lower courts at that time held that the rights afforded under the Act would be protected only if state action were involved, the Supreme Court has decided that the Act maintained its original character under the thirteenth amendment. Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976). Hence, the Act protects against individual discriminatory action. *Id. See generally* Gressman, *supra*, at 1328-29.

[4] Ortiz v. Bank of America, 547 F. Supp. 550, 554 (E.D. Cal. 1982); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

[5] Ortiz v. Bank of America, 547 F. Supp. 550, 554 (E.D. Cal. 1982); *cf.* United States v. Cruikshank, 92 U.S. 542, 555 (1875) (Civil Rights Act of 1866 intended to protect citizens of United States from discrimination stemming from race, color, or previous condition of servitude).

[6] 42 U.S.C. § 1981.

[7] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287 (1976); *cf.* CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866) (bill applies to persons of "every race and color") (statement of Sen. Trumbull), *quoted in* Ortiz v. Bank of America, 547 F. Supp. 550 (E.D. Cal. 1982).

[8] *Compare* Scott v. Eversole Mortuary, 522 F.2d 1110, 1113 (9th Cir. 1975) (Indian plaintiffs, as distinct group, may maintain action under § 1981) *with* Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186, 187-88 (D. Md. 1977) (Hispanic plaintiff cannot maintain § 1981 action based on allegation of racial discrimination suffered because of Hispanic background, even though discrimination based on Hispanic origin closely resembles racial discimination).

Illustrative of the modern controversy is the case of *Ortiz v. Bank of America*.[9] Carman R. Ortiz, a woman of Puerto Rican descent, filed a complaint against Bank of America National Trust and Savings Association (Bank of America) in the Superior Court of California, Placer County, on February 2, 1981.[10] Although employed by the bank for seventeen years, Ortiz alleged that she had been denied a promotion and was subsequently fired from her position of clerk because of her national origin and accent.[11] She claimed, *inter alia*,[12] that the discriminatory action taken by her employer violated section 1981.[13]

The action was removed by the defendant to the United States District Court for the Eastern District of California. Defendants then moved to dismiss alleging, in part, that the plaintiff, Ortiz, failed to state a cause of action under section 1981.[14] Specifically, Bank of America contended that the complaint should be dismissed[15] because the scope of section 1981 was only applicable to claims of racial discrimination; therefore, a claim alleging discrimination based on national origin was not encompassed by the statute.[16]

The court denied the defendant's motion to dismiss.[17] It found that construing the complaint in a most favorable light,[18] the plaintiff may be able to support her claim of discrimination based on her

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[9] 547 F. Supp. 550 (E.D. Cal. 1982).

[10] *Id.* at 552 n.2.

[11] *Id.* at 552.

[12] *Id.* In her complaint, Ortiz also claimed that the defendant had violated the CAL. LAB. CODE § 1418(a) (West 1971) (repealed and amended 1977, 1978); CAL. ADMIN. CODE. tit. 8, § 11345 (1976); 42 U.S.C. §§ 2000e-2000e-17 (1976) (Title VII). 547 F. Supp. at 552. She also alleged breach of contract and intentional infliction of emotional distress. *Id.*

[13] *Id.* Section 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind.

42 U.S.C. § 1981.

[14] 547 F. Supp. at 552. The defendant also claimed that the court lacked jurisdiction, that the plaintiff's allegation of emotional distress was barred by the statute of limitations, and that the DOE allegations and plaintiff's claim for compensatory and punitive damages under Title VII and the California Fair Employment and Housing Act should be stricken. *Id.*

[15] *Id.* at 553. Defendant did not, however, define the meaning of race or national origin. *Id.* at 551 n.1.

[16] *Id.* at 553.

[17] *Id.* at 568.

[18] The court explained that it is the Ninth Circuit's position to allow a plaintiff to continue with his case "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Id.* at 552-53 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957); *see also* De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979).

Puerto Rican descent under section 1981.[19] This decision was the product of an extensive analysis of the meaning of the term "race" as contained in the Act. Judge Karlton, presiding over the motion, found that a cause of action under section 1981 exists when the discrimination alleged is based on membership in a group which is perceived as being distinct from "the group which enjoys the broadest rights"[20] in our society, so long as the boundaries of that group are not fixed by sex, age, or religion exclusively.[21]

Judge Karlton explained that the statute's language, while seemingly clear and broad,[22] had been quite obfuscated by case law which suggested that Congress intended to limit the statute's breadth.[23] To ascertain the proper scope of section 1981 the court determined that an independent analysis of the statute's legislative history and subsequent judicial interpretations was indispensible.[24]

Section 1981 was enacted as part of the Civil Rights Act of 1866.[25] This Act was passed to enforce the protections of the thirteenth

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[19] 547 F. Supp. at 568.

[20] *Id.* In a footnote to his decision, Judge Karlton noted that the plaintiff's group "must . . . be one which is distinctive within the implied statutory taxonomy." *Id.* at 568 n.28.

[21] *Id.* at 568.

[22] *Id.* at 553-54. Judge Karlton explained that the statute is worded so as to protect "all persons" and contains no qualifying phrase. He explained that the language of the statute is the most accurate source of its meaning when that language is clear. *Id.* at 553-54 (relying on Smith v. Califano, 597 F.2d 152, 155 (9th Cir. 1979)).

