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# Thirty Years After *Al-Khazraji*: Revisiting Employment Discrimination Under Section 1981

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## ABSTRACT

Many scholars have written about the racialization process experienced by people of Southwest Asia and North African (SWANA) descent, emphasizing the increased discrimination experienced by those perceived as Middle Eastern or SWANA. There is very little scholarship, however, concentrating specifically on employment discrimination faced by those of SWANA descent in the United States. Although much § 1981 literature exists, few scholars have surveyed the § 1981 landscape that has developed after two landmark Supreme Court cases: *Saint Francis College v. Al-Khazraji* and *Shaare Tefila v. Cobb*. Using Iranian plaintiffs as a case study, this Comment argues that § 1981's outdated notion of race creates a theoretical distinction between categories such as race, color, ancestry, ethnicity, and national origin in situations where no such distinction exists. I argue that as a result of the Court's inability to recognize or articulate the differences between these distinctions, groups such as SWANA are inappropriately excluded from protection and that national origin should be included under § 1981.



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## INTRODUCTION

In 2006, Mr. Pourghoraishi, a truck driver of Middle Eastern descent and a native of Iran, struggled to maintain a case based on racial discrimination at his workplace.[1] Like many people of Iranian descent, Mr. Pourghoraishi attempted to invoke rhetoric of the infamous and yet outdated Aryan myth,[2] which only served to further complicate the case.[3] Litigating an employment case and seeking redress for race discrimination requires precise and legally cognizable language describing a plaintiff's race. Many people of Iranian descent, however, often have difficulty successfully articulating their race in court. Some courts only recognize Persian as a race whereas other courts recognize Iranian, for example. Moreover, because Iranian-Americans have been given various racial labels through a double racialization process,[4] the group tends to identify as Aryan, Caucasian, Iranian, Middle Eastern, Persian, and white (the list continues) and are therefore unsure which label to stand by when seeking redress in cases of employment discrimination.[5] The result is a level of confusion between what the law requires, what courts recognize, and how litigants self-identify. Such confusion has led to many barriers for qualified plaintiffs.

Employment discrimination cases are difficult to prove and are often dismissed. Yet some cases of racial discrimination are not dismissed based on the merits, but based simply on the fact that a plaintiff's race is one that is unrecognized by the law. For example, in 2007, an appellate court concluded that "Mr. Norouzian [the Iranian plaintiff] only offered evidence to prove discrimination based on his country of origin, Iran, and his religion, Islam. In fact, the record

1. Pourghoraishi v. Flying J, Inc., 449 F.3d 751 (7th Cir. 2006).
2. Reza Zia-Ebrahimi, *Self-Orientalization and Dislocation: The Uses and Abuses of the "Aryan" Discourse in Iran*, 44 IRANIAN STUD. 445 (2011) ("The claim to belong to the Aryan race, believed to be rooted in the ancient self-designation ariya, is a fundamental pillar of the Iranian nationalist discourse. This paper aims to show that in fact it is a twentieth-century import from Europe, where after being instrumentalized for colonial endeavors and Nazi atrocities, it has become almost completely discredited.").
3. *Pourghoraishi*, 449 F.3d at 757 ("Pourghoraishi complicated the analysis by testifying at his deposition that, 'Iran is the only non-Arab country in this region. . . . According to the United States recognition, Iran is whites in their Arian background.' Pourghoraishi correctly explained that, in this messy business of classifying persons by race, anthropologists do indeed classify Iranians into the perhaps antiquated category of 'Caucasians.'" (citation omitted)).
4. *See infra* Part II.A.
5. Zar v. South Dakota Bd. of Examiners of Psychologists, 976 F.2d 459, 467 (8th Cir. 1992) ("While Dr. Zar correctly recites the law, he bases his claim only on the fact that he is Iranian. At oral argument before this court, Dr. Zar's counsel repeated this position, and when asked whether Dr. Zar was an Arab, he responded 'I can't tell you, your Honor.'").

does not contain any indication of what Mr. Norouzian's race actually is."[6] Based on the complexity of the racial social structure in the United States today and the increased amount of violence against persons from the Southwest Asia and North Africa (SWANA) region,[7] this Comment argues that claims of discrimination based on national origin should be included in the civil rights statute § 1981, which is one of two federal statutes covering employment discrimination.[8]

Many scholars have contextualized the racialization process SWANA members experience and have written about the increased levels of discrimination experienced by those perceived as Middle Eastern or SWANA.[9] There is very

6. Cent. Am. Health Sci. Univ., Belize Med. Coll. v. Norouzian, 236 S.W.3d 69, 82 (Mo. App. W.D. 2007).

7. There is much debate about which term to use in describing the region—the two most emphasized terms are Southwest Asia and North Africa (SWANA) and Middle East and North Africa (MENA). Khaled A. Beydoun, *Boxed in: Reclassification of Arab Americans on the U.S. Census as Progress or Peril?*, 47 LOY. U. CHI. L.J. 693, 730 (2016); NEDA MAGHBOULEH, THE LIMITS OF WHITENESS: IRANIAN-AMERICANS AND THE EVERYDAY POLITICS OF RACE 142 (forthcoming 2017). Community members and the University of California (UC) prefer to use the term "Southwest Asia and North Africa" (SWANA) to describe the region rather than the term "Middle East." *See* Letter from Tom Andriola, Vice President & Chief Info. Officer, Info. Tech. Servs., Univ. of Cal., to Registrars & ITLC Members, Univ. of Cal. (Apr. 4, 2014), http://data.ucop.edu/subject-area/itlc-assets/jog-reg-2014-04-04.pdf [https://perma.cc/6KTU-LP4N]. For background on the use of the term SWANA, see generally *About SWANA*, IRANIAN ALL. ACROSS BORDERS (IAAB), http://iranianalliances.org/35-campaigns/107-about-swana [https://perma.cc/NAB2-W7QN]; *Definition of SWANA*, SWANA-LA, http://swanala.blogspot.com/p/definition-of-swana.html?m=1 [https://perma.cc/TH7R-55Q2]. For background on the term SWANA and efforts by UC students to persuade the administration to adopt its use, see *A Resolution in Support of the Creation of a Southwest Asian and North African Checkbox on the University of California Application*, UCLA UNDERGRADUATE STUDENTS ASS'N, https://www.usac.ucla.edu/documents/resolutions/UCLA%20SWANA%20Resolution.pdf [https://perma.cc/3F8U-TE4K]; Yoonjae Lim, *SWANA Proposal Under Review by UC*, DAILY BRUIN (Apr. 9, 2013), http://dailybruin.com/2013/04/09/swana-proposal-under-review-by-uc [https://perma.cc/48B7-DRQX]; Chris Yoder, *UC to Include Southwest Asian, North African Category on Next Year's Undergraduate Application*, DAILY CAL. (May 28, 2013), http://www.dailycal.org/2013/05/27/uc-to-introduce-new-category-for-southwest-asian-and-north-african-students-in-2013-2014-undergraduate-application [https://perma.cc/CK4G-DUBB].

8. 42 U.S.C. § 1981 (2012); Charu A. Chandrasekhar, Comment, *Flying While Brown: Federal Civil Rights Remedies to Post–9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L.J. 215, 216 (2003); Romtin Parvaresh, Note, *Prayer for Relief: Anti–Muslim Discrimination as Racial Discrimination*, 87 S. CAL. L. REV. 1287, 1288 (2014); Khaled A. Beydoun, *Boxed in: Reclassification of Arab Americans on the U.S. Census as Progress or Peril?*, 47 LOY. U. CHI. L.J. 693, 730 (2016).

9. *See, e.g.*, Chandrasekhar, *supra* note 8; John Tehranian, *Selective Racialization: Middle-Eastern American Identity and the Faustian Pact With Whiteness*, 40 CONN. L. REV. 1201 (2008); Parvaresh, *supra* note 8; Beydoun, *supra* note 8; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); *see also* Amaney Jamal, *Civil Liberties and the Otherization of Arab and Muslim Americans*, *in* RACE AND ARAB AMERICANS BEFORE AND AFTER 9/11: FROM INVISIBLE CITIZENS TO VISIBLE SUBJECTS 114, 117–18 (Amaney Jamal & Nadine Naber eds., 2008);

little scholarship, however, concentrating specifically on employment discrimination faced by SWANA members in the post-9/11 world. Similarly, although much § 1981 literature exists, most scholars have written about the anticipated consequences of *Saint Francis College v. Al-Khazraji*[10] and *Shaare Tefila Congregation v. Cobb*[11] (decided in the late 1980s), but very few authors have since surveyed the § 1981 landscape.[12] The scholarship that does exist specifically addresses Title VII, but no work thus far explicitly focuses on the exclusion of SWANA plaintiffs from § 1981.

Part I of this Comment outlines the intended coverage and evolution of federal employment discrimination jurisprudence. Two federal statutes exist that govern racial discrimination in the workplace: the Civil Rights Act of 1866, now codified as 42 U.S.C. § 1981 (§ 1981), and the Civil Rights Act of 1964, commonly referred to as Title VII.[13] This Comment focuses specifically on the ambiguity of § 1981, arguing that the statute presumes all plaintiffs fall neatly into recognized and distinct racial categories, and is therefore disconnected with the lived reality of SWANA plaintiffs.

The Comment then continues to track the expansion of § 1981 through two landmark U.S. Supreme Court cases: *Al-Khazraji* and *Shaare Tefila*. I argue that the Court formed and relied on an expansive definition of race in order to interpret Arab ancestry and Jewish faith as racial categories. The Court compared the way in which race was classified in the year 1866 when the statute was written against the backdrop of today's more accepted notion of race as a social construct. Ultimately, the Court found that individuals that are part of "identifiable classes of persons" should qualify for protection under the statute.[14] I conclude by arguing that the Court's inability to articulate distinctions between race, ancestry, ethnicity, and national origin has resulted in the exclusion of groups, such as SWANA, that were intended protection under § 1981.

Part II of the Comment demonstrates the difficulty courts have when faced with plaintiffs of SWANA descent who are formally coded as white by law, yet socially identify with racial categories that the law fails to recognize. The

Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER SOC. POL'Y & L. 411 (2010).

10. 481 U.S. 604 (1987).
11. 481 U.S. 615 (1987).
12. Barbara A. Bayliss, Note, Saint Francis College v. Al-Khazraji*: Cosmetic Surgery or a Fresh Breadth for Section 1981?*, 16 PEPP. L. REV. 77, 91–93 (1988) ("However, the greatest impact of *Saint Francis College* will surely be the interplay of section 1981 and Title VII claims. . . . This interplay of ancestry and 'place or nation of origin' will undoubtedly create confusion for federal courts trying to legitimately distinguish between the two concepts.").
13. 42 U.S.C. § 1981 (2012); *see also* 42 U.S.C. § 2000e-2 (2012) (Title VII).
14. *Al-Khazraji*, 481 U.S. at 613.

disjuncture between the way plaintiffs state their race compared to the way courts identify what qualifies as race results in additional barriers for members of SWANA. I use Iranian plaintiffs, in addition to other plaintiffs of SWANA descent, as a case study to illustrate this point.

Part III describes the racialization process persons of SWANA descent experience. The description of their experience is based on a theory of double racialization, in which SWANA plaintiffs are categorized by a certain race or ethnicity in their home country (such as Persian, Afghan, Kurdish, etc.), then again racialized as white or Caucasian by American standards. Unpacking the double racialization process provides context and support for the argument that the complexity of stating a race is much more challenging for groups that do not fall within the constraints of the historic racial binary upon which § 1981 case law is based. This Part argues that given the complicated racial trajectory of SWANA plaintiffs, if national origin discrimination is not protected under § 1981, many SWANA members will not have a remedy for workplace racial discrimination.

Lastly, the Comment offers several potential remedies. The Comment urges national origin coverage under § 1981, either through a broader interpretation of race that includes notions of national origin, application of a modified legal standard based on modern notions of race that accounts for SWANA plaintiffs, and/or a corrective mechanism similar to one used by Title VII to ensure protection for members of SWANA. Finally, Part IV entertains potential counterarguments and critiques of the proposed solutions and concludes that these solutions, while imperfect, are nevertheless preferable to the current approach.

## I. QUALIFYING FOR COVERAGE UNDER SECTION 1981

The Civil Rights Act of 1866, now codified as § 1981, was passed during the era of Reconstruction and against the backdrop of creating civil rights of Black Americans who had recently been emancipated by the Thirteenth Amendment. Given the racial history of the United States, especially after the conclusion of the Civil War, many scholars argue that § 1981 was specifically written in an effort to afford Blacks an opportunity to enter the predominately white workforce. Nearly a century later, the Civil Rights Act of 1964 added yet another statute to address racial discrimination, commonly referred to as Title VII.[15] Title VII not only addresses racial discrimination in the workplace, but also provides relief for discrimination based on color, national origin, religion,

15. 42 U.S.C. § 2000e-2.

and sex.[16] Therefore, although both § 1981 and Title VII address racial discrimination, Title VII is the more inclusive of the two statutes.[17]

Given the present demographics of the United States and the fact that racial categories have since 1866 become much more complex, § 1981's outdated notion of race creates a theoretical distinction between categories such as race, color, ancestry, ethnicity, and national origin in situations where no such distinction exists.[18] Whereas Title VII accommodates and accounts for racial discrimination that may stem from race, ancestry, ethnicity, and national origin, § 1981 has been construed to deny plaintiffs relief based on artificial distinctions between race and national origin.[19]

Title VII, however, has many qualifications; litigating a § 1981 case may therefore have many advantages over Title VII.[20] For example, in order to qualify under the Title VII statute, the defendant employer must maintain at least fifteen employees.[21] For plaintiffs that are unable to fulfill Title VII requirements,

16. *Id.*

17. Bayliss, *supra* note 12, at 91 ("Title VII is a 'comprehensive solution for the problem of invidious discrimination in employment . . . .'" (quoting Johnson v. Ry. Express Agency, 421 U.S. 454, 459 (1975))).

18. Beydoun, *supra* note 8, at 703–16; *see also* Laura Dudley Jenkins, *Race, Caste and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States*, 36 CONN. L. REV. 747, 774 (2004); United States v. Nelson, 277 F.3d 164, 176 n.12 (2d Cir. 2002) ("[T]he modern usage [of race] may well itself be a fiction, in the sense that it groups people into what are no more than socially constructed categories."); Mary J. Woodhead, Note, *Ethnic Origin Discrimination as Race Discrimination Under Section 1981 and Section 1982*, 1989 UTAH L. REV. 741, 751 (1989) ("Race as a framework for analyzing section 1981 and section 1982 cases is not as straightforward as judges may perceive, largely because of the initial problem of defining the term 'race.' Racial lines traditionally have been drawn in terms of variations of black and white, or black, white, and oriental. Anthropologists, on the other hand, have suggested that the term 'race' no longer represents a valid concept and thus should be excluded from our language." (citation omitted)).

19. Rachel R. Munafo, *National Origin Discrimination Revisited*, 34 CATH. LAW. 271, 275–79 (1991) ("In fact, the common understanding of 'national origin' is also ancestry or ethnicity. National origin is not limited, as courts generally seem to think, to birthplace alone. The dichotomy which the Court sets up between national origin and race as ancestry or ethnicity, lacks substance. . . . This creates the impression that the distinction between race as ancestry or ethnicity and national origin is artificial and even somewhat contrived.").

20. Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y.C. L. REV. 33, 65–66 (2009) ("For claims brought under § 1981, the statute of limitations may be the four-year-catchall . . . . This is considerably less restrictive for plaintiffs when compared to the 300-day maximum time period to submit a charge under Title VII. . . . Further, there are no caps on punitive and compensatory damages, as compared to Title VII, which caps such damages at a maximum of $300,000, depending on the size of the employer."); Lorilyn Chamberlin, Note, *National Origin Discrimination Under Section 1981*, 51 FORDHAM L. REV. 919, 939 (1983) (providing a section titled the "Exclusivity of the Title VII Remedy").

21. 42 U.S.C. § 2000e (2012) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the

§ 1981 is the only form of relief available. But because § 1981 has developed in a way that creates false distinctions that are no longer applicable to the diverse racial demographics in the United States, plaintiffs that state their national origin in place of stating their race are often unjustly denied protection.[22] Although Title VII has a built-in mechanism that accounts for the fact that the concept of race may sometimes be so interrelated with a plaintiff's national origin or religion that the two are indistinguishable,[23] § 1981 has no such mechanism.

The Supreme Court, faced with holdings that denied plaintiffs coverage due to narrow and antiquated interpretations of race, clarified and expanded the scope of § 1981 in two cases decided in 1987.[24] In both *Al-Khazraji*[25] and *Shaare Tefila*,[26] the Court recognized that given the evolving racial dynamic of the United States, it was necessary to expand § 1981 to include coverage of ancestry and ethnicity in addition to race.[27] The Court failed to determine

United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers."); *see also* Aziz, *supra* note 20, at 66.

22. Woodhead, *supra* note 18, at 746 ("While this rationale may make it possible to draw a clear line between protected and unprotected plaintiffs, such line drawing arbitrarily may exclude plaintiffs who are unable to isolate a physical manifestation sufficient to satisfy a given court.").

23. In certain instances, SWANA plaintiffs have been accommodated through use of the Title VII statute, despite the complexities between race, national origin, and religion that arise during litigation. Plaintiffs using Section 1981, however, are not afforded the opportunity to argue that their race or national origin is so interrelated that they may be treated as similar enough under the statute. *See, e.g.*, Sasannejad v. Univ. of Rochester, 329 F. Supp. 2d 385, 391 (W.D.N.Y. 2004) ("Here, [in a Title VII case] the religious demography of Iran is important. According to a publication of United States government, Iran is an Islamic Republic and ninety-eight percent of its population is Muslim. Thus, the line between discrimination based on Iranian national origin and the Islamic religion appears to be sufficiently blurred and the claims are reasonably related to one another."); *see also* Daneshvar v. Graphic Tech., Inc., 18 F. Supp. 2d 1277, 1284 (D. Kan. 1998) ("In light of plaintiff's particular claim (*i.e.*, discrimination based on Iranian ancestry and national origin), the court concludes that a discrimination claim based on race is 'reasonably related' to the allegations of national origin discrimination in plaintiff's charges submitted to the KHRC and the EEOC.").

24. *See* Chamberlin, *supra* note 20, at 924–25 (noting, in an article written before the *Al-Khazraji* decision, that plaintiffs of Hispanic or Asian descent were often denied protection under § 1981 by the courts).

25. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

26. Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987).

27. *See* Munafo, *supra* note 19, at 275 ("The expanded definition of race under sections 1981 and 1982 as created by *St. Francis College* and *Shaare Tefila* has significantly improved the ability of plaintiffs complaining of national origin discrimination to bring actions under those statutes. However, the Supreme Court opinions are not without their flaws. Foremost among these flaws is the lack of a

whether or not, in certain instances, national origin would also be covered under § 1981.[28]

Nonetheless, the concurrence did acknowledge that discrimination based on national origin, though not explicitly covered by § 1981, is often indistinguishable from what has been interpreted as race, ancestry, and ethnicity.[29] Because of what courts and scholars have referred to as an impossible distinction,[30] this Comment argues that § 1981 should provide protection to plaintiffs based on national origin discrimination. In the Parts that follow, I argue that failing to interpret race in a way that takes into consideration factors such as national origin makes § 1981 increasingly inaccessible for specific classes of plaintiffs.[31]

### A. Outdated Notions of Race and Intended Coverage

Defendant employers commonly, and often successfully, file a motion to dismiss based on the fact that a plaintiff has failed to state a proper race for which the U.S. Congress intended coverage under § 1981.[32] For example, plaintiffs stating their race as Mexican American have been denied protection under

true distinction between the new definition of 'race,' for section 1981 purposes, and 'national origin' as noted by Justice Brennan.").

28. *Id.*; *see also* Woodhead, *supra* note 18, at 752 ("The decisions in *Al-Khazraji* and *Shaare Tefila* combine to open the door to plaintiffs claiming discrimination based on ethnic or national origin under sections 1981 and 1982, but may leave those plaintiffs with new obstacles to overcome.").

29. *Al-Khazraji*, 481 U.S. at 614 (Brennan, J., concurring); *Shaare Tefila*, 481 U.S. at 617–18; *see also* Aziz, *supra* note 20, at 67 ("While the Supreme Court has not ruled directly on whether employment discrimination claims based on national origin can be brought pursuant to § 1981, Justice Brennan, in his concurring opinion in *Saint Francis College v. Al-Khazraji*, highlighted that the distinction between discrimination based on ancestry or ethnic characteristics and that based on place of birth is difficult to make.").

30. *Al-Khazraji*, 481 U.S. at 614 (Brennan, J., concurring) ("Pernicious distinctions among individuals based solely on their ancestry are antithetical to the doctrine of equality upon which this Nation is founded. Today the Court upholds Congress' desire to rid the Nation of such arbitrary and invidious discrimination, and I concur in its opinion and judgment. I write separately only to point out that the line between discrimination based on 'ancestry or ethnic characteristics,' and discrimination based on 'place or nation of . . . origin,' is not a bright one." (citations omitted)).

31. Woodhead, *supra* note 18, at 756 ("Thus, although the Court's decisions open up courthouse doors to many plaintiffs who were previously unprotected, it may do so in an inconsistent way. Plaintiffs who can find a record of themselves in congressional debates, and those whom society easily identifies as ethnically different may be protected while other plaintiffs may still fall through the cracks. . . . As a result, many plaintiffs will be left in a vacuum while attorneys attempt to find substance in the Supreme Court's new definition of race, and as each court formulates its own standards, some victims of discrimination will be left unprotected.").

32. *See* Lisa Tudisco Evrén, Note, *When Is a Race Not a Race?: Contemporary Issues Under the Civil Rights Act of 1866*, 61 N.Y.U. L. REV. 976, 1001 (1986) ("In the absence of authoritative Supreme Court guidance regarding the scope of the Act, lower federal courts have relied on Supreme Court dicta . . . . As a result, they have interpreted the Act narrowly, disregarding principles embodied in the Act and using arbitrary racial classifications to dismiss plaintiffs' claims.").

§ 1981 for failing to state a proper race.[33] Defendant employers have argued that Mexican American is not a racial category, rather solely a national origin, and therefore not covered by the statute.[34] If § 1981 is approached narrowly, without context, and strictly based on the congressional record of 1866, some courts may argue that coverage of § 1981 should only extend to the list of racial groups explicitly stated at the time. If that approach is to be taken, many plaintiffs from the SWANA region would have difficulty seeking protection under § 1981.[35] Since the word does not appear in the language of the statute, the interpretation of that specific word is "difficult."[36] Thus, courts have resorted to reading definitions of

33. Courts routinely dismissed such claims before the *Al-Khazraji* decision. *See, e.g.*, Gonzalez v. Stanford Applied Engineering, Inc., 597 F.2d 1298 (9th Cir. 1979) (reviewing a case dismissed by the District Court since the plaintiff was of Mexican descent and argued discrimination based on race as opposed to national origin); *see also* Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 970 (10th Cir. 1979) (reversing and remanding a case dismissed by the District Court finding that Mexican is not a race but only a national origin). Following *Al-Khazraji*, Mexican Americans have encountered fewer barriers to § 1981 coverage. *See* Bayliss, *supra* note 12, at 94 ("Finally, the obvious immediate impact of *Saint Francis College* is that it significantly broadens the potential class of claimants under section 1981. Groups such as Hispanics, Latinos, and Jews, which have been inconsistently precluded from pursuing section 1981 claims, will no longer be subjected to such piecemeal decision-making—provided, of course, that their claims are properly phrased in racial terms." (footnote omitted)). Martinez v. Hazelton Research Animals Inc., 430 F.Supp. 186 (D.Md.1977) ("[T]his court finds that the allegation that the plaintiff is an Hispanic male, without more, is an insufficient allegation of racial background to support an allegation of racial discrimination and thus fails to state a cause of action under 42 U.S.C.1981."); Davis v. Boyle–Midway, Inc., 615 F. Supp. 560 (N.D. Ga.1985) ("[I]t would be a mistake to conclude from this that all Hispanics, as a group, are subject to racial discrimination.").

34. *See Manzanares*, 593 F.2d at 969 ("[T]he sole issue on this appeal is whether the allegations in the complaint that plaintiff was discriminated against because he was of 'Mexican American descent' . . . [are] sufficient to permit plaintiff to seek relief under 42 U.S.C. § 1981.").

35. *See, e.g.*, Anooya v. Hilton Hotels Corp., 733 F.2d 48, 50 (7th Cir. 1984) (finding a plaintiff of Iraqi descent ineligible for race discrimination under § 1981 since the court found Iraqi is solely a national origin); *see also* Zar v. S.D. Bd. of Exam'rs of Psychologists, 976 F.2d 459, 467 (8th Cir. 1992) ("While Dr. Zar [plaintiff] correctly recites the law, he bases his claim only on the fact that he is Iranian. . . . This claim of discrimination based upon national origin is insufficient to state a § 1981 claim."); Ahmed v. Samson Mgmt. Corp., No. 95 Civ. 9530, 1996 WL 183011, at *6 (S.D.N.Y. 1996) ("Mr. Ahmed [Egyptian plaintiff] fails to allege that he was subjected to intentional discrimination based on his ancestry or ethnicity. The fact that the complaint includes a statement that Mr. Ahmed is an Egyptian is insufficient. This statement alone indicates only that Egypt is Mr. Ahmed's nation of origin." (citation omitted)). *Contra* Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1387 n.7 (10th Cir. 1991) ("We are satisfied that, in substance, the district court's findings on Daemi's [Iranian plaintiff] § 1981 claim dealt with the issue of discrimination in terms of race as broadly defined by the statute."); *Manzanares*, 593 F.2d at 971 ("We must read these cases that section 1981 is directed to racial discrimination primarily, but is not necessarily limited to the technical or restrictive meaning of 'race.'").

36. *Manzanares*, 593 F.2d at 970 ("Of course, section 1981 makes no mention of race, national origin, or alienage. The only reference is that 'all persons' shall have described rights and benefits of 'white citizens.' Thus the standard against whom the measure was to be made were the rights and benefits of white citizens. The measure is group to group, and plaintiff has alleged that the 'group'

race based on dictionary sources and encyclopedias available during congressional debates of 1866 in order to uncover which groups Congress may have been referring to when race was discussed. Such an approach has denied many eligible plaintiffs coverage under § 1981.[37]

Moreover, some may argue that since § 1981 was enacted during the era of Reconstruction, the statutory language available to Congress at the time was based on a racial binary that emphasized protection of Blacks.[38] From this, they conclude that § 1981 is explicitly focused on the racial inequality Blacks experience in the employment context. Courts and scholars, however, have agreed that § 1981's coverage should not be based on explicit and literal interpretations of race in 1866.[39] Courts have often articulated that Congress's intent was to protect all persons treated as *other* when compared to a person of white, European descent.[40] Therefore, although a plaintiff's race of Puerto Rican, for example, is not explicitly stated in the congressional record and legislative history, courts have held that § 1981 was not intended to cover only Blacks or listed racial categories, but to protect all racial groups from discrimination in the workplace.[41] The racial

to which he belongs those he describes as of Mexican American descent is to be measured against the Anglos as the standard.").

37. *See, e.g.*, Amiri v. Hilton Wash. Hotel, 360 F. Supp. 2d. 38, 40, 42–43 (D.D.C. 2003) (finding that a pro se plaintiff of Afghan descent, alleging racial discrimination in employment after the terrorist attacks of September 11, failed to state a cognizable claim under § 1981); *cf.* Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir. 1987) (granting § 1981 protection to a plaintiff of Puerto Rican descent who alleged that defendant discriminated against him based on national origin).

38. *See supra* note 11 and accompanying text.

39. *Manzanares*, 593 F.2d at 971 ("We must read these cases that section 1981 is directed to racial discrimination primarily, but is not necessarily limited to the technical or restrictive meaning of 'race.'"); *see also* Evrén, *supra* note 32, at 980 n.26 ("Some have questioned the wisdom of relying exclusively on the intent of the 1866 Congress when construing the Civil Rights Act in the context of contemporary problems." (citing Sanford v. Levinson, Review, *New Perspectives on the Reconstruction Court*, 26 STAN. L. REV. 461, 482–83 (1974))).

40. *See, e.g.*, *Manzanares*, 593 F.2d at 970 ("The measure is group to group, and plaintiff has alleged that the 'group' to which he belongs—those he describes as of Mexican American descent—is to be measured against the Anglos as the standard."); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 289–95 (1976) ("While it is, of course, true that the immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves, the general discussion of the scope of the bill did not circumscribe its broad language to that limited goal . . . . Rather, the Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race.").

41. Miranda v. Local 208, Amalgamated Clothing Workers of Am., No. 74-172, 1974 WL 221 (D.N.J. 1974) ("While section 1981 may have had its historical roots in the post-Civil War attempt to eradicate all incidence of black slavery . . . . Section 1981 has become a major tool in the struggle for equal employment opportunities for the nation's minorities, including Blacks, Indians, aliens, Mexican-Americans, and Puerto Ricans." (citations omitted)); Franceschi v. Hyatt Corp., 782 F. Supp. 712, 724 (1992) ("We also find that Puerto Ricans constitute a race or ethnic group for purposes of § 1981 and that plaintiffs physiognomic appearance is not determinative in maintaining a cause of action.").

categories explicitly stated in the congressional record have been referred to as illustrative, as opposed to an exhaustive list of protected groups.[42]

Since U.S. demographics have drastically changed since 1866, § 1981 fails to account for the reality that some immigrant groups may not easily fall into clear-cut racial categories, such as Black and white.[43] The definition of race and the system of racial discrimination has evolved into an extremely complex area of study, and scholars have determined that race is not fixed.[44] Accordingly, the term race may include notions of national origin, religion, and language since these factors are often used as characteristics or markers of race. As such, immigrant groups such as Afghans, Assyrians, Armenians, Egyptians, Iranians, Kurds, Turks, and others do not fall into either the white or Black category, and they were not recognized by dictionaries or encyclopedias used by Congress in 1866.[45]

42. *Id.*; *see also* Ortiz v. Bank of Am., 547 F. Supp. 550, 554 (E.D. Cal. 1982) ("Although the plight of the freed man was a primary focus of the congressional debate, arguments for the bill were often phrased in more general terms indicative of an intent to secure the same civil rights for all persons within the United States. Thus, the bill was introduced by Senator Trumbull of Illinois as a 'bill . . . to protect *all persons* in the United States in their civil rights' . . . . Moreover, the bill was initially described by Senator Trumbull as being applicable to 'every race and color.'"); *cf.* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287 (1976) ("First, we cannot accept the view that the terms of s 1981 exclude its application to racial discrimination against white persons. On the contrary, the statute explicitly applies to 'All persons' (emphasis added), including white persons. While a mechanical reading of the phrase 'as is enjoyed by white citizens' would seem to lend support to respondents' reading of the statute, we have previously described this phrase simply as emphasizing 'the racial character of the rights being protected.'" (citations omitted)).

43. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987) ("That construction . . . we have today rejected in *Saint Francis College v. Al-Khazraji* . . . . Our opinion in that case observed that definitions of race when § 1982 was passed were not the same as they are today . . . and concluded that the section was 'intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.'" (citations omitted)).

44. Much has been written in the area of Critical Race Theory establishing race as a social construction. *See* Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1163–72 (1997) [hereinafter López, *Salience of Race*] ("Race is not biological or fixed by nature; it is instead a question of social belief. . . . Perhaps exactly because it is so surprising, however, this consensus indicates dramatically the extent to which racial identities are not fixed by nature but rather evolve through social contestation, with high stakes, winners, and losers."); *see also* PETER L. BERGER & THOMAS LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S (1994). *See generally* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) [hereinafter López, *Social Construction of Race*].