[23] *Id.* at 554 (citing Runyon v. McCrary, 427 U.S. 160, 167 (1976) (section 1981 in no way protects against discrimination based on gender or religion)).

[24] *Id.*

[25] Civil Rights Act of 1866, ch. 31, 14 Stat. 27. Section 1 of the Civil Rights Act of 1866 provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id. § 1, at 27 (emphasis in original); *see* Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976). The Civil Rights Act of 1866 was passed by the Senate on February 2, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). It was passed by the House of Representatives on March 13, 1866. *Id.* at 1367. The bill was vetoed by President Andrew Johnson. *Id.* at 1679-81. Both the House and Senate voted to override the veto and passed the Act. *Id.* at 1861.

amendment[26] and to nullify the Black Codes enacted following the Civil War.[27] Obviously, the era in which the Act was passed, as well as the congressional debates, indicate that the Act was aimed primarily at alleviating the discrimination practiced against the recently freed black man.[28] Judge Karlton repeatedly emphasized, however, that the intent of the bill's framers was to secure equal treatment for *all* people located within the United States and its territories.[29] He in fact found that during the course of the congressional debates over the passing of the Act, the legislators continuously referred to the bill's application to persons of all races and colors.[30] This observation was supported by Judge Karlton through an examination of an amendment to the bill made in 1866.[31] The recommended change, proposed by Representative Wilson as an amendment to the first draft, led to the inclusion of the phrase "as is enjoyed by white citizens."[32] Judge Karlton relied upon comments made by Representative Wilson to

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[26] Runyon v. McCrary, 427 U.S. 160, 167 n.8 (1976). The Act was passed pursuant to Congress' power under § 2 of the thirteenth amendment. *Id.* at 179; Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968). Section 2 reads: "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

[27] 547 F. Supp. at 554. Most of the southern states enacted statutes (Black Codes) which effectively forced recently freed Negroes to work as slaves although their freedom had, in fact, been guaranteed by the Constitution. Gressman, *supra* note 3, at 1325. The Black Codes denied blacks the right to bear arms, the right to travel, and the right to be educated. Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 32, 39 (1980). The southern Negro was, "socially an outcast, industrially a serf, legally a separate and oppressed class." Gressman, *supra* note 3, at 1325 (quoting J. TENBROECK, THE ANTISLAVERY ORIGINS OF THE THIRTEENTH AMENDMENT 163 (1951); *see infra* note 29. Immediately after the thirteenth amendment was passed the need for enforcement legislation was obvious because "[w]idespread atrocities against the free Negroes and their white friends continued in the South." Gressman, *supra* note 3, at 1325.

[28] 547 F. Supp. at 554. President Andrew Johnson, in an official report, stated that the South, through its Black Codes, was intending to maintain the prior slave status of blacks. Comment, *supra* note 27, at 40.

[29] 547 F. Supp. at 554.

[30] *Id.; see* CONG. GLOBE, 39th Cong., 1st Sess. 77 (1866) (statement of Sen. Lane) ("[the former slaves] are free by the constitutional amendment lately enacted and entitled to all privileges and immunities of other free citizens of the United States").

Judge Karlton explained that the bill was introduced by Senator Trumbull of Illinois as a bill "to protect all persons in the United States in their civil rights." 547 F. Supp. at 554 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866)). He further noted that Senator Trumbull referred to the bill as being applicable to "every race and color." *Id.; see* CONG. GLOBE, 39th Cong., 1st Sess. 601 (1866) (remarks of Sen. Hendricks) ("The bill provides, in the first place, that the civil rights of all men, without regard to color, shall be equal").

[31] 547 F. Supp. at 555.

[32] *Id.* Judge Karlton used the words of Representative Wilson to explain: "It was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors." *Id.* (remarks of Rep. Wilson) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 157 (1866)).

conclude that the phrase was incorporated into the bill in order to limit the Act's coverage so that certain groups could not claim protection.[33] The judge concluded that the qualifying phrase should not be read to foster distinctions between race and national origin.[34]

Judge Karlton, however, found that this phrase had been interpreted by the Supreme Court as emphasizing the racial character of the protection afforded.[35] He cited to the decision of *McDonald v. Santa Fe Trail Transportation Co.*[36] wherein the Court interpreted the amendment as an indication that Congress intended the bill to protect against racial discrimination as opposed to discrimination against women and minors.[37] While the *McDonald* Court noted that the statute was not meant only to protect blacks, it failed to further detail what groups do qualify for protection under the Act.[38]

Judge Karlton concluded that the words of section 1981, although initially conceived to protect the emancipated black man,[39] were also passed with the intent to protect all groups (except those based on gender, age, or religion) from discriminatory acts.[40] He then turned to Supreme Court precedent construing the parameters of section 1981. Little insight, however, was revealed concerning the meaning of "race"[41] because the Supreme Court, although confronted with a number of controversies concerning the scope of section 1981,[42] had never heard a case in which the racial status of the claimant was in dispute.[43]

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[33] *Id.*; *see supra* note 32.

[34] 547 F. Supp. at 555. The amendment did not indicate that the bill was meant to protect only black men. *Id.* While this amendment has been interpreted to emphasize the "racial character," *see supra* note 7 and accompanying text; *infra* notes 35-38 and accompanying text, it should be noted that congressional debates concerning the passage of the Act in 1866 made little distinction between race and national origin. Freed slaves were referred to as those of African descent as well as blacks. 547 F. Supp. at 555 n.6. (relying on McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 288 n.19 (1976)).

[35] 547 F. Supp. at 555-56.

[36] 427 U.S. 273 (1976).

[37] *Id.* at 293. The Court held that the amendment was meant to emphasize the racial character of the bill and not to limit its application to nonwhites. *Id.*

[38] *Id.*; *see* Georgia v. Rachel, 384 U.S. 780, 791 (1965) (limiting the scope of the 1866 Act only in terms of racial equality).

[39] *See supra* notes 25-30 and accompanying text.

[40] 547 F. Supp. at 555.

[41] *Id.* at 556.

[42] *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Hodges v. United States, 203 U.S. 1 (1906).

[43] 547 F. Supp. at 556 (citing *McDonald*, 427 U.S. at 287; Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975)); *see, e.g.*, Georgia v. Rachel, 384 U.S. 780, 791-92 (1966) (Court noted that Civil Rights Act of 1866 was intended to extend rights to protect racial equality and that this category of rights is limited, but gave no definition of "race").

The Court held in *McDonald* that section 1981 extends its protection to white persons as well as nonwhites.[44] Through an extensive review of the statute's legislative history, the Court determined that the statute must be construed with regard to the intent of its framers.[45] This intent, it was found, was to extend equal treatment to "all men, without regard to color."[46] The Court, however, stopped short of deciding on a criteria under which claims of discrimination not based solely on the plaintiff's color would be actionable. Similarly, the Court in *Johnson v. Railway Express Agency*[47] stated conclusively that section 1981 provides a remedy for racial discrimination without any further discussion of the scope of such protection.[48]

After scrutinizing these applicable Supreme Court decisions, Judge Karlton focused on a series of cases decided in the Ninth Circuit to aid in defining the term "race" within the statutory context.[49] He found that the Ninth Circuit, although it had been confronted with the issue a number of times, failed to deal adequately with the controversy[50] as none of the cases reviewed by Judge Karlton contained any discussion of the definition of "race" in connection with the scope of section 1981.[51] Judge Karlton explained that the court of appeals repeatedly found ways to fit claims made by those who believed they were the victims of discrimination into the parameters of section 1981 by finding an element of racial discrimination in each case.[52] For example, in *Gonzalez v. Stanford Applied Engineering, Inc.*,[53] the court decided that although the plaintiff, a Mexican-American, alleged discrimination based on national origin in his complaint, such discrimination could be actionable under section 1981.[54] The court reasoned that since Mexican-Americans may have skin color that is not

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[44] 427 U.S. at 296.

[45] *Id.*

[46] *Id.* at 289 n.20 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 601 (remarks of Sen. Hendricks, an opponent to the bill)).

[47] 421 U.S. 454 (1975).

[48] *Id.* at 459-60.

[49] 547 F. Supp. at 557.

[50] *See id.* at 557-58.

[51] *Id.*; *see* Gonzalez v. Stanford Applied Eng'g, Inc., 597 F.2d 1298 (9th Cir. 1979) (Mexican-American permitted cause of action based on complaint alleging national original discrimination); Sethy v. Alameda City Water Dist., 545 F.2d 1157 (9th Cir. 1976) (en banc) (brown-skinned person of East Indian descent has cognizable claim); Scott v. Eversole Mortuary, 522 F.2d 1110, 1113 (9th Cir. 1975) (court in determining that statute prohibits private racial discrimination, allowed Indian plaintiff cause of action).

[52] 547 F. Supp. at 557-58; *see supra* note 51; *see also* Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

[53] 597 F.2d 1298 (9th Cir. 1979).

[54] *Id.* at 1299-1300.

characteristically caucasian, they could maintain an action based on racial discrimination.[55] Since no guidance existed in the Ninth Circuit under which the present case could be decided, the court turned to nonbinding authority from other jurisdictions.

Upon inspection of other jurisdictions, the court found three major approaches which dominated judicial thought on the scope of section 1981. Courts advocating the first approach require that a plaintiff allege he belongs to a racial classification other than white to maintain an action against a white defendant.[56] It then follows that section 1981 provides no protection to a person who claims discrimination based on national origin.[57] Illustrative of this view is *Jones v. United Gas Improvement Corp.*[58] The United States District Court for the Eastern District of Pennsylvania refused to permit Spanish surnamed individuals to join in a claim in which black plaintiffs were seeking relief under section 1981.[59] The statute's origins[60] and its judicial history,[61] concluded the court, showed that section 1981 applied to discrimination based on race or alienage,[62] and therefore, did not prohibit discrimination based "on national origin, religion, sex, or other human characteristics."[63]

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[55] *Id.* at 1300. The court found that the plaintiff suffered discrimination because of his brown skin color. *Id.*

[56] 547 F. Supp. at 560.