45. Aziz, *supra* note 20, at 67 ("The census and its complicated history illustrate the inconsistent and evolving treatment of 'racial' categories, as the Census has utilized 'racial' categories that have been based on a mixture of concepts including color (White or Black), national origin (e.g., Korean), and state of origin (e.g., Hawaiian)."); *see also* Woodhead, *supra* note 18, at 752 ("Rather than abandoning the relationship between sections 1981 and 1982 and race, the Court chose to

Choosing to ignore the racial inaccuracies that § 1981 was originally based on would be detrimental for many plaintiffs. Not only would courts refer to flawed notions of race that have since been repudiated, but Congress's purpose in creating the statute would not be realized.[46]

In contrast to § 1981, the Title VII framework acknowledges today's racial complexities and attempts to accommodate such realities by taking into account discrimination based on race, national origin, and religion. Unfortunately, § 1981 presumes that race is a category that is fixed, easily identifiable, and can only be determined by cross-referencing works from almost a century ago. Such an approach denies protection of plaintiffs that belong to a complicated and nuanced racial category that Congress in 1866 did not recognize, even though such groups presently experience the type of discrimination Congress explicitly set out to prevent.

### B. Section 1981 Compared to Title VII

As mentioned above, two statutes govern federal employment discrimination: the Civil Rights Act of 1866, commonly referred to as 42 U.S.C. § 1981 (§ 1981), and the Civil Rights Act of 1964, commonly referred to as Title VII.[47]

reinforce this faulty connection and rely instead on the scientific ignorance of Congress in 1866 as a means of expanding the coverage of the statute."); Chamberlin, *supra* note 20, at 935 (1983) (analyzing congressional intent to conclude that the 39th Congress focused on establishing a broader principle and that it would be unwarranted to preclude discrimination against certain groups simply because it was unforeseeable one hundred years ago).

46. Evrén, *supra* note 32, at 992 ("Rather, [the U.S. Supreme Court has] arbitrarily denominated certain groups as 'racial' and others as 'ethnic,' and extended the Act's protection only to the former. These judicial attempts at racial classification have been criticized by courts and commentators. As one court noted, such an exercise inevitably results in 'precisely the kind of stereotyping which the civil statutes were designed to prevent.'" (citation omitted)).

47. 42 U.S.C. § 1981 (2012); 42 U.S.C. § 2000e-2 (2012). This Comment does not explore the complexities of Title VII case law and mostly focuses on § 1981. Since Title VII was created in 1964 (much later than § 1981), Congress chose to add discrimination based on national origin, sex, and religion. Therefore, although members of SWANA ancestry continue to face obstacles in differentiating between race, national origin, and religion in the Title VII context, the statute has its own remedies to address such issues. 42 U.S.C. 2000e-2(a)(1)(2) (2012) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."); *see also* 42 U.S.C. § 1981(a) (2012) ("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

Since § 1981 was written only a year after the Civil War during the era of Reconstruction, the statute was mainly concerned with racial discrimination after the Thirteenth Amendment's abolition of slavery.[48] Title VII, however, was written during the civil rights movement in 1964 and focused on equality in the workplace based on more modern and nuanced constructions of race. Therefore, Title VII recognizes not only race, but also discrimination claims based on color, ethnicity, national origin, and religion.[49]

Title VII, written in 1964, is the more inclusive statute. But Title VII has a much shorter statute of limitations, limits on restitution, and an administrative process that must be exhausted before filing suit.[50] Given the filing requirements for Title VII, § 1981 could be the better strategic option for certain plaintiffs.[51] In other cases, § 1981 is the only option for plaintiffs. Whereas § 1981 covers all employers, regardless of size, Title VII only covers employers with at least fifteen employees. Additionally, Title VII does not cover independent contractors. All individuals, however, are included under § 1981, including independent contractors. Moreover, individuals are not personally liable under Title VII, but they are under § 1981. Remedies under Title VII are also limited and based on employer size.[52]

For the reasons articulated above, many plaintiffs will be better served by using § 1981. Other plaintiffs, such as small business employees or independent contractors, can only rely on § 1981 to remedy racial discrimination in the workplace. Plaintiffs that only have the option of filing a § 1981 claim, yet are of a racial category that may be unfamiliar to the court, risk dismissal. For example, although several courts have interpreted Iranian as a term encompassing race, ancestry, and ethnicity and, therefore, covered by the statute, other courts have dismissed Iranian plaintiffs on the ground that Iranian is solely a national origin and, therefore, not covered by § 1981.[53]

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shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.").

48. Linda A. Lacewell & Paul A. Shelowitz, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus From Racial Status to Racist Acts*, 41 U. MIAMI. L. REV. 823, 824 (1987); Woodhead, *supra* note 18, at 741; *see also* Tayyari v. New Mexico State Univ., 495 F. Supp. 1365, 1369 (D.N.M. 1980).

49. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

50. 42 U.S.C. § 2000e-5(e) Enforcement Provisions; *id.* § 2000e-5(g); *id.* § 2000e-5(c).

51. *See* Chamberlin, *supra* note 20 at 939 (providing a section on the "Exclusivity of the Title VII Remedy").

52. *Id.*

53. Various circuits have held conflicting opinions regarding Iranian as a race versus a national origin. *Compare* Abdullahi v. Prada USA Corp., 520 F.3d 710 (7th Cir. 2008) (holding that a plaintiff's Iranian ancestry did qualify for protection under § 1981), *with* Zar v. S.D. Bd. of Exam'rs of

This Comment takes the position that given the extremely diverse racial demographics in the United States, increasing levels of discrimination, and modern notions of race as a social construct, it is now time for either Congress or the Court to revisit § 1981. Clarification is needed regarding the types of claims that will be interpreted as based on race, ancestry, or ethnicity and, therefore, covered under the statute, and which claims will be dismissed as claims solely based on national origin and, therefore, outside of the scope of § 1981. Race, ethnicity, national origin are often interrelated and therefore impossible to separate. For example, as other scholars have questioned: "Does 'Arab' or 'Hispanic' denote a *race* or a *national* origin? Does 'Jewish' connote more than a religion? The judiciary's difficulty in answering these complex legal and sociopolitical questions is reflected by the inconsistent interpretations of section 1981."[54] In order to remedy the conflict between the inherent racial binary regime under which § 1981 was written and the growing diversity of the population in the United States, the Supreme Court implicitly extended the interpretation of race under § 1981 to include claims based on ancestry, ethnicity, and ethnic traits.[55] Two landmark cases shaped the expansion of § 1981 and drastically shifted the employment discrimination landscape: *Al-Khazraji*[56] and *Shaare Tefila*.[57] Although the Court recognized that distinctions based on race,

Psychologists, 976 F.2d 459 (8th Cir. 1992) (holding that plaintiff's Iranian ancestry was not actionable under § 1981).

54. S*ee* Bayliss *supra* note 12, at 77; Chamberlin, *supra* note 20, at 925 ("For example, East Indians, Mexican-Americans, Puerto Ricans and other Hispanic and Spanish-surnamed persons have tried to assert 'race' discrimination claims, yet have been unsuccessful under this approach because technically they were Caucasian, and their discrimination claim was considered to be based solely on national origin. . . . These same groups, however, have been protected by other courts under more expansive interpretations of the racial test." (citation omitted)). Franceschi v. Hyatt Corp., 782 F. Supp. 712, 721 (1992) ("This Court will not engage in a patronizing discourse over what constitutes the physiognomic, social and cultural characteristics that make up and define Puerto Ricans as a distinct race or ethnic group. Suffice it to say that given our rich heritage, Puerto Ricans of all colors, sizes and ethnic backgrounds abound. It is a generally accepted fact, and this Court takes judicial notice, that Puerto Ricans are of Taino Indian, Black, European and, more recently, Anglo–American ancestry (to name a few) and, more often than not, a mixture of two or more of the above. To simplistically and ignorantly argue that 'Hispanics are by definition of Spanish or Portuguese descent, and therefore biologically caucasians,' and to conclude that Puerto Ricans, as a race, admit of a definition of white, is to ignore the obvious." (citation omitted)).

55. Evrén, *supra* note 32, at 976 ("The Court unanimously answered in the affirmative the question addressed in this Note: whether the Civil Rights Act of 1866 protects ethnic minorities and other groups in contemporary society. In these decisions the Court extended the Act's antidiscriminatory protection to a Jewish congregation (*Shaare Tefila*) and an Arab-American professor (*Al-Khazraji*). The Court held that the statute protects members of indentifiable groups who are subject to discrimination because of their ancestry or skin color. Based on its review of the legislative history, the Court also held that Congress intended to protect such groups when it passed the Act.").

56. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

57. Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987).

ancestry, and national origin may only exist in theory, the Court suggested, but fell short of, including national origin coverage under § 1981.

Since the *Al-Khazraji* and *Shaare Telifa* decisions in 1987, plaintiffs of Hispanic and Latino descent, specifically of Mexican,[58] Colombian, Cuban, and Puerto Rican descent, have been able to properly state a race for purposes of § 1981 coverage.[59] The Supreme Court's acknowledgment that national origin may be so interrelated for some plaintiffs that it is impossible to distinguish national origin from race, ancestry, and ethnicity suggests that national origin should also be covered under § 1981.[60] The Court's reluctance to articulate whether or not national origin discrimination may be proper under § 1981 has led to many conflicting decisions denying protection to plaintiffs that Congress intended to cover.[61]

### 1. *Al-Khazraji*: Expansion of Section 1981 to Include Arab Ancestry

In 1987, in *Saint Francis College v. Al-Khazraji*, the Supreme Court expanded § 1981 to include ancestry and ethnicity in addition to race. The plaintiff, Mr. Majid Ghaidan Al-Khazraji, was a U.S. citizen of Muslim faith born in Iraq. Though the Court struggled, it ultimately held that a plaintiff of "Arabian" descent may seek relief on account of ancestry under § 1981.[62]

58. *Al-Khazraji*, 481 U.S. at 613; *Shaare Tefila*, 481 U.S. at 615. Though *Shaare Tefila* specifically addresses § 1982 in its holding, the appeal is based on §§ 1981, 1982, and 1985(3). Further, *Shaare Tefila* has been interpreted as applicable to § 1981 by legal scholars. *See generally* Jennifer Grace Redmond, *Redefining Race in* Saint Francis College v. Al-Khazraji *and* Shaare Tefila Congregation v. Cobb*: Using Dictionaries Instead of the Thirteenth Amendment*, 41 VAND. L. REV. 209 (1989); John Dexter Marble, Note, *Civil Rights: Qualifying for Protection Under 42 U.S.C. §§ 1981 and 1982*, 41 OKLA. L. REV. 151, 164 (1988) ("In *Shaare* the Court cited *Al-Khazraji* and held that that [sic] Jews are protected from racial discrimination under sections 1981 and 1982.").

59. *Al-Khazraji*, 481 U.S. at 613; *Shaare Tefila*, 481 U.S. at 615; *see* Cardona v. Am. Express Travel Related Servs. Co., Inc., 720 F. Supp. 960 (S.D. Fla. 1989) (allowing a plaintiff to state Colombian ancestry for § 1981 coverage); *see also* Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 10 CHICANO-LATINO L. REV. 69, 146 (1998); Franceschi v. Hyatt Corp., 782 F. Supp. 712, 720 (1992) (finding Cuban-American plaintiff has standing for a § 1981 claim); Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979) (concluding Mexican plaintiff could bring a § 1981 claim).

60. *Compare* Von Zuckerstein v. Argonne Nat'l Lab., 984 F.2d 1467, 1472 (7th Cir. 1993) ("[C]laims founded on that status [national origin] are not cognizable under section 1981, which is designed to remedy discrimination based on race or ethnicity."), *with* Amiri v. Hilton Wash. Hotel, 360 F. Supp. 2d 38, 42 (D.D.C. 2003) (finding national origin discrimination is recognized under § 1981 only when based on racial or ethnic characteristics).

61. Aziz, *supra* note 20, at 67–68 ("[S]ome lower federal courts have established a general rule that matters of racial discrimination are the only matters encompassed within § 1981. . . . Other courts, however, take a common-sense approach based on the factual practicalities indicating racial bias against certain groups of distinct national origin.").

62. *Al-Khazraji*, 481 U.S. at 613 (1987).

The plaintiff in *Al-Khazraji* filed suit against his former employer claiming that he was discriminated against because of his race.[63] Perhaps the plaintiff chose to state his race as "Arabian" instead of Iraqi due to fear that his case would be dismissed based on the argument that § 1981 does not cover national origin. Regardless, the plaintiff and the court faced many challenges pertaining to the stated Arabian race. Since persons of Arab descent are legally categorized as racially white or Caucasian through the process of racialization (as distinct from double racialization discussed in Part II.A) in the United States,[64] the former employer argued that the plaintiff was not a member of a protected class under § 1981. The district court held that the plaintiff only established a claim of national origin (Iraq) and religious discrimination (Muslim), and that neither type of discrimination was protected under § 1981.

The Supreme Court, however, took a broader approach by interpreting the experience of a Muslim plaintiff born in Iraq as racial in character and, therefore, found the plaintiff properly stated a claim under § 1981.[65] The Court formulated two different legal tests in expanding § 1981 coverage to include Arab ancestry: the "categorical approach" and the "racial in character" test.[66] The categorical approach relies on and references the definition of race within encyclopedias and dictionaries from the nineteenth century to determine coverage under the statute.[67] Since various sources in 1866 explicitly referred to

63. *Id.*

64. *See generally* JOHN TEHRANIAN, WHITEWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY (Richard Delgado et al. eds., 2009).

65. *Al-Khazraji*, 481 U.S. at 613; *see also* Lairold M. Street, *International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices*, 31 HOWARD L.J. 497, 500 n.9 (1988) ("The United States Supreme Court expanded the scope of U.S. civil rights law, when it ruled that the 1866 Civil Rights Act protects not only racial minorities but also other ethnic groups (*e.g.*, Jews and Arabs) from discrimination."); DIANNE AVERY & CATHERINE FISK, AM. BAR ASS'N, HARASSMENT ON THE BASIS OF RACE, COLOR, OR NATIONAL ORIGIN 1.II.B (2010) ("In *St. Francis College v. Al-Khazraji*, the Supreme Court interpreted § 1981 broadly to protect classes of persons on the basis of their 'race' as the concept was originally understood in the nineteenth century to include 'ancestry and ethnic characteristics.'").

66. *Al-Khazraji*, 481 U.S. at 613 ("Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory."); Evrén, *supra* note 32, at 991–94 (describing the Court's return to encyclopedias and dictionaries of 1866 to define race as the "categorical approach and the Court's willingness to interpret the applicability of § 1981 to "identifiable classes of persons" as the "racial in character" approach.).

67. Evrén, *supra* note 32, at 991–94 ("The analyses in these opinions are invariably conclusory, seizing on the wording of the plaintiff's complaint. . . . This categorical approach does not account for the Supreme Court cases extending protection to groups that would fail these courts' criteria for inclusion under the Act."); *see also Al-Khazraji*, 481 U.S. at 610.

Arabs and Jews, for example, the Court was persuaded that Congress must have viewed Arabs and Jews as identifiable classes.[68]

The racial in character test provides courts with a more flexible framework that is not restricted to specified racial labels.[69] Rather, the racial in character test allows courts to focus less on the formal definition of race as written in the 1800s and aims to protect groups that are treated as "other."[70] The Court stated: "Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics . . . whether or not it would be classified as racial in terms of modern scientific theory."[71] The Court further recognized that "[c]lear-cut categories do not exist . . . particular traits which have generally been chosen to characterize races have been criticized as having little biological significance . . . [leading] some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature."[72]

Although the Court took a drastic step in expanding the interpretation of race from one of rigid, outdated definitions to one that is socially constructed, the Court failed to flesh out how ethnic traits based on race, as distinct from ethnic traits based on national origin, may result in identifiable classes of persons or claims that are racial in character.

In fact, Justice Brennan wrote a separate concurrence in an effort to articulate the confusion arising from the absence of clear-cut racial categories. Justice Brennan wrote "only to point out that the line between discrimination based on 'ancestry or ethnic characteristics,' and discrimination based on 'place or nation of . . . origin,' is not a bright one."[73] Of course, it is possible that a person's national origin does not necessarily reflect their race. But there are also many instances in which the categories are interlaced. Justice Brennan pointed out that often race and national origin are indistinguishable as a factual matter, as when "one was born in the nation whose primary stock is one's own ethnic group."[74] He also indicated that national origin claims "have been treated as ancestry or ethnicity claims" and that in the context of Title VII, "the terms overlap as a legal

68. *Al-Khazraji*, 481 U.S. at 613.
69. Evrén, *supra* note 32, at 991.
70. *Id.* at 994 ("This approach allows a plaintiff to prevail on a claim of 'national origin discrimination only to the extent that it is motivated by, or indistinguishable from, racial discrimination.'").
71. *Al-Khazraji*, 481 U.S. at 613.
72. *Id.* at 610 n.4.
73. *Id.* at 614 (Brennan, J., concurring).
74. *Id.*

matter."[75] Based on footnote four of the decision, where the Court seems to have recognized that race is a social construct based on a sociopolitical process, the Court found that in order to understand which groups the 39th Congress in 1866 intended to protect under § 1981, courts must determine whether a plaintiff is within an identifiable class of persons.[76] The Court's reluctance to decide whether national origin is a factor that contributes to understanding whether or not a plaintiff is within an identifiable class of persons has resulted in some courts allowing national origin coverage under § 1981, while other courts strictly dismiss any such claims.[77]

### 2. *Shaare Tefila*: Expansion of Section 1981 to Include Jewish Faith

The Supreme Court extended the scope of § 1981 even further in *Shaare Tefila Congregation v. Cobb*,[78] concluding that a plaintiff attacked based on religious following may seek protection under the statute without proving a distinct race. In *Shaare Tefila*, a unanimous court decided that anti-Semitic slogans spray painted outside the walls of a synagogue were racial in character and constituted discrimination based on race.[79] The Court relied on *Al-Khazraji* to reject the notion that "because Jews today are not thought to be members of a separate race, they cannot make out a claim of racial discrimination."[80] In another dramatic move, the Court explicitly rejected the argument that a plaintiff must state a separate race in order to state a cognizable claim under § 1981.[81]

75. *Id.*
76. *Id.* at 610 n.4 ("There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.").
77. Tayyari v. New Mexico State University, 495 F. Supp 1365, 1369 (D.N.M. 1980).
78. 481 U.S. 615 (1987).
79. *Id.*
80. *Id.* at 617.
81. *Id.* ("That view rested on the notion that because Jews today are not thought to be members of a separate race, they cannot make out a claim of racial discrimination within the meaning of § 1982. That construction of the section we have today rejected in *Saint Francis College v. Al-Khazraji* . . . ." (citation omitted)).

Although the Court had the option to apply the broader racial in character test in its reasoning, the Court chose to employ the narrow categorical approach by stating that "the question before us is not whether Jews are considered to be a separate race by today's standards, but whether at the time [the statute] was adopted, Jews constituted a group of people that Congress intended to protect."[82] The Supreme Court's unwillingness to abandon the categorical approach was unexpected, given the Court's recognition in *Al-Khazraji* that race has no fixed definition and is a social process used to categorize groups of people over time. The Supreme Court failed to identify which of the two legal tests used in *Al-Khazraji* should be applied by lower courts in determining which racial groups are protected under § 1981, subsequently leading to many inconsistent decisions in lower courts.

The fact that Arab and Jewish were not considered races by the Supreme Court, yet the Court decided that such groups should be covered by § 1981, signals one of two things. The Supreme Court, by identifying race as a social construct that does not have any one specific definition, may have chosen to expand coverage to plaintiffs that are treated as "other" when compared to whites of European descent, hence the racial in character test.[83] Alternatively, the Supreme Court may have been hesitant to extend coverage to plaintiffs that are of a race, ancestry, or ethnicity not explicitly stated in the legislative history of § 1981. I believe that the former applies. The latter argument, if true, would suggest that many cases since 1987 have been decided incorrectly. That is, persons of Mexican, Hispanic, Columbian, Italian, and Iranian ethnicities improperly secured protection under § 1981, since none of the above was a recognized racial category in 1866.

### 3. Post-*Al-Khazraji* and *Shaare Tefila* Confusion

Currently, in order to state a § 1981 claim for discrimination based on race, a plaintiff must "connect themselves either to a group specifically considered by Congress in 1866 or to the 'type' of groups Congress intended to protect."[84] The congressional understanding of race in 1866 was based on inaccurate, scientifically unsound, and commonly disputed notions of race; therefore, applying the

82. *Id.*
83. Parvaresh, *supra* note 8, at 1308–11 (illustrating courts' willingness to extend coverage and regard anti-Semitism as racial discrimination).
84. Woodhead, *supra* note 18, at 752.

categorical approach and relying on such records will repeatedly produce inconsistent results, excluding plaintiffs that Congress intended to protect.[85]

*Al-Khazraji* makes clear that although the legislative history of § 1981 only refers to the concept of race, a narrow and rigid interpretation of race would preclude plaintiffs that Congress intended to protect from recovering under the statute. In order to add clarity to the § 1981 case law, the Court decided to expand the interpretation of race to include ancestry and ethnicity, providing protection for a larger class of racially ambiguous plaintiffs. Consistent with Supreme Court precedent and in preservation of congressional intent, shifting away from the precarious notion of race as it was understood in 1866 and applying the racial in character test may lead to the types of results Congress envisioned.

The Court in *Al-Khazraji* made a move towards a standard that focuses on the nature of the prohibited act, namely discrimination based on the fact that a plaintiff is a part of an identifiable group of people, in order to serve the purpose for which the statute was intended. The Court recognized that certain plaintiffs face racial discrimination because of multiple factors that contribute to what is commonly understood as race. Since the meaning of race, as it is now understood, consists of sociopolitical factors, such as ethnicity, national origin, religion, and political status, it is time for legislators and courts to once again revisit the § 1981 legal framework.

Given the complexity of the racialization process[86] that certain groups experience both inside and outside of the United States, the demographics of our country paint a much more nuanced racial picture than might once have been the case. Expecting plaintiffs to fall into racial categories identified by Congress in 1866 fails to account for the majority of persons in the United States today. Moreover, because racial discrimination has exponentially increased against plaintiffs of SWANA descent, it is time that the courts address the fact that certain groups, such as Afghans, Egyptians, Iranians, and other members of SWANA, are being unjustly targeted in the workplace. Yet plaintiffs of SWANA

85. Bayliss, *supra* note 12, at 81 ("Race has been commonly viewed in social or biological terms. In the nineteenth century, however, consistent scientific evaluations of 'race' were uncommon. Race generally encompassed characteristics such as color, hair form, and other distinguishing physical traits."); Evrén, *supra* note 32, at 978–79 ("These courts often conclude without explanation that the plaintiff is a member of an 'ethnic' rather than a 'racial' minority and therefore not within the scope of the Act. In so doing, these courts seem to rely on the unarticulated assumption that certain scientific or anthropological facts determine whether a plaintiff is a member of a racial group."); *see also* Woodhead, *supra* note 18, at 753 ("Any notion that these groups are scientifically separable is untenable, however, leaving open the question why the Court chose to hang on to the concept of race in reaching its decision.").

86. *See infra* Part II.A.

descent are excluded from coverage under § 1981. Since their race, ancestry, or ethnicity is unfamiliar to courts, unlisted in the legislative history, or interpreted as national origin, such plaintiffs are often unable to seek redress.

## II. SWANA PLAINTIFFS EXCLUDED FROM SECTION 1981 COVERAGE

Although *Al-Khazraji* and *Shaare Tefila* extended § 1981 coverage to include race, ancestry, and ethnicity, the Court in these cases did not address whether national origin discrimination was covered under the statute. The Court (for good reason) is typically hesitant to act as anthropologists and may for the same reason have chosen not to address national origin discrimination at the time. But given the precarious racial status of SWANA members in the United States—coded as white by law, yet treated as nonwhite in the workplace—it is important to unpack the racialization process SWANA plaintiffs experience.

The Court's failure to include national origin coverage under § 1981 has had a negative effect on plaintiffs of SWANA descent, such as Afghans, Armenians, Egyptians, Iranians, Kurds, and others, that face additional challenges in seeking protection under § 1981 or are unable to seek protection at all.[87] For example, as mentioned in Part II.A, if an Afghan plaintiff faces racial discrimination by an employer with fewer than fifteen employees, Title VII will not apply. The plaintiff must seek relief from § 1981. If the court fails to recognize national origin discrimination, however, that plaintiff has no means for redress at all. The court will likely reason that Afghan is not a proper race under the statute, but rather it is a national origin and that national origin is not covered by § 1981, leaving the SWANA plaintiff with no remedy.[88]

The hypothetical plaintiff discussed above has several options when deciding which race to state under § 1981. The plaintiff could say that his or her

87. Ahmed v. Samson Management Corp., No. 95 Civ. 9530, 1996 WL 183011 at *6 (S.D.N.Y. Apr. 17, 1996) ("Mr. Ahmed fails to allege that he was subjected to intentional discrimination based on his ancestry or ethnicity. The fact that the complaint includes a statement that Mr. Ahmed is Egyptian is insufficient. This statement alone indicates only that Egypt is Mr. Ahmed's nation of origin." (citations omitted)); Amiri v. Hilton Washington Hotel, 360 F. Supp. 2d 38, 42 (D.D.C. 2003) ("As to the § 1981 claim . . . . [Afghan] Plaintiff does not base his national origin discrimination claim on any such [racial or ethnic] characteristics, but solely based on the fact that he is from Afghanistan."); Bissasa v. Arkansas Children's Hospital, No. 4:08CV00362, 2009 WL 1010869 (2009) (struggling to find the plaintiff's Egyptian Copt heritage as sufficient to establish a prima facie case of discrimination); Hooda v. Brookhaven National Laboratory, 659 F. Supp. 2d 382, 392 (2009) (finding that a plaintiff of Indian descent must replead the § 1981 claim in order to base the discrimination claim on his "Indian ancestry or ethnicity, rather than his Indian national origin").

88. *Amiri*, 360 F. Supp. 2d at 42 (denying coverage to a plaintiff experiencing discrimination after the 9/11 attacks because the claim was "solely based on the fact he is from Afghanistan").

race is white, since members of SWANA are legally coded as white in the United States.[89] The plaintiff also has the option of stating that he or she is Afghan or Afghani. Given the case law, however, the defendant employer would likely win a motion to dismiss based on the argument that the plaintiff has failed to state a proper race (since Afghan will likely be interpreted as a national origin rather than a race).[90] Why is it that certain classes of plaintiffs have various options to choose from when required to state their race? I suggest that because of the double racialization process SWANA members undergo, where they are raced in their home country and may yet again be raced as white in the host country (the United States), such plaintiffs are not able to simply state an easily identifiable and clear-cut race for purposes of § 1981. If national origin discrimination is included under § 1981, the statute would be much more accommodating to members of SWANA, in addition to other immigrant groups that experience a similar racialization process.

In order to understand why certain plaintiffs may be disadvantaged if national origin discrimination is not covered by § 1981, this Part briefly describes the racialization process SWANA members may experience.

### A. Double Racialization

Because certain groups of immigrant communities undergo a double racialization process, in which they undergo some form of racialization unique to their home country and are once again raced upon arriving in the United States, members of SWANA struggle to identify a clear-cut and cognizable racial category cognizable by U.S. courts.[91] Though I do not purport to provide

89. Based on the U.S. Census Bureau and the Office of Management and Budget (OMB) standards on race and ethnicity, Iranians are considered white. *See About*, U.S. CENSUS BUREAU, http://www.census.gov/topics/population/race/about.html [https://perma.cc/3AMA-7EJQ] ("White—A person having origins in any of the original peoples of Europe, the Middle East, or North Africa."); *see also* Nina Farnia, *Law's Inhumanities: Peripheral Racialization and the Early Development of an Iranian Race*, 31 COMP. STUD. SOUTH ASIA, AFR. & MIDDLE E. 455 (2011); MAGHBOULEH, *supra* note 7; TEHRANIAN, *supra* note 64.

90. *Amiri*, 360 F. Supp. 2d at 42.

91. Nizami v. Hartford Financial Servs. Group, Inc., No. 3:10cv970, 2012 WL 3596482, at *4 (D. Conn. Aug. 20, 2012) ("Nizami was born in Afghanistan. Her race and ethnicity are Middle Eastern (or, more specifically, Persian). When Nizami applied to work at The Hartford, she listed her race as white, because she was unsure of which of the provided options applied to her; there was no box for 'Persian' or 'Afghani.' When asked, Nizami typically identifies herself as Afghani or Persian."); Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215, 220–21 (2005) ("The above definition of race suggests that the meanings about race change in response to social and political forces, including law. . . . For instance, Arabs in America have been classified variously as Black, Asian, and, currently, White.").

a history of the racialization process within Iran or the SWANA region, it is important to acknowledge the fact that plaintiffs may associate with certain racial or ethnic labels that are rooted in the politics of the home country.[92] For example, many Iranians often identify as Aryan, which has historical implications that date back to older regimes within Iran.[93] Even though the Aryan label is not the most accurate racial description, Iranian plaintiffs in the United States have used this label in an effort to seek redress for employment discrimination.[94]

Additionally, even if the Aryan label is not invoked, Iranian plaintiffs may still struggle to identify what is considered a cognizable race under the law. In *Central America Health Sciences University, Belize Medical College v. Norouzian*, the Missouri Court of Appeals held that the plaintiff failed to properly allege race discrimination. The plaintiff stated his race as Iranian American, but Iranian American was not a racial category that the court recognized. Instead, the court found that "[a] discrimination claim based solely on the fact that an individual is Iranian . . . is a claim based upon national origin, not race and, therefore, is insufficient to state a claim under 42 U.S.C. section 1981."[95]

92. For background on the nuances between Persian, Iranian, and ethnic minorities in Iran, see RASMUS CHRISTIAN ELLING, MINORITIES IN IRAN: NATIONALISM AND ETHNICITY AFTER KHOMEINI 35 (2013) ("[Although] the Persian-speakers constitute nearly 85 percent of the population of Iran, they do not comprise a dominant majority, because they are not a unified and homogeneous entity. Moreover, they occupy only 20 to 30 percent of the total area of Iran. The 'majority/minority' model simply does not work in the case of Iran.").

93. For more information on the Aryan myth that is often employed by Iranians, see Reza Zia-Ebrahimi, *Self-Orientalization and Dislocation: The Uses and Abuses of the "Aryan" Discourses in Iran*, 44 IRANIAN STUD. 445 (2011); *see also* Alex Shams, *A "Persian" Iran?: Challenging the Aryan Myth and Persian Ethnocentrism*, AJAM MEDIA COLLECTIVE (May 18, 2012), http://ajammc.com/2012/05/18/a-persian-iran-challenging-the-aryan-myth-and-persian-ethnocentrism [https://perma.cc/PUE2-AAGT]; MAGHBOULEH, *supra* note 7, at 91–92 ("Financially and politically backed by the Pahlavi state, Persian literary and intellectual elites reconceived Iran and its people as a glorious, learned, and rich civilization of 'Aryans' that had rescued Persian language and identity from Arab invasion across all time. This ideology was disseminated in schools and in both popular and high culture. The Aryan myth also offered an ideological pathway out from British and American control, with foreign investment and economic ties to Nazi Germany strengthened by both countries' strategic assertion of a shared Aryan lineage.").

94. Even Iranian plaintiffs themselves are not sure whether to identify as Persian, Iranian, or Aryan and have even attempted to employ the Aryan myth while in court. Pourghoraishi v. Flying J, Inc., 449 F.3d 751, 758 (2006) ("Pourghoraishi further stated at this deposition: Pourghoraishi: . . . Iran is the only non-Arab country in this region. We are not—Q.: Is it Persian—A: Persian is coming from—Persian came from Germany. According to the United States recognition, Iran is whites in their Arian background. That's the reason Iran means Arian. In the course of the history, [Iranian] is Arian generation.").