[57] *Id.* at 560 & n.17. Some courts in this category require the complaint to allege racial discrimination specifically as a basis for a § 1981 claim. *Id.* at 560 n.17 (citing National Ass'n of Gov't Employees v. Rumsfeld, 413 F. Supp. 1224, 1228 (D.D.C. 1976), *aff'd mem.*, 556 F.2d 76 (D.C. Cir. 1977)). Thus, only claims based on strict racial discrimination are actionable. *Id.* at 560. Courts conclude that when whites allege discrimination by other whites, the claim is not racial, but rather based on national origin, and therefore, not cognizable under § 1981. *Id.; see* Hiduchenko v. Minneapolis Medical & Diagnostic Center, 467 F. Supp. 103, 106 (D. Minn. 1979) (person of Ukranian descent could not be protected from discrimination by caucasian under § 1981); Vera v. Bethlehem Steel Corp., 448 F. Supp. 610, 613 (M.D. Pa. 1978) (although people of Puerto Rican descent are victims of discrimination similar to racial discrimination, it is, in fact, not racial in character and no § 1981 action may therefore be maintained). The *Vera* court, however, never confronted the question of what may be included in the term "race."

[58] 68 F.R.D. 1 (E.D. Pa. 1975).

[59] *Id.* at 10. The court found that the phrase "as is enjoyed by white citizens," which was added to § 1 of the 1866 Act was meant to emphasize the racial character of the Act. *Id.* at 12. The court then, with no discussion of the scope of the term "racial character" except for a statement holding that discrimination based on racial character is treatment which distinguishes the victim from white citizens, found that a Spanish surnamed invididual could not bring a suit based on § 1981. *Id.* at 10-12.

[60] *See supra* note 59.

[61] 68 F.R.D. at 11 (relying upon Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) and Georgia v. Rachel, 384 U.S. 780 (1966)).

[62] 68 F.R.D. at 13.

[63] *Id.* at 14. Because whites, as well as nonwhites, may be subject to discrimination for these characteristics, private discrimination based on these factors is not proscribed by statute. *Id.* at 15.

Judge Karlton found that the reasoning set forth in *United Gas* had been followed by courts advocating this first approach.[64] He criticized this line of reasoning, however, by pointing out that although these courts require a claim to be based on racial discrimination, they never fully define race.[65] In the court's opinion, these cases followed a haphazard method of analyzing a complaint brought under section 1981, which led only to "unarticulated and suppressed" definitions of race.[66] Judge Karlton concluded that judicial decisions were therefore based upon faulty, unsupportable premises.[67]

In contrast, the second approach allows a plaintiff of a certain ethnic group to bring a cause of action based on section 1981 so long as the plaintiff alleges an element of racial discrimination.[68] The complainant then bears the burden of producing evidence to show racial, as opposed to solely ethnic, discrimination.[69] The courts in this second group recognize the difficulty in attempting to distinguish between

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[64] *See* 547 F. Supp. at 560; *see also* Avigliano v. Sumitomo Shoji America, Inc., 473 F. Supp. 506 (S.D.N.Y. 1979), *aff'd in part, modified in part*, 638 F.2d 552 (2d Cir. 1981), *rev'd on other grounds and remanded*, 102 S. Ct. 2374 (1982); *supra* note 57 and accompanying text.

[65] 547 F. Supp. at 560.

[66] *Id.* This method is illustrated by Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977). In *Budinsky*, the district court concluded that Hispanics may claim protection pursuant to § 1981 since they have been traditionally subject to discrimination, but that persons of Slavic or Jewish origins cannot since they are not frequently subject to racial discrimination. *Id.* at 787. This conclusion is specious since the court offered no rationale or basis for its finding. This harsh result is somewhat ameliorated, however, since the court observed that a different result might have been reached had Title VII relief been unavailable. *Id.* at 788-89. One prominent writer, Dr. Thomas Gossett, finds the continued persecution of Jews akin to modern racism. Jews, according to Gossett, were regarded "as loathsome creatures who had bad physical, mental, and moral characteristics which they apparently inherited and passed on to their descendants." T. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 11 (1963).

[67] 547 F. Supp. at 560. Judge Karlton referred to S. MOLNAR, RACES: TYPES & ETHNIC GROUPS 12 (1975) to explain that these faulty notions of the term race are based on contradictory and vague ideas. 547 F. Supp. at 560 n.18. According to Molnar, each person's conception of the word "race" is wrongly assumed to be based on some scientific fact. S. MOLNAR, *supra* at 12; *see* 547 F. Supp. at 560 n.18. Although many courts find that Spanish surnamed individuals have no cause of action under § 1981 based on the judge's particular notion of the meaning of race, many scientists who attempt to classify human beings according to races find Ladino or Hispanics, to be one of the thirty types of racial classifications. 547 F. Supp. at 561 n.18 (relying on C. COON, S. GARN & J. BIRDSELL, RACES: A STUDY OF THE PROBLEM OF RACE FORMATION IN MAN 138 (1950)).

[68] 547 F. Supp. at 561. Courts in this category require plaintiffs to amend complaints alleging national origin discrimination in order to survive a motion for summary judgment. *See* Saad v. Burns Int'l Sec. Servs., 456 F. Supp. 33, 37 (D.D.C. 1978); Apodaca v. General Electric Co., 445 F. Supp. 821, 823-24 (D.N.M. 1978); Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186, 188 (D. Md. 1977).