95. Cent. Am. Health Scis. Univ., Belize Med. Coll. v. Norouzian, 236 S.W.3d 69, 81 (Mo. Ct. App. 2007).

The court in *Norouzian* reasoned that Iranian is a classification that merely indicates the country and geographic location in which one was born. Despite the Supreme Court's finding in *Al-Khazraji* that ancestry, ethnicity, and ethnic traits are also considered race discrimination or racial in character, the *Norouzian* court rejected the notion that Iranian has any racial implications.[96] The court did indicate, however, that if the plaintiff had argued he was "of Persian ancestry or any of Iran's many other ethnicity [sic]," that he would have properly alleged racial discrimination under § 1981.[97]

The instance above demonstrates the *Norouzian* court's willingness to consider Persian—which is only one of many ethnicities in Iran—as a cognizable race, while interpreting Iranian as non-racial for purposes of § 1981.[98] It is unclear, however, how the court is differentiating between Persian and Iranian in such instances, and why it does not understand Iranian as an ethnicity.[99] It seems that the court is interpreting Iranian strictly as a person born in Iran; therefore the court may be concerned that if Iranian is a recognized ethnicity, a plaintiff that is not of Iranian descent and yet born in Iran, could qualify for unwarranted protection. It is possible that a person is of a non-Iranian race or ethnicity, but born in the country of Iran. Interpreting Iranian, however, as solely a national origin is to deny the lived reality of Iranians in the United States. An Iranian person has a different racial experience than that of a white person in the United States—interpreting Iranian as distinct from Persian for purposes of 1981 is not only a game of semantics but denies the historical, cultural, and political experience of an entire group of people.[100] Because of the double racialization process,

96. *Id.* at 82 ("Mr. Norouzian only offered evidence to prove discrimination based on his country of origin, Iran, and his religion, Islam. In fact, the record does not contain any indication of what Mr. Norouzian's race actually is.").

97. *Id.*

98. *See generally* ELLING, *supra* note 92.

99. *Id.* ("The bottom-line is that Iranians, despite the diversity they exhibit and extol, are simply *Iranians*. It thus appears that to some, including prominent scholars, the Iranian community most universally recognized outside Iran ('the Persians') is somehow *sui generis* above the mundane categorization of 'ethnic' and that the ethnonym 'Persian' is based on a misunderstanding or that it is a political fiction.").

100. Even the U.S. Census Bureau recognized that race and ethnicity are informed by national origin. *See About*, *supra* note 89 ("In addition, it is recognized that the categories of the race item include racial and national origin or sociocultural groups."); *see also* Abdullahi v. Prada USA Corp., 520 F.3d 710 (7th Cir.2008) ("Some Iranians, especially if they speak English with an Iranian accent, might, though not dark-skinned, strike some Americans as sufficiently different looking and sounding from the average American of European ancestry to provoke the kind of hostility associated with racism. Yet hostility to an Iranian might instead be based on the fact that Iran is regarded as an enemy of the United States, though most immigrants to the United States from Iran are not friends of the current regime. So one would like to know whether the plaintiff is charging that the discrimination against her is based on politics or on her seeming to be member of a foreign

Persian is a term that has evolved to signify specific ethnic traits or, at a minimum, a distinct class of persons that are treated as nonwhite in the United States.[101] For example, the term Persian was used increasingly by Iranians in the United States to move away from the racialization of Iran after the Iranian Revolution in 1979.[102] Therefore, it could be argued that Persian does not necessarily stand for a specific ethnicity in Iran but rather may be used as a term that stands for all Iranians in the United States.[103]

Unpacking the complicated trajectory of racial classification that SWANA members experience is critical to understanding why failing to include coverage of national origin discrimination under § 1981 may result in unnecessary barriers to seek redress for people of SWANA descent.

### 1. Racialization in the Home Country

As discussed in Part II.A.2, members of SWANA are raced as white in the United States.[104] The history of race in the United States has created racial power

'race.' That would be a loose sense of the word 'race,' but the loose sense is the right one to impute to a race statute passed in 1866."); ELLING, *supra* note 92 ("This leads us to the argument that fārs should be replaced with 'Iranian' (irāni), which is what can be deduced from the sociologist Sekander Amanolahi's assertion that 'historically all ethnic groups in Iran, including the 'Persians', irrespective of their origin, language, or religion were always referred to, collectively, as Iranians (Irāni).'"); *see also* Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 136 (2008) ("The U.S. government's strong alliance with Israel, the first Gulf War, the U.S. invasion of Afghanistan in 2001 and the U.S. invasion of Iraq in 2003 expose a U.S. foreign policy centered for decades on wars against Muslim populations either for domination over the resources in the region or control over its territories. As a result, the pervasive racialized image of Muslims as the 'terrorist other' is connected to U.S. policies of violence and domination against Muslims domestically and abroad . . . .").

101. *See generally* TEHRANIAN, *supra* note 64; *see also* Farnia, *supra* note 89 (describing the role of American legal decisions in constructing the racialization of Iranians).

102. ELLING, *supra* note 92, at 32 ("Many Iranians outside Iran tend to use 'Persian' to identify themselves . . . For some, this has the effect of dissociation from the stigma attached in many Western societies to the label 'Iranian.' It may also be an attempt at association with Iran's pre-Islamic glory, which still is known to most Westerners in terms of a 'Persian Empire.'"); MAGHBOULEH, *supra* note 7, at 100. ("Very few youth described any sort of intrinsic or affective relationship to the term 'Persian' themselves. Rather, they were savvy about how 'Persian' was situated in the implicit and explicit ethno-racial hierarchies articulated by their families. To them, identifying as Persian was the strongest possible tool their Iranian-American elders could use to distance themselves from Arabs—the group into which they seemed to feel the greatest danger of being misidentified in the United States.").

103. Shams, *supra* note 93 ("'Persian' being the adjective of choice for those who avoided any connection to the Islamic Republic."); ELLING, *supra* note 92, at 8 ("This re-evaluation breaks with an understanding of Iran that has dominated history writing for a hundred years: as being somehow multi-ethnic but at the same time essentially 'Persian.'").

104. Teresa Wiltz, *Lobbying for a 'MENA' Category on the U.S. Census Bureau*, USA TODAY (Oct. 7, 2014, 11:12 AM), http://www.usatoday.com/story/news/nation/2014/08/13/stateline-census-

through the ways in which the law shaped and is shaped by racial relations across the social plane. Some argue that racial power has led to a racial caste system in which certain groups are perceived as superior to or more successful than others.[105] Such groups then earn a ticket into the exclusive expansion of the white racial group.[106]

Identifying as white in the United States has its benefits, and simplifying or reducing a person's ethnic background in order to identify as Persian also has advantages.[107] Though a person may identify as Afghan or Afghani, for example, that same person would likely choose to adopt Persian as their ethnicity in order to avoid confusion within the U.S. court system.[108] Iran is a country that is only approximately fifty percent Persian; therefore many Iranian litigants may be of ethnicities other than Persian.[109] When such ethnic minorities migrate to the United States, where courts seem to only recognize the Persian identity,[110] they are forced to create a false narrative in order to seek redress under U.S. antidiscrimination laws.[111] Thus, it is important to recognize the racialization

mena-africa-mideast/13999239 [https://perma.cc/5TAT-JD7R]; TEHRANIAN, *supra* note 64, at 37 ("According to this rubric, the EEOC classifies Arabs and other individuals from the Middle East, including Turks, Kurds, and Persians, as 'white.'").

105. Sarah Gualtieri, *Becoming "White": Race, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States*, 20 J. AM. ETHNIC HIST. 29, 44 (2001) ("al-Sarghani's statements reveal the change in Syrian thinking on race, whereby the claim to whiteness was framed explicitly against other racialized groups, namely, blacks and Asians.").

106. ELLING, *supra* note 92 ("However, they also raise the question about what criteria should be employed to define the categories. Since identification processes are situational and contextual, scholars cannot rely on one simplified criterion ('ethnicity') in order to grasp the diversity in Iranian society.").

107. It may be easier for a plaintiff to identify as Persian, rather than Afghan or Afghani, since Persian as an ethnicity has gained more recognition in courts. Nizami v. Hartford Financial Servs. Group, Inc., No. 3:10cv970, 2012 WL 3596482, at *4 (D. Conn. Aug. 20, 2012) ("Nizami was born in Afghanistan. Her race and ethnicity are Middle Eastern (or, more specifically, Persian). When Nizami applied to work at The Hartford, she listed her race as white, because she was unsure of which of the provided options applied to her; there was no box for 'Persian' or 'Afghani.' When asked, Nizami typically identifies herself as Afghani or Persian."). Bahrami v. Maxie Price Chevrolet-Oldsmobile, Inc., No. 1:11-CV-4483-SCJ-AJB, 2014 WL 11517837 (2014) (identifying plaintiff that attempted to use both white and Persian as their stated race in seeking protection under Title VII and § 1981).

108. *Nizami*, 2012 WL 3596482, at *4.

109. ELLING, *supra* note 92, at 25 ("In its 2007 estimate, the *Factbook* broke down Iran's ethnic composition as follows: Persian 51%, Azeri 24%, Gilaki and Mazandarani 8%, Kurd 7%, Arab 3%, Lur 2%, Baloch 2%, Turkmen 2%, other 1%.").

110. Abbasi v. SmithKline Beecham Corp., WL 1246316 (acknowledging Persian ethnicity as cognizable under Title VII and § 1981).

111. *Nizami*, 2012 WL 3596482, at *9 ("[T]he defendants believe they have identified an inconsistency with regard to whether Nizami identified herself as white. Nizami testified: '. . . . In filling out those forms, they told me to check the box for 'white' because I was not Hispanic, Black or Asian.'").

process that occurs between SWANA members leaving their home countries and landing in a U.S. courtroom in order to understand why certain SWANA members will have difficulty stating a formal race that will be recognized under antidiscrimination laws in the United States.[112]

### 2. Racialization in the Host Country

Once ethnic minorities from the SWANA region migrate to the United States and are raced as white by law, they avoid self-identifying in a way that tracks their racial experience and often seek to gain acceptance into the white category as a survival tactic.[113] Since plaintiffs from SWANA must endure the domestic ramifications of Orientalism,[114] many plaintiffs that experience racial discrimination would rather stay silent and face that oppression than attempt to articulate in a courtroom exactly what their race is, and why they qualify for protection under the law.[115]

The law therefore incentivizes SWANA plaintiffs to either construct false narratives in order to seek protection (for example, a Kurdish plaintiff identifying as Persian or Arab), stay silent in the face of unlawful discrimination, or fully subscribe to the notion of whiteness and deny any prior racial identities. Since many SWANA plaintiffs in the United States find that they are better served when invoking their whiteness, there is a lack of self-identity and

112. MAGHBOULEH, *supra* note 7, at 44 ("In the post-9/11 context, racial complications befall Iranian-Americans who seek to name or redress incidents of identity-based discrimination they face. Due to their white legal designation, they have been, and continue in some cases to be, left in a legal limbo: they are targets of (seemingly, and sometimes clearly) racist actions by individuals and institutions at the same time that they lack consistent access to race-based recourse. They find themselves in *racial loopholes* in which they are not white enough to avoid racial discrimination, but too white to have it legally redressed.").

113. Sarah Gualtieri, *Strange Fruit? Syrian Immigrants, Extralegal Violence and Racial Formation in the Jim Crow South*, 26 ARAB STUD. Q. 63, 66 (2004) ("This process of stock-taking will encourage debate not only on the history of discrimination against Arabs in the United States, but also on the ways they have sought to position themselves within and to benefit from racial hierarchies that perpetuate racist discourse, most frequently and detrimentally directed at African Americans."); *see also* TEHRANIAN, *supra* note 64, at 84 ("Beyond covering, Middle Eastern assimilation also crosses into the realm of passing and even conversion. As a matter of pride, many Middle Easterners (especially those from older generations, for which the importance of whiteness was perhaps more accentuated) insist on actually being considered white.").

114. Farnia, *supra* note 89, at 465 ("Grouping together Europe and America under the broader rubrics of civilization, history, empire, and whiteness, the next cases reveal the court's efforts at melding traditional legal frameworks of power that are structured through race with the orientalist frameworks of cultural and social inferiority.").

115. TEHRANIAN, *supra* note 64, at 157 ("Executive, administrative, and judicial bodies have failed to adequately protect the civil rights of Americans of Middle Eastern descent, a situation exacerbated by those bodies' own procedural machinations.").

group consciousness among SWANA members.[116] Such disenfranchisement among groups can lead to even more racist and prejudicial thinking, contributing to the model minority myth and racial positioning amongst groups already experiencing systemic racial discrimination in the United States.[117]

Although this Comment does not aim to explore the historical ramifications of racial power, it is important to note potential reasons why SWANA plaintiffs experience such confusion when attempting to articulate their race, especially in the context of legal claims in the United States.

### 3. Performance of Whiteness and Impact on Other Groups

Since SWANA members undergo double racialization and are often denied protection under antidiscrimination statutes based on the incorrect articulation of their race, this Comment argues that the legal system encourages members of SWANA to assimilate and identify as white, which then complicates their antidiscrimination claims.[118] The consequences of such identification not only affects those of SWANA descent, but also creates a top-to-bottom racial hierarchy that ultimately places SWANA members as a wedge group, further oppressing those groups that are perceived to be at the bottom of the racial hierarchy.[119]

116. *See Neda Maghbouleh on "The Limits of Whiteness, Iranian-Americans and the Everyday Politics of Race"*, AJAM MEDIA COLLECTIVE (Aug. 19, 2014), http://ajammc.com/2014/08/19/neda-maghbouleh-on-the-limits-of-whiteness [https://perma.cc/47YP-BJ2D] ("For this reason, almost every Iranian-American organization is encouraging Iranian-Americans to designate their race as 'Iranian' or 'Iranian-American.' Without being counted as 'Iranians,' we risk being disenfranchised both politically and economically for another 10 years."); *see also* Shams, *supra* note 93.

117. Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 94 (1997) ("Neil Gotanda points out that the positing of Asians and Latinos in the middle of the racial hierarchy serves to minimize the importance of the social and economic disparities between African Americans and European Americans, making it appear that such disparities 'are the product of "natural" and "normal" socioeconomic forces. . . . The presence of more successful Asian Americans and Latinos, located between Whites and African Americans, proves that the social and economic barriers can be overcome and are not rooted in "race."'"); *see also* Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African Amercian/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581, 1588–90 (1993).

118. TEHRANIAN, *supra* note 64, at 84 ("[I]n all but one of the many reported racial pre-requisite naturalization cases, the petitioners claimed to be white, despite the fact that it was much harder to establish white, rather than black, status. At the time, many states had laws on the books declaring any individual with a single quantum of black blood to be black by law." (citation omitted)).

119. Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 68 (1999) ("Scholars describing the distinct history and effects of racism on particular racialized groups generally disclaim any intention to create an oppression sweepstakes or race to the bottom, but often the framework of their narratives negates this contention.").

The history of racialization in the United States has always held whiteness as the gold standard.[120] Various groups throughout time have been accepted into and denied the formal title of white,[121] and given the negative associations of SWANA countries, many people from the region living in the United States choose to embrace their white status.[122] My purpose is to demonstrate the harms that may arise when a group's racialization process is ignored and then replaced when formally coded as white. But it is not clear how other groups may also be harmed by such classification, and what can be done to counteract those harms.[123]

Opting in and out of whiteness has disenfranchised SWANA members and distorted social consciousness among the group. As such, members choose to associate more closely with whiteness, but what is not always evident is that SWANA members are not fully accepted within this category[124] and share a

120. TEHRANIAN, *supra* note 64, at 87 ("Of course, not everyone seeks white recognition. The younger generation of Middle Eastern Americans is much more likely than prior generations not only to eschew covering techniques but to celebrate actively their ethnicity and even insist on their nonwhiteness.").

121. Prerequisite cases refer to naturalization cases in the United States in which it was required to prove inclusion in the white or Black race in order to apply for citizenship. United States v. Thind, 261 U.S. 204 (1923); Ozawa v. United States, 260 U.S. 178 (1922); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1997) (explaining that naturalization cases that involved the prerequisite of whiteness are what Haney López calls the "prerequisite cases"); TEHRANIAN, *supra* note 64, at 69 ("Given the tendency to conflate race with religious affiliation, and Christianity with assimilability, it is not surprising that, at the beginning of the twentieth century, courts declared Armenians and even some Arabs white by law, thereby entitling them to privileges of whiteness, including naturalization.").