[69] 547 F. Supp. at 561; *see* Carrillo v. Illinois Bell Tel. Co., 538 F. Supp. 793 (N.D. Ill. 1982) wherein the court, although acknowledging that Hispanics have suffered discrimination closely akin to that suffered by blacks, decided that Hispanics as a group may not maintain an action under § 1981 but that individual Hispanics may allege racial discrimination under the Act based on their nonwhite appearance. *Id.* at 796.

racial and national origin discrimination.[70] For example, in *Bullard v. Omi Georgia, Inc.*,[71] the Fifth Circuit court determined that the differences between national origin and racial discrimination were so discrete that trial evidence would be necessary to decide whether a cause of action under section 1981 was present.[72] The *Bullard* court acknowledged that a case may arise in which the difference between the two types of discrimination are so closely related as to be indistinguishable.[73] While most courts in this second category recognized a distinction between race and national origin discrimination, Judge Karlton noted that none clearly defined the term "race."[74] Accordingly, Judge Karlton concluded that the second approach was as inadequate as the first in delineating any attempt to determine the scope of section 1981.[75]

The third approach which the court analyzed makes no attempt to define race in a technical sense since the courts use the notion of race in a practical manner and repeatedly find no line of demarcation between race and national origin.[76] Such a view abandons all search for a static definition of race and instead permits a cause of action under section 1981 based on national origin as well as race and alienage.[77] In *Manzanares v. Safeway Stores, Inc.*,[78] the Court of

[70] 547 F. Supp. at 561. These courts do, however, recognize that some distinction exists and the plaintiff must meet the burden of proving "racial animus" as the motivating factor for the discrimination. *Id.* (citing Comment, *supra* note 27, at 89).

[71] 640 F.2d 632 (5th Cir. 1981).

[72] *Id.* at 634.

[73] *Id.*

[74] 547 F. Supp. at 561. Although the difficulty of differentiating between race and national origin is recognized by courts in the second category, Judge Karlton found that most of these courts place the burden of proving racial discrimination on the plaintiff. *Id.* at 561-62.

[75] *Id.* at 562.

[76] *Id.* Scientists finding that pigmentation is too variable to be meaningful in defining race have tried to base racial classifications on blood types, skull measurements, and skull shapes. *Id.* at 562 n.19. The court maintained that such data would be irrelevant with respect to § 1981 claims since it would not aid in protecting people against invidious discrimination. *Id.* Judge Karlton then explained that a fourth, even more liberal, category may exist. *Id.* This approach espoused by Judge Kane in LaFore v. Emblem Tape & Label Co., 448 F. Supp. 824 (D. Colo. 1978), finds no need to even address the controversy surrounding the meaning of race. This view, instead, finds any attempt to classify race a futile, confusing exercise. The *LaFore* court found that § 1981 is meant to protect *all* persons from discrimination. *Id.* at 826 (emphasis added). Judge Karlton found that although the *LaFore* court made an important contribution to the controversy surrounding the definition of "race," the decision was too broad, based on the Supreme Court's decision in Runyon v. McCrary, 427 U.S. 160, 167 (1976), wherein the Court held that the scope of § 1981 did not include protection for gender, age, or religious based claims. 547 F. Supp. at 562 n.20.

[77] 547 F. Supp. at 562. Courts within the third category all deal with the racial character found in the statute, yet vary in approach. Some courts look at whether the plaintiff is part of an identifiable group which is distinguishable from white persons while others look only at whether the discrimination is based on racial perception. *Id.*

[78] 593 F.2d 968 (10th Cir. 1979), *cited in* 547 F. Supp. at 563-64.

Appeals for the Tenth Circuit allowed a plaintiff of Mexican-American descent to claim the protection of section 1981 although recognizing that the section was meant to protect against racial discrimination.[79] The court opined that it was not essential for race to be given a technical meaning.[80] It reasoned that prejudice is a product of attitude in a community and that it is often based on a misconception of race.[81] The *Manzanares* court stated: "[D]efendants may be poor anthropologists, but the prejudice is asserted to be directed against plaintiff in contrast to the Anglos. This in our view is sufficient. [This] is the equivalent to the 'all persons' compared to 'white citizens' " discrimination contemplated by § 1981."[82] Thus, Judge Karlton adopted this third theory, finding an "identifiable group"[83] standard to conform to both the modern social realities and the original legislative intent.[84] This dynamic approach has gained significant credibility in the federal courts.[85]

Although a number of cases existed upon which a decision in favor of Ortiz's right to sue could be based, Judge Karlton saw a need to proceed with his analysis.[86] Continued discussion was necessary because his investigation of prior law failed to provide a proper definition or analysis of the term "race" for purposes of the statute.[87]

Judge Karlton maintained that no "immutable category" of race existed.[88] A definition of "race" is only valid when the *reason* for the

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[79] 593 F.2d at 970.

[80] *Id.* The *Manzanares* court reasoned that since § 1981 is designed to afford all persons the rights afforded white citizens, and the statute itself makes no mention of race, national origin, or alienage; the measure is group to group. In the *Manzanares* case, the plaintiff alleged that the group to which he belonged was Mexican-American and his rights should be measured against the group termed "Anglos." *Id.*

[81] *Id.* at 971. The court held that § 1981 is particularly aimed at racial discrimination, but that the term "race" should not have a restrictive definition. *Id.*

[82] *Id.*

[83] 547 F. Supp. at 564. Judge Karlton adopted the "group to group" measure implemented by the *Manzanares* court thereby labeling it an "identifiable group" standard. *Id.* at 564 (relying on *Manzanares*, 593 F.2d at 970).

[84] *Id.* "Thus it extends § 1981's protections to those persons who today are members of groups that, like the then recently freed slaves, are in a position far from equal to that of the majority, historically 'white persons.'" *Id.*

[85] *Id.* at 563-64. This approach was first announced in Budinsky v. Corning Glass Works, 425 F. Supp. 786, 788 (W.D. Pa. 1977) and has since been supported by commentators like Greenfield & Kates, MEXICAN AMERICANS, RACIAL DISCRIMINATION, AND THE CIVIL RIGHTS ACT OF 1866, 63 CAL. L. REV. 662 (1975) and Comment, *supra* note 27, at 89-90.

[86] 547 F. Supp. at 564-65. Judge Karlton explained that although the legislative history and case law suggests that the plaintiff had a cause of action, he saw a need to illustrate why race cannot be given a static, objective meaning. *Id.*

[87] *Id.* at 565.

[88] *Id.* Although no immutable category exists the judge explained that differences in human characteristics provide a basis for the classification. *Id.*

classification is revealed.[89] Classification of race then is necessarily based on the perception of he who is making the categorization.[90] Race, therefore, is not static; rather, " 'history, in the biological as well as the cultural senses, is always in motion.' "[91]

As a result of the foregoing determinations, Judge Karlton found that a definition of "race" is necessary to differentiate it from "national origin."[92] Great difficulties, however, exist in the casting of such a meaning. According to scientific thought, race is a human grouping "which is culturally defined in a given society."[93] Therefore, the meaning of race is closely linked to the geographical and cultural distinctions among people, attributes traditionally associated with national origin.[94] It then follows that no scientific explanation could differentiate race and national origin.[95]

The *Ortiz* court determined that no common meaning of race can be substituted to fulfill the purpose of section 1981.[96] Judge Karlton maintained that racial classifications have shifted over the course of

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[89] *Id.* (relying on C. COON, *supra* note 67, at 140; S. MOLNAR, *supra* note 67, at 13). After a group of scientists developed a list of 30 races, they emphasized that the number of races could be narrowed to 10 or widened to 50. S. MOLNAR, *supra* note 67, at 13. According to Judge Karlton, this demonstrated that race is an evolving notion. 547 F. Supp. at 565; *see* G. SIMPSON & J. YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION (1965). Simpson and Yinger point out that there exists thousands of definitions for the word "race." In the Middle Ages, the nobility of Europe considered themselves a separate race from the common people. *Id.* at 37. Supposedly the nobility was descended from the Germanic ancestors and the commoners were descended from the Celts and Romans. *Id.* Another example of a racial definition is seen in Adolf Hitler's book, *Mein Kampf*, wherein it is stated by Hitler that there exists three categories of human race: the "founders, maintainers, and destroyers of culture—the Aryan stock alone can be considered as representing the first category." *Id.* at 38. In addition to this "mystical" conception of race, the authors point out that there also exists administrative concepts of race established by bureaucratic action, *id.* at 38-39, and biological concepts of race which vary from a traditional view based on skin color to endocrine theories based on the thyroid gland. *Id.* at 39-54; *see also* J. BARZUN, RACE: A STUDY IN SUPERSTITION 1-16 (1965).

[90] 547 F. Supp. at 566. No single element can be used to classify people into racial categories. S. MOLNAR, *supra* note 67, at 95.

[91] 547 F. Supp. at 565 (quoting C. COON, *supra* note 67, at 140).

[92] *Id.* at 565.

[93] *Id.*

[94] *Id.* at 566. "Common territory and point in space" are necessary to determine classifications. *Id.* (quoting S. MOLNAR, *supra* note 27, at 14). Further, Judge Karlton noted that human varieties are more mixed than animal or plant forms and there is a significant integration between groups. *Id.* (relying on A. MONTAGU, MAN'S MOST DANGEROUS MYTH 92 (1964)).