122. TEHRANIAN, *supra* note 64, at 69 ("However, the composition of the Middle Eastern American population has undergone a dramatic change in recent years, especially in the public imagination.").

123. Caldwell, *supra* note 119, at 68 ("By focusing selectively on the social and economic indicators which make one such group as bad or worse off than another and by developing general claims of exceptionalism, a competitive model of group empowerment is reinforced. More often than not, the selected indicators do not demonstrate in toto the positions of racialized groups relative to each other so much as they demonstrate the differential operation of White supremacy in an overarching system of subordination." (citation omitted)).

124. MAGHBOULEH, *supra* note 7, at 52 ("Despite their legal classification as white, the twenty-first century experiences of Iranians and other Middle Easterners exemplify an extension of Mia Tuan's concept of the 'forever foreigner' in which no degree of citizenship, legal whiteness, occupational and education success, assimilatory efforts, or self-identification as "American" render Middle Easterners fully white in day-to-day life."); Ikemoto, *supra* note 117, at 1583 ("Although the conflict as constructed does not directly speak of dominant white society, it arranges the various racial identities so as to preserve the authority of whiteness and devalue difference."). *See generally* Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9, 12 (2005) ("Mexicans' position in nineteenth-century New Mexico functioned simultaneously to challenge and buttress white supremacy. Mexicans' sometimes successful claims to whiteness challenged white supremacy by forcing a rupture in categories. At the same time, Mexicans' claim to whiteness was fragile and continually contested; as a result, Mexican elites sought to subordinate non-white groups lower on the racial hierarchy, including

more common history with other nonwhite groups. If SWANA members work towards claiming their racialization process and owning a racial code that more closely tracks their experience, they will be in a better position to coalition-build with other groups that are discriminated against in the United States.[125]

Scholars such as Sumi Cho have written about acceptance into the white category and the harms that may occur when a racial hierarchy is formed, since she argues racial groups are then "pitted against each other."[126] Though an in-depth analysis of intergroup conflict that may arise due to racial classifications is beyond the scope of this Comment, it is important to note the long-term consequences of subscribing to whiteness, even if only as a formal racial code. Not only are SWANA members disadvantaged, but the opt-in whiteness option of the group will sustain the oppression that holds many nonwhite groups down on the social hierarchy scale and promotes group conflict instead of unification.

### B. White by Law

Until 1952, in order to become eligible for naturalization in the United States, immigrants were required to be classified as either Black or white.[127] These cases are commonly referred to as the prerequisite cases and signal the beginning of the SWANA racialization process in the United States.[128] In order to progress in the United States, gain citizenship benefits, and obtain property

Pueblo Indians, Blacks (free and enslaved), and other communities of Indians. The fourth and final theme concerns the way in which Mexicans' second-class citizenship interacted with their precarious white status to produce conditions under which Mexicans sought to continually distance themselves from other non-white groups.").

125. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 844 (1997) ("In this manner, law operates as a 'cultural system that structures relationships throughout society, not just those that come before courts.' As a cultural system, law sometimes inscribes and reproduces liberatory ideas and group images. Often, however, it reflects dominant interests and fosters structural 'oppression less by coercion than by offering people identities contingent upon their acceptance of oppression as defining characteristics of their very selves.'" (citation omitted)).

126. Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren*, Brown, *and a Theory of Racial Redemption*, 19 B.C. L. REV. 73, 120 (1998) ("[R]acial redemption theory is available for a wide range of purposes, including . . . understanding the phenomenon of pitting one subordinated group against another in a process . . . [referred to as] 'racial brokering;' explaining the increasing use of people of color as spokespersons or 'racial mascots' for racially regressive policies and reconciling the increasing equality discourse with the decreasing yield in material resources to redress inequality.").

127. *See supra* note 121.

128. Farnia, *supra* note 89, at 456 (describing early naturalization cases, often called "racial prerequisite" cases, in an effort to highlight the specific racial ideologies constructing Iran and Iranians as enemy others in American law); Parvaresh, *supra* note 8, at 1300–05 (describing the racialized identities created through the prerequisite cases).

rights, SWANA plaintiffs argued that they should be classified as white by law and therefore be eligible to enjoy the benefits that came with such a classification.[129]

Although members of SWANA have benefited from the privileges associated with whiteness,[130] the community's effort to align themselves with the category of racially white creates additional obstacles in seeking protection under antidiscrimination laws.[131] For example, in *Al-Khazraji*, the defendant employers argued that because the Iraqi plaintiff was legally classified as white, the plaintiff was disqualified from seeking protection under § 1981.[132] But as instances of discrimination have increased, especially post-9/11, communities that are nonwhite—or "inbetween" or "not-quite white"[133]—have begun to experience the problems that arise from this racialization process, including discrimination.[134]

Due to the process of double racialization, where plaintiffs are raced in their country of origin (for example, as Persian or Afghan) and once again in the host country (for example, as white), plaintiffs of SWANA descent in the United States face additional challenges when seeking coverage under § 1981. Iranians, for example, are formally coded as white on the U.S. Census, perceived as other by the general U.S. population, and yet self- identify as Iranian, Persian, Middle Eastern, or Aryan.[135] Since many members of SWANA lack a fixed

129. *See generally* TEHRANIAN, *supra* note 64, at 72.

130. Gualtieri, *supra* note 113.

131. *See generally* TEHRANIAN, *supra* note 64, at 72 ("[B]oth privileged and damned by their proximity to the white dividing line, [Middle Easterners] engage in persistent (and frequently effective) covering of their ethnic background . . . combin[ing] to create a pernicious stereotyping feedback loop that enervates the political strength of the Middle Eastern community, heightens its invisibility, and leaves little effective resistance to the growing assaults against its civil rights.").

132. Although the Court reversed and therefore dismissed the argument, this case illustrates the concept that SWANA members face additional barriers in litigation because they are classified as white or Caucasian in the United States. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 609 (1987).

133. Gualtieri, *supra* note 113, at 75.

134. Chandrasekhar, *supra* note 8, at 215 ("The terrorist attacks of September 11, 2001 ('9/11') permanently transformed the American civil liberties landscape. . . . [P]eople of South Asian, Arab, and Middle Eastern descent have become targets of hundreds of hate crimes and incidents of racial profiling across the country. Racial profilers and perpetrators of hate crimes have particularly discriminated against South Asians, presumably focusing on perceived racial, ethnic, and religious similarities to the hijackers." (citation omitted)); Parvaresh, *supra* note 8, at 1311–17 (describing the way in which the Muslim identity has been racialized post-9/11); *see also* Tabaddor v. Holder, 156 F. Supp. 3d 1076, 1079 (2015) (arguing that an Iranian-American immigration judge who participated in Iranian community events must recuse herself of any cases involving Iranian nationals); Press Release, White House, Executive Order: Protecting the Nation From Foreign Terrorist Entry Into the United States (Jan. 27, 2017), https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states.

135. Shams, *supra* note 93.

racial identity and respond to various labels, SWANA plaintiffs fail to articulate a racial language that is recognized by the courts when seeking protection under § 1981.

### C. Lived Reality of the Nonwhite Experience

Although Iranians and other members of SWANA have benefited from white privilege,[136] the lived reality of an Iranian in the United States, for example, is not the same as that of a white person of European descent.[137] Iranians and persons of SWANA experience the negative effects of racial slurs, government surveillance, racial profiling, and employment discrimination—indeed, "[d]erogatory slurs such as 'camel jockeys,' 'sand nigger,' and 'Scum Arab,' have been the basis of numerous national origin harassment claims brought by Arab employees."[138] Regardless of a plaintiff's race, ethnicity, religion, or national origin, members of SWANA experience discrimination in the workplace because they are perceived by employers as other and thus dangerous.[139]

Especially after the tragic attacks of 9/11, racialization of Iranians and the greater SWANA community increasingly includes notions of religion and foreign policy.[140] The country began to associate the Muslim faith with

136. Gualtieri, *supra* note 113 at 76 ("If Arabs in America now disclaim whiteness, they must acknowledge how they benefited from it through access to citizenship, the right to purchase property, and to participate on the white side of the color line . . . ."); *see also* Salami v. N.C. Agric. & Tech. State Univ., 394 F. Supp. 2d 696, 714 (M.D.N.C. 2005) ("[P]articularly after such a polarizing event as the devastating attacks on September 11, 2001, it is not unreasonable to suspect that an Iranian and Muslim individual may have been treated differently by an employer . . . ."); Parvaresh, *supra* note 8, at 1293 ("At a population of nearly 2.6 million, Muslim-Americans make up less than 1 percent of the U.S. demographic. However, in the immediate aftermath of 9/11, Muslims encountered an unprecedented rise in discrimination through acts of both private and public prejudice, evidenced by a reported 1600 percent increase in anti-Muslim hate crimes in 2001." (citation omitted)).

137. *See* Farnia, *supra* note 89, at 472.

138. Aziz, *supra* note 20, at 36–37.

139. *See* Parvaresh, *supra* note 8, at 1313–15.

140. Matthew Filipowicz, *Hillary Clinton's Disturbing Comments Calling Iranians Her "Enemies"*, HUFFINGTON POST (Oct. 16, 2015, 5:30 PM), http://www.huffingtonpost.com/matthew-filipowicz/hillary-clintons-disturbi_b_8297580.html [https://perma.cc/V9R3-T5KC]; Pete Hegseth, *When the Enemy (Iran) Comes to Town, We Should Give Them What They Deserve*, FOX NEWS (Sep. 22, 2016), http://www.foxnews.com/opinion/2016/09/22/when-enemy-iran-comes-to-town-should-give-them-what-deserve.html [https://perma.cc/XW59-MCZR]; Doyle McManus, *That GOP Letter to Iran? Not Illegal, But Not Smart Either*, L.A. TIMES (Mar. 13, 2015, 9:12 PM), http://www.latimes.com/nation/la-oe-0315-mcmanus-cotton-iran-letter-obama-20150315-column.html [https://perma.cc/2UHG-LLDY]; Carol Morello, *A Year After the Nuclear Deal, Iranian Optimism Turns Sour*, WASH. POST (Sept. 23, 2016), https://www.washingtonpost.com/world/national-security/a-year-after-the-nuclear-deal-iranian-

terrorism and U.S. foreign policy demonized countries in the SWANA region, contributing to continued racialization.[141]

Therefore, it is possible that employers may not explicitly state a person's particular race or ethnicity, yet discrimination based on the fact that an employee looks like the employer's stereotypical notion of a terrorist and is from a country in the SWANA region does in fact implicate notions of racial discrimination.[142] In the Part that follows, I recommend that Congress amend § 1981 to include national origin, that the Supreme Court revisit this topic and explicitly include national origin as a consideration (similar to ancestry and ethnicity) when interpreting race, or that lower courts apply the broader racial in character test relied on in *Al-Khazraji*.[143] If one or all of the remedies above are implemented, minorities that have experienced double racialization and, therefore, lack a fixed racial classification, may still seek redress under employment antidiscrimination laws.

## III. INCLUSION OF SWANA UNDER SECTION 1981

Since members of SWANA undergo what I describe as double racialization, where members are raced by their home country in ethnic terms such as Persian, Assyrian, Armenian, Kurdish, etc., then again raced upon arrival in the United States as white or Caucasian, failing to include coverage of national origin under § 1981 may frustrate the purpose for which the statute was intended. This Part offers several proposals aimed to remedy this issue so that § 1981 will apply equally to all those that experience racial discrimination because they are perceived as other or nonwhite by persons in the workplace.

In the most ideal situation, Congress would amend § 1981 to include claims of national origin discrimination. Since Congressional action is often a lengthy

optimism-turns-sour/2016/09/23/8a7a8611-335d-48c9-ac1f-777f960ebada_story.html [https://perma.cc/WET9-CZDX].

141. Jeff Faux, *Why Is Iran Our Enemy?*, NATION (June 13, 2016), https://www.thenation.com/article/why-is-iran-our-enemy [https://perma.cc/U72Q-45VP]; Joseph I. Lieberman, *Remember Iran's Role in 9/11*, WALL STREET J. (Sept. 7, 2016, 7:21 PM), http://www.wsj.com/articles/remember-irans-role-in-9-11-1473290470 [https://perma.cc/4JS7-VRKC]; *see also* John Tehranian, *Playing Cowboys and Iranians: Selective Colorblindness and the Legal Construction of White Geographies*, 86 U. COLO. L. REV. 1 (2015); Amy Malek, *Claiming Space: Documenting Second-Generation Iranian Americans in Los Angeles*, 10 ANTHROPOLOGY OF THE MIDDLE EAST 16, 17 (2015) ("Since the 1979 Iranian Revolution, Iranians—like other Middle Eastern Americans—have been represented in United States news media as a monolith of religious extremists, terrorists and part of an 'axis of evil', positioned (however inaccurately) as the eternal enemy of the United States." (citation omitted)).

142. Parvaresh, *supra* note 8, at 1315–17.

143. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

process, especially given the current state of political affairs, such a remedy is not the most likely to occur in the immediate future. Thus I instead suggest further judicial interpretation and articulation based on the reasoning in *Al-Khazraji*. The conflict in the SWANA region and the tense political climate[144] are contributing factors explaining the drastic increases in racial discrimination in the United States. Thirty years have elapsed since the Supreme Court's decision in *Al-Khazraji*; now is the time for the Court to revisit its § 1981 jurisprudence and finally make clear whether national origin discrimination is covered under the statute. Even if the Court finds that national origin is not covered, the Court may instead choose to provide a remedial mechanism similar to the remedy Title VII has provided for in instances of ambiguity between race, ancestry, ethnicity, and national origin. Lastly, the Court should, at the very least, choose a specific legal test that lower courts must systemically apply when deciding § 1981 cases.

### A. Inclusion of National Origin Under Section 1981

As mentioned earlier in this Comment, § 1981 was written in 1866, at a time when the common understanding of race was one based on fixed definitions, founded on science, and premised on the existence of only several races. Since § 1981 does not actually include the word "race" in the statute, the interpretation of which groups Congress intended to protect under § 1981 has been based on legislative history and congressional debates. Given the outdated, oversimplified, and rejected notion of race as it was understood in 1866, it's important for Congress to reflect on the definition of race as distinct from

144. Press Release, White House, *supra* note 134 ("I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas)."); *see also* Tayyari v. New Mexico State University, 495 F. Supp. 1365, 1374 (D.N.M. 1980) ("Notably, the only mention of finances in the Regents' minutes of May 9, 1980, Plaintiffs' Exhibit 2, is that the taxpayers shouldn't have to support Iranian students at NMSU. The reasoning given for that proposition at the time had nothing to do with whether Iranian students could or would pay their bills. It was that Iran had become an enemy of the United States and that Americans are angry and fed up with Iranians and, therefore, Iranian students shouldn't get any benefits from New Mexico taxpayers."); Kevin Liptak, *Trump Defends Executive Order Concerning Extreme Vetting*, CNN (Jan. 29, 2017, 6:10 PM), http://www.cnn.com/2017/01/29/politics/donald-trump-executive-order-statement/ [https://perma.cc/MHX8-XTD9] ("While Obama did order his administration to pause consideration of Iraqi refugee applications for six months in 2011, Trump's action is far more sweeping, preventing all citizens of Iraq from entering the United States for 90 days. The other nations under the same restrictions are Iran, Libya, Somalia, Sudan, Syria and Yemen.").

national origin, and decide whether or not national origin should be a protected category under § 1981.