[95] *Id.*

[96] *Id.* at 566-67. Judge Karlton demonstrated this point by using the definition of "race" found in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 187 (1976). The dictionary gives a

history and have concomitantly shifted the focus of prejudices over time.[97] This evolutionary concept indicates the dynamics of the notion of race—a notion that changes with both time and locality whether one looks to history, anthropology, biology, or community standards.[98] Section 1981 then, being defined by the Supreme Court as a statute designed to protect against racial discrimination,[99] must also be dynamic.[100]

Judge Karlton resolved the issue in this motion to dismiss by holding that a dynamic, adaptable meaning of race is essential in deciding whether a plaintiff has a cognizable claim under section 1981.[101] Such a definition requires that a plaintiff need only allege that he is a member of "a group composed of both men and women, the boundaries of which are not fixed by age or exclusively by religious faith, and which is of a character that it is or may be perceived as distinct when measured against the group which enjoys the broadest rights."[102] The judge then determined that in the present controversy, Ortiz, a woman of Puerto Rican descent, could possibly prove she was a member of a group protected by section 1981.[103] Accordingly, the court decided that the complaint was sufficient to survive the motion to dismiss.[104]

The flexible approach adopted by the *Ortiz* court is a practical solution to the problem of statutory interpretation which has plagued

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lengthy definition, but concludes that all technical definitions of the term are controversial and lead to confusion and misuse. *Id.*

[97] 547 F. Supp. at 567. The judge noted that discrimination could be found even in the Han Dynasty (3rd century B.C.). During this period the ancient Chinese invaders of India, using pigmentation as a distinguishable characteristic, differentiated themselves from blonde, light-eyed barbarians who resembled monkeys. *Id.* (citing T. GOSSETT, *supra* note 66, at 4). Judge Karlton pointed out that although black people have been the most consistent object of discrimination in the United States, discrimination has also been practiced against "almost every immigrant (and native) group . . . [throughout] this country's intellectual history." *Id.*

[98] *Id.* The court observed that the notion of race throughout the history of the nation has been only a means to practice discrimination. *Id.*

[99] *See McDonald*, 427 U.S. at 287; *see also supra* notes 36-38 and accompanying text.

[100] 547 F. Supp. at 567. Indeed, although the Supreme Court has said religious discrimination is not a basis for a § 1981 claim, it does not follow that Jews, as a distinct racial group could not bring an action within the scope of § 1981. *Id.* at 567 n.25. *But see* Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977).

[101] 547 F. Supp. at 567.

[102] *Id.* at 568.

[103] *Id.*

[104] *Id.*; *cf.* Escalera v. New York City Housing Auth., 425 F.2d 853, 857 (2d Cir.) (plaintiff's complaint survived motion to dismiss since under civil rights action, liberal standard in favor of plaintiff is applied), *cert. denied*, 400 U.S. 853 (1970).

section 1981 for over one hundred years. The confusion, which finds its basis in the statute's legislative history, stems not from an ambiguity in the language used, but rather from the underlying meaning those words may suggest, especially when viewed in the context of a growing, changing nation.

The Supreme Court has concluded that the statute's words were chosen by its framers so as to provide a protection against racial discrimination;[105] yet, the statute makes no mention of the word "race."[106] Indeed, section 1981 provides that "all persons . . . shall have the same right[s] . . . as is enjoyed by white citizens."[107] This standard established by the language of the Act, provides a measure against which a group claiming discrimination may be assessed—white citizens. It also clearly states that all persons are entitled to its protection. At first glance then, the statute would appear to provide protection to *any* person who has been denied rights afforded to the group enjoying the broadest range of rights, traditionally, white citizens.

Under this standard, national origin discrimination as well as discrimination grounded on race could be actionable.[108] The United States District Court for the District of Colorado in *LaFore v. Emblem Tape & Label Co.*[109] followed such an approach, rejecting any interpretation of section 1981 which included the term "race."[110] Although the court recognized that the statute does serve to prohibit racial discrimination,[111] it refused to define the statute in terms of race.[112] The court declared that "[e]quating, 'white citizens' with a racial classification is utterly lacking in sophistication"[113] and therefore found the statute to afford all people the same rights as that group enjoying the broadest spectrum of rights.[114]

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[105] Georgia v. Rachel, 384 U.S. 780, 791 (1965); *accord McDonald*, 427 U.S. at 285; Runyon v. McCrary, 427 U.S. 160, 168 (1976); *Johnson*, 421 U.S. at 459.

[106] *See supra* note 13.

[107] 42 U.S.C. § 1981.

[108] *Id.* The statute makes no distinction between race and national origin. *See id.*

[109] 448 F. Supp. 824 (D. Colo. 1978).

[110] *Id.* at 826. The court found any analysis of the statute based on race to be "unproductive." *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* The court explained that no scientific basis existed that would adequately define race within the confines of the statute. *Id.*

[114] *Id.* This standard, set by the *LaFore* court, is conspicuously similar to the standard used by the *Ortiz* court. *See supra* notes 96-100 and accompanying text. The *LaFore* court, while quick to criticize the *Ortiz* approach as found in *Manzanares*, 448 F. Supp. at 825-26, failed to realize that the standard it employed differed only in semantics. *Ortiz* and *Manzanares* both used the

Although the *LaFore* court construed the words of section 1981 in a straightforward, sensible manner, the court failed to reconcile its interpretation of the section's parameters with precedent clearly indicating that section 1981 is a statute aimed at protecting against racial discrimination.[115] The *LaFore* court simply dismissed any racial interpretation of the statute by finding an attempt to define race and apply it in a legal context questionable and "fraught with peril."[116]

A better alternative to *LaFore*'s disregard for precedent is found in *Ortiz*.[117] The *Ortiz* court recognized the danger of a preconceived, static notion of race and yet successfully fit a reasonable, workable alternative into the well-established framework of the statute as defined by the Supreme Court.[118] Judge Karlton, conducting an independent analysis of the section's legislative history, concluded that the incorporation of the phrase "white citizens" intended to exclude women and minors[119] yet in no way was meant to suggest any other exclusionary criteria.[120] Nevertheless, the court acknowledged that the legislative intent in 1866 was subject to ambiguity, and therefore, it elected to define the statute's scope within the framework previously established by the Supreme Court.[121]

While the Supreme Court has decided that section 1981 was devised as a protection against discrimination based on race.[122] *Ortiz* correctly pointed out that the term "race" has never been limited by the Court.[123] The *Ortiz* court then arrived at a broad, workable definition of race by analyzing, and in turn eliminating, the possible sources from which a static definition, containing immutable catego-

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term race in a dynamic manner which allowed for a group to group analysis. *See supra* notes 78-85 and accompanying text. The *LaFore* court, in reality, employed the same standard as the *Ortiz* court, using the term "identifiable class" instead of "race." *See* 448 F. Supp. at 826.

[115] 448 F. Supp. at 826.

[116] *Id.*

[117] The *Ortiz* court noted the difficulty in wholeheartedly accepting *LaFore* because the *LaFore* court chose to disregard the Supreme Court's holding in Runyon v. McCrary, 427 U.S. 160, 167 (1976). *See* 547 F. Supp. at 562 n.20. Instead, the *LaFore* court chose to redefine the protection afforded by the statute through a strict construction of its words. *See supra* notes 109-14 and accompanying text.

[118] 547 F. Supp. at 565.

[119] *Id.* at 555.

[120] *Id.* Judge Karlton explained that by "incorporating a racial concept the Supreme Court has incorporated a flexible and changing concept." *Id.* at 567.

[121] *See id.* at 555-56.

[122] *See supra* note 105 and accompanying text.

[123] 547 F. Supp. at 556. The reason the Court has never explained the meaning of race as used in the statute is because the Court has always considered cases in which the people claiming protection were those who fit squarely within the statute's meaning as evidenced by its legislative history (i.e., blacks and whites). *Id.*

ries, could be drawn.[124] Relying upon anthropology, biology, and history, the court discovered that no valid, definitive meaning of race could be invoked.[125] Judge Karlton noted, however, that vast inconsistencies existed between the static concept of race invoked by prior courts and the treatment of race in the scientific community.[126] While courts have refused to allow a cause of action under section 1981 when the plaintiff has alleged only national origin discrimination as opposed to racial discrimination,[127] scientific thought has actually defined race in terms of geographic origin and cultural ties—ideas commonly associated with national origin.[128]

Moreover, the court found any commonly defined notion of race equally inadequate since this, too, is highly variable.[129] As an alternative, the court elected to use a definition of race which would allow a plaintiff to maintain a cause of action when he can show membership in a group which has been denied rights which members of the most favored group enjoy.[130]

The definition employed by *Ortiz* is a viable alternative to the static, conclusory definitions used by other courts in an attempt to blindly follow Supreme Court precedent. A dynamic definition of the parameters of race respects precedent yet recognizes the practical need for expanding the scope of the Civil Rights Act of 1866 so as to allow all people who suffer discrimination based on their group affiliation a remedy. Certainly the framers of the 1866 Act, acknowledging a need to protect Chinese immigrants, as well as emancipated blacks,[131] had no intention of precluding from the Act's protection, groups who would later enter this country in search of equality.[132]

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[124] *Id.* at 565-67.

[125] *Id.* at 567. The *Ortiz* court concluded that no scientific meaning of race existed, *id.* at 566, and further, that no commonly accepted meaning could be substituted. *Id.* at 567.

[126] *Id.* at 566.

[127] *See supra* notes 57-63 and accompanying text.

[128] 547 F. Supp. at 566; *see also supra* note 89.

[129] 547 F. Supp. at 567.

[130] *Id.* at 568; *accord LaFore*, 448 F. Supp. at 826.

[131] Greenfield & Kates, *supra* note 85, at 673-74; *see supra* note 30 and accompanying text.

[132] The drafters of the bill make no mention of any exclusionary criteria except that of women and minors. *See supra* note 32 and accompanying text. Nevertheless, even if the framers of the bill did not mean to confer upon the people of the United States a general protection against discrimination, a liberal interpretation should be given the Reconstruction Congress' legislation. *Runyon*, 427 U.S. at 191. "If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." *Id.* (quoting B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) (emphasis in original)); *see also* Comment, *supra* note 27, at 69.

The Supreme Court now has the responsibility of acknowledging the sound premise of the *Ortiz* approach. A uniform method analyzing the problem of discrimination protected by section 1981 is long overdue. A statute, based on the landmark amendment which abolished slavery and badges of servitude[133] needs to be interpreted consistently with a keen sensitivity to societal mores. Section 1981 should not be subject to a constrained definition allowing only blacks a remedy. A dynamic definition of race, which would force the fact-finder to undertake an inquiry that would reveal whether the plaintiff has, in fact, been denied rights which the group exercising the broadest rights enjoyed is imperative if such groups are to enjoy the benefits of equality bestowed on the people of this country more than one hundred years ago.

Julie Colin

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[133] *See supra* note 1.