Case precedent has proven that there are no specific racial groups or minorities that Congress intended to cover. Rather, time and again, courts have interpreted § 1981 to cover groups that are treated as other based on race in the workplace. Since the modern understanding of race is based on a social construct that includes many markers, such as ancestry, ethnicity, ethnic traits, national origin, religion, and foreign policy, it is important for Congress to either do away with race altogether or at least take into account a broader definition of the term.[145] Upon closer examination, Congress may agree that application of the statute would be better served if § 1981 were amended to include national origin since modern understandings of race acknowledge that race alone does not serve as an accurate metric to identify persons intended for coverage under the statute.[146]

### 1. National Origin Strictly Interpreted

Above, I argue that national origin should be covered under § 1981. As with other statutory language used in employment discrimination litigation, however, Congress and the Court have failed to define national origin.[147] The result is much confusion among plaintiffs and courts when attempting to prove national origin discrimination as distinct from discrimination based on race. Since national origin is not currently protected under § 1981, it is important to

145. See López, *Salience of Race*, *supra* note 44, at 1173, for a discussion of race as a social construct ("This multidirectional process [of racial formation] operates on a macrosocial level, involving the interplay between economic interests, government institutions, labor, religions, ideologies, and so on, as well as on a microsocial level, shaping and in turn being shaped by the formation of individual and group identities and by local practices of differentiation and discrimination."); *see also* Ibrahim, *supra* note 100, at 155 ("Achieving this step of expanding the definition of race to include characteristics beyond just phenotype by having the courts recognize Muslims' and Muslim-looking peoples' claim of racial discrimination on the basis of religious or perceived religious differences would have a huge impact, not just in protecting the rights of Muslims, but also in helping establish more expansive, inclusive, race-conscious remedies for other groups of color.").

146. This would mean the courts would rely on what factors contribute to how plaintiffs are treated as identifiable classes of persons versus relying on specific racial terms or coverage based on particular races.

147. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 824 (1994) ("Just as Congress failed to consider in depth the nature of national origin discrimination, so the Court, by rendering only one decision in nearly thirty years, has failed to give authoritative guidance on the meaning of Title VII for plaintiffs claiming to be victims of national origin discrimination.").

thoughtfully consider what is meant when the term is invoked.[148] National origin is covered by the only other federal statute that prohibits discrimination based on race in employment, Title VII. Therefore, it makes sense to consider how the doctrine has developed within Title VII jurisprudence.[149] Moreover, both § 1981 and Title VII were originally created for the same purpose—to eradicate discrimination against Blacks in the workplace. Thus, turning to Title VII interpretations of national origin seems appropriate at this juncture.[150]

Many scholars have explored the origination and evolution of the inclusion of national origin in Title VII and have concluded that statutory canons of interpretation have been unhelpful in determining the definition that Congress intended.[151] The term national origin was a transplant from previous doctrines within the context of fair employment, and thus among the boilerplate terminology that was simply inserted into Title VII.[152] Based on the statute, the plain meaning of national origin was initially defined within congressional debates very simply as the country in which a person was born.[153] Since the legislative his-

148. *Id.* at 807 ("Despite its parallel status and equal longevity in Title VII, the prohibition against 'national origin' discrimination remains, as it began, largely undeveloped and ineffective.").

149. It is important to take note of and understand shifts that have been made within Title VII in order to expand upon what is meant by ethnicity or national origin as distinct from race. *See* Eugenio Abellera Cruz, Note, *Unprotected Identities: Recognizing Cultural Ethnic Divergence in Interpreting Title VII's 'National Origin' Classification*, 9 HASTINGS WOMEN'S L.J. 161, 163 (1998) ("[T]he discourse of 'nationhood' has shifted focus from political boundaries and hegemony to ethnic boundaries and cultural delineation. This phenomenon is readily apparent in America's changing ethnic and racial composition. Given the global power and significance of ethnicity, it is imperative that we take into consideration the significance of ethnicity in scrutinizing one of America's anti-discrimination laws—Title VII of the 1964 Civil Rights Act." (footnotes omitted)).

150. Perea, *supra* note 147, at 821 ("The overriding purpose of the [Title VII] legislation was to alleviate the manifest problems of society-wide discrimination against African Americans. Congress gave little or no consideration to the nature of what we now call 'national origin' discrimination, nor to the actual problems faced by ethnic minorities other than African Americans in this country.").

151. *See id.* at 807 ("[W]hat is usually referred to as the legislative history of the 'national origin' term consists of a few unilluminating paragraphs of the House debate that discuss what national origin meant."); Lisa L. Behm, Comment, *Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 573 (1998) ("With little guidance from the legislature, the courts have broadly construed the term national origin.").

152. Perea, *supra* note 147, at 807–11 ("At the time, Congress gave no serious thought to the content of the national origin term nor to its proper scope. . . . With respect to fair employment practices, the phrase appears to have become part of the standard 'boilerplate' language of executive orders prohibiting discrimination in employment.").

153. *See, e.g.*, *id.* at 818 ("Congressman Roosevelt explained: 'May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from [sic].'").

tory of the term is so limited, many courts have chosen to apply the plain meaning definition.[154]

Some scholars have found that such a restricted definition of national origin could have negative implications for plaintiffs that are ethnically nonwhite and yet natural citizens of the United States.[155] For example, given the fraught political climate between the United States and many SWANA countries, plaintiffs may have no choice but to create a fictional narrative and connect with outsider nations in order to make a legally cognizable claim based on national origin.[156]

### 2. EEOC Interpretation

The Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title VII, has taken a much broader approach when interpreting national origin.[157] Since courts tend to defer to agency interpretation when there are ambiguities or questions regarding congressional intent, I believe the proper definition of national origin is the one the EEOC provides.[158] The EEOC defines national origin as any type of discrimination "because an individual has the physical, cultural or linguistic characteristics of a national origin group."[159] Simply stated, plaintiffs discriminated against based on eth-

154. *Id.* at 843–44 ("Applying its method of statutory interpretation, the Court will look to the plain meaning of 'national origin' and its clear, but extremely limited, legislative history and conclude that Congress meant what little it said.").

155. *Id.* at 855.

156. *Id.* ("First, United States citizens who *constitute* part of the American polity *and* part of American identity must define themselves as having a foreign national origin and as outsiders not belonging to the American community."); Cruz, *supra* note 149, at 164 ("However, to interpret national origin on a solely geographic basis is to ignore the reality of *ethnicity*—which can encompass race, religion, language, culture and other characteristics in formation of personal and group identity.").

157. *See* Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771, 772 (1996) ("Over time, Title VII generally has been able to accommodate changing concepts of discrimination."); *see also* Perea, *supra* note 147, at 830 ("Based on the statutory phrase 'national origin,' the EEOC has developed an expansive conception of national origin discrimination in its *Guidelines on Discrimination Because of National Origin*."); Behm, *supra* note 151, at 570 ("Although Congress has never expressly defined the term 'national origin,' the Equal Employment Opportunity Commission ('EEOC'), which is responsible for enforcing Title VII, has interpreted the concept of national origin to encompass an individual's language rights." (internal footnotes omitted)).

158. Andrew J. Robinson, Comment, *Language, National Origin, and Employment Discrimination: The Importance of the EEOC Guidelines*, 157 U. PA. L. REV. 1513, 1533 (2009) ("Beyond the precedential reasons for granting deference to the EEOC guidelines, there are strong policy reasons for doing so."). *See generally* Perea, *supra* note 147, at 807.

159. 29 C.F.R. § 1606.1 (2015).

nic traits may still qualify as having experienced national origin discrimination under Title VII. Acknowledging that national origin strictly speaking "refers to the country where a person was born,"[160] but that national origin may also overlap with race and color, is critical for plaintiffs of SWANA descent.

Additionally, because the EEOC uses a broader definition of national origin, including discrimination based on physical, cultural, or linguistic characteristics, plaintiffs face fewer barriers when attempting to make a national origin claim. Not only are such plaintiffs protected under Title VII when the EEOC interpretation of national origin is invoked, but even those in a special relationship with the plaintiff (such as a spouse) also have standing to make a claim.[161] Moreover, even a job posting requiring English fluency or lack of an accent may qualify as discrimination based on national origin.[162] The breadth of characteristics covered by the EEOC definition makes it clear that not only is the country in which one was born included in the concept of national origin, but ethnic traits and ethnicity are also subcategories that qualify for protection under national origin.[163]

The EEOC's interpretation of national origin is consistent with Critical Race Theory scholarship that understands racial codes, markers, and metrics that give rise to what we perceive as race to be a complicated social process.[164] Similarly, what we understand as discrimination based on national origin is much more complicated than the country in which a person is born. To deny the reality that race, ethnicity, and national origin may have characteristics that overlap is to turn a blind eye to the discrimination many plaintiffs in the workplace are experiencing.[165] Since the EEOC is the agency charged with implementing and enforcing Title VII and has chosen an expansive view of national origin, should Congress choose to amend § 1981 to include coverage

160. Espinoza v. Farah, 414 U.S. 86, 88 (1973) ("The term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."); *see also* TITLE VII AND SECTION 1981 COMPARISON CHART, PRACTICAL LAW CHECKLIST 5-539-1185 (2015).

161. Perea, *supra* note 147, at 830; *see also* Alizadeh v. Safeway Stores, Inc., 802 F.2d 111, 115 (5th Cir. 1986) (holding that a white woman married to an Iranian could state a claim under § 1981 for discrimination directed toward her husband by persons who "considered her husband nonwhite").

162. Perea, *supra* note 147, at 831.

163. *Id.* at 830 ("What the agency is actually protecting, however, is not national origin but rather the traits of ethnicity.").

164. See López, *Salience of Race*, *supra* note 44, at 1173, for a Critical Race Theory perspective on "racial formation." *See generally* OMI & WINANT, *supra* note 44; López, *Social Construction of Race*, *supra* note 44.

165. López, *Salience of Race*, *supra* note 44, at 1177 ("All socially constructed identities are indissolubly intertwined, and no single one of them can be comprehended except through the concomitant exploration of the others.").

based on national origin discrimination, the EEOC's broad definition ought to be adopted.

### B. The Supreme Court Thirty Years After *Al-Khazraji*

The Supreme Court revisited § 1981 jurisprudence as it relates to the conflation of race, ancestry, ethnicity, and ethnic traits in 1987. At that point, the Court decided that in order for § 1981 to function in the way in which Congress intended, it was necessary to broaden the definition of race to include notions of ancestry, ethnicity, and ethnic traits. Nearly thirty years later, although *Al-Khazraji* extended protection, persons of SWANA descent remain excluded from coverage under § 1981. Taking into account the increased instances of racial discrimination against SWANA members and the tools developed through Critical Race Theory to understand the racialization process of such groups, the Supreme Court should now reconsider the interpretation of race under § 1981. Specifically, the Court should again expand its definition of race to include national origin discrimination. The *Al-Khazraji* Court found it necessary to seek modern and updated notions of race in reaching its decision. By doing so, the Court provided relief for plaintiffs that Congress intended to cover, yet who had been denied protection under § 1981. Similarly, if the Court were to pause and take note of the increasing levels of racial discrimination against members of SWANA today, it may respond with a more favorable and decisive opinion regarding the inclusion of national origin discrimination under the statute.

At a minimum, it would serve the Court and the integrity of the statute to at least include a mechanism that would prevent cases from being dismissed based purely on confusion or inaccuracy of a person's stated race. The Court could set a precedent, similar to what was done in Title VII, where the plaintiff may amend a complaint to change his or her race in order to survive a motion to dismiss.[166] For example, the Court could allow a plaintiff who originally stated Iranian as her race to change her race to Persian in order to avoid a defendant's motion to dismiss. Moreover, like Title VII, the Court could apply a "reasonably related" test, where

166. *See, e.g.*, Sassannejad v. University of Rochester, 329 F. Supp. 2d 385, 391 (2004) ("A claim based on national origin discrimination is theoretically different from a claim based on religious or racial discrimination. Nevertheless, in certain circumstances, the two claims may be so interrelated as to be indistinguishable. Here the religious demography of Iran is important. . . . [P]laintiff relies on the same alleged discriminatory conduct in support of both claims. Therefore, based on the facts of this case, I will assume, without deciding, that plaintiff's religious discrimination claim is reasonably related to his claim of national origin discrimination."); *see also* Butts v. City of N.Y. Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402 (2d Cir. 1993) ("In determining whether claims are reasonably related, the focus should be 'on the factual allegations made in the [EEOC] charge itself . . . .'").

if a plaintiff's national origin or religion were reasonably related to his or her "race, ancestry, or ethnicity," such claims would also survive a motion to dismiss.[167]

### C. Application of the Racial in Character Test

Lastly, this Part argues that if neither Congress nor the Supreme Court changes the meaning of race under the statute, lower courts, in deciding § 1981 cases, should apply the racial in character test used by the Court in *Al-Khazraji*.[168] I have argued that although courts have traditionally referred to race as a fixed and neatly defined category, modern-day conceptions of race include many additional factors, such as ethnic traits, country of origin, and religion.[169] Thus, although a plaintiff's religion is theoretically a separate issue from discrimination based on race or national origin, many times these characteristics are indistinguishable and ultimately complicate whether or not a person of SWANA descent may allege racial discrimination under § 1981. Due to this disjuncture and the inconsistency in the willingness of courts to incorporate modern conceptions of race, this Part concludes by arguing that courts should apply the racial in character test in determining which plaintiffs are covered under § 1981. That test should take into account factors that influence race, such as ethnic characteristics, national origin, and religion.

The failure of courts to implement a consistent legal framework in order to determine which racial groups qualify for protection under § 1981 leads to many unjust results. Plaintiffs of SWANA descent who have been identified and labeled by multiple racial terms over time will be arbitrarily denied protection from workplace discrimination if the courts do not adopt a more systematic approach. Ultimately, SWANA plaintiffs seeking redress for racial discrimination must overcome excessive obstacles to simply qualify to allege discrimination, resulting in delays, extra costs, dismissals, and unpredictable holdings. If the courts were to adopt the racial in character test, however, such incidences could be dramatically reduced.

167. *See* Daneshvar v. Graphic Tech., Inc., 18 F. Supp. 2d 1277, 1284 (D. Kan. 1998) ("In light of plaintiff's particular claim (*i.e.*, discrimination based on Iranian ancestry and national origin), the court concludes that a discrimination claim based on race is 'reasonably related' to the allegations of national origin discrimination in plaintiff's charges submitted to the KHRC and the EEOC.").

168. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987).

169. "The distinction the Court makes, while never clearly explained, appears to be between discrimination based on ethnic characteristics and discrimination based only on national origin in a purely geographic sense. It is unclear, however, what difference there is, if any, between ethnic origin discrimination and national origin discrimination." Woodhead, *supra* note 18, at 753–54.

### 1. *Pourghoraishi v. Flying J, Inc.*

In *Pourghoraishi v. Flying J, Inc.*, the court documents stated that the plaintiff was of "Middle Eastern descent" and "a native of Iran."[170] The Seventh Circuit stated that in order to establish a prima facie claim of racial discrimination, the plaintiff was required to show that "(1) he is a member of a racial minority; (2) the defendants had the intent to discriminate on the basis of race; and (3) the discrimination concerned the making or enforcing of a contract."[171] If this specific jurisdiction chose to interpret *Al-Khazraji* based on the narrow categorical approach, the plaintiff would automatically fail to establish the first prong of the legal test and therefore lose the case before he even had the opportunity to show evidence of discrimination. Since Middle Eastern was not defined as a race in the dictionaries used by Congress in 1866, this plaintiff would not be able to seek redress through § 1981.

But the court in *Pourghoraishi* applied a broader reading of *Al-Khazraji* and implemented the racial in character framework, leading to what seems to be a much more equitable result. Although the court expressed much concern and found it difficult to decipher the plaintiff's race and whether Iranian was covered by § 1981, the court applied a generous reading of *Al-Khazraji* in concluding that Iranian was in fact a protected racial group. The court found that although it had "never expressly addressed the question of whether those of Iranian ancestry belong to a distinct race," other circuits had held "that Iranians may state a claim for race discrimination under § 1981."[172] The court reasoned that although the plaintiff listed several racial categories, the race-based labels were inconsequential to its inquiry, since the labels were fixed notions of race or "definitions of race that require distinctive physiognomy, or strict adherence to taxonomical, biological or anthropological definitions."[173] Further, the court emphasized that race is a concept that extends to ancestry, and that ancestry is often associated with nationality.[174]

The *Pourghoraishi* court refused to limit §1981's protection based on outdated taxonomy and biologically defined groups by applying the more flexible racial in character test. By choosing to apply this framework, the court acknowledged that race and ethnicity are social concepts that are continuously shifting and evolving. Thus, courts applying the racial in character test tend to

170. Pourghoraishi v. Flying J, Inc., 449 F.3d 751, 753–54 (7th Cir. 2006).
171. *Id.* at 756.
172. *Id.* at 757.
173. *Id.*
174. *Id.*

understand that the concept of race inherently includes notions of national origin, ethnicity, and religion.[175] Therefore, no single term will always be able to accurately describe the racial experiences of a plaintiff.[176] If all courts were to adopt this legal framework, SWANA plaintiffs would find easier access to courts and finally have their cases heard on the merits rather than dismissed on the basis of arbitrary technicalities.

### 2. *Abdullahi v. Prada USA Corp.*

*Abdullahi v. Prada USA Corp.* was a case heard by the Seventh Circuit in 2008. The plaintiff was a woman of Muslim faith born in Iran, and alleged racial discrimination. The court engaged in an extensive discussion of the political climate between the United States and Iran and reasons why discrimination based on national origin, religion, or ethnicity may be interlaced with discrimination based on what we understand as race.[177] The arguments made weigh heavily in favor of using the racial in character test and abandoning the categorical approach. For example, the court argued that a plaintiff describing herself as a Muslim Iranian should be protected under § 1981.[178] Though such an understanding of race would require a broad interpretation of the statute, or "a loose sense of the word 'race,'" the court stated that this understanding "is the right one to impute to a race statute passed in 1866."[179]

The court in *Abdullahi* essentially called for a framework similar to the racial in character test, arguing that because of political tension, physical appearance, and a spoken accent, an Iranian plaintiff may be perceived as other when compared to an average white American and, thus, should qualify for protection un-

175. See Sasannejad v. Univ. of Rochester, 329 F. Supp. 2d 385, 391 (W.D.N.Y. 2004), for an example of a court adopting this approach. Faced with a Muslim plaintiff born in Iran, the Court reasoned that "[a] claim based on national origin discrimination is theoretically different from a claim based on religious or racial discrimination. Nevertheless, in certain circumstances, the two claims may be so interrelated as to be indistinguishable." *Id.* (citation omitted). The plaintiff in *Sasannejad* was born in Iran and was a non-practicing Muslim. *Id.* at 387. The court explored the historical religious makeup of Iran in determining whether the discrimination claim was based on race, national origin, or religion. *Id.* at 391. The court justified its reasoning by using data on the religious demographics of Iran. *Id.* The court stated that "[h]ere, the religious demography of Iran is important. According to [the CIA World Factbook], Iran is an Islamic Republic and ninety-eight percent of its population is Muslim." *Id.* Thus, the line between discrimination based on national origin, race, and religion is somewhat indistinguishable.

176. *Id.* ("[T]he line between discrimination based on Iranian national origin and the Islamic religion appears to be sufficiently blurred . . . .").

177. Abdullahi v. Prada USA Corp., 520 F.3d 710, 710–13 (7th Cir. 2008).

178. *Id.* at 712 (holding that the lower court was premature in dismissing the § 1981 claim of an Iranian, Muslim plaintiff).

179. *Id.*

der the statute. Judge Richard Posner stated that "[s]ome Iranians, especially if they speak English with an Iranian accent, might, though not dark-skinned, strike some Americans as sufficiently different looking and sounding from the average American of European ancestry to provoke the kind of hostility associated with racism."[180] These factors seem to contribute to a plaintiff's classification into an identifiable group regardless of what specific racial term (Black, white, Iranian, Persian) has been assigned to describe the plaintiff's race.

Judge Posner's opinion also seemed to argue that foreign policy is a contributing factor to how one is racialized, providing further support for an evolving understanding of racial discrimination. Judge Posner found that "hostility to an Iranian might . . . be based on the fact that Iran is regarded as an enemy of the United States, though most immigrants to the United States from Iran are not friends of the current regime."[181] Accepting the idea that employees may face racial discrimination based on the U.S. political climate or foreign policy, Judge Posner found that race should be broadly construed to incorporate such factors. To allege racial discrimination based on politics may be a generous interpretation of race, but it seems, based on Judge Posner's reasoning, that such an interpretation is an appropriate one.

Although the Iranian plaintiff in this case above seemed to complicate the court's understanding of race and national origin, the court agreed with the plaintiff and reversed dismissal of the case. Judge Posner stated that "the present case is more ambiguous [than *Al-Khazraji*] because in it national origin and 'race' coincide—Iranian."[182] Since members of SWANA have experienced various racial terms through double racialization, it is essential that courts decide to implement the framework of the racial in character test and abandon the categorical approach. Employment discrimination cases should not be decided on semantics regarding a person's race, and persons of SWANA descent should not be denied access to the court system because of the way in which they have been raced by others.

## IV. COUNTERARGUMENTS AND CRITIQUES

I have argued that given the Supreme Court's acknowledgment and modern understanding of race as a social construct informed by many factors, such as ethnicity, religion, and national origin, § 1981 should be interpreted to include national origin. Alternatively, the legal test employed by courts

180. *Id.*
181. *Id.*
182. *Id.*

should be based on a racial in character legal analysis and framework. Traditional notions of race inaccurately presume that one's race can be reduced to a fixed and easily identifiable category or single term. But given the increasing immigrant population of the United States and the way in which certain groups undergo a double racialization process, qualifying antidiscrimination protection on semantics overburdens members of SWANA.

Implementing such a legal framework, however, is not easy. There may be concerns about members of SWANA, who are typically classified as white in the United States, benefiting from white privilege when it is favorable and yet seeking protection under antidiscrimination laws designed to protect racial minorities that are not on equal footing.

More practically, ensuring the implementation of the racial in character test throughout the various circuit courts poses another problem. Would the Supreme Court have to clarify that the racial in character test is the only legal test that may be applied by the courts? Would it be appropriate to abandon the categorical approach even though the Court that decided both *Al-Khazraji*[183] and *Shaare Tefila*[184] seemed to reference traditional and historical accounts of race? Would the Court have referred to such a test if it believed that the test was inadequate?

Lastly, one could argue that the *Al-Khazraji* Court purposefully created two types of tests or forms of legal analysis and intended for the circuit courts to have discretion in choosing which test is the most appropriate to apply. In this Part, I engage in a brief discussion of these counterarguments.

### A. Title VII Alternative

In instances where § 1981 fails to provide coverage for certain groups of people, some may argue that Title VII is the solution. It is possible to imagine that Congress, having realized that groups such as SWANA were being excluded from § 1981, chose to enact a more inclusive statute that explicitly covered race, ethnicity, national origin, and religion. Therefore, in situations where a plaintiff's race, ethnicity, national origin, and religion are so interrelated that they are indistinguishable, that plaintiff would not be denied protection entirely, but would instead be eligible to bring suit under Title VII. Some may also argue that national origin was not intended coverage under § 1981 because Congress

183. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).
184. Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987).

could have amended the statute to add national origin discrimination, but instead, Congress chose to create a brand new statute (Title VII).[185]

Although Title VII is indeed a more inclusive statute, including protection against discrimination based on race, color, ethnicity, national origin, religion, and sex, many plaintiffs automatically fail to qualify for protection under the statute. In order to qualify for protection under Title VII, a plaintiff must work for a large employer (with at least fifteen employees), cannot be an independent contractor, must file a claim with the EEOC within 300 calendar days, and must pursue a federal court action within ninety days after the EEOC has supplied the plaintiff with a right to sue letter.[186] An Uber driver (independent contractor), for example, would not be able to seek protection from employment discrimination under Title VII. If an Uber driver of SWANA descent was discriminated against because she identified as Iranian, she would have to file a § 1981 claim. Therefore, although Title VII includes national origin, the statute does not necessarily provide a solution to all plaintiffs, especially plaintiffs of SWANA descent.

### B. Racial in Character Ambiguity

Applying a racial in character test may lead to a slippery slope. What factors are to be considered in such a test? Should the Court draw a line at national origin? Should notions of religion, sex, or foreign policy be included when considering the amorphous definition of race—types of discrimination that § 1981 may not have been intended to cover? In other words, if national origin is added to § 1981 coverage or if the definition of race is interpreted broadly enough to include national origin, should religion and other categorizations also be covered under the statute? I would argue that they should, since religion and national origin may contribute to the way in which a person is racialized; it is therefore possible that a plaintiff may be treated as other based on those factors. Though it is necessary to maintain the integrity and legislative intent of § 1981, it should be acknowledged that Congress chose to protect national origin under the

185. *See* Chamberlin, *supra* note 20, at 940 ("It is also argued that when Title VII was passed, if Congress had wanted to redress the problem of national origin discrimination . . . it could have easily amended section 1981 to expressly apply to national origin discrimination. The legislative history of Title VII, however, demonstrates that it was intended to augment, and be co-extensive with, an individual's remedy under section 1981. Thus, it was unnecessary for Congress to amend section 1981. Accordingly, a plaintiff should not be foreclosed from relief under section 1981 merely because he may have alternate relief under Title VII." (footnotes omitted)).

186. 42 U.S.C. §§ 2000e-5(e)(1), (e)(3)(A), (e)(3)(B) (2012). TITLE VII AND SECTION 1981 COMPARISON CHART, *supra* note 160; *see also* Kevin Bennardo, *Claimants Beware: Strict Deadlines Limit Federal Employment Discrimination Suits*, 97 ILL. BAR J. 304 (2009).

only other federal statute addressing race-based employment discrimination. While fuller engagement with this counterargument is beyond the scope of this Comment, I would argue that Congress's decision to protect national origin, color, and religion under § 1981's sister statute, Title VII, illustrates Congress's understanding that race is an ever-evolving social term that may include factors such as national origin. This implicit acknowledgement may therefore lend support for a broader understanding of § 1981.

### C. Benefits of White Privilege

Members of SWANA descent have always experienced a certain amount of racial discrimination in the United States.[187] In addition to the systematic oppression people of color have historically endured, foreign relations between the Middle East and the United States have often been tumultuous, leading to discrimination against SWANA members. For example, although Iranians were formally identified and recognized as white by law, Iranian Americans living in the United States during the Iranian hostage crisis in 1979 were subjected to brutal forms of discrimination.[188] Many Iranians were fired from their jobs, referred to as camel jockeys or sand niggers, and lived in constant fear of being physically attacked.[189] As a survival tactic, many Iranians attempted to hide their true identities in an effort to disassociate from Iran and falsely referred to themselves as white or Italian (or any ethnicity other than Iranian).[190]

Claiming whiteness and embracing the formal classification has become a common trend among members of SWANA.[191] Although the notion of claiming whiteness began as a survival tactic, some may argue that people of SWANA descent have the ability to opt in and opt out of whiteness when it is most convenient.[192] Since antidiscrimination laws were fought for and won by minority groups that were oppressed by the notion of whiteness, one might argue that members of SWANA did not contribute to such civil rights battles, but in fact aligned themselves with whiteness instead. Such an interpretation could leave one to argue that SWANA's alliance with the structures that have

187. *See* TEHRANIAN, *supra* note 64, at 119.
188. *Id.*
189. *Id.* at 123.
190. *See id.* at 81–88; Alex Shams, *Why Did the Munich Killer Beg Us to See Him As German?*, HUFFINGTON POST (Jul. 26, 2016, 6:36 PM), http://www.huffingtonpost.com/alex-shams/why-did-the-munich-killer_b_11154486.html [https://perma.cc/9E3D-ZVJJ].
191. *See* TEHRANIAN, *supra* note 64, at 88.
192. *See id.* at 72 (describing how people of SWANA descent may present as white situationally).

historically oppressed racial minorities signifies that members of SWANA were not intended—or do not deserve—protection under antidiscrimination statutes.

Although such an argument has been the topic of some scholarly debate,[193] it is fairly settled that, at least in the area of employment discrimination, members of SWANA have not been treated as white.[194] Especially in the post-9/11 world, with the war on terror, the United States' intervention in the Middle East, and the newfound debate and fear relating to terrorists in the country and the so-called "Muslim Ban," members of SWANA have been consistently discriminated against based on their race and affiliation with the Middle East.[195] Regardless of the privileges that may exist when aligning with whiteness, people of SWANA descent have begun to mobilize and speak out against the imposed white racial category.[196] Having been treated as other in the employment context, such groups should be covered by antidiscrimination laws, at least in the area of employment discrimination.

### D. Implementation

Even if courts decide that the racial in character test is the better approach, what mechanism would be used to ensure that all circuits employ the same legal test and reasoning? Would the Supreme Court have to hear another case to clarify the multiple approaches used in *Al-Khazraji*? If the Supreme Court fails to articulate a specific test or standard to be used for § 1981 cases, do the circuit

193. *See* Gualtieri, *supra* note 113.

194. Even if they were, whites are afforded protection under § 1981. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1990) (finding that a district court erred in dismissing a claim under § 1981 on the grounds that petitioner's race was white). But if Iranian plaintiffs state they are white, then proving cause and the rest of the elements will be difficult, given that the discrimination experienced will be based on Iranian ethnicity. For example, accusations that the plaintiff is a terrorist will not be seen as discrimination based on race if the plaintiff lists white as his or her race in the complaint.

195. *See supra* note 144.

196. John Blake, *Arab and Persian-American Campaign: 'Check It Right' on Census*, CNN, http://www.cnn.com/2010/US/04/01/census.check.it.right.campaign [https://perma.cc/EZV6-CTFG] ("That's the slogan ['check it right; you ain't white!'] of a campaign that may change how Arab-and Persian-Americans define themselves on the U.S. census. Activists are encouraging both groups to shun a practice that dates to the late 19th century, when immigrants from the Middle East began identifying themselves as white."); IRANIAN AM. BAR ASS'N, *The Iranians Count 2010 Census Coalition Seeks Specifics*, http://www.iaba.us/wp-content/uploads/The-Iranians-Count-2010-Census-Coalition-Seeks-Specifics.pdf [https://perma.cc/C4LM-GJ28]. *But see* Khaled Beydoun, *A Demographic Threat? Proposed Reclassification of Arab Americans on the 2020 Census*, 114 MICH. L. REV. FIRST IMPRESSIONS 1, 3 (2015) (cautioning that creation of a Middle East and North Africa (MENA) category in the U.S. census "may erode Arab American civil liberties" by facilitating harmful government surveillance).

courts have the authority to force lowers courts to abandon the categorical approach?

Additionally, there is the argument that the Supreme Court intended to create two different legal tests—in essence a two-pronged approach to determine whether or not a plaintiff may qualify for protection under the statute. It is also possible to argue that the Court purposefully created two distinct tests in an effort to give the circuit courts discretion over which to apply in any given case.

Regardless of the Supreme Court's intent in articulating two distinct tests, circuit courts interpreting the reasoning and legal framework articulated in *Al-Khazraji* differently and applying the two available tests in a way that reaches inconsistent or discriminatory results creates inequitable outcomes. In other words, an Iranian plaintiff in a New York appellate court may properly state a § 1981 claim, but the same plaintiff in a California court could not, which illustrates an inconsistent and unjust result. Therefore, although it is difficult to ascertain why the Supreme Court did not itself abandon the categorical approach, what matters is that courts are inconsistently applying the legal framework of *Al-Khazraji*. As a result, some courts inappropriately deny members of SWANA access to relief for employment discrimination.

## CONCLUSION

*Al-Khazraji* and *Shaare Tefila* were both decided in 1987—just as Critical Race Theory scholarship emerged and the Supreme Court began to understand race as a social construct. It is now time for either Congress, the Supreme Court, or both, to take a second look at how race has been defined for purposes of federal employment discrimination and to reevaluate why traditional notions of race that have been proven false are still implemented in a way that is preventing litigants from bringing claims of workplace discrimination. In order to solve the current inconsistences relating to SWANA members, it is essential for either Congress or the Court to ensure that discrimination on the basis of national origin discrimination receives the protection it is due under § 1981.